

*Additional damages**Article 71***[Damages in case of avoidance and substitute transaction]**

If the contract is avoided and if, in a reasonable manner and within a reasonable time after avoidance, the buyer has bought goods in replacement or the seller has resold the goods, the party claiming damages may recover the difference between the contract price and the price in the substitute transaction and any further damages recoverable under the provisions of article 70.

## PRIOR UNIFORM LAW

ULIS, article 85.

**Commentary**

1. Article 71 sets forth a means of calculating damages when the contract has been avoided and replacement goods have in fact been purchased or the seller has in fact resold the goods.

*Basic formula*

2. In such case the injured party may "recover the difference between the contract price and the price in the substitute transaction", i.e. the price paid for the goods bought in replacement or that obtained in the resale. In addition, he may recover any further damages recoverable under article 70.<sup>1</sup>

3. If the contract has been avoided, the formula contained in this article will often be the one used to calculate the damages owed the injured party since, in many commercial situations, a substitute transaction will have taken place. If the substitute transaction occurs in a different place from the original transaction or is on different terms, the amount of damages must be adjusted to recognize any increase in costs (such as increased transportation) less any expenses saved as a consequence of the breach.

4. Article 71 provides that the injured party can rely on the difference between the contract price and the price in the substitute transaction only if the resale or cover purchase were made in a reasonable manner. For the substitute transaction to have been made in a reasonable manner within the context of article 71, it must have been made in such a manner as is likely to cause a resale to have been made at the highest price reasonably possible in the circumstances or a cover purchase at the lowest price reasonably possible. Therefore, the substitute transaction need not be on identical terms of sale in respect of such matters as quantity, credit or time of delivery so long as the transaction was in fact in substitution for the transaction which was avoided.

5. It should also be noted that the time limit within which the resale or cover purchase must be made for it to be the basis for calculating damages under article 71 is "a reasonable time after avoidance". Therefore, this time limit does not begin until the injured party has in fact declared the contract avoided.

6. If the resale or cover purchase is not made in a reasonable manner or within a reasonable time after the contract was avoided, damages would be calculated as though no substitute transaction had taken place. Therefore, resort would be made to article 72 and, if applicable, to article 70.

7. If resort is made to article 72, the difference between the contract price and the market price is calculated as of the time the party claiming damages first has the right to declare the contract avoided, which is also the earliest moment in time that the difference between the contract price and the price received on resale or paid for the cover purchase may be calculated under article 71.

<sup>1</sup> See paras. 8 and 9 *infra*.

8. Article 71 recognizes that the injured party may incur further damages which would not be compensated by the basic formula. These further damages are recoverable under article 70.

9. The most usual type of further damages to be recovered under article 70 would be the additional expenses which may have been caused as a result of the receipt of non-conforming goods or the necessity to purchase substitute goods as well as losses which may have been caused if goods purchased in the substitute transaction could not be delivered by the original contract date. The amount of the recoverable damages of this type is often limited by the requirement of foreseeability in article 70.<sup>2</sup>

<sup>2</sup> See para. 8 of the commentary to article 70.