

tion as the value that the goods actually delivered would have had at the time of the conclusion of the contract bears to the value that conforming goods would have had at that time. However, if the seller remedies any failure to perform his obligations in accordance with article 44 or if he is not allowed by the buyer to remedy that failure in accordance with that article, the buyer's declaration of reduction of the price is of no effect.

PRIOR UNIFORM LAW

ULIS, article 46.

Commentary

1. Article 46 states the conditions under which the buyer can declare the price to be reduced if the goods do not conform with the contract.

2. Under article 33 (1) goods do not conform with the contract, and are therefore subject to reduction of the price, unless they are of the quantity, quality and description required by the contract, are contained or packaged in the manner required by the contract, and meet the four specific requirements set out in article 33 (1) (a) to (d). Goods may conform with the contract even though they are subject to the right or claim of a third party under article 39 or 40.

3. The remedy of reduction of the price is a remedy which is not known in some legal systems. In those legal systems it would be natural to see this remedy as a form of damages for non-performance of the contract. However, although the two remedies lead to the same result in some situations, they are two distinct remedies to be used at the buyer's choice.

4. The remedy of reduction of the price also leads to results which are similar to those which would result from a partial avoidance of the contract under article 47.

5. First, article 46 itself makes it clear that the price can be reduced by the buyer even though he has already paid the price.¹ Article 46 does not depend on the buyer's ability to withhold future sums due. Second, even if the seller is excused from paying damages for his failure to perform the contract by virtue of article 65, the buyer may still reduce the price if the goods do not conform with the contract. Third, the right to reduce the price is not affected by the limitation to which a claim for damages is subjected under article 70 i.e. that the amount of damages may not exceed the loss which the party in breach foresaw or ought to have foreseen at the time of the conclusion of the contract as a possible consequence of the breach of the contract. Fourth, similar to that which prevails in respect of avoidance, the amount of monetary relief which is granted the buyer is measured in terms of the contract price which need not be paid (or which can be recovered from the seller if already paid), and not in terms of monetary loss which has been caused to the buyer. This can have an important effect on the calculation of monetary relief where there has been a change in price for the goods between the time at which the contract was concluded and the time the goods were delivered.

6. The comparison between the remedy of reduction of the price and avoidance of the contract is obvious if the lack of conformity of the goods consists of the delivery of less than the agreed upon quantity. This aspect of the rule can be illustrated by the following examples:

Example 46 A: Seller contracted to deliver 10 tons of No. 1 corn at the market price of \$ 200 a ton for a total of \$ 2,000. Seller delivered only 2 tons. Since such an extensive short delivery constituted a fundamental breach, Buyer avoided the contract, took none of the corn and was not obligated to pay the purchase price.

Example 46 B: Under the same contract as in example 46 A, Seller delivered 9 tons. Buyer accepted the 9 tons and reduced the price by 10 per cent, paying \$ 1,800.

¹ In this respect article 46 follows the same policy as does article 66 (2). It is also true, of course, that a claim for damages does not depend on the buyer's ability to withhold future sums due.

Article 46

[Reduction of the price]

If the goods do not conform with the contract and whether or not the price has already been paid, the buyer may declare the price to be reduced in the same propor-

² See article 36.

³ See para. 16 to the commentary on article 44.

⁴ Article 66 (1).

7. The calculation is the same if the non-conformity of the goods delivered relates to their quality rather than to their quantity. This can be illustrated by the following example:

Example 46C: Under the same contract as in example 46A, Seller delivered 10 tons of No. 3 corn instead of 10 tons of No. 1 corn as required. At the time of contracting the market price for No. 3 corn was \$ 150 a ton. If the delivery of No. 3 corn in place of No. 1 corn constituted a fundamental breach of the contract, Buyer could avoid the contract and not pay the contract price. If the delivery of No. 3 corn did not constitute a fundamental breach or if Buyer did not choose to avoid the contract, Buyer could declare the reduction of the price from \$ 2,000 to \$ 1,500.

8. Although the principle is simple to apply in a case where, as in example 46C, the non-conformity as to quality is such that the goods delivered have a definite market price which is different from that for the goods which should have been delivered under the contract, it is more difficult to apply to other types of non-conformity as to quality. For instance:

Example 46D: Seller contracted to furnish decorative wall panels of a certain design for use by Buyer in an office building being constructed by Buyer. The wall panels delivered by Seller were of a less attractive design than those ordered. Buyer has the right to "declare the price . . . reduced in the same proportion as the value that the goods actually delivered would have had at the time of conclusion of the contract bears to the value that conforming goods would have had at that time".

9. In example 46D there may be no easy means of determining the extent to which the value of the goods was diminished because of the non-conformity, but that does not affect the principle. It should be noted that it is the buyer who makes the determination of the amount by which the price is reduced. However, if the seller disputes the calculation, the matter can finally be settled only by a court or an arbitral tribunal.

10. It should also be noted that the calculation is based on the extent to which the value of the goods "at the time of the conclusion of the contract" has been diminished. The calculation of the reduction of the price does not take into consideration events which occurred after this time as does the calculation of damages under articles 70 to 72. In the case envisaged in example 46D this would normally cause no difficulties because the extent of lost value would probably have been the same at the time of the conclusion of the contract and at the time of the non-conforming delivery. However, if there has been a price change in the goods between the time of the conclusion of the contract and the time of the non-conforming delivery, different results are achieved if the buyer declares the price reduced under this article rather than if the buyer claims damages. These differences are illustrated by the following examples:

Example 46E: The facts are the same as in example 46C. Seller contracted to deliver 10 tons of No. 1 corn at the market price of \$ 200 a ton for a total of \$ 2,000. Seller delivered 10 tons of No. 3 corn. At the time of contracting the market price for No. 3 corn was \$ 150 a ton. Therefore, if Buyer declared a reduction of the price, the price would be \$ 1,500. Buyer would in effect have received monetary relief of \$ 500.

However, if the market price had fallen in half by the time of delivery of the non-conforming goods so that No. 1 corn sold for \$ 100 a ton and No. 3 corn sold for \$ 75 a ton, Buyer's damages under article 70 would have been only \$ 25 a ton or \$ 250. In this case it would be more advantageous to Buyer to reduce the price under article 46 than to claim damages under article 70.

Example 46F: If the reverse were to happen so that at the time of delivery of the non-conforming goods the market price of No. 1 corn had doubled to \$ 400 a ton and that of No. 3 corn to \$ 300 a ton, Buyer's damages under article 70 would be \$ 100 a ton or \$ 1,000. In this case it would be more advantageous to Buyer to claim damages under article 70 than to reduce the price under article 46.

11. The results in examples 46E and 46F are caused by the fact that the remedy of reducing the price has a similar effect to a partial avoidance of the contract. The same result occurs in even greater degree if the buyer totally avoids the contract as is illustrated in the following example:

Example 46G: In example 46E it was shown that if the market price for No. 1 corn had dropped in half from \$ 200 a ton to \$ 100 a ton and the price of No. 3 corn had dropped from \$ 150 a ton to \$ 75 a ton, Buyer could retain the No. 3 corn and either receive \$ 250 in damages or reduce the price by \$ 500. If the delivery of No. 3 corn in place of No. 1 corn amounted to a fundamental breach of contract and Buyer avoided the contract pursuant to article 45 (1) (a), he could purchase in replacement 10 tons of No. 3 corn for \$ 750, i.e., for \$ 1,250 less than the contract price. However, if he declared the contract avoided, he would be more likely to purchase 10 tons of No. 1 corn for \$ 1,000, i.e., for an amount of \$ 1,000 less than the contract price.

12. Except for example 46D, all of the examples above have assumed a fungible commodity for which substitute goods were freely available thereby making it feasible for the buyer to avoid the contract, providing a ready market price as a means of measuring damages, and precluding any additional damages by way of lost profits or otherwise. If there is not such a ready market for the goods, the problems of evaluation are more difficult and the possibility of additional damages is greater. These factors do not change the means by which article 46 works but they may change the relative advantage to the buyer of one remedy rather than another.

13. Article 41 (2) makes it clear that the buyer can claim damages in addition to declaring the reduction of the price in those cases where reducing the price does not give as much monetary relief as would an action for damages. A buyer might wish to combine the two remedies in a case like example 46F if there was some possibility that damages could not be recovered, either because there was a question as to whether the seller was exempted from damages (but not from reduction of the price) under article 65 or because there was a question as to whether the damages had been foreseeable under article 70. A declaration of reduction of the price would give the buyer some immediate relief while the rest of his claim for damages was subject to negotiation or litigation. More likely, however, would be the case in which the buyer had suffered additional expenses incurred as a result of the breach.²

Limitation on right to reduce price

14. The buyer's right to declare a reduction in the price is expressly subject to the seller's right to remedy any failure to perform his obligations pursuant to article 44.³ If the seller subsequently remedies his failure to perform or is not allowed by the buyer to remedy that failure, the "declaration of reduction of the price is of no effect".

² See example 70D.

³ See paras. 2 to 12 of the commentary to article 44 for a discussion of this rule.