

SECTION III. EFFECTS OF AVOIDANCE

Article 66

[Release from obligations; contract provisions for settlement of disputes; restriction]

(1) Avoidance of the contract releases both parties from their obligations thereunder, subject to any dama-

ges which may be due. Avoidance does not affect any provisions of the contract for the settlement of disputes or any other provisions of the contract governing the respective rights and obligations of the parties consequent upon the avoidance of the contract.

(2) If one party has performed the contract either wholly or in part, he may claim from the other party restitution of whatever he has supplied or paid under the contract. If both parties are bound to make restitutions, they must do so concurrently.

PRIOR UNIFORM LAW

ULIS, article 78.

Commentary

1. Article 66 sets forth the consequences which follow from a declaration of avoidance. Articles 67 to 69 give detailed rules for implementing certain aspects of article 66.

Effect of avoidance, paragraph (1)

2. The primary effect of the avoidance of the contract by one party is that both parties are released from their obligations to carry out the contract. The seller need not deliver the goods and the buyer need not take delivery or pay for them.

3. Partial avoidance of the contract under article 47 or 64 releases both parties from their obligations as to the part of the contract which has been avoided and gives rise to restitution under paragraph (2) as to that part.

4. In some legal systems avoidance of the contract eliminates all rights and obligations which arose out 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, including provisions for arbitration, choice of law, choice of forum, and clauses excluding liability or specifying "penalties" or "liquidated damages" for breach, terminate with the rest of the contract.

5. Paragraph (1) provides a mechanism to avoid this result by specifying that the avoidance of the contract is "subject to any damages which may be due" and that it "does not affect any provisions of the contract for the settlement of disputes or any other provisions of the contract governing the respective rights and obligations of the parties consequent upon the avoidance of the contract." It should be noted that article 66 (1) would not make valid an arbitration clause, a penalty clause, or other provision in respect of the settlement of disputes if such a clause was not otherwise valid under the applicable national law. Article 66 (1) states only that such a provision is not terminated by the avoidance of the contract.

6. The enumeration in paragraph (1) of two particular obligations arising out of the existence of the contract which are not terminated by the avoidance of the contract is not exhaustive. Some continuing obligations are set forth in other provisions of this Convention. For example, article 75 (1) provides that "if the goods have been received by the buyer, and if he intends to reject them, he must take such steps as are reasonable in the circumstances to preserve them" and article 66 (2) permits either party to require of the other party the return of whatever he has supplied or paid under the contract. Other continuing obligations may be found in the contract itself¹ or may arise out of the necessities of justice.

Restitution, paragraph (2)

7. It will often be the case that at the time the contract is avoided, one or both of the parties will have performed all or part of his obligations. Sometimes the parties can agree on a formula for adjusting the price to the deliveries already made. However, it may also occur that

one or both parties desires the return of that which he has already supplied or paid under the contract.

8. Paragraph (2) authorizes either party to the contract who has performed in whole or in part to claim the return of whatever he has supplied or paid under the contract. Subject to article 67 (2), the party who makes demand for restitution must also make restitution of that which he has received from the other party. "If both parties are required to make restitution, they must do so concurrently," unless the parties agree otherwise.

9. Paragraph (2) differs from the rule in some countries that only the party who is authorized to avoid the contract can make demand for restitution. Instead, it incorporates the idea that, as regards restitution, the avoidance of the contract undermines the basis on which either party can retain that which he has received from the other party.

10. It should be noted that the right of either party to require restitution as recognized by article 66 may be thwarted by other rules which fall outside the scope of the international sale of goods. If either party is in bankruptcy or other insolvency procedures, it is possible that the claim of restitution will not be recognized as creating a right in the property or as giving a priority in the distribution of the assets. Exchange control laws or other restrictions on the transfer of goods or funds may prevent the transfer of the goods or money to the demanding party in a foreign country. These and other similar legal rules may reduce the value of the claim of restitution. However, they do not affect the validity of the rights between the parties.

11. The person who has breached the contract giving rise to the avoidance of the contract is liable not only for his own expenses in carrying out the restitution of the goods or money, but also the expenses of the other party. Such expenses would constitute damages for which the party in breach is liable. However, the obligation under article 73 of the party who relies on the breach of the contract to "take such measures as are reasonable in the circumstances to mitigate the loss" may limit the expenses of restitution which can be recovered by means of damages if physical return of the goods is required rather than, for example, resale of the goods in a local market where such resale would adequately protect the seller at a lower net cost.²

¹ Article 5.

² Cf. article 77 on the authority of one party who holds goods for the account of the other party to sell the goods for the account of the other party.