

Article 80

A party may not rely on a failure of the other party to perform, to the extent that such failure was caused by the first party's act or omission.

INTRODUCTION

1. Article 80 strips a party of its right to rely on the other side's failure to perform to the extent that the second party's failure was caused by an "act or omission" of the first party. Thus article 80 may relieve a party of at least some of the legal consequences of a failure to perform. The broad equitable rule of article 80 that a party cannot claim legal redress for the other party's breach to the extent its own actions caused the breach has been cited as evidence that principles of good faith apply under the CISG.¹ Together with article 77, the provision forms a general principle that each party who contributes to a loss shall bear their (its ?) own share at least where the respective remedy, for instance damages, allows such an allocation of losses.²

PURPOSES FOR WHICH ARTICLE 80
HAS BEEN APPLIED

2. Article 80 has frequently been used as a tool for sorting out the parties' rights when both sides have allegedly failed to perform their obligations. In a case where the seller delivered dioxin contaminated sand for the processing of French fries and the previously warned buyer had resold it without precautions, a Supreme Court distributed the loss (claims of subbuyers) half and half between the parties.³ Several decisions have involved attempts by the seller to cure non-conforming goods. In one such case, the seller had not fulfilled a promise to cure a delivery of non-conforming goods, and the buyer had set-off the costs of remedying the defects from the price. The seller argued that article 80 should block the buyer's right to claim (and then set off) damages for the non-conformity because the buyer's own failure to ship the goods back to the seller prevented the seller from curing. The court rejected this argument, however, ruling that the failure to cure was attributable to the carrier responsible for returning the goods to the seller, and that the seller was responsible for the carrier's performance.⁴ In another case, however, a seller successfully argued that the buyer had forfeited its rights to a remedy for a lack of conformity because the buyer had unjustifiably rejected the seller's offer of cure.⁵ Another decision involving a seller's agreement to take back and cure delivered goods illustrates the use of article 80 to determine the effect of a buyer's non-payment of debts that arose from other dealings with the seller. The buyer returned machinery to the seller, who promised to adjust the equipment and ship it back to the buyer promptly. Thereafter, however, the seller refused to return the goods to the buyer until the buyer paid other debts owed by the buyer. The trial court held that article 80 prevented the buyer from claiming damages for the late re-delivery because the buyer's own action of

failing to pay the past debts caused the seller to withhold the goods. An appeals court reversed, holding that the seller had no right to insist on payment of the other debts before returning the goods as no such condition had been included in the re-delivery agreement.⁶ Similarly, a court rejected a seller's article 80 defence that the buyer's failure to pay prior debts disabled the seller from financially supporting a troubled supplier, leading to the seller's inability to deliver the goods: the court found that an agreement under which the buyer prepaid for the delivery in question meant that the seller had assumed all risks relating to the supply of the goods.⁷ The Supreme Court of Poland rejected a seller's article 80 defence, holding that the buyer's declaration of avoidance based on non-conformity of goods did not result from lack of mutual performance under the contract, but rather from seller's failure to tender conforming goods; the court commented, "Article 80 imposes on the parties the duty of loyalty and abstention from any acts that would hinder the performance of the contract. One of the imperative elements of this article is the legal relation (causation) between the obligor's conduct and obligee's performance. It is an objective element independent from the obligor's will."⁸

3. In a significant number of decisions article 80 has been applied to deny a remedy to a party whose own breach caused the other side to refuse to perform.⁹ For example, a seller involved in a long term contract to supply aluminium ore announced that it would make no future deliveries. The seller's defence in the resulting lawsuit was that, after it announced it was stopping future deliveries, the buyer withheld payment for deliveries that had already been made. An arbitral panel rejected seller's defence on the basis of article 80, holding that the buyer's non-payment was caused by the seller's repudiation of its future delivery obligations.¹⁰ Decisions applying article 80 to determine which party should be deemed in breach of contract can involve unusual or complex facts. In one such case, a seller contracted to sell a machine produced by a manufacturer with whom the seller had a distribution agreement, with title to the goods to be transferred to the buyer after payment of the final instalment of the purchase price (which was due upon buyer's acceptance of the machine). Before the machine was delivered, however, the manufacturer terminated its distribution agreement with the seller and refused to ship the seller any more machines. Instead, the manufacturer shipped the goods directly to the buyer, who made no further payments to the seller (paying the manufacturer instead) and who tried to avoid the contract with the seller on the grounds that the seller could not fulfil its obligation to convey title to the machine. The trial court denied the buyer's right to avoid on the basis of article 80, ruling that the buyer's action of accepting the goods while it was still bound to a contract

with the seller led the seller to believe that it had fulfilled its obligations; thus, the trial court reasoned, any subsequent non-performance by the seller was caused by the buyer's actions.¹¹ An intermediate appeals court affirmed this part of the decision, holding that the seller was not obliged to transfer title until the buyer had paid the price; thus article 80 prevented the buyer from avoiding because the seller's non-performance was caused by the buyer's own actions of withholding payment and failing to set an additional period of time under article 47 (1) for the seller to transfer title after the price had been paid.¹² A higher appeals court affirmed the denial of the buyer's right to avoid on grounds that did not involve article 80.¹³

REQUIREMENT THAT THE OTHER PARTY'S FAILURE TO PERFORM BE DUE TO AN "ACT OR OMISSION" OF THE FIRST PARTY

4. Article 80 requires that a party's "act or omission" cause the other side's failure to perform. In cases involving the following acts or omissions, tribunals have found that the requirements of article 80 were satisfied: a buyer's breach of its obligation to pay the price and its failure to set a deadline for seller to perform under article 47 (1);¹⁴ a buyer's failure to pay the price for delivered goods;¹⁵ a buyer's failure to take delivery;¹⁶ a seller's failure to perform its obligation to designate the port from which the goods would be shipped;¹⁷ a seller's repudiation of future delivery obligations;¹⁸ a buyer's unjustified refusal to accept the seller's offer to cure a lack of conformity in the goods.¹⁹ In cases involving the following acts or omissions, tribunals have refused to apply article 80, although not necessarily because the act or omission requirement was not satisfied: a buyer's failure to ship goods back to the seller to permit cure (where the failure to ship was attributable to the carrier);²⁰ a buyer's failure to pay debts arising from other dealings with the seller (where such payment had not been made a condition to the seller's duty to redeliver the goods to the buyer);²¹ a buyer's failure to pay for prior deliveries of goods (where the buyer had prepaid for the delivery in question and the seller bore all risks relating to the supply of the goods);²² a buyer's failure to prepare suitable business premises for the goods (where the seller was obliged to prepare the goods in a way that the buyer would later be able to put it into operation);²³ a buyer's failure to open a letter of credit based on a changed price list (where the buyer did not prove that its failure to open the letter of credit was caused, at that time, by seller).²⁴

REQUIREMENT THAT THE OTHER PARTY'S FAILURE TO PERFORM BE "CAUSED BY" THE FIRST PARTY

5. Article 80 requires that a party's failure to perform be "caused by" the other side's act or omission. In one case, application of article 80 focused on whether it was the actions of the buyer or a third party that caused the seller not to fulfil its obligations. The seller had agreed to take back non-conforming chemicals and reprocess them in order to remedy their defects, and it told the buyer which carrier should be used to return the goods. When the buyer discovered that the carrier had delayed forwarding the goods to the seller, the buyer arranged for the chemicals to be reprocessed in its

own country in order to meet the time demands of its customers. The buyer set-off the costs of the reprocessing against the purchase price. The seller complained that it could have performed the remedial work much more cheaply itself, and that article 80 should prevent the buyer from recovering its higher reprocessing expenses because the buyer's own failure to ship the goods back to the seller prevented the seller from curing the defects. The court disagreed, holding that the delay of the carrier ultimately caused the buyer's higher reprocessing costs, and that on these facts the carrier's performance was the seller's responsibility.²⁵ In other decisions involving allegations of the following causal sequences, tribunals have refused to apply article 80, although this result was not necessarily due to failure to satisfy the causation requirement: a buyer's failure to pay debts arising from other dealings with the seller, causing the seller to refuse to redeliver the goods to the buyer;²⁶ a buyer's failure to pay for prior deliveries of goods, causing the seller to be unable to deliver because it could not financially support a distressed supplier.²⁷

6. In cases involving allegations of the following causal sequences, tribunals have found that the requirements of article 80 were satisfied: a buyer's breach of its obligation to pay the price and its failure to set a deadline for seller to perform under article 47 (1), causing the seller to be unable to arrange for the buyer to receive title to the goods;²⁸ a buyer's failure to pay the price for delivered goods, causing the seller to fail to deliver other goods;²⁹ a buyer's failure to take delivery of the goods, causing the seller's failure to make delivery;³⁰ a seller's failure to perform its obligation to designate the port from which the goods would be shipped, causing the buyer's failure to open a letter of credit;³¹ a seller's repudiation of future delivery obligations, causing the buyer's failure to pay for some prior deliveries;³² a buyer's unjustified refusal to accept the seller's offer to cure a non-conformity, causing the seller's failure to cure;³³ a buyer's failure to perform its obligation to notify the seller and the carrier in charge of the transportation of the time and place of delivery.³⁴

CONSEQUENCES IF ARTICLE 80 APPLIES

7. Unlike article 79, which only prevents an aggrieved party from claiming damages for a failure to perform, article 80 by its terms strips an aggrieved party of its right to "rely" on the other party's non-performance. Thus article 80 has been invoked not only to prevent a party from recovering damages,³⁵ but also to block a party from avoiding the contract³⁶ and from using the other side's non-performance as a defence.³⁷

DECISIONS THAT APPEAR TO APPLY THE PRINCIPLE UNDERLYING ARTICLE 80

8. Some decisions appear to apply the principle of article 80, although it is not clear if the tribunal actually invoked the provision. For example, where a buyer supplied the design for boots that the seller manufactured for the buyer, and after delivery it was determined that a symbol on the boot violated another company's trademark, the buyer was barred from recovering damages from the seller: as an alternative rationale for this holding, the court found that

the buyer itself had caused the infringement by specifying a design that included the offending symbol.³⁸ This fact, it would appear, should have prevented the buyer from relying on the infringement under article 80, although the court apparently did not cite the provision. In another decision, the parties' agreement included a clause allowing the seller to terminate the contract if there was a substantial change in the management of the buyer. The buyer dismissed its general manager, and the seller invoked this as grounds for terminating the contract. The arbitral tribunal held that seller did

not have the right to terminate because it had been involved in the activities that led to the general manager's dismissal, and in fact had become an "accomplice" of the general manager.³⁹ The tribunal appears to have invoked the principle of article 80 when, in support of its holding that the seller did not have the right to exercise the termination clause, it asserted that "[a]s is the case with all sanctions, its application may not be requested by those who are even partially responsible for the modification on which they rely in order to terminate the contract".

Notes

¹ CLOUT case No. 230 [Oberlandesgericht Karlsruhe, Germany, 25 June 1997] (see full text of the decision). This decision was reversed on other grounds in CLOUT case No. 270 [Bundesgerichtshof, Germany, 25 November 1998].

² Bundesgerichtshof, Germany, 24 September 2012, *Internationales Handelsrecht* 2012, 231 = CISG-online No. 2348.

³ Bundesgerichtshof, Germany, 24 September 2012, *Internationales Handelsrecht* 2012, 231 = CISG-online No. 2348 (para. 36).

⁴ Amtsgericht München, Germany, 23 June 1995, Unilex.

⁵ CLOUT case No. 282 [Oberlandesgericht Koblenz, Germany, 31 January 1997].

⁶ CLOUT case No. 311 [Oberlandesgericht Köln, Germany, 8 January 1997] (see full text of the decision).

⁷ CLOUT case No. 166 [Schiedsgericht der Handelskammer Hamburg, Germany, 21 March, 21 June 1996].

⁸ CLOUT case No. 1080 [Supreme Court, Poland, 11 May 2007] (Shoe leather case), English translation available on the Internet at www.cisg.law.pace.edu.

⁹ See, in addition to the decisions discussed in the text, CLOUT case No. 273 [Oberlandesgericht München, Germany, 9 July 1997] (buyer who had unjustifiably withheld payments for certain prior deliveries was denied damages, pursuant to article 80, for seller's refusal to make further deliveries: the court held that the buyer's own failure to pay caused the seller to withhold delivery); CLOUT case No. 133 [Oberlandesgericht München, Germany, 8 February 1995] (buyer denied damages under article 80 because seller's non-delivery was caused by buyer's failure to take delivery) (see full text of the decision); CLOUT case No. 176 [Oberster Gerichtshof, Austria, 6 February 1996] (buyer's failure to open a letter of credit, which would normally be a breach precluding it from recovering for seller's failure to deliver, was caused in this case by seller's failure to fulfil its obligation to designate a port for shipping the goods; therefore article 80 precluded the seller from invoking buyer's failure as a defence in buyer's suit for damages) (see full text of the decision).

¹⁰ Zurich Chamber of Commerce, Switzerland, 31 May 1996 (Arbitral award No. ZHK 273/95), Unilex.

¹¹ Landgericht Düsseldorf, Germany, 9 July 1992, Unilex.

¹² Oberlandesgericht Düsseldorf, Germany, 18 November 1993, available on the Internet at www.cisg-online.ch, English translation available on the Internet at www.cisg.law.pace.edu.

¹³ CLOUT case No. 124 [Bundesgerichtshof, Germany, 15 February 1995].

¹⁴ Oberlandesgericht Düsseldorf, Germany, 18 November 1993, available on the Internet at www.cisg-online.ch, English translation available on the Internet at www.cisg.law.pace.edu. A lower court decision in this case had found that the buyer's act of accepting delivery of the goods from the manufacturer while still under contract with the seller (thus misleading the seller into thinking that its obligations had been fulfilled) constituted an "act or omission" that met the requirements of article 80. See Landgericht Düsseldorf, Germany, 9 July 1992, Unilex. On appeal of the intermediate appellate court decision that is described in the text accompanying this note, the Supreme Court affirmed without invoking article 80. CLOUT case No. 124 [Bundesgerichtshof, Germany, 15 February 1995].

¹⁵ CLOUT case No. 273 [Oberlandesgericht München, Germany, 9 July 1997].

¹⁶ CLOUT case No. 133 [Oberlandesgericht München, Germany, 8 February 1995] (see full text of the decision).

¹⁷ CLOUT case No. 176 [Oberster Gerichtshof, Austria, 6 February 1996] (see full text of the decision).

¹⁸ Zurich Chamber of Commerce, Switzerland, 31 May 1996 (Arbitral award No. ZHK 273/95), Unilex.

¹⁹ CLOUT case No. 282 [Oberlandesgericht Koblenz, Germany, 31 January 1997].

²⁰ Amtsgericht München, Germany, 23 June 1995, Unilex.

²¹ CLOUT case No. 311 [Oberlandesgericht Köln, Germany, 8 January 1997] (see full text of the decision).

²² CLOUT case No. 166 [Schiedsgericht der Handelskammer Hamburg, Germany, 21 March, 21 June 1996].

²³ CLOUT case No. 1399 [Oberlandesgericht Hamburg, Germany, 25 January 2008] (Café inventory case), English translation available on the Internet at www.cisg.law.pace.edu.

²⁴ Arbitration Court of the International Chamber of Commerce, 2003 (Arbitral award No. 11849) (Fashion products case), available on the Internet at www.cisg.law.pace.edu.

²⁵ Amtsgericht München, Germany, 23 June 1995, Unilex.

²⁶ CLOUT case No. 311 [Oberlandesgericht Köln, Germany, 8 January 1997] (see full text of the decision).

²⁷ CLOUT case No. 166 [Schiedsgericht der Handelskammer Hamburg, Germany, 21 March, 21 June 1996].

²⁸ Oberlandesgericht Düsseldorf, Germany, 18 November 1993, Unilex. A lower court decision in this case had found that the buyer's act of accepting delivery of the goods from the manufacturer while still under contract with the seller (thus misleading the seller into thinking that its obligations had been fulfilled) had caused the seller's non-performance. Landgericht Düsseldorf, Germany, 9 July 1992, Unilex. On appeal of the intermediate appellate court decision described in the text accompanying this note, the Supreme Court affirmed without invoking article 80. CLOUT case No. 124 [Bundesgerichtshof, Germany, 15 February 1995].

²⁹ CLOUT case No. 273 [Oberlandesgericht München, Germany, 9 July 1997].

³⁰ CLOUT case No. 133 [Oberlandesgericht München, Germany, 8 February 1995].

³¹ CLOUT case No. 176 [Oberster Gerichtshof, Austria, 6 February 1996] (see full text of the decision).

³² Zurich Chamber of Commerce, Switzerland, 31 May 1996 (Arbitral award No. ZHK 273/95), Unilex.

³³ CLOUT case No. 282 [Oberlandesgericht Koblenz, Germany, 31 January 1997].

³⁴ China International Economic and Trade Arbitration Commission, People's Republic of China, 9 January 2008 (Metallic silicon case), English translation available on the Internet at www.cisg.law.pace.edu (seller exempted from liability for non-delivery because of the buyer's termination of the contract and what the tribunal characterized as the buyer's blackmail).

³⁵ Tribunal of International Commercial Arbitration at the Ukraine Chamber of Commerce and Trade, Ukraine, 15 February 2006 (Coal case), English translation available on the Internet at www.cisg.law.pace.edu; CLOUT case No. 273 [Oberlandesgericht München, Germany, 9 July 1997]; CLOUT case No. 133 [Oberlandesgericht München, Germany, 8 February 1995] (see full text of the decision); CLOUT case No. 282 [Oberlandesgericht Koblenz, Germany, 31 January 1997].

³⁶ Landgericht Düsseldorf, Germany, 9 July 1992, Unilex, affirmed in relevant part by Oberlandesgericht Düsseldorf, Germany, 18 November 1993, Unilex, affirmed in relevant part without invoking article 80 in CLOUT case No. 124 [Bundesgerichtshof, Germany, 15 February 1995].

³⁷ CLOUT case No. 176 [Oberster Gerichtshof, Austria, 6 February 1996] (see full text of the decision); Zurich Chamber of Commerce, Switzerland, 31 May 1996 (Arbitral award No. ZHK 273/95), Unilex.

³⁸ Supreme Court of Israel, 22 August 1993, Unilex. In denying the buyer damages the court relied primarily on the fact that the buyer could not have been unaware of the infringement when the contract was concluded, which under article 42 (2) (a) barred the buyer's claim. The transaction in this decision was actually governed by the Hague Sales Convention (ULIS), but the court referred to CISG by analogy.

³⁹ Arbitration Court of the International Chamber of Commerce, December 1997 (Arbitral award No. 8817), Unilex.