

### Article 60

#### [Seller's right to avoid contract]

(1) The seller may declare the contract avoided:

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

(b) if the buyer has not, within the additional period of time fixed by the seller in accordance with paragraph (1) of article 59, performed his obligation to pay the price or taken delivery of the goods, or if he has declared 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 his right to declare the contract avoided if he has not done 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, within a reasonable time after he knew or ought to have known of such breach, or within a reasonable time after the expiration of any additional period of time fixed by the seller in accordance with paragraph (1) of article 59 or the declaration by the buyer that he will not perform his obligations within such an additional period.

#### PRIOR UNIFORM LAW

ULIS, articles 61 (2), 62, 66 and 70.

#### Commentary

1. Article 60 describes the seller's right to declare the contract avoided. The buyer's right to declare the contract avoided is described in article 45.

#### Declaration of avoidance

2. The contract is avoided as a result of the buyer's breach only if "the seller . . . declare [s] the contract avoided". This narrows the rule from that found in articles 61 and 62 of ULIS which provided for an automatic or *ipso facto* avoidance in certain circumstances in addition to avoidance by declaration of the seller. Automatic or *ipso facto* avoidance was deleted from the remedial system in this Convention because it led to uncertainty as to whether the contract was still in force or whether it had been *ipso facto* avoided. Under article 60 of this Convention the contract is still in force unless the buyer has affirmatively declared it avoided. Of course, uncertainty may still exist as to whether the conditions had been met authorizing the buyer to declare the contract avoided.

3. Article 24 provides that "a declaration of avoidance of the contract is effective only if made by notice to the other party". The consequences which follow if a notice of avoidance fails to arrive or fails to arrive in time or if its contents have been inaccurately transmitted are governed by article 25.

#### Fundamental breach, subparagraph (1) (a)

4. The typical situation in which the seller may declare the contract avoided is where the failure by the buyer to perform any of his obligations amounts to a fundamental breach. The concept of fundamental breach is defined in article 23.

5. If there is a fundamental breach of contract, the seller has an immediate right to declare the contract avoided. He need not give the buyer any prior notice of his intention to declare the contract avoided. It may be questioned, however, how often the buyer's failure to pay the price, take delivery of the goods or perform any of his other obligations under the contract and this Convention would immediately constitute a fundamental breach of contract if they were not performed on the date they were due. It would seem that in most cases the buyer's failure would amount to a fundamental breach as it is defined in article 23 only after the passage of some period of time.

#### Buyer's delay in performance, subparagraph (1) (b)

6. Subparagraph (1) (b) further authorizes the seller to declare the contract avoided in one restricted case. If the buyer has not paid the price or taken delivery of the goods and the seller requests him to do so under article 59, the seller can avoid the contract "if the buyer has not, within the additional period of time fixed by the seller in accordance with paragraph (1) of article 59, performed his obligation to pay the price or taken delivery of the goods, or if he has declared that he will not do so within the period so fixed."

7. The buyer's obligation to pay the price includes taking such steps and complying with such formalities which may be required by the contract and by any relevant laws and regulations to enable payment to be made, such as registering the contract with a government office or with a bank, procuring the necessary foreign exchange, as well as applying for a letter of credit or a bank guarantee to facilitate the payment of the price.<sup>1</sup> Therefore, the buyer's failure to take any of these steps within an additional period of time fixed by the seller in accordance with article 59 would authorize the seller to declare the contract avoided under article 60 (1) (b). The seller would not be required to use the procedures of either article 60 (1) (a) on fundamental breach or article 63 on anticipatory breach.

#### Loss or suspension of right to avoid, paragraph (2)

8. Article 60 (2) provides that where the buyer has paid the price, the seller will lose the right to declare the contract avoided if he does not declare the contract avoided within a specified period of time. The seller does not lose his right to declare the contract avoided until the total price has been paid.

9. If the fundamental breach on which the seller relies to declare the contract avoided is the late performance of an obligation, paragraph (2) (a) provides that where the price has been paid, the seller loses his right to declare the contract avoided at the time he becomes aware that the performance has been rendered. Since the late performance in question will most often be in respect of the payment of the price, in most cases the seller will lose the right to declare the contract avoided under article 60 (1) (a) at the time he becomes aware that the price has been paid.

10. If the buyer has paid the price but there is a fundamental breach of the contract in respect of some obligation other than late performance by the buyer, paragraph (2) (b) provides that the seller loses the right to declare the contract avoided if the seller does not declare the contract avoided within a reasonable time after he knew or ought to have known of such breach.

11. Article 60 (2) (b) may also take away the right of the seller to declare the contract avoided in cases where he has fixed an additional period for performance under article 59 (1). If the buyer performs after the additional period fixed pursuant to article 59 (1) or after he has declared that he will not perform within that additional period of time, the seller loses the right to declare the contract avoided if he does not do so within a reasonable time after the expiration of the additional pe-

<sup>1</sup> See article 50 and the commentary thereto.

riod or within a reasonable time after the buyer has declared that he will not perform within that additional period of time.

12. Since the seller does not lose his right to declare the contract avoided under article 60 (2) until the total price is paid, under this provision all the instalments in an instalment contract must be paid before the seller loses the right to declare the contract avoided. However, under article 64 (2) the seller's right to declare the contract avoided in respect of future instalments must be exercised "within a reasonable time" after that failure to perform by the buyer which justifies the declaration of avoidance.

*Right to avoid prior to the date for performance*

13. For the seller's right to avoid prior to the contract date of performance, see articles 63 and 64 and the commentaries thereon.

*Effects of avoidance*

14. The effects of avoidance by the seller are described in articles 66 and 69. The most significant consequence of avoidance for the seller is that he is no longer required to deliver the goods and he may claim their return if they have already been delivered.

15. Avoidance of the contract does not terminate either the buyer's obligation to any damages caused by his failure to perform or any provisions in the contract for the settlement of disputes.<sup>2</sup> Such a provision is important because in many legal systems avoidance of the contract eliminates all rights and obligations which arose out of the existence of the contract. In such a view once a contract has been avoided, there can be no claim for damages for its breach and contract clauses relating to the settlement of disputes, which usually means arbitration clauses, terminate with the rest of the contract.

---

<sup>2</sup> Article 66 (1).