

SECTION IV. DAMAGES

Article 70

[General rule for calculation of damages]

Damages for breach of contract by one party consist of a sum equal to the loss, including loss of profit, suffered by the other party as a consequence of the breach. Such damages may not exceed the loss which the party in breach foresaw or ought to have foreseen at the time of the conclusion of the contract, in the light of the facts and matters which he then knew or ought to have known, as a possible consequence of the breach of contract.

PRIOR UNIFORM LAW

ULIS, article 82.

Commentary

1. Article 70 introduces the Section containing the rules on damages in case of a claim under article 41 (1) (b) or article 57 (1) (b) by setting forth the basic rule for the calculation of those damages. Articles 71 and 72 implement article 70 by providing the means of calculating damages in certain defined cases when the contract has been avoided. Article 73 provides a rule on mitigation of damages while article 65 provides the rules on exemption from liability because of an impediment to performance of the obligation.

2. Article 70 provides the rule for the calculation of damages whenever and to the extent that articles 71 and 72 are not applicable. Therefore, article 70 applies whenever the contract has not been declared avoided by the party claiming damages, whether or not it could have been. It also applies where the contract has been avoided but there are damages in addition to those which can be calculated under article 71 or 72.

Basic damages

3. Article 70 provides that the injured party may recover as damages "a sum equal to the loss, including loss of profit, suffered . . . as a consequence of the breach". This makes it clear that the basic philosophy of the action for damages is to place the injured party in the same economic position he would have been in if the contract had been performed. The specific reference to loss of profit is necessary because in some legal systems the concept of "loss" standing alone does not include loss of profit.

4. Since article 70 is applicable to claims for damages by both the buyer and the seller and these claims might arise out of a wide range of situations, including claims for damages ancillary to a request that the party in breach perform the contract or to a declaration of avoidance of the contract, no specific rules have been set forth in article 70 describing the appropriate method of determining "the loss . . . suffered . . . as a consequence of the breach." The court or arbitral tribunal must calculate that loss in the manner which is best suited to the circumstances. The following paragraphs discuss two common situations which might arise under article 70 and suggest means of calculating "the loss . . . suffered . . . as a consequence of the breach".

5. Where the breach by the buyer occurs before the seller has manufactured or procured the goods, article 70 would permit the seller to recover the profit which he would have made on the contract plus any expenses which he had incurred in the performance of the contract. The profit lost because of the buyer's breach includes any contribution to overhead which would have resulted from the performance of the contract.

Example 70A: The contract provided for the sale for \$ 50,000 FOB of 100 machine tools which were to be manufactured by the seller. Buyer repudiated the contract prior to the commencement of manufacture of the tools. If the contract had been performed, Seller would have had total costs of \$ 45,000 of which \$ 40,000 would have represented costs incurred only because of the existence of this contract (e.g., materials, energy, labour hired for the contract or paid by the unit of production) and \$ 5,000 would have represented an allocation to this contract of the overhead of the firm (cost of borrowed capital, general administrative expense, depreciation of plant and equipment). Because Buyer repudiated to contract, Seller did not expend the \$ 40,000 in costs which would have been incurred by reason of the existence of this contract. However, the \$ 5,000 of overhead which were allocated to this contract were for expenses of the business which were not dependent on the existence of the contract. Therefore, those expenses could not be reduced and, unless the Seller has made other contracts which have used his entire productive capacity during the period of time in question, as a result of Buyer's breach Seller has lost the allocation of \$ 5,000 to overhead which he would have received if the contract had been performed. Thus, the loss for which Buyer is liable in this example is \$ 10,000.

Contract price	\$ 50,000
Expenses of performance which could be saved	\$ 40,000
Loss arising out of breach	\$ 10,000

Example 70B: If, prior to Buyer's repudiation of the contract in example 70A, Seller had already incurred \$ 15,000 in non-recoverable expenses in part performance of the contract, the total damages would equal \$ 25,000.

Example 70C: If the product of the part performance in example 70B could be sold as salvage to a third party for \$ 5,000, Seller's loss would be reduced to \$ 20,000.

6. Where the seller delivers and the buyer retains defective goods,¹ the loss suffered by the buyer might be measured in a number of different ways. If the buyer is able to cure the defect, his loss would often equal the cost of the repairs. If the goods delivered were machine tools, the buyer's loss might also include the loss resulting from lowered production during the period the tools could not be used.

7. If the goods delivered had a recognized value which fluctuated, the loss to the buyer would be equal to the difference between the value of the goods as they exist and the value the goods would have had if they had been as stipulated in the contract.² Since this formula is intended to restore him to the economic position he would have been in if the contract had been performed properly, the contract price of the goods is not an element in the calculation of the damages. To the amount as calculated above there may be additional damages, such as those arising out of additional expenses incurred as a result of the breach.³

Example 70D: The contract provided for the sale of 100 tons of grain for a total price of \$ 50,000 FOB. When delivered the grain had more moisture in it than allowable under the contract description and, as a result of the moisture, there had been some deterioration in quality. The extra cost to Buyer of drying the grain was \$ 1,500. If the grain had been as contracted, its value would have been \$ 55,000, but because of the deterioration caused by the moisture after it was dried the grain was worth only \$ 51,000.

Contract price	\$ 50,000
Value the grain would have had if as contracted	\$ 55,000
Value of grain as delivered	\$ 51,000
	\$ 4,000
Extra expenses of drying the grain	\$ 1,500
Loss arising out of breach	\$ 5,500

Foreseeability

8. The principle of recovery of the full amount of damages suffered by the party not in breach is subject to an important limitation. The amount of damages that can be recovered by the party not in breach "may not exceed the loss which the party in breach foresaw or ought to have foreseen at the time of the conclusion of the contract, in the light of the facts and matters which he then knew or ought to have known, as a possible consequence of the breach of contract". Should a party at the time of the conclusion of a contract consider that breach of the contract by the other party would cause him exceptionally heavy losses or losses of an unusual nature, he may make this known to the other party with the result that if such damages are actually suffered they may be recovered. This principle of excluding the recovery of damages for unforeseeable losses is found in the majority of legal systems.

9. In some legal systems the limitation of damages to those "which the party in breach foresaw or ought to have foreseen at the time of the

¹ If the delivery of the defective goods constituted a fundamental breach of contract, the buyer could avoid the contract. In such a case he would measure his damages under article 71 or 72 to the extent that those articles were applicable.

² Article 70 gives no indication of the time and place at which "the loss" to the injured party should be measured. Presumably it should be at the place the seller delivered the goods and at an appropriate point of time, such as the moment the goods were delivered, the moment the buyer learned of the non-conformity of the goods or the moment that it became clear that the non-conformity would not be remedied by the seller under article 35, 42, 43 or 44, as the case may be.

³ These additional elements of the buyer's damages will often be limited by the requirement of foreseeability discussed in para. 8 *infra*.

conclusion of the contract" is not applicable if the non-performance of the contract was due to the fraud of the non-performing party. However, no such rule exists in this Convention.