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Article 82

1. The buyer loses the right to declare the contract avoided or to require the seller to deliver substitute goods if it is impossible for him to make restitution of the goods substantially in the condition in which he received them.

2. The preceding paragraph does not apply:

(a) If the impossibility of making restitution of the goods or of making restitution of the goods substantially in the condition in which the buyer received them is not due to his act or omission;

(b) If the goods or part of the goods have perished or deteriorated as a result of the examination provided for in article 38; or

(c) If the goods or part of the goods have been sold in the normal course of business or have been consumed or transformed by the buyer in the course of normal use before he discovered or ought to have discovered the lack of conformity.

* The present digest was prepared using the full text of the decisions cited in the Case Law on UNCITRAL Texts (CLOUT) abstracts and other citations listed in the footnotes. The abstracts are intended to serve only as summaries of the underlying decisions and may not reflect all the points made in the digest. Readers are advised to consult the full texts of the listed court and arbitral decisions rather than relying solely on the CLOUT abstracts.



Overview

1. Whereas article 81 (2) gives the parties to an avoided contract a claim for restitution of whatever such party has supplied or paid under the contract, article 82 deals with the effect of an aggrieved buyer's inability to make restitution of goods substantially in the condition in which they were delivered. Specifically, article 82 (1) conditions an aggrieved buyer's right to declare the contract avoided, as well as its right to require that the seller deliver substitute goods, on the buyer having the ability to return whatever goods have already been delivered under the contract substantially in the condition in which the buyer received them.¹ Article 82 (2), however, creates three very broad exceptions to the rule of article 82 (1): a buyer is not precluded from avoiding the contract or demanding substitute goods if its inability to return the goods to the seller substantially in their original condition was not the result of the buyer's own act or omission (art. 82 (2) (a)), if it occurred as a consequence of the examination of the goods provided for in article 38 (art. 82 (2) (b)), or if it arose from buyer's resale, consumption or transformation of the goods in the normal course and "before [the buyer] discovered or ought to have discovered the lack of conformity" (art. 82 (2) (c)).

Article 82 in general

2. The provisions in Chapter V, Section V of the CISG, which include article 82, have been cited in support of the proposition that avoidance of contract is "a constitutive right of the buyer, which changes the contractual relationship into a restitutional relationship."² Article 82 has also been characterized as part of the Convention's "risk distribution mechanism" for avoided contracts, under which "the seller alone bears the risk of chance accidents and force majeure".³ In line with this view, this decision found that a buyer is not liable for loss or damage to the goods that occurred while they were being transported back to the seller following the buyer's justified avoidance of the contract.⁴ The court reasoned that this "one-sided or predominant burdening of the seller with the risks of restitution" of the goods is explained by the fact that the seller caused these risks by breaching the contract.⁵

¹ Thus, although it is located in the part of the CISG entitled "Effects of avoidance" (Chap. V, Sect. V), article 82 is not limited to situations where a buyer seeks to avoid the contract or some part thereof under articles 49, 51, 72 or 73: it also applies when a buyer does not avoid the contract and instead invokes the substitute goods remedy in article 46 (2). Whereas article 81 (2) clearly requires an avoiding buyer to make restitution of goods delivered under the avoided contract, article 46 (2) does not expressly state that a buyer who wishes to require the seller to deliver substitute goods must return the original goods, except insofar as use of the term "substitute goods" suggests such an obligation. Article 82, however, indicates that a buyer seeking substitute goods must in fact give back the originals substantially in the condition in which it received them, unless one of the exceptions in article 82 (2) applies.

² Landgericht Düsseldorf, Germany, 11 October 1995, Unilex.

³ Oberster Gerichtshof, Austria, 29 June 1999, Unilex.

⁴ Id.

⁵ Id.

Article 82 (1)

3. Article 82 (1) imposes a requirement that, in order to preserve its right to avoid the contract or require the seller to deliver substitute goods, an aggrieved buyer must retain the ability to make restitution of goods that the buyer received under the contract “substantially in the condition in which [the buyer] received them”. Several decisions have denied a buyer the right to avoid the contract because it could not meet this requirement. Thus, where a buyer attempted to avoid a contract for the sale of flower plants because the delivered plants allegedly were defective in appearance and colour, a court noted that the buyer had lost the right to avoid under article 82 (1) because it had discarded some plants and resold others.⁶ A buyer of textiles, some of which did not conform to a pattern specified in the contract, was also found to have lost the right to avoid because it resold the goods.⁷ And another buyer lost its right to avoid the contract because, after it discovered that marble slabs delivered by the seller were stuck together and broken, it cut and processed the slabs, thus making it impossible to return them substantially in the condition in which they were received.⁸

4. On the other hand, a decision has noted that article 82 does not prevent a buyer from avoiding the contract where no claim was made that buyer could not return the goods substantially in the condition in which they were received⁹—suggesting that the party resisting avoidance bears the burden of going forward with evidence that article 82 precludes the remedy. The same decision also indicates that article 82 only encompasses loss of or deterioration in the goods that occurs before the declaration of avoidance is made.¹⁰ It has also been found that a buyer did not lose the right to avoid under article 82 merely by announcing, prior to trial, that it was attempting to resell the goods (an attempt that the court characterized as an effort to mitigate damages): the court indicated that article 82 would prevent the buyer from avoiding only if it had actually resold the goods before it declared the contract avoided.¹¹ Several other decisions have refused to deny a buyer the right to avoid, even though the buyer could not make restitution of the goods substantially in the condition in which they were received, because the requirements of one or more of the exceptions in article 82 (2) were satisfied.¹²

⁶ Rechtbank Rotterdam, the Netherlands, 21 November 1996, Unilex. Presumably the resale occurred after the buyer discovered or ought to have discovered the alleged lack of conformity.

⁷ CLOUT case No. 82 [Oberlandesgericht Düsseldorf, Germany, 10 February 1994]. Again, the resale presumably occurred after the buyer discovered or ought to have discovered the alleged lack of conformity.

⁸ CLOUT case No. 316 [Oberlandesgericht Koblenz, Germany, 27 September 1991].

⁹ CLOUT case No. 2 [Oberlandesgericht Frankfurt am Main, Germany, 17, September 1991] (see full text of the decision).

¹⁰ Id.

¹¹ Amtsgericht Charlottenburg, Germany, 4 May 1994, Unilex. The court also indicated that the buyer would lose the right to avoid only if the resale occurred before the buyer discovered the lack of conformity. Article 82 (2) (c), however, preserves the buyer’s right to avoid unless the resale (or other ordinary course consumption or transformation of the goods by the buyer) occurs after the buyer discovers or ought to have discovered the lack of conformity.

¹² CLOUT case No. 235 [Bundesgerichtshof, Germany, 25 June 1997] (art. 82 (2) (b) satisfied); Landgericht Ellwangen, Germany, 21 August 1995, Unilex (art. 82 (2) (c) satisfied). For discussion of the exceptions in article 82 (2), see *infra* paras. 5-7.

Article 82 (2) (a)

5. Even if a buyer is unable to give restitution of previously delivered goods substantially in the condition in which they were received, article 82 (2) (a) provides that the buyer retains the right to avoid the contract or to require the seller to deliver substitute goods if the buyer's inability to make restitution is not due to its own act or omission. This provision was cited by a court in holding that a buyer was not liable for damage to goods that occurred while they were being transported back to the seller following the buyer's justified avoidance of contract: the seller itself conceded that the damage occurred while the goods were in the hands of the carrier, and thus could not have been caused by the buyer's act or omission.¹³ On the other hand, article 82 (2) (a) did not protect the avoidance rights of a buyer who cut and processed non-conforming marble slabs before avoiding the contract, because the buyer's inability to make restitution of the goods substantially in the condition in which they were received was indeed due to its own acts.¹⁴

Article 82 (2) (b)

6. Article 82 (2) (b) preserves an aggrieved buyer's right to avoid the contract or to demand substitute goods where the buyer's inability to make restitution of the goods substantially in the condition in which they were received arose as a result of the examination of the goods provided for in article 38. This provision has been invoked to preserve the avoidance rights of a buyer that processed wire before discovering that it did not conform to the contract: the court found that defects in the wire could not be detected until it was processed.¹⁵ The court also determined that the rule of article 82 (2) (b), which by its terms applies if the goods "have perished or deteriorated" because of the article 38 examination, applied even though the processing of the wire actually enhanced its value.¹⁶ On the other hand, a court has held that the substantial change in condition of marble slabs that occurred when the buyer cut and processed them did not result from the article 38 examination, and thus the buyer's avoidance rights were not preserved under article 82 (2) (b).¹⁷

Article 82 (2) (c)

7. Under article 82 (2) (c), a buyer retains its right to avoid the contract or to demand that the seller deliver substitute goods even though it is unable to make restitution of the goods substantially in their delivered condition, provided that the goods were "sold in the normal course of business or have been consumed or transformed by the buyer in the course of normal use before he discovered or ought to have discovered the lack of conformity". Under this provision, a buyer who resold paprika in its ordinary course of business before discovering that the goods contained ethylene oxide in amounts that exceeded domestic legal limits retained its

¹³ Oberster Gerichtshof, Austria, 29 June 1999, Unilex.

¹⁴ CLOUT case No. 316 [Oberlandesgericht Koblenz, Germany, 27 September 1991].

¹⁵ CLOUT case No. 235 [Bundesgerichtshof, Germany, 25 June 1997].

¹⁶ Id. (see full text of the decision).

¹⁷ CLOUT case No. 316 [Oberlandesgericht Koblenz, Germany, 27 September 1991].

right to avoid the contract under which it purchased the paprika.¹⁸ On the other hand, the requirements for this exception were not satisfied when a buyer resold textiles that were, in part, of a different pattern than that called for in the contract, and the buyer lost its right to avoid because it could not make restitution of the goods as required by article 82 (1).¹⁹ And a buyer that cut and processed marble slabs after discovering that they were non-conforming did not meet the requirements of article 82 (2) (c) and did not have the right to avoid the contract.²⁰ It has also been suggested that a buyer's resale of the goods after declaring the contract avoided is beyond the scope of article 82.²¹

¹⁸ Landgericht Ellwangen, Germany, 21 August 1995, Unilex.

¹⁹ CLOUT case No. 82 [Oberlandesgericht Düsseldorf, Germany, 10 February 1994].

²⁰ CLOUT case No. 316 [Oberlandesgericht Koblenz, Germany, 27 September 1991].

²¹ Amtsgericht Charlottenburg, Germany, 4 May 1994, Unilex (stating that the buyer would have lost the right to avoid the contract under art. 82 (1) only if it had resold by the time of its letter declaring the contract avoided). The court also indicated that the buyer would retain the right to avoid unless the resale occurred before the buyer discovered the lack of conformity. Article 82 (2) (c), however, preserves the buyer's right to avoid unless the resale (or other ordinary course consumption or transformation of the goods by the buyer) occurs after the buyer discovers or ought to have discovered the lack of conformity.