

Article 87

A party who is bound to take steps to preserve the goods may deposit them in a warehouse of a third person at the expense of the other party provided that the expense incurred is not unreasonable.

OVERVIEW

1. In certain circumstances, CISG imposes upon sellers (article 85) and buyers (article 86) an obligation to take reasonable steps to preserve goods that are within the party's possession or control, along with a right to retain the goods until the party is reimbursed its expenses of preservation. Article 87 specifies one means by which a party can fulfil its obligation to preserve goods: it can store the goods in a third party's warehouse "at the expense of the other party provided that the expense incurred is not unreasonable".

APPLICATION

2. Only a small number of decisions, generally involving a party's claim for reimbursement of the costs of storing goods in a warehouse, have applied article 87. Thus a buyer who had resold and delivered defective steel plates when avoiding the contract was held to have taken reasonable steps to preserve the goods as they were kept safely in the warehouse of the sub-buyer.¹ Where a buyer refused to take delivery of trucks and the seller deposited them in a warehouse (before eventually reselling them to another buyer), an arbitral tribunal found that the seller's actions were justified under articles 85 and 87; after determining that the warehousing costs

were reasonable, the tribunal awarded seller compensation for those expenses.² Similarly, article 87 has been cited in support of a buyer's recovery of the cost of storing delivered goods in a warehouse after the buyer justifiably avoided the contract.³ Another arbitral tribunal held a breaching buyer liable for the seller's costs of storing the goods in a warehouse; however, the tribunal denied the 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.⁴ Where the buyer had properly avoided the contract, a tribunal denied the seller's claim under article 87 (and article 85) for reimbursement of the expenses of warehousing the goods on the grounds that the buyer did not breach its obligations.⁵ An avoiding buyer's costs of warehousing rejected air conditioner compressors have also been treated as damages recoverable under article 74, without any reference to article 87.⁶ In a case where a buyer sought interim relief to prevent re-sale of a key component of industrial machinery, which the seller had retained after the buyer failed to make full payment, the court held that the seller was entitled to move the component to a warehouse, but the seller would itself have to advance the storage expenses because article 87 could not be relied upon in a proceeding involving interim measures of protection.⁷ Another court referred to articles 86 and 87 in determining that a buyer who is bound to take steps to preserve the goods may deposit such goods with the court.⁸

Notes

¹ High People's Court of Zhejiang Province, People's Republic of China, 20 August 2014, (Grand Resources Group Co. Ltd v. STX Corp.) (2014) *Zhe Shang Wai Zhong Zi* No 48 Civil Judgment, available on the Internet at www.ccmt.org.cn.

² CLOUT case No. 141 [Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, Russian Federation, 25 April 1995 (Arbitral award No. 192/1994)].

³ CLOUT case No. 304 [Arbitration Court of the International Chamber of Commerce, 1994 (Arbitral award No. 7531)] (see full text of the decision).

⁴ CLOUT case No. 104 [Arbitration Court of the International Chamber of Commerce, 1993 (Arbitral award No. 7197)] (see full text of the decision).

⁵ CLOUT case No. 293 [Schiedsgericht der Hamburger freundschaftlichen Arbitrage, Germany, 29 December 1998] (see full text of the decision).

⁶ CLOUT case No. 85 [U.S. District Court, Northern District of New York, United States, 9 September 1994] (characterizing recovery of preservation costs as "consequential damages" recoverable under article 74) (see full text of the decision), affirmed in relevant part in CLOUT case No. 138 [U.S. Court of Appeals (2nd Circuit), United States, 6 December 1993, 3 March 1995] (characterizing recovery of preservation costs as "incidental damages") (see full text of the decision).

⁷ CLOUT case No. 96 and No. 200 [Tribunal cantonal de Vaud, Switzerland, 17 May 1994] (both abstracts dealing with the same case) (see full text of the decision).

⁸ CLOUT case No. 489 [Appellate Court of Barcelona, Spain, 11 March 2002] (*G & D Iberica S.A. v. Cardel*), English translation available at www.cisg.law.pace.edu. The court applied domestic law that allowed the deposit of the goods with the court for the benefit of the seller, suggesting that that under articles 86 and 87 CISG depositing the goods with the court may also be carried out for the benefit of the buyer.