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**United Nations Commission  
on International Trade Law**

**UNCITRAL Digest of case law on the United Nations  
Convention on the International Sale of Goods\***

*Article 85*

If the buyer is in delay in taking delivery of the goods or, where payment of the price and delivery of the goods is to be made concurrently, if he fails to pay the price, and the seller is either in possession of the goods or otherwise able to control their disposition, the seller must take such steps as are reasonable in the circumstances to preserve them. He is entitled to retain them until he has been reimbursed his reasonable expenses by the buyer.

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\* 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.



## **In general**

1. Article 85 creates both an obligation and a right, applicable to sellers that have retained possession or control of goods either because the buyer has delayed taking delivery or because the buyer has failed to make a payment due concurrently with delivery. Under the first sentence of article 85, such a seller must “take such steps as are reasonable in the circumstances” to preserve the goods. Under the second sentence of article 85, such a seller has the right to retain the goods until the buyer reimburses the seller’s reasonable expenses of preservation. Article 85 has been cited in relatively few decisions, most of which have focused on the seller’s right to reimbursement for the expenses of preserving the goods.

## **Seller’s obligation to preserve goods**

2. A small number of decisions have dealt with the seller’s article 85 obligation to preserve goods. That obligation has been invoked to justify a seller’s actions after a buyer demanded that a seller stop making deliveries of trucks covered by a contract for sale: an arbitral tribunal stated that, because the buyer unjustifiably refused delivery, the seller had the right to take reasonable steps toward preserving the goods, including depositing them in a warehouse.<sup>1</sup> In another proceeding, a buyer sought interim relief in the form of an order preventing the seller from selling a key component of industrial machinery. The seller had retained the component after the buyer failed to make full payment for the machinery, and the seller planned to transfer the machinery to another warehouse and resell it. Because the proceeding focused on interim relief, the court applied the national law of the forum rather than the CISG, holding that the seller could move the goods to a new warehouse, but (despite art. 87) it would have to advance the warehouse expenses itself, and (despite art. 88) it would be restrained from exporting or reselling the component.<sup>2</sup>

## **Seller’s right to retain goods until reimbursed for reasonable expenses of preservation**

3. A number of decisions have held breaching buyers liable for expenses that an aggrieved seller incurred to preserve the goods. These decisions usually (although not always) cite article 85 in support of the award,<sup>3</sup> but they frequently characterize

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<sup>1</sup> Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, Russian Federation, 25 April 1995, Unilex.

<sup>2</sup> CLOUT case No. 96 and No. 200 [Tribunal Cantonal Vaud, Switzerland, 17 May 1994] (both abstracts dealing with the same case).

<sup>3</sup> See CLOUT case No. 361 [Oberlandesgericht Braunschweig, Germany, 28 October 1999] (citing art. 85 and awarding the seller’s costs for cold storage of meat) (see full text of the decision); ICC Court of Arbitration, award No. 9574, August 1998, Unilex (citing art. 85 and awarding the seller’s costs for storing and transporting equipment and spare parts); Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, Russian Federation, 25 April 1995, Unilex (citing art. 85 and awarding the seller’s costs for storing trucks in warehouse); CLOUT case No. 104 [Arbitration-International Chamber of Commerce no. 7197, 1993] (citing art. 85 and awarding the seller’s costs for storing goods in a warehouse). But see Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, Russian Federation, 9 September 1994, Unilex

the award as damages recoverable under article 74 of the CISG.<sup>4</sup> One court has stated that “when applying the CISG, the [buyer’s] duty to pay damages is based on article 74, in part also on article 85”.<sup>5</sup> The preservation costs for which sellers have successfully claimed reimbursement have generally been incurred after the buyer unjustifiably refused to take delivery,<sup>6</sup> although in one case they were incurred after the buyer failed to open a letter of credit required by the sales contract.<sup>7</sup> In several cases, an award of the seller’s expenses for preserving the goods was made only after the tribunal expressly determined the costs were reasonable.<sup>8</sup> Where the seller was in breach and the buyer properly avoided the contract, however, it was found that the prerequisites for the seller to claim, under either article 74 or article 85, reimbursement for expenses of storing and reselling the goods were not met because the buyer did not breach its obligations to pay the price or take delivery; the seller’s claim was therefore denied.<sup>9</sup> And even where a buyer was found liable for seller’s costs of storing the goods in a warehouse, an arbitral tribunal denied seller’s claim for damage to the goods resulting from prolonged storage, because risk of loss had not passed to the buyer under applicable rules.<sup>10</sup> Finally, the principle of the second sentence of article 85 that, in proper circumstances, a seller can retain goods until reimbursed for the reasonable costs of preserving them has also been invoked to support the idea that, unless otherwise agreed, a seller is not obligated to make delivery until the buyer pays the price.<sup>11</sup>

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(apparently not citing art. 85 in awarding seller’s costs for storing goods). See also CLOUT case No. 96 and No. 200 [Tribunal Cantonal Vaud, Switzerland, 17 May 1994] (both abstracts dealing with the same case) (citing art. 85, but applying national law of the forum to deny seller an interim order requiring the buyer to pay the costs of transporting the goods to a new warehouse) (see full text of the decision).

- <sup>4</sup> See CLOUT case No. 361 [Oberlandesgericht Braunschweig, Germany, 28 October 1999] (see full text of the decision); CLOUT case No. 104 [Arbitration-International Chamber of Commerce no. 7197, 1993] (see full text of the decision).
- <sup>5</sup> CLOUT case No. 361 [Oberlandesgericht Braunschweig, Germany, 28 October 1999] (see full text of the decision).
- <sup>6</sup> Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, Russian Federation, 25 April 1995, Unilex; CLOUT case No. 361 [Oberlandesgericht Braunschweig, Germany, 28 October 1999] (see full text of the decision); ICC Court of Arbitration, award No. 9574, August 1998, Unilex; Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, Russian Federation, 9 September 1994, Unilex.
- <sup>7</sup> CLOUT case No. 104 [Arbitration-International Chamber of Commerce no. 7197, 1993] (see full text of the decision).
- <sup>8</sup> Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, Russian Federation, 25 April 1995, Unilex; CLOUT case No. 361 [Oberlandesgericht Braunschweig, Germany, 28 October 1999] (see full text of the decision); Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, Russian Federation, 9 September 1994, Unilex.
- <sup>9</sup> CLOUT case No. 293 [Arbitration-Schiedsgericht der Hamburger freundschaftlichen Arbitrage, Hamburg, Germany, 29 December 1998] (see full text of the decision).
- <sup>10</sup> CLOUT case No. 104 [Arbitration-International Chamber of Commerce no. 7197, 1993] (see full text of the decision).
- <sup>11</sup> CLOUT case No. 96 and No. 200 [Tribunal Cantonal Vaud, Switzerland, 17 May 1994] (both abstracts dealing with the same case) (see full text of the decision).