

The seller may be a merchant who will assemble the quantity to be delivered from inventory or he may be a manufacturer who will, subsequent to the notification, manufacture the goods according to the buyer's specifications.

3. Even in these cases in which the buyer is obligated to make the specification, he may fail to do so by the date required, before 1 September in this example, either through oversight or because he would now prefer not to receive the 1,000 pairs of shoes. If he now desires not to receive the shoes, it will usually be because of changes in business conditions which have reduced his need for the 1,000 pairs of shoes or because the price has declined and he could buy them at a lower price elsewhere.

Seller's remedies, paragraph (1)

4. Article 61 rejects any suggestion that the contract is not complete until the buyer has notified the seller of the specification or that the buyer's notification of the specification is a condition to the seller's right to deliver the goods and demand payment of the price.

5. Article 61 (1) authorizes the seller, at his choice, to provide the specification himself or to exercise any other rights he may have under the contract and this Convention for the buyer's breach. Of course, the buyer's failure to make the specification would constitute a breach of the contract only if the buyer was obligated to do so, not if he was merely authorized to do so.

6. If the buyer's failure to make the specification constituted a breach of contract, the seller could pursue his remedies for that breach, in place of or in addition to making the specification himself under article 61. Therefore, the seller could: (1) sue for damages under article 57 (1) (b), (2) if the buyer's failure to make the required specification amounted to a fundamental breach of contract, avoid the contract under article 60 (1) (a) and sue for any damages,¹ or (3) fix an additional period of reasonable length for the buyer to perform his obligation under article 59 (1). If, pursuant to article 59, the seller fixes an additional period of time of reasonable length for performance by the buyer and the buyer does not perform within this additional time, the seller could avoid the contract under article 60 (1) (b) and sue for any damages even if the buyer's failure to make the specification did not constitute a fundamental breach of contract.

7. If the seller chooses to exercise his right to make the specification himself pursuant to article 61 (1), he may do so immediately upon the passage of the date agreed upon in the contract as the date by which the buyer would make the specification. Alternatively, the seller may request the specification from the buyer, in which case the seller must await a reasonable time after the buyer has received the request from the seller before he can make the specification himself.²

Notice to the buyer, paragraph (2)

8. Article 61 imposes three obligations on a seller who intends to make the specification himself. According to article 61 (1) he must make the specification "in accordance with any requirement of the buyer that may be known to him". According to article 61 (2) the seller must inform the buyer of the specification and its details and he must fix a reasonable time within which the buyer may make a different specification.

9. If the seller does not make the specification in accordance with the requirements of the buyer or does not inform the buyer of the specification and its details, the specification would not be binding on the buyer. If the seller does not fix a reasonable period of time for the buyer to make a different specification, the buyer would, nevertheless, be entitled to such a period in which to make the specification.

10. Although the seller is called on to fix the period in the notice by which he informs the buyer of the specification, the reasonableness of that period is measured from the time at which the buyer receives the

¹ Article 66 (1) preserves the right to sue for damages even though the contract has been avoided.

² It should be noted that the request for specification here is pursuant to article 61 (1) and not pursuant to article 59 as discussed in para. 6 *supra*.

Article 61

[Specification by seller]

(1) If under the contract the buyer is to specify the form, measurement or other features of the goods and he fails to make such specification either on the date agreed upon or within a reasonable time after receipt of a request from the seller, the seller may, without prejudice to any other rights he may have, make the specification himself in accordance with any requirement of the buyer that may be known to him.

(2) If the seller makes the specifications himself, he must inform the buyer of the details thereof and must fix a reasonable time within which the buyer may make a different specification. If the buyer fails to do so after receipt of such a communication, the specification made by the seller is binding.

PRIOR UNIFORM LAW

ULIS, article 67.

Commentary

1. Article 61 describes the seller's rights where the buyer fails to specify some aspect or quality of the goods ordered by the date on which he was obligated to do so.

2. It often occurs that the buyer wishes to contract for the purchase of goods even though at that moment he is as yet undecided about some feature of the goods ordered. For example, on 1 April the buyer might order 1,000 pairs of shoes at a certain price for delivery on or before 1 October. The contract might also state that the buyer must specify the styles and sizes to the seller before 1 September or it might state that the buyer has the right, but not the obligation, to make the specification.

specification. If the specification is never received by the buyer, it never becomes binding on him.³

11. Within the reasonable period of time after the buyer receives the specification, he must either make a new specification or that made by the seller is binding.

³ The requirement that the buyer must have received the specification from the seller places the risk of transmission on the sender of the notice and thus reverses the general rule contained in article 25.