



General Assembly

Distr.: General
8 June 2004

Original: English

**United Nations Commission
on International Trade Law**

UNCITRAL Digest of case law on the United Nations Convention on the International Sale of Goods*

Article 64

(1) The seller may declare the contract avoided:

(a) If the failure by the buyer to perform any of his obligations under the contract or this Convention amounts to a fundamental breach of contract; or

(b) If the buyer does not, within the additional period of time fixed by the seller in accordance with paragraph (1) of article 63, perform his obligation to pay the price or take delivery of the goods, or if he declares that he will not do so within the period so fixed.

(2) However, in cases where the buyer has paid the price, the seller loses the right to declare the contract avoided unless he does so:

(a) In respect of late performance by the buyer, before the seller has become aware that performance has been rendered; or

(b) In respect of any breach other than late performance by the buyer, within a reasonable time:

(i) After the seller knew or ought to have known of the breach;
or

* The present digest was prepared using the full text of the decisions cited in the Case Law on UNCITRAL Texts (CLOUT) abstracts and other citations listed in the footnotes. The abstracts are intended to serve only as summaries of the underlying decisions and may not reflect all the points made in the digest. Readers are advised to consult the full texts of the listed court and arbitral decisions rather than relying solely on the CLOUT abstracts.

- (ii) After the expiration of any additional period of time fixed by the seller in accordance with paragraph (1) of article 63, or after the buyer has declared that he will not perform his obligations within such an additional period.

Introduction

1. This provision deals with cases in which the seller may declare the contract avoided when the buyer has been in breach of one of its obligations. The rules mirror those of article 49 governing the buyer's right to declare the contract avoided owing to a failure by the seller to perform its obligations under the contract. The effects of avoidance are governed by articles 81 to 84. In all cases avoidance requires a declaration by the seller as specified in article 26.

Requirements for the right to declare the contract avoided (paragraph (1))

2. Article 64 (1) specifies two cases in which the seller has the right to declare the contract avoided.

The case of fundamental breach of contract (article 64 (1) (a))

3. The first case envisaged in article 64 (1) is that of fundamental breach of contract as defined in article 25.¹ For this provision to apply, it is necessary that the breach of contract caused such damage to the seller that the seller was substantially deprived of what it was entitled to expect under the contract. One arbitral award found that, "according to both the general framework of the Convention and its interpretation in case law, the notion of fundamental breach is usually construed narrowly in order to prevent an excessive use of the avoidance of the contract"². A number of illustrations in case law can be cited with regard to the three conceivable types of contract violation, namely failure to pay the purchase price, failure to take delivery of the goods and failure to perform other obligations specified under the contract.

4. Thus it has been decided that definitive failure to pay the price constitutes a fundamental breach of contract.³ According to another decision, the delay in opening a letter of credit does not in itself constitute a fundamental breach of contract⁴; yet another decision stated that the refusal on the part of the buyer to open the letter of credit does constitute a breach of contract.⁵

¹ See Digest Article 25.

² ICC Court of Arbitration, award No. 9887, *ICC International Court of Arbitration Bulletin*, 2000, 118.

³ *Id.*; see also CLOUT case No. 130 [Oberlandesgericht Düsseldorf, Germany, 14 January 1994]. Similarly, Tribunal cantonal du Valais, Switzerland, 2 December 2002, available on the Internet at <<http://www.cisg-online.ch/cisg/urteile/733.pdf>>; US District Court for the Western District of Michigan, United States, 17 December 2001, available on the Internet at <<http://www.cisg.law.pace.edu/cisg/wais/db/cases2/011217u1.html>>.

⁴ Landgericht Kassel, 21 September 1995, available on the Internet at

5. Final refusal to take delivery, or return of the goods in the absence of a fundamental breach of contract by the seller, have been judged as constituting fundamental breaches of contract.⁶ Generally, a mere delay of a few days in the delivery of the goods will not be considered a fundamental breach.⁷

6. Non-performance of obligations arising from the contract—that are not imposed upon the parties by the Convention—may also constitute a fundamental breach, as in the case where the buyer violated a re-export prohibition⁸ or of an exclusive rights clause⁹.

Fixing of an additional period of time without result (article 64 (1) (b))

7. If the buyer does not perform its obligation to pay the price or to take delivery of the goods within the additional period of time fixed by the seller under article 63 (1), or if the buyer declares that it will not do so within the period so fixed, the seller may declare the contract avoided.¹⁰

8. The obligation to pay the price includes that of taking the necessary steps for that purpose under article 54. Thus it has been decided that the buyer's failure to take the necessary steps within the additional period of time granted to him by the seller by itself justifies the seller's right to declare the contract avoided¹¹.

Timing of the declaration of avoidance of the contract (article 64 (2))

9. It is apparent from article 64 (2) that the seller may declare the contract avoided as long as the buyer has not paid the price. Once the price has been paid, the declaration of avoidance is subject to certain rules of timing. When the buyer performs its obligations, albeit belatedly, the seller loses the right to declare the contract avoided unless the seller does so before it has become aware of the

<<http://www.cisg-online.ch/cisg/urteile/192.htm>>.

⁵ Supreme Court of Queensland, Australia, 17 November 2000, available on the Internet at <<http://www.austlii.edu.au/au/cases/qld/QSC/2000/421.html>>.

⁶ See Kantonsgericht Zug, Switzerland, 12 December 2002, available on the Internet at <<http://www.cisg-online.ch/cisg/urteile/720.htm>>; CLOUT case No. 217 [Handelsgericht des Kantons Aargau, Switzerland, 26 September 1997], in connection with non-performance of the obligation to take delivery (see full text of the decision); CLOUT case No. 227 [Oberlandesgericht Hamm, Germany, 22 September 1992], in connection with a buyer's refusal to take delivery of more than half of the goods.

⁷ CLOUT case No. 243 [Cour d'appel, Grenoble, France, 4 February 1999].

⁸ CLOUT case No. 154 [Cour d'appel, Grenoble, France, 22 February 1995].

⁹ Compare CLOUT case No. 217 [Handelsgericht des Kantons Aargau, Switzerland, 26 September 1997] (seller's violation of exclusive rights clause).

¹⁰ See above the cases under article 63, footnotes 3 and 4. See also Handelsgericht St. Gallen, Switzerland, 3 December 2002, available on the Internet at <<http://www.cisg-online.ch/cisg/urteile/727.htm>>; Oberlandesgericht Graz, Austria, 24 January 2002, available on the Internet at <<http://www.cisg-online.ch/cisg/urteile/801.pdf>>.

¹¹ CLOUT case No. 261 [Bezirksgericht der Sanne, Switzerland, 20 February 1997], in connection with failure to open a letter of credit following expiry of the additional period of time fixed by the seller.

performance having been rendered (article 64 (2) (a)). In other cases, the right is lost after the expiration of a reasonable period of time starting from the moment when the seller knew or ought to have known of the breach (article 64 (2) (b) (i)) or, where an additional period of time was fixed in accordance with article 63 (1), following the expiration of that additional period. There are not yet any court decisions which have addressed this issue.
