

REMEDIES AVAILABLE TO THE SELLER AND SELLER'S RIGHT  
TO REQUIRE SPECIFIC PERFORMANCE (ARTICLES 61, 62 AND 28)

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The articles of the CISG that I will examine have almost never given rise to problems of interpretation. Since most of the cases dealing with these provisions have simply mentioned them as a basis for their reasoning, I will limit myself to very general observations.

ARTICLE 61

Article 61(1) states in general terms that, when the buyer fails to perform any of his obligations, the seller may:

- (a) have recourse to the remedies set out in articles 62 to 65 (request of specific performance, avoidance of the contract) and
- (b) claim damages as provided in articles 74 to 77.

While the statement under letter (a) is a simple reference to other articles of the CISG, Article 61(1)(b) is the actual legal basis for the seller's right to claim damages, since the articles regarding this issue (Articles 74-77) only deal with the determination of the amount of damages.

According to Article 61, the failure to perform any obligation under the contract of sale may justify a claim for damages, independent of the existence of a fault of the buyer.<sup>1</sup> This leaves space for a wide application of this remedy.

However, it should be mentioned that the buyer is not responsible for damages caused by his non-performance where his failure to perform is due to an impediment beyond his control (*force majeure*) falling under Article 79. So, for example, it has been decided in one case that no damages were due because the seller's failure to comply with the contract was exempted under

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1. CLOUT Case No. 281 [Oberlandesgericht Koblenz, Germany, 17 Sept. 1993], available at <http://cisgw3.law.pace.edu/cases/930917g1.html>.

Article 79.<sup>2</sup> In another case, where the purchaser terminated a long-term sales agreement because of a price decrease requested by his customer, the court decided that this termination did not amount to a situation falling under Article 79 and, consequently, awarded the seller damages arising from the buyer's unjustified contract avoidance.<sup>3</sup>

One of the most common situations justifying a claim for damages arises when the buyer does not take delivery of the goods (or declares his unwillingness to do so) and the seller consequently avoids the contract and sells the goods to another purchaser.<sup>4</sup> In this case, the seller will claim, the damage suffered,<sup>5</sup> which will normally be the difference between the price actually paid by the third party and the price that the buyer should have paid<sup>6</sup> plus other possible expenses,<sup>7</sup> instead of the price of the goods.

A similar situation arises where the buyer does not timely issue a documentary credit, where this type of payment was agreed between the parties.<sup>8</sup>

However, the claim for damages may also concur with the claim for payment of the price. For example, a German court has condemned the buyer not only to pay the price of the goods (under Article 62), but also to reimburse the seller for the costs sustained in respect of dishonoured checks provided by the buyer.<sup>9</sup>

While the seller's right to require interest on delayed payment need not be construed as a claim for damage, since such right is expressly recognized

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2. Amtsgericht Willisau, Switzerland, 12 Mar. 2004, *available at* <http://cisgw3.law.pace.edu/cases/040312s1.html> (CISG-online No. 961).

3. CLOUT Case No. 480 [Cour d'Appel Colmar, France, 12 June 2001], *available at* <http://cisgw3.law.pace.edu/cases/010612f1.html>.

4. CLOUT Case No. 47 [Landgericht Aachen, Germany, 14 May 1993], *available at* <http://cisgw3.law.pace.edu/cases/930514g1.html>.

5. There are many cases applying this principle. *See, e.g.*, Landgericht Göttingen, Germany, 20 Sept. 2002, *available at* <http://cisgw3.law.pace.edu/cases/020920g1.html>; Handelsgericht St. Gallen, Switzerland, 3 Dec. 2002, *available at* <http://cisgw3.law.pace.edu/cases/021203s1.html>.

6. *See, e.g.*, Kantonsgericht Zug, Switzerland, 12 Dec. 2002, *available at* <http://cisgw3.law.pace.edu/cases/021212sl.html>; Oberlandesgericht Graz, Austria, 24 Jan. 2002, *available at* <http://cisgw3.law.pace.edu/cases/020124a3.html> (CISG-Online No. 801).

7. Such as, for example, the chartering of a vessel for shipping the goods to the buyer. *See* Supreme Court of Queensland, Australia, 12 Oct. 2001, *available at* <http://cisgw3.law.pace.edu/cases/011012a2.html> (regarding a contract for scrap steel).

8. *Id.*; CLOUT Case No. 261 [Bezirksgericht der Saane, Switzerland, 20 Feb. 1997], *available at* <http://cisgw3.law.pace.edu/cases/970220sl.html>; Cour de Justice Genève, Switzerland, 13 Sept. 2002, *available at* <http://cisgw3.law.pace.edu/cases/020913sl.html>.

9. CLOUT Case No. 376 [Landgericht Bielefeld, Germany, 2 Aug. 1996], *available at* <http://cisgw3.law.pace.edu/cases/960802g1.html>.

in Article 78, there may be space for claiming as damage, in addition to interest, the cost for a credit.<sup>10</sup>

An interesting application of Article 61(1)(b) regards the seller's right to claim the reimbursement of attorneys' fees paid for recovering his credit. Several courts have decided that when the buyer delays payment, and thus forces the seller to have recourse to an attorney, he causes a damage for which the seller should be indemnified.<sup>11</sup>

As regards Article 61(3), according to which the courts or arbitral tribunals cannot grant a period of grace when the seller resorts to a remedy for breach of contract, this provision has rarely given rise to discussion. In a recent case, a Belgian Court has stated the principle that a court cannot grant such period of grace due to Article 61.<sup>12</sup>

#### ARTICLE 62 AND ARTICLE 28

Article 62 expressly recognizes the seller's right to require the buyer to pay the price, take delivery or perform other obligations, unless the seller has resorted to a remedy which is inconsistent with this requirement.

Thus, this provision gives the seller the right to require specific performance of the buyer's obligations, which solution, however, can be applied only within the limits of Article 28. This means that courts which would not enter into a judgement for specific performance under their national law, may refuse such request. This should not create problems in the most common case, i.e. where the seller, having delivered the goods, claims payment from the buyer.<sup>13</sup> So, it is normal that, in such a case, the court makes express reference to Article 62 affirming that, since the seller did not comply with his payment obligation, he must pay the price (or the remaining part of it in case of partial payment).<sup>14</sup>

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10. CLOUT Case No. 281 [Oberlandesgericht Koblenz, Germany, 17 Sept. 1993], *available at* <http://cisgw3.law.pace.edu/cases/930917g1.html>.

11. Landgericht Berlin, Germany, 21 Mar. 2003, *available at* <http://cisgw3.law.pace.edu/cases/030321g1.html>; CLOUT Case No. 166 [Schiedsgericht der Handelskammer Hamburg, Germany, 21 June 1996], *available at* <http://cisgw3.law.pace.edu/cases/960621g1.html>; Oberlandesgericht Düsseldorf, Germany, 22 July 2004 (CISG-Online No. 916).

12. Rechtbank van Koophandel Hasselt, Belgium, 18 Feb. 2004, *available at* <http://www.law.kuleuven.ac.be/ipr/eng/cases/2004-02-18.html> (Dutch).

13. Even in countries which tend to limit the possibility of the courts to grant specific performance (mainly the common law countries), the seller will normally have the right to recover the price of goods delivered. See, for example, § 2-709 of the U.S. Uniform Commercial Code.

14. I will mention only some of the most recent cases. Landgericht Bielefeld, Germany, 15 Aug. 2003, *available at* <http://cisgw3.law.pace.edu/cases/030815g1.html> (CISG-onlineNo. 906); Cour de Justice

In some cases, the seller may claim payment of the price even where the goods have not been delivered. So, in a case where the buyer clearly refused to take delivery of the goods, the seller has insisted in obtaining payment for the goods that were ready for shipment at its premises, and the court has accepted such a claim.<sup>15</sup>

As regards the right of the seller to require the buyer to take delivery of the goods, it is very unlikely that the seller will resort to this remedy. In fact, unless the seller has already received payment, he will prefer to avoid the contract (and retain the goods) and make a claim for damages, instead of requesting payment of the price. And, where payment is warranted through a documentary credit, the seller will be able to ship the goods (and to obtain payment from the bank) without needing to force the buyer to take delivery.

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de Genève, Switzerland, 19 Sept. 2003 (CISG-online No. 854); Landgericht München, Germany, 27 Feb. 2002, available at <http://cisgw3.law.pace.edu/cases/020227g1.html>.

15. Landgericht Hamburg, Germany, 10 Sept. 1993 (CISG Online No. 874).