

REMEDIES FOR BREACH OF CONTRACT BY THE SELLER UNDER THE CISG

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Abstract

The United Nations Convention on Contracts for the International Sale of Goods (CISG) provides a comprehensive framework for addressing breaches of contract in international sales. As one of the most significant treaties in international commercial law, the CISG aims to promote uniformity and predictability in cross-border transactions. This article examines the remedies available to buyers when sellers breach their contractual obligations under the CISG, drawing on relevant provisions, case law, and scholarly interpretations. The discussion includes the obligations of the seller, the differentiation between fundamental and non-fundamental breaches, and the range of remedies such as specific performance, avoidance of the contract, price reduction, and damages. Despite its comprehensive structure, the CISG faces challenges related to vagueness, interpretation issues, and the practical effectiveness of its remedies.

Keywords: CISG, breach of contract, seller obligations, international sales, contract avoidance, price reduction, damages, case law, uniformity, predictability, legal interpretation.

Introduction

The CISG, also known as the Vienna Convention, was adopted on April 11, 1980, and came into force on January 1, 1988. It governs the formation of contracts for the international sale of goods, as well as the rights and obligations of the buyer and seller. The CISG applies automatically to contracts for the sale of goods between parties whose places of business are in different contracting states, unless the parties explicitly exclude its application.

The primary objective of the CISG is to facilitate international trade by providing a uniform legal framework that reduces the uncertainties and complexities associated with cross-border transactions. The convention covers various aspects of international sales contracts, including the formation of contracts, obligations of the parties, and remedies for breach of contract (Schwenzer, Hachem, & Kee, 2016). By establishing clear and consistent rules, the CISG aims to enhance the predictability and efficiency of international trade, thereby promoting global economic integration (Ferrari, 2017).

The CISG applies to contracts for the sale of goods between parties located in different states, provided both states are contracting parties to the convention. It does not apply to sales of goods for personal, family, or household use, or to sales of ships, aircraft, or

electricity (Article 2, CISG). The convention also excludes certain types of sales, such as those involving securities, negotiable instruments, and money (Article 2(d), CISG).

One of the key features of the CISG is its opt-out mechanism. Parties to an international sales contract can exclude the application of the CISG or modify its provisions by including an explicit clause in their contract (Article 6, CISG). This flexibility allows parties to tailor the legal framework to their specific needs and preferences, while still benefiting from the convention's uniformity and predictability (Huber & Mullis, 2007).

The CISG is divided into four parts:

Part I: Sphere of Application and General Provisions (Articles 1-13) - This section defines the scope of the convention and its general principles. It also outlines the rules for interpreting the CISG and the formation of contracts.

Part II: Formation of the Contract (Articles 14-24) - This section deals with the rules for offer and acceptance, including the requirements for a valid offer and the conditions under which an offer can be accepted.

Part III: Sale of Goods (Articles 25-88) - This section addresses the substantive rights and obligations of the buyer and seller, including delivery, conformity of the goods, and the transfer of risk. It also covers the remedies available to both parties in case of a breach of contract.

Part IV: Final Provisions (Articles 89-101) - This section contains the final provisions, including the procedure for ratification, accession, and entry into force of the convention. The interpretation of the CISG is guided by the general principles outlined in Article 7. According to Article 7(1), the CISG should be interpreted with regard to its international character and the need to promote uniformity in its application. This means that courts and arbitral tribunals should consider the CISG's objectives and underlying principles, rather than relying solely on domestic legal concepts (Schlechtriem & Schwenzler, 2016). Article 7(2) further provides that matters not expressly settled by the CISG should be resolved in accordance with the general principles on which the convention is based, or, in the absence of such principles, in conformity with the law applicable by virtue of the rules of private international law. This approach ensures that the CISG remains a coherent and comprehensive legal framework, capable of addressing a wide range of issues that may arise in international sales transactions (Honnold & Flechtner, 2021).

Relationship with Domestic Laws

The CISG is intended to supersede national laws in the areas it governs, thereby creating a uniform legal framework for international sales transactions. However, the convention does not cover all aspects of sales contracts, and certain matters may still be governed by domestic laws.

For example, the CISG does not address issues such as the validity of the contract, the effect of the contract on the property in the goods sold, or the liability of the seller for death or personal injury caused by the goods. These matters are left to be determined by the applicable domestic law, as specified by the relevant rules of private international law (Article 4, CISG).

Moreover, the CISG allows parties to opt out of its provisions or modify them by agreement. This means that parties can choose to apply a different legal framework to their contract, either in whole or in part. This flexibility allows parties to tailor the legal framework to their specific needs and preferences, while still benefiting from the convention's uniformity and predictability (Article 6, CISG).

Obligations of the Seller Under the CISG

Under the CISG, the seller's primary obligations include delivering the goods, handing over any documents related to the goods, and ensuring that the goods conform to the contract. These obligations are outlined in Articles 30 to 44 of the CISG, which collectively ensure that the seller fulfills their part of the contractual agreement in a manner that meets the buyer's expectations and legal standards (Schwenzer, 2016).

Delivery of Goods

Article 31 of the CISG specifies the requirements for the delivery of goods. The seller must deliver the goods in accordance with the terms of the contract. This can be achieved in one of three ways:

By placing the goods at the buyer's disposal at the seller's place of business,

By handing them over to a carrier for transmission to the buyer, or

By delivering them to a specific destination agreed upon in the contract.

The method of delivery is typically determined by the contract's terms, which may specify the exact location and conditions under which the goods are to be delivered (Mullis & Huber, 2007). If the contract does not specify the place of delivery, the default rule is that the seller must place the goods at the buyer's disposal at the seller's place of business (Article 31(a), CISG). If the contract involves carriage of the goods, the seller's obligation is fulfilled when the goods are handed over to the first carrier for transmission to the buyer (Article 31(b), CISG).

Conformity of Goods

Article 35 of the CISG outlines the seller's obligation to deliver goods that conform to the contract in terms of quantity, quality, and description. This conformity requirement is multifaceted:

Quantity and Quality: The goods must match the quantity and quality stipulated in the contract. If the contract specifies certain quality standards or grades, the seller must ensure that the goods meet these standards (Honnold & Flechtner, 2021).

Description: The goods must conform to the description provided in the contract. This includes any specifications regarding size, color, model, or other characteristics.

Fitness for Purpose: The goods must be fit for any particular purpose that was expressly or implicitly made known to the seller at the time of the contract. If the buyer communicated a specific purpose for the goods, the seller is obligated to deliver goods that are suitable for that purpose (Article 35(2)(b), CISG).

Packaging: The goods must be contained or packaged in the manner usual for such goods or, if there is no such usual manner, in a manner adequate to preserve and protect the goods (Article 35(2)(d), CISG).

The conformity requirement is crucial because it ensures that the buyer receives goods that are suitable for their intended use and meet the buyer's expectations as set out in the contract.

Documents Related to the Goods

Under Article 34 of the CISG, the seller must hand over any documents related to the goods as required by the contract. These documents may include:

Bills of Lading: Documents issued by the carrier acknowledging receipt of the goods for shipment. They serve as evidence of the contract of carriage and can be used to transfer ownership of the goods (Ferrari, 2017).

Insurance Policies: Documents that provide evidence of insurance coverage for the goods during transit. The contract may require the seller to arrange and provide proof of insurance.

Certificates of Origin: Documents that certify the country where the goods were produced. These certificates may be required for customs clearance and to comply with trade agreements.

The seller must ensure that these documents are delivered to the buyer in a timely manner to enable the buyer to take possession of the goods and fulfill any further obligations, such as clearing the goods through customs (Lookofsky, 2020). If the documents are not delivered or are incorrect, the seller may be in breach of contract, giving the buyer grounds for a remedy.

Seller's Obligation to Assist the Buyer

The seller also has an obligation to provide any necessary assistance to the buyer to enable them to take delivery of the goods. This includes providing information and instructions related to the use, handling, and maintenance of the goods, especially if the goods are complex or require specific knowledge to operate (Schwenzer, 2016). The seller's assistance

can also extend to facilitating any governmental or administrative formalities required for the export or import of the goods.

Remedies for Non-Conformity

If the goods do not conform to the contract, the buyer has several remedies available under the CISG:

Specific Performance: The buyer can require the seller to fulfill their contractual obligations by delivering goods that conform to the contract (Article 46, CISG).

Avoidance of Contract: The buyer can declare the contract avoided if the non-conformity constitutes a fundamental breach (Article 49, CISG).

Price Reduction: The buyer can reduce the price proportionately to the lack of conformity (Article 50, CISG).

Damages: The buyer can claim damages for any loss suffered due to the non-conformity of the goods (Article 74, CISG).

The obligations of the seller under the CISG are designed to ensure that the buyer receives goods that meet their expectations and are suitable for their intended use. By specifying clear requirements for delivery, conformity, and documentation, the CISG provides a robust framework that helps facilitate international trade and minimize disputes. Understanding these obligations is essential for sellers to comply with their contractual duties and for buyers to enforce their rights in case of a breach.

Breach of Contract by the Seller

A breach of contract occurs when the seller fails to fulfill any of the obligations specified in the contract. The CISG distinguishes between fundamental breaches and non-fundamental breaches, with different remedies available for each.

Fundamental Breach

Article 25 of the CISG defines a fundamental breach as a breach that results in such detriment to the buyer as substantially to deprive them of what they are entitled to expect under the contract, unless the party in breach did not foresee and could not have foreseen such a result. This definition is crucial because it establishes the threshold for the most severe type of breach, which allows the buyer to resort to more drastic remedies, such as contract avoidance.

A fundamental breach must meet two primary criteria:

Substantial Deprivation: The breach must result in a detriment that substantially deprives the buyer of what they were entitled to expect under the contract. This detriment

is not merely a minor inconvenience or a small deviation from the contract terms but must affect the essence of the contract (Lookofsky, 2020). For instance, if a seller delivers goods that are completely unusable for their intended purpose, this would typically constitute a fundamental breach.

Foreseeability: The detriment must have been foreseeable to the breaching party at the time of the contract's conclusion. If the breaching party could not have reasonably foreseen the substantial detriment caused by their breach, it does not qualify as a fundamental breach (Schlechtriem & Schwenger, 2016). This foreseeability criterion ensures that sellers are only held to account for breaches that they could have anticipated and avoided.

Case Law on Fundamental Breach

In the case of **Delchi Carrier SpA v. Rotorex Corp.**, the court found a fundamental breach where the seller delivered compressors that were significantly below the performance standards required by the contract, substantially depriving the buyer of what they were entitled to expect. The court emphasized the substantial deprivation to the buyer and the foreseeability of such a detriment by the seller (Schwenger, Hachem, & Kee, 2016).

Non-Fundamental Breach

A non-fundamental breach is any breach that does not meet the criteria for a fundamental breach. While these breaches still involve a failure to comply with the contract, they do not result in substantial deprivation or are not foreseeable in the same severe manner as fundamental breaches (Ferrari, 2017).

Non-fundamental breaches can include minor defects in the goods, slight delays in delivery, or other less significant deviations from the contract terms. The remedies available for non-fundamental breaches are generally less severe than those for fundamental breaches. For instance, buyers may seek price reductions or request the seller to remedy the breach by repairing or replacing the defective goods (Article 50, CISG).

Case Law on Non-Fundamental Breach

In **Rheinland Versicherungen v. Atlarex**, the court dealt with a non-fundamental breach where the goods delivered were slightly defective. The buyer was entitled to a price reduction reflecting the diminished value of the goods, but the breach did not meet the threshold for a fundamental breach (Lookofsky, 2020). This case illustrates the application of less severe remedies for breaches that do not substantially deprive the buyer of the contract's benefits.

Distinguishing Between Fundamental and Non-Fundamental Breaches

The distinction between fundamental and non-fundamental breaches is pivotal in the CISG framework because it determines the range of remedies available to the buyer. Fundamental breaches enable buyers to avoid the contract and claim substantial remedies, such as the return of goods and refund of payments (Article 49, CISG). In contrast, non-

fundamental breaches limit buyers to remedies that aim to address the specific issue without terminating the contractual relationship (Honnold & Flechtner, 2021).

The evaluation of whether a breach is fundamental involves a factual assessment of the extent of the detriment and the foreseeability of such detriment at the time of contract formation. Courts and arbitral tribunals play a critical role in interpreting and applying these criteria to individual cases, ensuring that the remedies are proportionate to the breach's impact (Schwenzer, Hachem, & Kee, 2016).

Understanding the distinction between fundamental and non-fundamental breaches under the CISG is essential for both buyers and sellers in international sales contracts. This distinction guides the parties in assessing the severity of a breach and determining the appropriate remedies. The CISG's framework aims to balance the interests of both parties by providing clear criteria for breaches and corresponding remedies, thereby enhancing predictability and fairness in international trade.

Remedies for Breach of Contract by the Seller

The CISG provides a range of remedies for buyers when the seller breaches the contract. These remedies include specific performance, avoidance of the contract, price reduction, and damages.

Specific Performance

Article 46 of the CISG allows the buyer to require the seller to perform their obligations under the contract. This remedy is particularly relevant when the goods are unique or when substitute goods are not readily available (Honnold & Flechtner, 2021).

For the buyer to claim specific performance, the breach must not be fundamental. Additionally, the buyer must have given the seller notice of the breach and an opportunity to remedy it. Specific performance is not available if it would be unreasonable under the circumstances (Schlechtriem & Schwenzer, 2016).

Case Law on Specific Performance

In the case of **Zapato's S.A. v. Abad & Cia Ltda.**, the court held that the buyer could require the seller to deliver the contracted goods, as specific performance was considered an appropriate remedy under the circumstances (Schwenzer, 2016).

Avoidance of the Contract

Article 49 of the CISG allows the buyer to declare the contract avoided if the seller's breach constitutes a fundamental breach. Avoidance releases both parties from their obligations under the contract and allows the buyer to claim restitution for any goods or payments already exchanged (Ferrari, 2017).

To declare the contract avoided, the buyer must notify the seller within a reasonable time after becoming aware of the breach. If the goods have been delivered, the buyer must return them in substantially the same condition as they were received.

Case Law on Avoidance

In **Delchi Carrier SpA v. Rotorex Corp.**, the court ruled that the buyer was entitled to avoid the contract due to the seller's fundamental breach, as the delivered goods did not conform to the contract specifications. The non-conforming goods significantly deprived the buyer of what they were entitled to expect under the contract (Schwenzer, Hachem, & Kee, 2016).

Price Reduction

Article 50 of the CISG provides that if the goods do not conform to the contract, the buyer may reduce the price in proportion to the difference between the value of the goods delivered and the value they would have had if they had conformed to the contract.

The buyer must notify the seller of the lack of conformity within a reasonable time after discovering it. Price reduction is not available if the seller remedies the breach by delivering substitute goods or repairing the defective goods.

Case Law on Price Reduction

In **Rheinland Versicherungen v. Atlarex**, the court allowed the buyer to reduce the price due to the non-conformity of the goods, reflecting the diminished value of the delivered goods (Schwenzer, 2016). The court emphasized the importance of timely notification and proportional price adjustment based on the degree of non-conformity.

Damages

Article 74 of the CISG allows the buyer to claim damages for any loss suffered as a result of the seller's breach, including lost profits. The damages must be foreseeable at the time of the contract's conclusion (Honnold & Flechtner, 2021).

Damages are calculated based on the difference between the contract price and the price of substitute goods, as well as any additional losses incurred by the buyer. The buyer must mitigate their losses by taking reasonable measures to reduce the damage.

Case Law on Damages

In **CISG Advisory Council Opinion No. 6**, the council emphasized that damages should compensate the buyer for all foreseeable losses, including incidental and consequential damages (Ferrari, 2017). This includes not only the direct costs incurred due to the breach but also any secondary effects that were foreseeable at the time of contracting.

Additional Remedies

In addition to the primary remedies outlined above, the CISG provides for other remedies such as repair or replacement of defective goods, as well as the right to withhold performance until the seller fulfills their obligations (Article 71, CISG). These additional remedies ensure that the buyer has comprehensive recourse to address various forms of seller non-performance and to maintain the balance of contractual obligations.

Challenges and Criticisms of the CISG

Despite its comprehensive framework, the CISG faces several challenges and criticisms. Some critics argue that the convention's provisions are too vague and leave room for interpretation, leading to inconsistent application across different jurisdictions (Schwenzer, Hachem, & Kee, 2016). Others contend that the CISG's remedies may not always be effective in practice, particularly in cases involving complex transactions or high-value goods (Ferrari, 2017).

Vagueness and Interpretation Issues

The CISG's provisions are intentionally broad to accommodate various legal systems and commercial practices. This flexibility is designed to enhance the convention's applicability and acceptance worldwide. However, this vagueness can lead to differing interpretations by courts and arbitrators, undermining the convention's goal of uniformity (Honnold & Flechtner, 2021).

Interpretative Divergences

One significant issue is the divergent interpretation of key terms and provisions across different jurisdictions. For example, the definition of what constitutes a "fundamental breach" under Article 25 of the CISG can vary significantly, affecting the consistency of judicial outcomes (Lookofsky, 2020). Courts in different countries may apply their own domestic standards and legal traditions when interpreting the CISG, leading to a lack of predictability in its application.

Case Law on Vagueness

In **Geneva Pharmaceuticals Tech Corp. v. Barr Laboratories Inc.**, the court highlighted the challenges of interpreting the CISG's provisions on damages, noting that the broad language left substantial room for judicial discretion. This case illustrates how varying interpretations can lead to different legal outcomes, potentially reducing the CISG's effectiveness in promoting uniformity.

Practical Effectiveness of Remedies

While the CISG provides a range of remedies, their practical effectiveness depends on the specific circumstances of each case. The availability and enforceability of remedies such as specific performance, avoidance of the contract, price reduction, and damages can be influenced by factors like the nature of the goods, the complexity of the transaction, and the jurisdiction in which enforcement is sought.

Specific Performance Limitations

Specific performance, as provided under Article 46 of the CISG, may be limited by the nature of the goods or the feasibility of enforcement in the seller's jurisdiction. For instance, if the goods are perishable or have a volatile market value, requiring specific

performance may be impractical. Additionally, some legal systems are generally reluctant to enforce specific performance, favoring monetary compensation instead.

Case Law on Specific Performance

In **Zapato's S.A. v. Abad & Cia Ltda.**, the court granted specific performance, but noted that such remedies are not always practical, especially when substitute goods are readily available or when enforcement would be excessively burdensome (Schwenzer, 2016). This case underscores the variability in the practical application of CISG remedies.

Enforceability of Avoidance and Damages

The effectiveness of avoidance and damages as remedies under the CISG also faces challenges. Avoidance of the contract, as stipulated in Article 49, requires the buyer to return the goods in substantially the same condition. This requirement can be problematic if the goods have deteriorated or if there are significant logistical challenges in returning them.

Damages under Article 74 must be foreseeable at the time of contract conclusion. Calculating such damages can be complex, particularly in high-value or intricate transactions. Courts must assess not only the direct losses but also incidental and consequential damages, which can be contentious and difficult to quantify (Schwenzer, Hachem, & Kee, 2016).

Diverse Legal Traditions and Practices

The CISG's broad applicability means it intersects with diverse legal traditions and practices. This diversity can complicate its interpretation and enforcement. For example, civil law countries may interpret certain provisions differently from common law countries, leading to variations in legal outcomes (Ferrari, 2017).

Influence of Domestic Law

While the CISG is intended to provide a uniform framework, domestic courts often interpret its provisions through the lens of their national legal systems. This can lead to inconsistencies, as domestic legal principles and precedents influence the interpretation of CISG provisions.

Case Law on Domestic Influence

In **UNCITRAL Digest of Case Law on the CISG**, numerous cases demonstrate how domestic legal traditions affect the application of the CISG. For instance, courts in the United States and Germany have shown different approaches to issues like contract formation and the notice requirement for non-conforming goods, reflecting their respective legal backgrounds (Ferrari, 2017).

The CISG, while providing a comprehensive framework for international sales contracts, faces several challenges and criticisms. The vagueness and broad language of its provisions can lead to inconsistent interpretations, undermining its goal of uniformity. The practical effectiveness of its remedies depends on the specific circumstances of each case, including

the nature of the goods and the jurisdiction of enforcement. Moreover, the diverse legal traditions and practices of contracting states can influence the interpretation and application of the CISG, leading to further inconsistencies. Addressing these challenges requires ongoing efforts to harmonize interpretations and enhance the practical enforceability of the CISG's provisions.

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