



CISG Advisory Council Opinion No. 9.  
Consequences of Avoidance of the Contract

By

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At its formative meeting in Paris in June 2001, Prof. Peter Schlechtriem of Freiburg University, Germany, was elected Chair of the CISG-AC for a three-year term. Dr. Loukas A. Mistelis of the Centre for Commercial Law Studies, Queen Mary, University of London, was elected Secretary. The founding members of the CISG-AC were Prof. Emeritus Eric E. Bergsten, Pace University School of Law; Prof. Michael Joachim Bonell, University of Rome La Sapienza; Prof. E. Allan Farnsworth, Columbia University School of Law; Prof. Alejandro M. Garro, Columbia University School of Law; Prof. Sir Roy M. Goode, Oxford, Prof. Sergei N. Lebedev, Maritime Arbitration Commission of the Chamber of Commerce and Industry of the Russian Federation; Prof. Jan Ramberg, University of Stockholm, Faculty of Law; Prof. Peter Schlechtriem, Freiburg University; Prof. Hiroo Sono, Faculty of Law, Hokkaido University; Prof. Claude Witz, Universität des Saarlandes and Strasbourg University. Members of the Council are elected by the Council. At subsequent meetings, the CISG-AC elected as additional members Prof. Pilar Perales Viscasillas, Universidad de La Rioja; Professor Ingeborg Schwenzer, University of Basel; Prof. John Y. Gotanda, Villanova University; and Prof. Michael G. Bridge, London School of Economics; Prof. Jan Ramberg served for a three-year term as the second Chair of the CISG-AC. At its 11th meeting in Wuhan, People's Republic of China, Prof. Eric E. Bergsten of Pace University School of Law was elected Chair of the CISG-AC and Prof. Sieg Eiselen of the Department of Private Law of the University of South Africa was elected Secretary.

## Opinion

- 1.1 Rights to damages for non-performance against a party not exempted from liability under Article 79 survive avoidance of the contract, whether they have accrued prior to avoidance or arise from future non-performance.
- 1.2 Provisions of the contract survive its avoidance if they assist in the winding-up of the contract or are intended by the parties to survive avoidance.
- 1.3 An agreement to avoid the contract is governed by its terms and by the Convention.
- 1.4 The Convention does not deal with the proprietary aspects of restitution.
- 2.1 The right to restitution of performance on avoidance derives from the contract of sale and the Convention.
- 2.2 Restitution of the goods takes place at the buyer's premises or at the agreed place of delivery or at the place where the buyer acting reasonably has warehoused the goods, according to the case.
- 2.3 Restitution of the price takes place at the buyer's premises or at a bank of the buyer's choice.
- 2.4 Restitution of the price should be made in the currency of payment.
- 2.5 Additional costs arising after restitution are recoverable as damages from an unexempted non-performing party but not from a party whose non-performance is exempted under Article 79.
- 2.6 Restitution of performance by seller and buyer should take place within a reasonable time.
- 2.7 Where the buyer's restitutionary duty includes an account of money as a substitute for original goods, the seller may set off the corresponding portion of the price against this amount.
- 3.1 Restitution of benefits derived from the goods and of interest on the price should take place concurrently.
- 3.2 The concurrent restitution of benefits and interest should normally take place separately from the concurrent restitution of the goods and the price.
- 3.3 Monetary benefits flowing from the goods and interest on the purchase payable by the seller may be made the subject of a set-off.
- 3.4 Interest on the purchase price is normally determined by the commercial investment rate prevailing at the seller's place of business.
- 3.5 Interest runs from the date the seller receives the price to the date that repayment is made to the buyer.
- 3.6 It is irrebuttably presumed that the seller has earned interest on the price.
- 3.7 The seller has to prove that the buyer has derived benefits derived from the goods.

## Comments

### Introduction

Where a contract is avoided, it is in the interests of both parties for the avoidance process to be carried out as quickly as possible with a minimum of cost, loss and delay.

The restitution of the goods and the price is based on a modified resale of the goods to the seller, drawing upon the rules in the Convention dealing with the original sale.

Because the Convention does not make provision for property rights in the goods or the price, avoidance takes place concurrently in the interest of mutual security of the parties. For that reason, concurrency should also be required for the restitution of interest and benefits.

The question whether a contract is avoided retrospectively or prospectively has divided legal systems but is not an issue that needs to be considered under the Convention, given the explicit way that the Convention sets out the effects of avoidance.

In determining the effects of avoidance, courts and tribunals should clearly separate restitutionary questions and damages questions.

### Drafting History

The first sentence of Article 81(1) CISG is more or less identical to the whole of Article 78(1) of the Uniform Law on the International Sale of Goods (ULIS) and Article 81(2) CISG is substantially the same as Article 78(2) ULIS. There is nothing in ULIS that corresponds to the provision in Article 81(1) CISG dealing with contractual provisions that survive avoidance. ULIS does, however, contain in its Article 81 provisions corresponding to Article 84 CISG, dealing with restitution by the buyer of benefits received from the goods and by the seller of interest on the price.

The Working Group on the International Sale of Goods<sup>1</sup> considered a proposal that, where the contract has been avoided in part, the rule in Article 81(1) should be expressly limited to the relevant part of the contract.<sup>2</sup> This proposal was not adopted in the 1977 draft of UNCITRAL's Committee of the Whole<sup>3</sup>. At the 1980 Diplomatic Conference, concerns were expressed that the rule of restitution in Article 81 might be seen as giving rise to *in rem* consequences, affecting

<sup>1</sup> Established at the second session of UNCITRAL.

<sup>2</sup> Fifth Session (Geneva 1974), A/CN.9/87, para 143. See also Report of the Secretary-General (1975), A/CN.9/100, annex IV, para 44.

<sup>3</sup> Report (1977), A/32/17, Annex 1 para 461.

domestic bankruptcy legislation. A proposal was therefore made for a new paragraph stating that the seller's rights should not interfere with those of third parties or creditors in the buyer's bankruptcy, but the proposal was withdrawn after failing to gain the necessary support.<sup>4</sup>

The Working Group decided to adopt the ULIS provision (Article 81) dealing with the restitution of benefits flowing from the price and the goods on avoidance of the contract, but extended it also to cases where the buyer had required substitute goods to be delivered. At the Diplomatic Conference, a number of amendments were proposed to specify the rate of interest that the seller had to pay but were later withdrawn.<sup>5</sup>

## Interpretation

### *General Remarks*

Avoidance of the contract under Article 81 of the CISG (hereinafter the Convention) is determined by Articles 49 (avoidance by the buyer) and 64 (avoidance by the seller) and can arise in two cases: first, where a fundamental breach has occurred and the party entitled to performance elects to avoid the contract; and secondly, where one party has served a time notice on the other, the other has failed to perform within the additional time prescribed in that notice, and the first party elects to avoid the contract. In either case, avoidance may occur where the non-performing party is not liable in damages as a result of an impediment beyond his control.<sup>6</sup>

#### aa) Effects of Avoidance

The basic effect of avoidance is that both parties are released from their primary performance obligations<sup>7</sup> and are no longer entitled to perform those obligations.<sup>8</sup> The primary obligations of the parties include the seller's obligations to make delivery and transfer ownership<sup>9</sup> and the

<sup>4</sup> 33rd Meeting (2 April 1980), A/CONF.97/C.1/SR.33, paras 75-84.

<sup>5</sup> J Honnold, *Uniform Law for International Sales under the 1980 United Nations Convention* (3rd ed, 1999), 709-10.

<sup>6</sup> Article 79.

<sup>7</sup> Oberlandesgericht Frankfurt (Germany), 17 September 1991, Unilex, translated at <http://cisgw3.law.pace.edu/cases/910917g1.html>; Bundesgerichtshof (8th Civil Panel) (Germany), 25 June 1997, translated at <http://cisgw3.law.pace.edu/cases/970625g2.html>; Bezirksgericht Saane (Switzerland), 20 February 1997, translated at <http://cisgw3.law.pace.edu/cases/970220s1.html>.

<sup>8</sup> . In a related way, avoidance of the contract of sale has been held to prevent a seller from drawing down a bank letter of credit: Oberster Gerichtshof (Austria), 19 January 1999, translated at <http://cisgw3.law.pace.edu/cases/990119a3.html>.

<sup>9</sup> Article 30.

buyer's obligations to pay the price and take delivery.<sup>10</sup> Other related obligations may also be avoided, such as maintenance and service agreements. Rights to damages that may have accrued by the time of avoidance remain in existence, even as against the avoiding party. Where avoidance occurs after unexempted non-performance by one of the parties, the liability of that non-performing party includes damages for future non-performance prevented by the avoidance of the contract.<sup>11</sup> Avoidance may nevertheless occur as a result of exempted non-performance, where neither party is liable in damages for future non-performance.<sup>12</sup>

#### bb) Surviving Provisions of the Contract

Provisions of the contract designed to govern the rights and obligations of the parties after or notwithstanding avoidance nevertheless survive avoidance of the contract. In this regard, dispute settlement provisions are specifically mentioned in Article 81(1). These include jurisdiction clauses and should also include arbitration clauses,<sup>13</sup> though these may be regarded as separate contracts and thus capable of surviving independently of Article 81(1).<sup>14</sup> The identity of other surviving clauses will depend upon the interpretation of the contract, but should normally include choice of law clauses, provisions for penalty and related payments,<sup>15</sup> *force majeure* clauses,<sup>16</sup> exclusion and limitation clauses and clauses making provision for the return of the goods.<sup>17</sup> These are all clauses that assist in the winding-up of the avoided contract.

<sup>10</sup> Article 53.

<sup>11</sup> This follows from Articles 75-76.

<sup>12</sup> Article 79.

<sup>13</sup> Federal District Court New York (United States), 14 April 1992 (*Filanto v Chilewich*), available at <<http://cisgw3.law.pace.edu/cases/920414u1.html>>; Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, No 280/1999, 13 June 2000, translated at <<http://cisgw3.law.pace.edu/cases/000613r1.html>>.

<sup>14</sup> UNCITRAL Model Law on International Commercial Arbitration 1985 (amended in 2006) (Article 16(1); UNCITRAL Arbitration Rules (Article 21(2)) (an agreement independent of the other terms of the contract'); Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, No 161/1994, 25 April 1995, translated at <<http://cisgw3.law.pace.edu/cases/950425r3.html>>.

<sup>15</sup> ICC Court of Arbitration, Award No 9978, March 1999, Unilex, CISG On-line; ICC Court of Arbitration, Award No 9887, August 1999, Unilex; Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, No 280/1999, 13 June 2000, translated at <<http://cisgw3.law.pace.edu/cases/000613r1.html>>; Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, No 160/1997, 5 March 1998, translated at <<http://cisgw3.law.pace.edu/cases/980305r2.html>>; Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, No 95/2004, 27 May 2005, translated at <<http://cisgw3.law.pace.edu/cases/050527r1.html>>.

<sup>16</sup> Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, No 280/1999, 13 June 2000, translated at <<http://cisgw3.law.pace.edu/cases/000613r1.html>>

<sup>17</sup> Oberster Gerichtshof (Austria), 29 June 1999, Unilex, translated at <<http://cisgw3.law.pace.edu/cases/990629a3.html>>.

Certain other clauses, such as confidentiality clauses, might also survive avoidance if the intention of the parties, determined by interpreting the contract, is that they should do so. The survival of these clauses should turn upon the circumstances of non-performance and the interpretation of the particular contract of sale. For example, where the buyer avoids the contract because of the seller's non-performance, a put option allowing the seller to supply more goods is less likely to survive avoidance than a call option in favour of the buyer. If the buyer's call option did not survive, the buyer would have a claim for damages against the seller for future non-performance, which would not be the case if the non-performing seller's put option failed to survive. The survival of the buyer's call option gives the parties a chance to perform which would avoid a dispute and damages assessment. The seller's non-performance, however, which led to the avoidance of the contract of sale, gives the buyer good reason to doubt that the seller would perform any future contract of sale brought into existence by the exercise of that seller's put option.

#### cc) Related Contracts

Once a contract of sale has been avoided, the Convention takes no express position on the survival of related contracts. The issues here bear some resemblance to those concerning the survival of options. Related contracts are not to be assimilated with the contract of sale to produce a single contract, so that they are avoided along with the contract of sale. In principle, they should survive the avoidance of the contract of sale. Some related contracts, for example, framework and master agreements, may not be governed by the Convention, so that the question of their avoidance would be a matter for their applicable laws. In cases where related contracts are governed by the Convention, there may be scope for the rules on contractual suspension and anticipatory repudiation if the behaviour of a party to a contract of sale raises serious concerns about its willingness or ability to perform related contracts.<sup>18</sup> Finally, the parties themselves, however, may make provision for avoiding related contracts by means of cross-default clauses in those contracts.

#### dd) Termination Agreements

Where the parties consensually terminate the contract, the position is governed by their termination agreement<sup>19</sup> in accordance with the Convention.<sup>20</sup> To the extent that they are not

<sup>18</sup> Articles 71 (as extended with the aid of Article 7(2)) and 72.

<sup>19</sup> Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, Case no 82/1996 of 3 March 1997, Unilex, translated at <<http://cisgw3.law.pace.edu/cases/970303r1.html>>; Oberster Gerichtshof (Austria), 29 June 1999, Unilex, translated at <<http://cisgw3.law.pace.edu/cases/990629a3.html>>.

<sup>20</sup> Article 29(1) (which refers to termination rather than avoidance).

displaced by conflicting terms in the termination agreement itself,<sup>21</sup> nevertheless, the provisions of Article 81 will also apply to supplement the termination agreement.<sup>22</sup>

#### ee) Proprietary Consequences of Avoidance

Nothing in Article 81 deals with the existence of property rights in the goods or money subject to the restitutionary process. The Convention does not deal with the effect that the contract may have on the property in the goods sold.<sup>23</sup> In view of the way that the Convention ought to be interpreted and the gaps in its coverage filled,<sup>24</sup> it should also be regarded as not dealing with the property in the goods returned to the original seller under the restitutionary process and with the existence of proprietary rights in the price that the seller must repay to the buyer. The restitutionary process in the Convention amounts to a type of reverse sale of the goods back to the original seller. In the event of avoidance of the contract, the effect of a reservation of title clause is a matter for the applicable law governing proprietary matters and not for the Convention. Similarly, a seller's right to recover the goods on avoidance is subject to relevant property and insolvency laws.<sup>25</sup> A buyer prevented by such laws from making restitution of the goods will, because of the concurrent restitution rule (see below), be unable to require the seller to repay the price. Furthermore, where the buyer has acquired the property in the goods, the buyer is contractually bound to restore the seller to its original property rights.<sup>26</sup> The proprietary effect of the buyer's efforts to do so will be determined by the applicable law for proprietary matters.

#### *Restitution of performance*

##### aa) Nature of Restitutionary Relationship

As seen above, the avoidance of the contract does not mean the avoidance of all provisions of the contract. In addition, the Convention at the point of avoidance introduces new rights and duties to give effect to avoidance by transforming the original contractual relationship into a

<sup>21</sup> Article 6.

<sup>22</sup> Oberlandesgericht Düsseldorf (Germany), 28 May 2004, translated at <<http://cisgw3.law.pace.edu/cases/040528g1.html>>; Oberlandesgericht München (Germany), 19 October 2006, translated at <<http://cisgw3.law.pace.edu/cases/061019g1.html>>. *Aliter*, Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, Case no 82/1996 of 3 March 1997, Unilex, translated at <<http://cisgw3.law.pace.edu/cases/970303r1.html>>.

<sup>23</sup> Article 4(b).

<sup>24</sup> See Article 7(2).

<sup>25</sup> Federal District Court Illinois (United States), 28 March 2002 (*Usinor Industeel v Leeco Steel Products*), available at <<http://cisgw3.law.pace.edu/cases/020328u1.html>> .

<sup>26</sup> See Articles 30 and 41, which should be brought into play in line with Article 7(2).

winding-up or restitutionary relationship.<sup>27</sup> Where the agreement has been executed on both sides, restitution involves the return of the goods to the seller and the return of the price to the buyer.<sup>28</sup> If only one party has performed, then restitution takes place unilaterally. The requirement of restitution binds both parties, and not just the party whose non-performance led to avoidance.<sup>29</sup> The rights of the parties arising on avoidance are contractual and are not based on the unjust enrichment rules of any applicable law.<sup>30</sup> This restitutionary relationship does not foreclose rights to damages for breach of the contract of sale. The Convention calls for what is in effect a resale of the goods from the buyer to the seller but it leaves unstated the rules concerning the place and costs of restitution and the allocation of risk under that resale. There are, however, rules concerning the preservation and disposal of the goods after avoidance.<sup>31</sup> It has also been decided that a buyer has an actionable right for the seller to take redelivery of the goods.<sup>32</sup> This should be so whether it is the seller's or the buyer's non-performance that led to the avoidance of the contract. The receipt of the price is unlikely to raise the same practical problems but the principle is the same.

#### bb) Exactness of Restitution

In relation to the goods, restitution means the redelivery of the very goods supplied.<sup>33</sup> Repaying the price is a different matter, compounded by currency issues. Repayment of the price should presumptively be in the currency of account and payment, where these are the same<sup>34</sup> and

<sup>27</sup> Landgericht Düsseldorf (Germany), 11 October 1995, translated at <<http://cisgw3.law.pace.edu/cases/951011g1.html>>; Handelsgericht St Gallen (Switzerland), 3 December 2002, translated at <<http://cisgw3.law.pace.edu/cases/021203s1.html>>. See also P Schlechtriem and I Schwenzer, *Commentary on the UN Convention on the International Sale of Goods* (2nd (English) edn, 2005), 855-56.

<sup>28</sup> The Austrian Supreme Court appears in one case concerning jurisdiction to have ruled that the restitution of advance payments made by the buyer is not governed by the Convention: Oberster Gerichtshof, 10 March 1998, translated at <<http://cisgw3.law.pace.edu/cases/980310a3.html>>. There is no good reason to distinguish advance payments made by the buyer to the seller from other payments made by the buyer.

<sup>29</sup> See Secretariat Commentary on Article 66 (which was later renumbered Article 81), para 9.

<sup>30</sup> ICC Court of Arbitration, Award No 9978, March 1999, Unilex, CISG-online.ch no. 708. But note that the Convention does not apply in the case where a seller mistakenly restores to the buyer a price that the buyer in fact has not paid and now seeks reimbursement from the buyer: Oberlandesgericht München (Germany), 28 January 1998, translated at <<http://cisgw3.law.pace.edu/cases/980128g1.html>>. Restitution of this money is governed by the relevant applicable law.

<sup>31</sup> Articles 86-88.

<sup>32</sup> Landgericht Krefeld (Germany), 24 November 1992, Unilex, translated at <<http://cisgw3.law.pace.edu/cases/921124g1.html>>. In this case, there was an agreement on the avoidance of the contract.

<sup>33</sup> So far as the avoiding buyer is excusably unable to do this, the buyer must account for the benefits instead of the goods that cannot be redelivered: Article 84(2)(b).

<sup>34</sup> This was the result in a case dealing with interest: China International Economic and Trade Arbitration Commission, 10 March 1995, translated at <<http://cisgw3.law.pace.edu/cases/950310c2.html>>.

should be in the currency of payment if this is different from the currency of account.<sup>35</sup> It has nevertheless been held in one case that, if the buyer is truly to be restored to the pre-contractual position, the buyer must receive repayment in the currency which it expended to effect performance in the contract of sale. If the buyer therefore expended US dollars to acquire the roubles needed to pay the seller, this would mean that the buyer would be entitled to restitution in dollars.<sup>36</sup> This is incorrect. The restitution process is designed to reverse gain and not to compensate for loss. Since the seller's obligation under Article 81 is a restitutionary one, it would therefore be more appropriate if a buyer suffering currency losses made a claim for damages for such losses under Article 74.

#### cc) Partial Restitution

Restitution under Article 81 need not necessarily be bilateral but can instead be unilateral restitution. This will be the case if only the seller or the buyer has performed. In addition, restitution may for various reasons be partial. A buyer avoiding the contract may not be able fully to restore the goods to the seller, for the goods or some of them may have been sold on to sub-buyers or transformed by a manufacturing or similar process into goods of a different kind. Although the buyer loses the right to avoid the contract if unable to restore the goods 'substantially' in the condition in which they were received, in exceptional cases the buyer may still avoid the contract.<sup>37</sup> First, the impossibility of making restitution may not be due to the act or omission of the buyer.<sup>38</sup> Secondly, restitution in full may not be possible because of the buyer's examination of the goods.<sup>39</sup> Thirdly, and most importantly, the goods may have been sold on, consumed or transformed before the buyer discovers that they are non-conforming. Where goods in these cases cannot be redelivered, the rules regarding the restitution of benefits in Article 84 come into play in place of the basic duty to redeliver the goods under Article 81.

Where performance has been executed on both sides, each party has some security for the return of performance by the other (see below). This will be more or less adequate from the buyer's point of view according to the quality and condition of the goods delivered. In addition, if only one party has performed, the question arises whether the non-performing party is entitled to some assurance that the other party will return performance, especially where the

<sup>35</sup> Where the contract fails to state the currency of payment, the Unidroit Principles of International Commercial Contracts (Article 6.1.10) prescribe the currency of the place where payment is due. This rule is not appropriate for a restitutionary obligation to *repay* money.

<sup>36</sup> Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, No 2/1997, 11 May 1995, translated at <<http://cisgw3.law.pace.edu/cases/970511r1.html>>.

<sup>37</sup> Article 82(2).

<sup>38</sup> For example, the goods may have perished and the seller may have committed a fundamental breach: see Article 70.

<sup>39</sup> Under Article 38.

contract has been avoided for that party's fundamental breach. In such cases, the device of contractual suspension in Article 72, pending the receipt of adequate assurance of performance by means, for example, of a performance bond or standby letter of credit, may not usefully be extended. The party seeking restitution in these circumstances is not seeking to suspend the resale of the goods. Furthermore, no useful purpose would be served by requiring adequate assurance to be given, followed by an award of damages in the event of it not being given.

#### dd) Concurrent Restitution

Article 81(2) requires restitution between seller and buyer to be concurrent.<sup>40</sup> The seller may not object to restitution in those cases under Article 82 where the avoiding buyer is excusably unable to redeliver all the goods.<sup>41</sup> Otherwise, the requirement of concurrent restitution applies in all cases. The concurrence of the parties' obligations means that each party has a type of security in not having to give credit to the other. If restitution by one party is prevented by national laws dealing with bankruptcy or currency restrictions, for example,<sup>42</sup> the party who is not prevented by these laws from making restitution is protected by the concurrency rule from having to make restitution.

#### ee) Place of Restitution

The place of restitution is not dealt with expressly by the Convention but it is a matter governed by the Convention and so is to be determined by the general principles on which the Convention is based.<sup>43</sup> Taking first redelivery of the goods, suppose that the contract of sale calls for delivery at the seller's premises. If it is the buyer who avoids the contract for the seller's unexempted non-performance, requiring the buyer to redeliver to the seller's premises would give rise to an additional damages liability of the seller under Article 74. Furthermore, nothing in Article 81 would allow the buyer to insist on reimbursement of these carriage costs before handing the goods over. Concurrence goes to the reversal of delivery and payment and not to damages. The avoidance of economic waste may be seen as a general principle underlying the Convention.<sup>44</sup> A requirement of redelivery at the buyer's premises, even if the contract is

<sup>40</sup> Kantonsgericht Schaffhausen (Switzerland), 27 January 2004, <<http://cisgw3.law.pace.edu/cases/040127s1.html>> ('reciprocally and simultaneously').

<sup>41</sup> Landgericht Freiburg (Germany), 22 August 2002, <<http://cisgw3.law.pace.edu/cases/020822g1.html>>. For the operation of the concurrency rule in this case, see below.

<sup>42</sup> See Secretariat Commentary on Article 66 (which was later renumbered Article 81), para 10.

<sup>43</sup> Oberster Gerichtshof (Austria), 29 June 1999, Unilex, translated at <<http://cisgw3.law.pace.edu/cases/990629a3.html>>. Cf Cour d'appel de Paris (France), 14 January 1998, Unilex, translated at <<http://cisgw3.law.pace.edu/cases/980114f1.html>> (applying rules of private international law under Article 7(2) so that the place of repayment was the debtor's (i.e., the seller's) residence).

<sup>44</sup> See Articles 25 (the rule of fundamental breach does not lightly permit avoidance) and 77.

avoided for the buyer's non-performance (see below), would allow for disposal of the goods in the local market and thus minimise the costs of the restitutionary process. In addition, redelivery at the buyer's premises avoids the complications of allocating risk in transit. It would also delay the process of restitution if the buyer had to hand over the goods at the seller's premises, thus adding further to the cost of restitution. Redelivery at the buyer's premises is therefore the general rule and is supported by cases where the seller is the non-performing party.<sup>45</sup> It can be seen as flowing also from the Convention rules on delivery, since the avoiding buyer, as part of the winding-up process, may be seen as reselling the goods to the seller. These delivery rules presumptively call for delivery at the seller's premises.<sup>46</sup> This result is preferable to requiring restitution to be made at the place of performance of the original primary obligations.<sup>47</sup>

Two exceptional cases should however be considered. If the contract calls for delivery of the goods at another place, then this place should be the place of redelivery. If the buyer acting reasonably has warehoused the goods at another place still, then the warehouse should be the place where the goods are to be redelivered, though any warehouse warrant or similar document that has to be produced to release the goods should be the subject of transfer at the buyer's premises.

In addition, if it is the seller who avoids the contract for the buyer's unexempted non-performance, it is less clear that redelivery should be required at the buyer's premises. If redelivery did take place there, the seller would have an action for damages against the buyer under Article 74 for any consequent costs of carriage. Nevertheless, the likely cause of a seller avoiding the contract is where the buyer fails to pay for the goods, in which case the seller would have a practical interest in taking an active position and expediting the redelivery process. This points to the efficacy of a clear rule in all cases, including cases where the contract is avoided for exempted non-performance, that redelivery should take place at the buyer's premises.

The place of repayment of the purchase price is also not dealt with expressly by the Convention. Treating the seller as the buyer of the redelivered goods, the price should be

<sup>45</sup> Landgericht Krefeld (Germany), 24 November 1992, Unilex, translated at <<http://cisgw3.law.pace.edu/cases/921124g1.html>>; Kantonsgericht Valais (Switzerland), 21 February 2005, translated at <<http://cisgw3.law.pace.edu/cases/050221s1.html>>. But see P Schlechtriem and I Schwenzer, *Commentary on the UN Convention on the International Sale of Goods* (2nd (English) edn, 2005), 860-61, for the view that the place of redelivery should be an exact reversal of the place of delivery. This would mean that goods delivered carriage paid to the buyer's premises should be redelivered carriage paid to the seller's premises.

<sup>46</sup> Article 31.

<sup>47</sup> With the assistance of the Austrian Civil Code, this was the result in Oberlandesgericht Wien, 1 June 2004, detailed abstract available at <<http://cisgw3.law.pace.edu/cases/040601a3.html>>.

repayable at the original buyer's premises.<sup>48</sup> This obligation of the seller should not be interpreted too literally since the means of payment and repayment also have to be considered. If payment under the contract of sale has been made by a bank transfer, repayment by the same method to a bank of the buyer's choice represents the most practical method of effecting restitution. Requiring restitution of the goods and the purchase price in different places is not as such inconsistent with the rule of concurrency of restitution, though exact concurrency may be hard to achieve in all cases where redelivery and repayment occur in different places.

ff) Costs of Restitution

Even though restitution may have taken place in full, with redelivery of the goods at the buyer's premises, there will frequently be additional costs arising out of the subsequent disposal of the goods. Any such additional costs of restitution should be borne by the unexempted non-performing party.<sup>49</sup> If for example goods already delivered to the buyer have to be shipped back to the seller, the cost of carriage should be borne by the unexempted buyer, if the seller avoided the contract, and by the unexempted seller, if the buyer avoided the contract. The unexempted buyer would be liable for the cost of carriage under Article 74; the unexempted seller would bear the cost of carriage on its own account.<sup>50</sup> In the latter case, if the buyer actually paid the cost of carriage back to the seller, it is arguable that this is a consequence of the seller's non-performance and that therefore the cost would be recoverable by the buyer as damages under Article 74.<sup>51</sup> If the goods can more efficiently be disposed of or used in a local market, then the requirement of mitigation of loss will limit a claim for damages against an unexempted buyer under Article 74 for the cost of carriage back to the seller.<sup>52</sup> The complication of an Article 74 damages claim having to be made by the avoiding seller would of course not arise if the cost of carriage were paid by the unexempted buyer.<sup>53</sup> In those cases where avoidance follows exempted

<sup>48</sup> Article 57(1)(a); Landgericht Giessen (Germany), 17 December 2002, translated at <<http://cisgw3.law.pace.edu/cases/021217g1.html>> (departing from the contrary decision under the ULIS of the Bundesgerichtshof, BGHZ 78, 257). See also P Schlechtriem and I Schwenzer, *Commentary on the UN Convention on the International Sale of Goods* (2nd (English) edn, 2005), 860, for apparent support for this rule, treating the buyer restoring the goods as the seller and relying on Oberlandesgericht Düsseldorf (Germany), 2 July 1993, translated at <<http://cisgw3.law.pace.edu/cases/930702g1.html>>, which asserts the existence of a general rule in the Convention that payment in all cases takes place at the seller's premises.

<sup>49</sup> See Secretariat Commentary on Article 66 (which was later renumbered Article 81), para 11; CM Bianca and MJ Bonell, *Commentary on the International Sales Law* (1987), 605 (Tallon).

<sup>50</sup> See P Schlechtriem and I Schwenzer, *Commentary on the UN Convention on the International Sale of Goods* (2nd (English) edn, 2005), 861.

<sup>51</sup> The alternative approach, where this is done at the request of the seller, is to treat the seller's liability as a matter of express or implied contract between the parties consequent upon the avoidance of the contract. This would seem to be a matter for the law applicable to the contract.

<sup>52</sup> Article 77.

<sup>53</sup> No practical purpose would be served by inferring a separate rule with the aid of Article 7(2) that these costs should in the first instance be paid by the non-performing party.

non-performance,<sup>54</sup> the cost of carriage back to the seller should not be borne by the exempted buyer, who is exempt from liability for in damages non-performance in Article 79. This exemption is expressed in general terms as an exemption from paying damages under the Convention, and not in special terms as an exemption from paying damages for the non-performance that led to avoidance of the contract.<sup>55</sup> Since restitution is plainly a matter governed by the Convention, along with exemption, there is no room for the cost of carriage or of disposal of the goods to be allocated to another applicable law.

#### gg) Time of Restitution

The Convention does not state when mutual restitution of performance has to take place but performance within a reasonable time may be inferred as a general principle under Article 7(2),<sup>56</sup> in the absence of an agreed time, upon or after avoidance of the contract. Since the duty to make restitution is a contractual one, any unexempted delay in effecting restitution, giving rise to loss suffered by the receiving party, should be compensable in damages in accordance with Article 74. Loss is more likely to arise where it is the seller who delays in making restitution, since the buyer may incur costs in warehousing or handling the goods when unable to put them to productive use. If the buyer is late in making restitution, so that the seller holds back the purchase price together with interest on the purchase price, the seller will not be incurring loss in holding the money but will indeed be earning interest on money not yet paid back to the buyer.

#### hh) Risk Prior to Restitution

Requiring restitution of the goods at the buyer's premises minimises complications stemming from the allocation of the risk of loss. Apart from loss or destruction of the goods arising out of their defective state upon delivery,<sup>57</sup> there remains a need to allocate risk in the period between avoidance and redelivery. In principle, the question of whose fault led to the avoidance of the contract ought not to be relevant, or indeed whether there was fault at all, since the allocation of risk pertains to the identity of the party better able to take out loss insurance. That person is the buyer as the party in possession.<sup>58</sup> The cost of insuring the goods in very many cases will be negligible or non-existent: the buyer's insurance may cover all goods in its possession. If the

<sup>54</sup> Article 79 is likely to be applied infrequently to cases where goods have been delivered.

<sup>55</sup> Paragraph (5). See also CM Bianca and MJ Bonell, *Commentary on the International Sales Law* (1987), 605 (Tallon).

<sup>56</sup> Deriving from Article 33(c).

<sup>57</sup> Article 70 in substance would leave the risk with the seller where the seller commits a fundamental breach of the contract.

<sup>58</sup> It is assumed that the buyer in possession will have an insurable interest under the relevant law.

contract is avoided because of the seller's unexempted non-performance, the buyer should be able to claim damages for the cost of insurance or safeguarding the goods under Article 74. If the contract is avoided for the seller's exempted non-performance, then Article 79 precludes transferring the cost of insurance to the seller by means of a damages claim. In those cases where the seller is at fault in making timely restitution, there is a case for transferring the risk to the seller in order to give an incentive to complete the restitutionary process. The better view, on balance, however, is that the reasons for allocating risk to the buyer remain valid for this case. The additional cost of insuring and safeguarding the goods beyond the due restitution date if the seller has failed to participate in a timely way in the process of restitution are recoverable as damages under Article 74.

### *Restitution of the Fruits of Performance*

#### aa) General

After the contract has been avoided, Article 84 imposes correlative duties on the seller to pay interest to the buyer, if the price has to be refunded, and on the buyer, to account to the seller for benefits derived from the goods. These duties apply where restitution in full occurs, but they may also be brought into play in cases of partial restitution, whether or not partial restitution occurs further to Article 82. They apply in favour of each party to the avoided contract, whether or not that party was a performing party, an exempted non-performer or an unexempted non-performer.<sup>59</sup>

The mutual restitution of interest and benefits will usually be financial on both sides. Mutual restitution raises a number of questions. The first question is whether the rule of concurrency expressed in Article 81 for the goods and money, but not referred to in Article 84, nevertheless applies in the latter case to benefits. If concurrency does apply, the second question is whether restitution under Article 84 is to be integrated with restitution under Article 81 or is separate. The third question is whether set-off takes place with respect to the two Article 84 payments, so as to leave only one payment to be made representing the balance. The fourth question, if set-off is permissible, is whether payments to be made under Articles 81 and 84 can be the subject of a consolidated set-off.

<sup>59</sup> Bezirksgericht Saane (Switzerland), 20 February 1997, translated at <<http://cisgw3.law.pace.edu/cases/970220s1.html>>. Where non-performance, due to the inexact description of the goods, was held to be the fault of neither party, a Chinese tribunal incorrectly halved the rate of interest that the seller had to pay when repaying the buyer: China International Economic and Trade Arbitration Commission, 23 April 1997, translated at <<http://cisgw3.law.pace.edu/cases/970423c2.html>>.

bb) Separation of Articles 81 and 84

The process of calculating interest and benefit under Article 84 may in some cases be difficult and time-consuming. The avoidance of business disruption and economic waste may fairly be inferred from the Convention as principles on which it is based. If these losses are to be kept to a minimum, then restitution under Article 81 should be effected as quickly as possible and indeed before any complex calculations required by Article 84 are completed. Nevertheless, in those cases where the buyer has to return benefits in lieu of the original goods, a one-sided concurrency would arise under Article 81 if the seller's repayment of the price were made in return for only part of the goods delivered to the buyer. The most practical solution, if the seller is unwilling in these circumstances to return the price in full, is to prorate the price so as to match the quantity of goods that the buyer is able to return.<sup>60</sup> The remainder of the price would then become concurrently repayable when the buyer accounted for the benefits received from the missing goods. By this means, the process of restitution under Article 81 is kept as separate as is possible from the process of restitution under Article 84.

cc) Concurrency

Concurrency is the means by which mutual restitution can take place under the Convention without account having to be taken of proprietary considerations. Although the principle of concurrency is not expressed in Article 84, consistency therefore requires it also to be the rule under Article 84 following on from the general principle laid down in Article 81.<sup>61</sup>

dd) Set-off Issues

Although there are numerous decisions stating that set-off is not dealt with by the Convention,<sup>62</sup> there are many different ways in which set-off or something akin to set-off might arise between a buyer and a seller. Consequently, a general denial of set-off as a subject dealt with by the Convention is too widely stated. Set-off, broadly understood to include permissible deductions, is explicitly permitted in one case where a buyer avoids the contract. Where a buyer is permitted to sell the goods for one of the reasons stated in Article 88, the expenses of preserving the goods and selling them may be deducted from the proceeds of sale, prior to their remittance to the seller. So far as there has to be concurrency in making restitution, and so far

<sup>60</sup> Because it is simpler, this solution is preferable to the alternative of requiring such a buyer to account for the benefits received from the missing goods at the time of concurrent restitution under Article 81. These benefits may take time to calculate, which would delay the Article 81 restitution process if this approach were adopted.

<sup>61</sup> Article 7(2). See also Article 58(1).

<sup>62</sup> For example, Bundesgerichtshof (Switzerland), 20 December 2006, translated at <<http://cigw3.law.pace.edu/cases/061220s1.html>>; Landgericht München (Germany), 20 March 1995, translated at <<http://cigw3.law.pace.edu/cases/950320g1.html>>.

as payments have to be made by both buyer and seller as part of the restitutionary process, then concurrency is most effectively promoted by permitting set-off.<sup>63</sup> Set-off serves the purpose of minimising business disruption and avoiding economic waste. To the extent, however, that the process of restitution under Article 81 needs to be implemented before the calculations are made under Article 84, it follows that set-off in respect of amounts that will or might fall due under the Article 84 process ought not to be allowed as against payments to be made under Article 81. Various claims for damages might arise under or pursuant to the contract of sale, either before or during the implementation of the restitutionary process. This opinion does not take a view on whether set-off might take place between a restitutionary claim and a damages claim.

ee) Commencement of Interest

The seller's duty to pay interest under Article 84 runs from the date that payment is made. In the case of a seller who fails to deliver, it does not run from the time that the seller was in breach of contract for failing to deliver.<sup>64</sup> If payment is made on the buyer's behalf by a third party, the seller's duty to pay interest runs from this date.<sup>65</sup> The Convention does not define when payment is made but the purpose underlying the restitutionary provisions of the Convention is best served by treating payment as having occurred when the seller is able to start earning interest on the money paid by the buyer. If, for example, a transfer of funds is made to an account nominated by the seller, then payment should in principle be treated as occurring when the seller is able to draw on the account with incurring interest charges to the bank.

ff) Rate of Interest

The Convention does not state from where the rate of interest is to be derived: seller and buyer will usually be located in different countries. Interest is payable by the seller whether in fact interest has been earned or not, according to the use that the seller could have made of the

<sup>63</sup> In favour of set-off, further to Article 7(2), where there are two reciprocal claims arising under the Convention, see Oberlandesgericht Hamburg (Germany), 26 November 1999, translated at <<http://cisgw3.law.pace.edu/cases/991126g1.html>>; Landgericht Mönchengladbach (Germany), 15 July 2003, translated at <<http://cisgw3.law.pace.edu/cases/030715g1.html>>. A deduction for the cost of goods disposed of by the buyer against the buyer's claim for the return of the price was allowed in Oberlandesgericht Köln (Germany), 14 October 2002, translated at <<http://cisgw3.law.pace.edu/cases/021014.html>>.

<sup>64</sup> Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, No 135/2002, 16 June 2003, translated at <<http://cisgw3.law.pace.edu/cases/030616r1.html>>.

<sup>65</sup> Cour d'appel Aix-en-Provence (France), 21 November 1996, translated at <<http://cisgw3.law.pace.edu/cases/961121f1.html>>; Cour de cassation (France) 26 May 1999, translated at <<http://cisgw3.law.pace.edu/cases/990526f1.html>>.

money paid by the buyer.<sup>66</sup> The seller's duty to pay interest therefore is based on an irrebuttable presumption that the seller has invested the money in an interest-bearing account or has benefited from the money in some other way. This presumption avoids any inquiry into the actual use made by the seller of the money paid by the buyer and thus also avoids difficult questions arising out of tracing the money through the seller's commercial activities.<sup>67</sup> Because of this presumption, and because the seller's duty to account for interest is a restitutionary one, the commercial investment rate current at the seller's place of business should normally be applied.<sup>68</sup> In the majority of cases, the rate at the seller's place of business has been arrived at by applying the forum's rules of private international law.<sup>69</sup> A preferable justification is to infer the

<sup>66</sup> ICC Court of Arbitration, No 6653 of 25 March 1993, translated at <<http://cisgw3.law.pace.edu/cases/936653i1.html>>; Handelsgericht Zürich, 5 February 1997, translated at <<http://cisgw3.law.pace.edu/cases/970205s1.html>>.

<sup>67</sup> There is an argument that a seller in receipt of revolving credit may have benefited more from payment of the price than the amount recoverable according to the commercial investment rate. The benefit would be the commensurate avoidance of the higher borrowing rate that the seller would otherwise have had to pay its bank under the revolving credit facility. An inquiry into the amount of such benefit would be time-consuming and expensive, and would unduly complicate the process of effecting restitution.

<sup>68</sup> See P Schlechtriem and I Schwenzer, *Commentary on the UN Convention on the International Sale of Goods* (2nd (English) edn, 2005), 885-86. The Unidroit Principles of Commercial Contracts (Article 7.4.9), in the different case of failing to pay a sum of money when it falls due, refer to the "average short-term lending rate to prime borrowers prevailing for the money of payment at the place of payment". Failing the existence of such a rate, they turn to the same rate in the State of the currency of payment or some other rate fixed by the law of that same State. This approach is inappropriate for a restitutionary obligation.

<sup>69</sup> Oberlandesgericht Celle (Germany), 24 May 1995, translated at <<http://cisgw3.law.pace.edu/cases/950524g1.html>>; Landgericht Landshut (Germany), 5 April 1995, translated at <<http://cisgw3.law.pace.edu/cases/950405g1.html>>; the Oberlandesgericht Karlsruhe (Germany), 19 December 2002, translated at <<http://cisgw3.law.pace.edu/cases/021219g1.html>>; the ICC Court of Arbitration, Award No 9978, March 1999, Unilex, CISG On-line; Tribunale d'appello Lugano/Ticino (Switzerland), 15 January 1998, translated at <<http://cisgw3.law.pace.edu/cases/980115s1.html>>; Bezirksgericht Saane (Switzerland), 20 February 1997, translated at <<http://cisgw3.law.pace.edu/cases/970220s1.html>>; Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, No 175/2003, 28 May 2004, translated at <<http://cisgw3.law.pace.edu/cases/040528r1.html>>; Oberlandesgericht Frankfurt am Main (Germany), 18 January 1994, translated at <<http://cisgw3.law.pace.edu/cases/940118g1.html>>; Kantonsgericht Schaffhausen (Switzerland), 27 January 2004, <<http://cisgw3.law.pace.edu/cases/040127s1.html>>. Although it conceded that the buyer's entitlement to interest derived from the CISG, the same approach was adopted by the Oberlandesgericht München (Germany), 8 February 1995, translated at <<http://cisgw3.law.pace.edu/cases/950208g1.html>>. In one case, the rate was determined according to the applicable law, which was neither the law of the seller's nor of the buyer's place of business: ICC Court of Arbitration, No 7660, 23 August 1994, translated at <<http://cisgw3.law.pace.edu/cases/947660i1.html>>.

rate at the seller's place of business directly from Article 84 itself.<sup>70</sup> A minority of tribunals have favoured the rate of interest prevailing at the buyer's place of business,<sup>71</sup> which is inconsistent with the restitutionary character of the seller's duty to pay interest. One tribunal has held that the interest rate should accord with the currency in which restitution of the price has to be made, since it should reflect the use that the creditor (the buyer) could have made of the money.<sup>72</sup> This approach seeks to indemnify the buyer for the loss of use of its money and is again inconsistent with the restitutionary character of the seller's duty to pay interest.<sup>73</sup> In some

<sup>70</sup> See Secretariat Commentary on Article 69 (which was later renumbered Article 84), para 2; Handelsgericht Zürich (Switzerland), 5 February 1997, translated at <<http://cisgw3.law.pace.edu/cases/970205s1.html>>. The view advanced in this Opinion rejects is contrary to the Landgericht Landshut (Germany), 5 April 1995, translated at <<http://cisgw3.law.pace.edu/cases/950405g1.html>> expressly rejected the drawing of general restitutionary principles by analogy from Articles 31 *et seq* of the Convention. The source of the rule that the rate at the seller's residence should apply was left open in Oberlandesgericht Düsseldorf (Germany), 28 May 2004, translated at <<http://cisgw3.law.pace.edu/cases/040528g1.html>>. The seller was Italian and the result would have been the same whether an Italian interest rate was inferred directly from Article 84 or applied by virtue of private international rules, since Italy was the place of business of the characteristic performer (the seller).

<sup>71</sup> Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, No 99/2002, 16 April 2003, translated at <<http://cisgw3.law.pace.edu/cases/030416r1.html>>; China International Economic and Trade Arbitration Commission, 30 November 1998, translated at <<http://cisgw3.law.pace.edu/cases/981130c1.html>>; Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, No 133/1994, 19 December 1995, translated at <<http://cisgw3.law.pace.edu/cases/951219r1.html>> (but rate not proved by the buyer); Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, No 1/1993, 15 April 1994, Unilex; Hof van Beroep Gent (Belgium), 11 September 2003, noted at <<http://cisgw3.law.pace.edu/cases/030911b1.html>>. That same law would also have been applied but for the absence of a Russian rate of interest for Indian rupees in Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, No 100/2002, 19 May 2004, translated at <<http://cisgw3.law.pace.edu/cases/040519r1.html>>. The tribunal applied instead the Unidroit rule (Article 7.4.9(2)), namely, the average short-term lending rate for prime borrowers in the place of payment, failing which, in the place of the currency of repayment. A Hamburg arbitral tribunal has also applied the local law in the case of a German buyer and Czech seller: Schiedsgericht Hamburger Freundschaftliche Arbitrage (Germany), 29 December 1998, translated at <<http://cisgw3.law.pace.edu/cases/981229g1.html>>.

<sup>72</sup> ICC Court of Arbitration, No 6653 of 25 March 1993, translated at <<http://cisgw3.law.pace.edu/cases/936653i1.html>> (basing the award of interest on the London Inter-Bank Offered Rate (LIBOR)). This part of the award was later reversed on the ground that the parties had not been properly heard on the subject of interest: Cour d'appel Paris (France), 6 April 1995, translated at <<http://cisgw3.law.pace.edu/cases/950406f1.html>>.

<sup>73</sup> A case that is hard to classify is ICC Court of Arbitration No 7585 of 1992, translated at <<http://cisgw3.law.pace.edu/cases/927585i1.html>>, where the tribunal selected the currency most closely related to the financial aspects of the contract of sale.

cases, by default, the rate of interest prevailing under the local law has incorrectly been applied.<sup>74</sup>

gg) Currency of Interest

Payment of interest should presumptively be in the currency of account and payment, where these are the same,<sup>75</sup> and should be in the currency of payment if this is different from the currency of account. Since the seller's duty to pay interest is a restitutionary one, interest should be paid in the currency in which the seller earned the interest if this differs from the currency of payment.

hh) Cessation of Interest

The Convention does not state when the seller's duty to pay interest should cease. In principle, the restitutionary character of the seller's duty ought to mean that interest runs until the buyer has been reimbursed,<sup>76</sup> but it has been held in one case, incorrectly, to run to the date of commencement of the proceedings.<sup>77</sup> A difficult case arises where restitution is unduly delayed by the buyer. One argument favours allowing the seller to retain the interest accruing after the due date of restitution, in order to give an incentive to the buyer to effect timely restitution, but the better view is that the seller should account for interest even in this case since the seller has incurred no loss arising from the buyer's delay.<sup>78</sup>

<sup>74</sup> The approach that seems to have been adopted in Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, No 53/1997, 25 December 1997, translated at <<http://cisgw3.law.pace.edu/cases/971225r1.html>>; Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, No 439/1995, 29 May 1997, translated at <<http://cisgw3.law.pace.edu/cases/970529r1.html>>; Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, No 72/1995, 25 April 1996, translated at <<http://cisgw3.law.pace.edu/cases/960425r1.html>>; Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, No 22/1995, 1 December 1995, translated at <<http://cisgw3.law.pace.edu/cases/951201r2.html>>; Juzgado de primera instancia Tudela (Spain), 29 March 2005, translated at <<http://cisgw3.law.pace.edu/cases/050329s4.html>>. An award of interest, incorrectly, as damages has led also to the buyer's law: Käräjäoikeus Kuopio (Finland), 5 November 1996, translated at <<http://cisgw3.law.pace.edu/cases/961105f5.html>>

<sup>75</sup> This was the result in China International Economic and Trade Arbitration Commission, 10 March 1995, translated at <<http://cisgw3.law.pace.edu/cases/950310c2.html>>.

<sup>76</sup> As decided by Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, No 1/1993, 15 April 1994, translated at <<http://cisgw3.law.pace.edu/cases/940415r1.html>>; Pretura circondariale Parma (Italy), 24 November 1989, translated at <<http://cisgw3.law.pace.edu/cases/891124i3.html>>.

<sup>77</sup> Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, No 100/2002, 19 May 2004, translated at <<http://cisgw3.law.pace.edu/cases/040519r1.html>>.

<sup>78</sup> If the seller did incur a loss, it would have a claim for damages against the buyer (Article 74).

ii) Benefits Flowing from the Goods

3.28 The buyer's duty to account for benefits received under Article 84, unlike the seller's duty to pay interest, is based on actual benefits and not notional benefits. These benefits should also be net benefits, after the cost of using or enjoying the goods has been taken into account.<sup>79</sup> There will be many cases where a buyer, despite delivery having occurred long before avoidance, will have received no measurable benefits. An example is where the goods have been sold on to a domestic sub-buyer who has eventually rejected them or who may yet reject them.<sup>80</sup> Any money derived from that sub-buyer does not count as a benefit under the head contract of sale if it has to be returned to the sub-buyer, since Article 84 concerns only retained benefits.<sup>81</sup> The burden of proof is on the seller to show that the buyer has obtained benefits.<sup>82</sup> There may be difficult cases arising out of the supply of durable machines and similar goods that yield profits over a lengthy term. The calculation of benefits in such cases would require a close examination of the buyer's business and a calculation of its profit margin and its fixed and variable overhead. There are no decided cases quantifying benefits that the buyer must restore to the seller.

The buyer's duty to account for benefits is stated to apply not only in cases of avoidance. It applies also where the buyer has required the seller to deliver substitute goods.<sup>83</sup> The meaning of this provision is obscure. The buyer's duty to account for benefits is the counterpart to the seller's duty to pay interest on money received by the buyer, and no mention is made of the any duty of the seller to pay interest in cases where the buyer requires substitute goods. If substitute goods are delivered, perhaps some time after the first delivery, the seller will have had the use of the buyer's money in the meantime. The provision appears to contemplate goods with a limited commercial life where the buyer gets value from the rejected goods, despite the existence of a fundamental breach,<sup>84</sup> in excess of the seller's value derived from payment and in a way that replicates the value stemming from the substitute goods. This provision has not given rise to any decided cases and is unlikely to do so.

<sup>79</sup> P Schlechtriem and I Schwenzer, *Commentary on the UN Convention on the International Sale of Goods* (2nd (English) edn, 2005), 889.

<sup>80</sup> Oberlandesgericht Oldenburg (Germany), 1 February 1995, translated at <<http://cisgw3.law.pace.edu/cases/950201g1.html>>.

<sup>81</sup> Landgericht Freiburg (Germany), 22 August 2002, translated at <<http://cisgw3.law.pace.edu/cases/020822g1.html>>.

<sup>82</sup> Ibid. The seller was able to prove a sub-sale by the buyer in Compromex Arbitration (Mexico), 4 May 1993, translated at <<http://cisgw3.law.pace.edu/cases/930504m1.html>>.

<sup>83</sup> Article 84(2)(b).

<sup>84</sup> Article 46(2).

## Addendum: Cases Cited

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### Belgium

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### China

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 - *Polyethylene film case* of 10 March 1995. Notes 34 and 75  
 - *Automobile case* of 23 April 1997. Note 59  
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- Käräjaoikeus Kuopio 5 November 1996 (*Butter case*). Note 74

### France

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### Germany

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