

*Article 88*

(1) A party who is bound to preserve the goods in accordance with article 85 or 86 may sell them by any appropriate means if there has been an unreasonable delay by the other party in taking possession of the goods or in taking them back or in paying the price or the cost of preservation, provided that reasonable notice of the intention to sell has been given to the other party.

(2) If the goods are subject to rapid deterioration or their preservation would involve unreasonable expense, a party who is bound to preserve the goods in accordance with article 85 or 86 must take reasonable measures to sell them. To the extent possible he must give notice to the other party of his intention to sell.

(3) A party selling the goods has the right to retain out of the proceeds of sale an amount equal to the reasonable expenses of preserving the goods and of selling them. He must account to the other party for the balance.

## OVERVIEW

1. Under article 88, a party who is required by either article 85 or article 86 to preserve the goods for the other side may be entitled or even required to sell the goods to a third party.

## ARTICLE 88 (1): A PRESERVING PARTY'S OPTION TO SELL THE GOODS TO A THIRD PARTY

2. It has been held in several decisions that a party bound to preserve goods is entitled under article 88 (1) to sell them to a third party. Where a buyer refused to take delivery of trucks that it had contracted to purchase, triggering the seller's obligation to preserve the goods under article 85, the seller was held to have the right to resell them at the market price when the buyer continued to refuse delivery.<sup>1</sup> In another case, the buyer was found to have the right to sell scaffold fittings when, after the goods were delivered, the buyer rightfully avoided the contract, thus assuming the obligation to preserve the goods on behalf of the seller pursuant to article 86, and the seller refused to take the goods back.<sup>2</sup> And where a seller did not wish to take back delivered goods (doors and door jambs) after the buyer had properly avoided the contract, the court, citing article 88 (1), held that the buyer properly resold the goods in order to reduce storage costs.<sup>3</sup> In another decision, a buyer had rightfully avoided a contract for jeans that proved non-conforming, and on 22 September 1993 the buyer made the jeans available to the seller for their return, but the seller did not take them back; the court approved the buyer's sale of the goods, which took place between April 1995 and November 1996.<sup>4</sup> The court also approved the buyer's actions in disposing of a portion of the jeans that were infected with fungus; the buyer had resold them through "special sales" of second-quality goods, and the seller had been notified that the buyer would initiate the sale in order to recoup its costs unless the seller suggested another solution.<sup>5</sup> Where a buyer's refusal to pay the purchase price

or to take delivery of the goods amounted to a breach of contract, a court held that the seller was entitled to stop delivery of the goods and to take measures to mitigate the loss by reselling the goods.<sup>6</sup>

3. In another decision, which was reached under applicable domestic law but which the tribunal justified by reference to article 88 of the CISG, an arbitral tribunal approved a party's decision to dispose of some of the goods while reselling the remainder; the seller had withheld delivery of equipment because the buyer refused to make payment, and the tribunal asserted that the seller's "right to sell undelivered equipment in mitigation of its damages is consistent with recognized international law of commercial contracts. The conditions of article 88 of the Convention are all satisfied in this case: there was unreasonable delay by the buyer in paying the price and the seller gave reasonable notice of its intention to sell."<sup>7</sup> Specifically, the tribunal found that the seller proved it had made reasonable efforts in reselling the goods by showing that it had sought buyers all over the world, also offering a reasonable explanation as to why the goods did not fetch as much as the original contract price. The seller also demonstrated that it had used its best efforts to resell the goods by showing that the part of the equipment the seller decided to scrap could not be resold. With respect to notice, the seller had informed the buyer of its intention to resell, and although it had not notified the buyer of its intention to scrap some of the equipment, the buyer had never responded to the sales notices. It was clear that the buyer was not genuinely interested in receiving delivery of the goods and had not been prejudiced.<sup>8</sup> Failure to satisfy the notice required by article 88 (1), however, has been cited to justify a court's rejection of a freight forwarder's argument that article 88 supported its claim to ownership of goods that it was supposed to deliver to the buyer.<sup>9</sup> On the other hand, a court has held that a seller satisfied the notice requirement of article 88 (1) when it attempted to communicate its intention to resell to the buyer by fax (and by telephone): the fax was sent to the correct number (and thus, under article 27, was

effective even if it did not arrive), and the 14 days the seller gave the buyer to take delivery of the goods was reasonable under article 88 (1).<sup>10</sup>

4. Other decisions have suggested limits to the authorization to resell given by article 88 (1). Thus where a seller had withheld delivery of one component of machinery because the buyer had paid only part of the price, and the buyer sought interim relief seeking to prevent the seller from selling the component to any third party, the court recognized that article 88 (1) would authorize the seller to sell the goods if the buyer had unreasonably delayed paying the price.<sup>11</sup> However, the court issued the order against resale on the grounds that it was not bound by article 88 of CISG in an action for interim relief.<sup>12</sup> An arbitral tribunal found that a seller was authorized to resell undelivered goods under article 88 (1) (and thus to recover the expenses of preserving and reselling the goods) only if the buyer had breached its obligation to pay the sale price or take delivery. In the case at hand it was the seller who fundamentally breached and the buyer that rightfully avoided the contract; thus the tribunal concluded that the seller was not entitled to proceed under article 88 (1).<sup>13</sup> Another court held that the buyer was not entitled to sell the goods under article 88 (1) (unless it could do so at a price higher than the contract price with the seller) where the seller, in response to the buyer's notice of non-conformity, had sought return of the goods.<sup>14</sup> In another case, a court held that the seller was entitled to resell the goods where the buyer, based on an improper rejection of the goods, had unreasonably delayed acceptance of the goods.<sup>15</sup>

#### ARTICLE 88 (2): A PRESERVING PARTY'S OBLIGATION TO TAKE REASONABLE MEASURES TO SELL THE GOODS TO A THIRD PARTY

5. The article 88 (2) obligation to take reasonable measures to resell goods, which is imposed on a party required to preserve goods under article 85 or 86 if the goods are subject to rapid deterioration or their preservation would involve unreasonable expense, was deemed violated where an aggrieved buyer deposited goods that it had received under an avoided contract (and was attempting to return to the seller) in a warehouse, where they remained for almost three years accumulating storage charges: an arbitral tribunal concluded that the buyer had failed to meet its article 88 (2) resale obligation, which was triggered when the storage fees (eventually totalling almost the contract price for the goods) reached unreasonable levels; as a result of the buyer's violation of article 88 (2), the tribunal denied the greater part of the buyer's claim against the seller for the expenses of preservation.<sup>16</sup> On the other hand, several decisions have involved circumstances that were deemed not to trigger an obligation to attempt to resell goods under article 88 (2). Thus in issuing an interim order forbidding an aggrieved seller from reselling a key component of industrial machinery, which the seller had retained because of the buyer's failure to pay the full contract price, the court noted that article 88 (2) would not require the seller to sell the component because it was not subject to rapid deterioration.<sup>17</sup> And an aggrieved seller that rightfully withheld delivery of venison when the buyer refused to make

payment was found not to be obligated to sell the goods under article 88 (2) "because the meat in question could be preserved through freezing, because the cost of such preservation did not exceed 10 per cent of the value of the meat, and because the decrease in prices in venison to be expected after the Christmas holidays does not constitute a deterioration" in the meaning of article 88 of the Convention.<sup>18</sup> In another case, the seller allowed part of the goods, which were subject to rapid deterioration, to spoil, and gave the rest away to charitable organizations, without furnishing any evidence of inability to resell the goods; the court found that, having failed in its duty to resell, the seller was entitled to recover only 25 per cent of the contract price.<sup>19</sup>

#### ARTICLE 88 (3): DISPOSITION OF THE PROCEEDS OF SALE

6. Several decisions have dealt with the allocation of the proceeds of a sale under article 88. According to article 88 (3), a party that has sold goods pursuant to article 88 has the right to retain from the sale proceeds "an amount equal to the reasonable expenses of preserving the goods and selling them," but is bound to "account to the other party for the balance." In one case an arbitral tribunal, applying domestic law but also supporting its decision by reference to article 88 (3), found that an aggrieved seller who had justifiably resold the goods to a third party could deduct from sale proceeds the expenses it incurred in carrying out the sale, with the balance to be credited against the buyer's liability under the contract; the tribunal found that the seller had adequately documented and proved such costs, and the buyer had not substantiated its objections to the documentation.<sup>20</sup> Similarly, a seller who justifiably resold goods that the buyer had refused to receive was held entitled to be reimbursed for the expenses of "eliminating the defects in the goods, which arose at the time of storage, since without eliminating such defects the [seller] would have not been able to sell the goods."<sup>21</sup> A buyer who rightfully avoided the contract and justifiably sold the goods after the seller refused to take them back was found to have submitted exhibits that adequately documented the total profit the buyer gained from the sale, and the seller had not made specific objection to the documentation; the buyer, however, was denied the right to deduct other expenses (agent costs and carriage costs) because it failed to prove it was entitled to such deductions.<sup>22</sup> In the same decision, furthermore, the court found that the breaching seller's claim under article 88 (3) for the balance of the sale proceeds was subject to set-off by the buyer's claim for damages under articles 45 and 74; although article 88 (3) refers only to a selling party's right to deduct reasonable costs of preserving and selling the goods from the sale proceeds, the court suggested that CISG contained a general principle within the meaning of article 7 (2) that permitted reciprocal claims arising under CISG (here, the buyer's claims for damages and the seller's claim for the balance of the sale proceeds) to be offset; the court refused, however, to settle whether the buyer's right to set off its damage claim against its liability for the balance of the sale proceeds derived directly from CISG or from the applicable domestic law that led to the same result.<sup>23</sup>

## Notes

<sup>1</sup> Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, Russian Federation, 25 April 1995 (Arbitral award No. 142/94) (Trucks case), English translation available on the Internet at [www.cisg.law.pace.edu](http://www.cisg.law.pace.edu).

<sup>2</sup> CLOUT case No. 304 [Arbitration Court of the International Chamber of Commerce, 1994 (Arbitral award No. 7531 (Scaffold fittings case)) (see full text of the decision).

<sup>3</sup> CLOUT case No. 1153 [Higher Court (Appellate Court) in Ljubljana, Slovenia, 14 December 2005] (Door and door jamb case), English translation available on the Internet at [www.cisg.law.pace.edu](http://www.cisg.law.pace.edu).

<sup>4</sup> CLOUT case No. 348 [Oberlandesgericht Hamburg, Germany, 26 November 1999 (Jeans case)] (see full text of the decision).

<sup>5</sup> Ibid. (see full text of the decision).

<sup>6</sup> Second Intermediate People's Court of Shanghai, People's Republic of China, 22 June 1998 (China Yituo Group Company v. Germany Gerhard Freyso LTD GmbH & Co. KG), available on the Internet at [aff.whu.edu.cn/cisgchina](http://aff.whu.edu.cn/cisgchina), English translation available on the Internet at [www.cisg.law.pace.edu](http://www.cisg.law.pace.edu).

<sup>7</sup> Iran/US Claims Tribunal, 28 July 1989 (Watkins-Johnson Co., Watkins-Johnson Ltd v. Islamic Republic of Iran), Unilex.

<sup>8</sup> Ibid.

<sup>9</sup> CLOUT case No. 485 [Audiencia Provincial de Navarra, Spain, 22 January 2003].

<sup>10</sup> CLOUT case No. 540 [Oberlandesgericht Graz, Austria, 16 September 2002].

<sup>11</sup> Audiencia Provincial de Navarra, Spain, 22 January 2003 (Goods case). Despite the buyer's partial payment, the seller had not avoided the contract and thus was presumably obliged to preserve the goods pursuant to article 85.

<sup>12</sup> CLOUT case No. 96 and No. 200 [Tribunal cantonal de Vaud, Switzerland, 17 May 1994] (both abstracts dealing with the same case). Oberlandesgericht Graz, Austria, 16 September 2002 (Garments case).

<sup>13</sup> CLOUT case No. 293 [Schiedsgericht der Hamburger freundschaftlichen Arbitrage, Germany, 29 December 1998] (see full text of the decision).

<sup>14</sup> Foreign Trade Arbitration Court attached to the Yugoslav Chamber of Commerce in Belgrade, Serbia, 25 May 2001] (Berries case), English translation available on the Internet at [www.cisg.law.pace.edu](http://www.cisg.law.pace.edu).

<sup>15</sup> U.S. District Court, Eastern District of California, United States, 19 May 2008 (The Rice Corporation v. Grain Board of Iraq), available on the Internet at [www.cisg.law.pace.edu](http://www.cisg.law.pace.edu).

<sup>16</sup> China International Economic and Trade Arbitration Commission, People's Republic of China, 6 June 1991, Unilex. The tribunal also noted that resale by the buyer pursuant to article 88 (2) would have avoided or reduced the deterioration in the condition of the goods (chemicals) that occurred during the lengthy storage period.

<sup>17</sup> 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).

<sup>18</sup> CLOUT case No. 361 [Oberlandesgericht Braunschweig, Germany, 28 October 1999] (see full text of the decision).

<sup>19</sup> Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, Russian Federation, 10 February 2000, English translation available on the Internet at [www.cisg.law.pace.edu](http://www.cisg.law.pace.edu).

<sup>20</sup> Iran/US Claims Tribunal, 28 July 1989 (Watkins-Johnson Co., Watkins-Johnson Ltd v. Islamic Republic of Iran), Unilex.

<sup>21</sup> Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, Russian Federation, 25 April 1995 (Arbitral award No. 142/94) (Trucks case), English translation available on the Internet at [www.cisg.law.pace.edu](http://www.cisg.law.pace.edu).

<sup>22</sup> CLOUT case No. 348 [Oberlandesgericht Hamburg, Germany, 26 November 1999] (see full text of the decision).

<sup>23</sup> Ibid. (see full text of the decision).