

Article 65

(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 the requirements of the buyer that may be known to him.

(2) If the seller makes the specification 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, after receipt of such a communication, the buyer fails to do so within the time so fixed, the specification made by the seller is binding.

INTRODUCTION

1. Article 65 addresses those cases where the contract leaves it to the buyer to specify “the form, measurement or other features of the goods” (article 65 (1)). The provision enables the seller to act in the buyer’s stead so that it can itself make the specification required by the contract. Article 65 accordingly grants the seller a further remedy for preserving its rights. Article 65 also clarifies article 14 (1): a proposal for concluding a contract can be sufficiently definite to constitute an offer if the proposed contract requires a specification of the goods after its conclusion.¹ Court decisions or arbitral awards which have implemented or cited article 65 are very rare.²

SELLER’S RIGHT TO MAKE SPECIFICATIONS (ARTICLE 65 (1))

2. The seller’s right to make the specification itself in place of the buyer is subject to various requirements. First, the buyer has to have failed to make the required specification “on the date agreed upon”. If a date is not indicated in the contract, a seller wishing to make the specification must request the buyer beforehand to provide the specification, which has to be made “within a reasonable time after receipt” of the request. Thus, the seller’s request has to reach the buyer in order to be effective, contrary to the general rule set forth in article 27. Secondly, the specification

made by the seller following the buyer’s failure to do so has to meet “the requirements of the buyer that may be known to him”.

3. The seller is not obliged to make the specification required of the buyer. The seller may prefer to resort to the other remedies available for breach of contract by the buyer. Also, a specification provided by the seller does not prejudice any other rights which the seller may have. This means that a seller who has made the specification retains the right to claim damages for the loss caused by the buyer’s failure.

IMPLEMENTATION OF THE RIGHT TO MAKE SPECIFICATIONS (ARTICLE 65 (2))

4. Article 65 (2) regulates the seller’s exercise of its right to make a specification on behalf of the buyer under article 65 (1). The seller is required to inform the buyer of the details of the specification and to fix a reasonable time during which the buyer may make a different specification (first sentence). If the buyer does not take advantage of the right to make a different specification within the reasonable time so fixed, the seller’s specification is binding (second sentence). It has been held that, if a seller makes a specification without taking the preliminary steps laid down in article 65 (2), the seller’s specification is not binding on the buyer, who remains free to make a different specification.³

Notes

¹ See, in connection with the relationship between CISG article 65 and contract formation, China International Economic and Trade Arbitration Commission, People’s Republic of China, 23 April 1997 (Arbitral award No. CISG/1997/08), *Zhōngguó guójì jīngjì mào yì zhòng-cái cáijúé shū xuǎnbiān*, vol. 1997, 2004, 1740, available in English on the Internet at www.cisg.law.pace.edu (whereas the buyer alleged that the contract was not formed, invoking, inter alia, articles 14 (1) and 65, the arbitration tribunal pointed out that article 65 “does not stipulate that, if the parties do not describe the details of the goods, the contract is not established”); CLOUT case No. 133 [Oberlandesgericht München, Germany, 8 February 1995] (article 65 cannot make up for non-acceptance of a proposed modification of a contract involving, inter alia, a necessary specification of the goods).

² Efeteio Athinon, Greece, 2006 (docket No. 4861/2006), *Episkópsi Emporikou Dikaíou*, 2005, 841, available in Greek on the Internet at www.cisg.law.pace.edu, English abstract available on the Internet at www.cisg.law.pace.edu (the decision merely cites article 65 among the remedies available to the seller); China International Economic and Trade Arbitration Commission, People’s Republic of China, 29 September

2000, available in English on the Internet at www.cisg.law.pace.edu (article 65 is cited only by the buyer); China International Economic and Trade Arbitration Commission, People's Republic of China, 23 April 1997 (Arbitral award No. CISG/1997/08), *Zhōngguó guójì jīngjì mào yì zhòngcái cáijúe shū xuǎnbiān*, vol. 1997, 2004, 1740, available in English on the Internet at www.cisg.law.pace.edu; Landgericht Aachen, Germany, 19 April 1996, available in German on the Internet at www.cisg-online.ch; CLOUT case No. 133 [Oberlandesgericht München, Germany, 8 February 1995].

³Landgericht Aachen, Germany, 19 April 1996, available in German on the Internet at www.cisg-online.ch.