

Article 84

(1) If the seller is bound to refund the price, he must also pay interest on it, from the date on which the price was paid.

(2) The buyer must account to the seller for all benefits which he has derived from the goods or part of them:

(a) If he must make restitution of the goods or part of them; or

(b) If it is impossible for him to make restitution of all or part of the goods or to make restitution of all or part of the goods substantially in the condition in which he received them, but he has nevertheless declared the contract avoided or required the seller to deliver substitute goods.

OVERVIEW

1. Article 84 elaborates on the restitutionary obligations imposed on parties to a contract that has been validly avoided, as well as on the restitutionary obligations of a buyer that invokes its rights under article 46 (2) to require the seller to deliver substitute goods.

WHEN INTEREST IS DUE UNDER ARTICLE 84 (1)

2. Many decisions have awarded interest under article 84 (1) on payments that a seller must refund to a buyer.¹ Such awards have frequently been made against a breaching seller in favour of a buyer that has avoided the contract.² Interest under article 84 has also been awarded to a breaching buyer who became entitled to a refund of payments when the aggrieved seller avoided the contract.³ Article 84 (1) has also been found to govern a buyer's claim for repayment of funds that a seller obtained under a bank guarantee for part of the price of goods covered by a cancelled contract, even though the buyer's claim was based on principles of applicable national law (because it arose from the seller's dealing with the bank rather than the buyer) and not on restitutionary obligations under the Convention: the court reasoned that the buyer's claim, while not based on the CISG, was nevertheless a claim for a refund of the price in a transaction governed by the CISG, and thus came within the terms of article 84 (1).⁴ A court has also determined that a buyer is entitled to interest under article 84 even though it had not made a formal request for such interest in its pleadings.⁵

RATE OF INTEREST UNDER ARTICLE 84 (1)

3. Like article 78, article 84 (1) does not specify the rate of interest applicable to awards made under its authority. Many decisions have set the interest rate according to the dictates of national law, resulting in the imposition of a domestic statutory rate of interest.⁶ Such decisions often invoke choice of law principles to determine the applicable national law,⁷ finding support in article 7 (2) on the view that questions regarding the rate of interest fall within the

scope of the CISG, yet since such rate is settled neither by its express provisions nor by the general principles on which it is based, the rate must be fixed "in conformity with the law applicable by virtue of the rules of private international law".⁸ On the other hand, interest has been awarded at the rate prevailing at the seller's place of business because this is where sellers are likely to have invested the payments they must refund.⁹ An arbitral tribunal has held that the rate of interest under article 84 (1) should be the one used in international trade with respect to the currency of the transaction (in this case, Eurodollars), leading to the application of London Inter-Bank Offered Rate (LIBOR).¹⁰ This aspect of the arbitration award, however, was reversed on appeal because the parties had not been given sufficient opportunity to be heard on the question of the proper interest rate.¹¹ In lieu of awarding interest under article 84, other courts opted for awarding damages under article 74 in favour of buyers who timely and properly avoided the contract, measuring such damages by the finance charges that the buyer incurred in order to finance payment for the goods (provided such charges were foreseeable at the time of the conclusion of the contract).¹²

TIME PERIODS FOR WHICH INTEREST IS AWARDED UNDER ARTICLE 84 (1); CURRENCY AND EXCHANGE RATE CONSIDERATIONS

4. Article 84 (1) specifies that, when the seller must refund payments made by the buyer, it must pay interest "from the date on which the price was paid". Many decisions have in fact awarded interest from this date.¹³ Where payment was made on behalf of the buyer by a guarantor bank and the buyer reimbursed the bank, the buyer was awarded interest from the date that the guarantor made payment.¹⁴ In the case of partial contract avoidance, it has been determined that interest is due from the time that the buyer paid for goods covered by the avoided portion of the contract.¹⁵ Article 84 (1) does not state the date as of which interest should cease to accrue, but it has been determined that interest accrues until the time that the price is in fact refunded.¹⁶ It has also been determined that an avoiding buyer's refund, including interest thereon, was due in the same currency as that in which the price was duly

paid (even though the contract price was valued in a different currency), and at the exchange rate that was specified in the contract for payment of the price to seller.¹⁷

ARTICLE 84 (2)

5. Article 84 (2) requires a buyer to account to the seller for benefits derived from goods that were delivered under a contract that was avoided, or from goods that the buyer is requiring the seller to replace pursuant to article 46 (2). In both situations, the buyer is subject to the seller's claim for restitution of delivered goods. Thus, under article 81 (2), a buyer who is party to a contract that has been avoided (whether by the buyer or the seller) must make restitution of goods received under the contract. Under article 82, furthermore, if a buyer wishes either to avoid the contract or to require the seller to deliver substitute goods pursuant to article 46 (2), the buyer must make restitution of goods already delivered "substantially in the condition in which he received them", unless one of the exceptions in article 82 (2) applies. Article 84 (2), in turn, requires the buyer to "account to the seller for all benefits which he has derived from the goods or part of them" in two situations: whenever the buyer is obligated to make restitution of the goods (article 84 (2) (a)); and whenever the buyer successfully avoids the contract or requires the seller to deliver substitute goods despite being unable to make restitution of the original goods substantially in the condition in which they were received (i.e., when one of the article 82 (2) exceptions from the requirement to make restitution applies).

6. Article 84 (2) has been the subject of fewer decisions than those rendered under article 84 (1). Article 84 (2) has been characterized in general as requiring that the buyer "account to the seller the exchange value of all benefits

which the [buyer] has derived from the goods or part of them."¹⁸ It has been stated that it is the seller's burden to prove the amount of benefits for which the buyer must account to the seller under article 84 (2).¹⁹ In line with this principle, an appellate court reversed a lower court's award under article 84 (2) in favour of a seller whom the appeals court found had not carried its burden: the seller had shown only that the buyer's customer might in the future avoid its contract to purchase the goods in question (furniture that proved non-conforming); proof of the possibility that the buyer *might* obtain benefits from its customer's rescission, the court reasoned, was not sufficient to trigger the obligation to account for benefits under article 84 (2), particularly where the amount of the possible benefits was also uncertain.²⁰ The court dismissed the seller's claim for benefits allegedly received by the buyer "because the use of defective furniture is not a measurable monetary benefit and would thus have to be considered as an imposed benefit."²¹ Another decision indicated, in passing, that if a buyer had succeeded in reselling shoes received under a contract that it avoided, the buyer "would have had to account to the seller for any profit under article 84 (2) CISG"; this suggested to the court that the buyer's attempt to resell the shoes was merely an effort to mitigate the "negative effect for both sides" of the shoes' lack of conformity, and should not be deemed an "acceptance" of the shoes as conforming.²²

RETURN OF UNJUSTIFIED ENRICHMENT AS A GENERAL PRINCIPLE OF THE CONVENTION

7. A court has held that "the provision of CISG article 84 (2) is the basis for the relevant general principle of the Convention which orders the return of the enrichment received in case the sales contract is declared avoided at a later time."²³

Notes

¹ CLOUT Case No. 103 [Arbitration Court of the International Chamber of Commerce, 1993 (Arbitral award No. 6653)]; Cour d'appel Paris, France, 6 April 1995, Unilex; Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, Russian Federation, 15 April 1994 (Arbitral award No. 1/1993), Unilex; Cour d'appel Aix-en-Provence, France, 21 November 1996, Unilex; CLOUT case No. 253 [Cantone del Ticino Tribunale d'appello, Switzerland, 15 January 1998] (see full text of the decision); CLOUT case No. 214 [Handelsgericht des Kantons Zürich, Switzerland, 5 February 1997]; CLOUT case No. 302 [Arbitration Court of the International Chamber of Commerce, 1994 (Arbitral award No. 7660)]; Landgericht Landshut, Germany, 5 April 1995, Unilex; Arbitration Court of the International Chamber of Commerce, March 1999 (Arbitral award No. 9978), Unilex; CLOUT case No. 136 [Oberlandesgericht Celle, Germany, 24 May 1995]; CLOUT case No. 133 [Oberlandesgericht München, Germany, 8 February 1995]; CLOUT case No. 261 [Berzirksgericht der Sanne, Switzerland, 20 February 1997]; CLOUT case No. 293 [Schiedsgericht der Hamburger freundschaftlichen Arbitrage, Germany, 29 December 1998]; China International Economic and Trade Arbitration Commission, People's Republic of China, 30 October 1991, Unilex, English translation also available on the Internet at www.cisg.law.pace.edu. See also CLOUT case No. 313 [Cour d'appel Grenoble, France, 21 October 1999] (indicating that an avoiding buyer was entitled to interest, under article 84, on the price to be refunded by the breaching seller, but then declining jurisdiction over case). On the other hand, in lieu of interest under article 84, some courts appear to have awarded avoiding buyers damages under article 74 in the amount of foreseeable finance charges that the buyer incurred in order to finance payment for the goods. See CLOUT case No. 304 [Arbitration Court of the International Chamber of Commerce, 1994 (Arbitral award No. 7531)]; Käräjaoikeus Kuopio, Finland, 5 November 1996, available on the Internet at www.utu.fi, English translation available on the Internet at www.cisg.law.pace.edu.

² Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, Russian Federation, 15 April 1994 (Arbitral award No. 1/1993), Unilex; CLOUT case No. 253 [Cantone del Ticino Tribunale d'appello, Switzerland, 15 January 1998] (see full text of the decision); CLOUT case No. 214 [Handelsgericht des Kantons Zürich, Switzerland, 5 February 1997]; Landgericht Landshut, Germany, 5 April 1995, Unilex; Arbitration Court of the International Chamber of Commerce, March 1999 (Arbitral award No. 9978), Unilex; CLOUT case No. 293 [Schiedsgericht der Hamburger freundschaftlichen Arbitrage, Germany, 29 December 1998]; China International Economic and Trade Arbitration Commission, People's Republic of China, 30 October 1991, Unilex; CLOUT case No. 103 [Arbitration Court of the International Chamber of Commerce, 1993 (Arbitral award No. 6653)]; Cour d'appel Paris, France, 6 April 1995. See also Käräjaoikeus Kuopio, Finland, 5 November 1996, available on the Internet at www.utu.fi, English translation available on

the Internet at www.cisg.law.pace.edu (apparently awarding buyer's actual finance charges as damages under article 74, not as interest under article 84); CLOUT case No. 90 [Pretura circondariale di Parma, Italy, 24 November 1989] (court applied CISG to transaction and held that buyer was entitled to avoid and recover payments from seller; it also awarded interest, but without citing article 84 and perhaps on the basis of national law); CLOUT case No. 302 [Arbitration Court of the International Chamber of Commerce, 1994 (Arbitral award No. 7660)] (court allowed interest on buyer's partial refund claim for undelivered spare part parts, but did not specifically discuss whether buyer avoided this part of the contract).

³ CLOUT case No. 261 [Berzirksgericht der Sanne, Switzerland, 20 February 1997].

⁴ CLOUT case No. 133 [Oberlandesgericht München, Germany, 8 February 1995].

⁵ CLOUT case No. 103 [Arbitration Court of the International Chamber of Commerce, 1993 (Arbitral award No. 6653)], where the court noted that article 84 (1) is not clear on whether such a formal request for interest is necessary, but that the provision would be construed not to require such a request; the tribunal noted that the domestic law that would apply under article 7 (2) to resolve matters not settled by the provisions of CISG or its general principles did not require a formal request for interest. This portion of the decision was affirmed in Cour d'appel Paris, France, 6 April 1995, Unilex.

⁶ CLOUT case No. 594 [Oberlandesgericht Karlsruhe, Germany 19 December 2002] (see full text of the decision); CLOUT case No. 253 [Cantone del Ticino Tribunale d'appello, Switzerland, 15 January 1998] (see full text of the decision); CLOUT case No. 302 [Arbitration Court of the International Chamber of Commerce, 1994 (Arbitral award No. 7660)]; Landgericht Landshut, Germany, 5 April 1995, Unilex; CLOUT case No. 136 [Oberlandesgericht Celle, Germany, 24 May 1995]; CLOUT case No. 261 [Berzirksgericht der Sanne, Switzerland, 20 February 1997]; CLOUT case No. 293 [Schiedsgericht der Hamburger freundschaftlichen Arbitrage, Germany, 29 December 1998]; CLOUT case No. 133 [Oberlandesgericht München, Germany, 8 February 1995]; Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, Russian Federation, 15 April 1994, Arbitral award No. 1/1993, Unilex; Cour d'appel Aix-en-Provence, France, 21 November 1996, Unilex; Arbitration Court of the International Chamber of Commerce, March 1999 (Arbitral award No. 9978), Unilex. See also CLOUT case No. 90 [Pretura circondariale di Parma, Italy, 24 November 1989] where the court held that the buyer was entitled to avoid the contract and recover its payments from the seller under CISG; it also awarded interest at the domestic law statutory rate, but without citing article 84 and perhaps on the basis of national law); China International Economic and Trade Arbitration Commission, People's Republic of China, 30 October 1991, Unilex (tribunal awarded 8 per cent interest on payments that seller had to refund to avoiding buyer, but did not specify how it determined the rate).

⁷ CLOUT case No. 867 [Tribunale di Forlì, Italy, 11 December 2008 (Mitias v. Solieda S.r.l)], English translation available on the Internet at www.cisg.law.pace.edu; CLOUT case No. 594 [Oberlandesgericht Karlsruhe, Germany 19 December 2002] (see full text of the decision); CLOUT case No. 253 [Cantone del Ticino Tribunale d'appello, Switzerland, 15 January 1998] (see full text of the decision); CLOUT case No. 302 [Arbitration Court of the International Chamber of Commerce, 1994 (Arbitral award No. 7660)]; Landgericht Landshut, Germany, 5 April 1995, Unilex; CLOUT case No. 136 [Oberlandesgericht Celle, Germany, 24 May 1995]; Arbitration Court of the International Chamber of Commerce, March 1999 (Arbitral award No. 9978), Unilex; CLOUT case No. 261 [Berzirksgericht der Sanne, Switzerland, 20 February 1997]; CLOUT case No. 293 [Schiedsgericht der Hamburger freundschaftlichen Arbitrage, Germany, 29 December 1998]; CLOUT case No. 133 [Oberlandesgericht München, Germany, 8 February 1995].

⁸ CLOUT case No. 253 [Cantone del Ticino Tribunale d'appello, Switzerland, 15 January 1998] (see full text of the decision); CLOUT case No. 261 [Berzirksgericht der Sanne, Switzerland, 20 February 1997]; CLOUT case No. 293 [Schiedsgericht der Hamburger freundschaftlichen Arbitrage, Germany, 29 December 1998] (see full text of the decision).

⁹ CLOUT case No. 214 [Handelsgericht des Kantons Zürich, Switzerland, 5 February 1997] (see full text of the decision).

¹⁰ CLOUT case No. 103 [Arbitration Court of the International Chamber of Commerce, 1993 (Arbitral award No. 6653)].

¹¹ Cour d'appel Paris, France, 6 April 1995, Unilex.

¹² See CLOUT case No. 304 [Arbitration Court of the International Chamber of Commerce, 1994 (Arbitral award No. 7531)], Unilex; Käräjaoikeus Kuopio, Finland, 5 November 1996, English translation available on the Internet at www.utu.fi.

¹³ China International Economic and Trade Arbitration Commission, People's Republic of China, 18 April 2008 (PTA powder case), English translation available on the Internet at www.cisg.law.pace.edu; Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, Russian Federation, 15 April 1994 (Arbitral award No. 1/1993), Unilex; CLOUT case No. 253 [Cantone del Ticino Tribunale d'appello, Switzerland, 15 January 1998] (see full text of the decision); CLOUT case No. 214 [Handelsgericht des Kantons Zürich, Switzerland, 5 February 1997] (advance payment); CLOUT case No. 302 [Arbitration Court of the International Chamber of Commerce, 1994 (Arbitral award No. 7660, 1994)]; Landgericht Landshut, Germany, 5 April 1995, Unilex; CLOUT case No. 136 [Oberlandesgericht Celle, Germany, 24 May 1995]; CLOUT case No. 261 [Berzirksgericht der Sanne, Switzerland, 20 February 1997] (award of interest to breaching buyer on refund from avoiding seller); CLOUT case No. 293 [Schiedsgericht der Hamburger freundschaftlichen Arbitrage, Hamburg, Germany, 29 December 1998]; China International Economic and Trade Arbitration Commission, People's Republic of China, 30 October 1991, Unilex; CLOUT case No. 312 [Cour d'appel Paris, France, 14 January 1998] (see full text of the decision). But see CLOUT case No. 90 [Pretura circondariale di Parma, Italy, 24 November 1989] (court applied CISG to transaction and held that buyer was entitled to avoid and recover payments from seller; it awarded interest from the date of avoidance, but without citing article 84 and perhaps on the basis of national law).

¹⁴ Cour d'appel Aix-en-Provence, France, 21 November 1996, Unilex; CLOUT case No. 315 [Cour de cassation, France, 26 May 1999], also available in Unilex.

¹⁵ CLOUT case No. 103 [Arbitration Court of the International Chamber of Commerce, 1993 (Arbitral award No. 6653)]; Cour d'appel Paris, France, 6 April 1995, Unilex.

¹⁶ Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, Russia, award in case No. 1/1993 of 15 April 1994, Unilex.

¹⁷ CLOUT case No. 302 [Arbitration Court of the International Chamber of Commerce, 1994 (Arbitral award No. 7660)].

¹⁸ CLOUT case No. 165 [Oberlandesgericht Oldenburg, Germany, 1 February 1995] (see full text of the decision).

¹⁹ Ibid. (see full text of the decision).

²⁰ Ibid. (see full text of the decision).

²¹ Ibid. (see full text of the decision).

²² Amtsgericht Charlottenburg, Germany, 4 May 1994, Unilex.

²³ Polimeles Protodikio Athinon, Greece, 20 September 2009 (Bullet-proof vest case), English editorial analysis available on the Internet at www.cisg.law.pace.edu.