

Declaration of avoidance

2. The contract is avoided as a result of the seller's breach only if "the buyer . . . declare[s] the contract avoided". This narrows the rule from that found in articles 26 and 30 of ULIS which provided for an automatic or *ipso facto* avoidance in certain circumstances in addition to avoidance by declaration of the buyer. Automatic or *ipso facto* avoidance was deleted from the remedial system in this Convention because it led to uncertainty as to whether the contract was still in force or whether it had been *ipso facto* avoided. Under article 45 of this Convention the contract is still in force unless the buyer has affirmatively declared it avoided. Of course, uncertainty may still exist as to whether the conditions had been met authorizing the buyer to declare the contract avoided.

3. Article 24 provides that "a declaration of avoidance of the contract is effective only if made by notice to the other party". The consequences which follow if a notice of avoidance fails to arrive or fails to arrive in time or if its contents have been inaccurately transmitted are governed by article 25.

Fundamental breach, subparagraph (1) (a)

4. The typical situation in which the buyer may declare the contract avoided is where the failure by the seller to perform any of his obligations amounts to a fundamental breach. The concept of fundamental breach is defined in article 23.

5. If there has been a fundamental breach of contract, the buyer has an immediate right to declare the contract avoided. He need not give the seller any prior notice of his intention to declare the contract avoided or any opportunity to remedy the breach under article 44.

6. However, in some cases the fact that the seller is able and willing to remedy the non-conformity of the goods without inconvenience to the buyer may mean that there would be no fundamental breach unless the seller failed to remedy the non-conformity within an appropriate period of time.

7. The rule that the buyer can normally avoid the contract only if there has been a fundamental breach of contract is not in accord with the typical practice under CIF and other documentary sales. Since there is a general rule that the documents presented by the seller in a documentary transaction must be in strict compliance with the contract, buyers have often been able to refuse the documents if there has been some discrepancy in them even if that discrepancy was of little practical significance.

Seller's delay in performance, subparagraph (1) (b)

8. Subparagraph (1) (b) further authorizes the buyer to declare the contract avoided in one restricted case. If the seller has not delivered the goods and the buyer has fixed an additional period of time of reasonable length for the seller to perform pursuant to article 43, the buyer can avoid the contract if the seller "has not delivered the goods within the additional period of time fixed by the buyer in accordance with paragraph (1) of article 43 or has declared that he will not deliver within the period so fixed".¹

Loss or suspension of right to avoid, paragraph (2)

9. Article 45 (2) provides that where the seller has made delivery, the buyer will lose his right to declare the contract avoided if he does not make the declaration within a specified period of time. The buyer does not lose his right to declare the contract avoided under this provision until all the goods have been delivered.

10. If the fundamental breach on which the buyer relies to declare the contract avoided is the late delivery of the goods, article 45 (2) (a) provides that once the seller has made delivery, the buyer loses his right to declare the contract avoided if he has not done so within a reasonable time after he becomes aware that delivery has been made.

11. If the seller has made delivery but there is a fundamental breach of the contract in respect of some obligation other than late delivery,

¹ However, see article 47 (2) and the commentary thereon.

*Article 45***[Buyer's right to avoid contract]**

(1) The buyer may declare the contract avoided:

(a) if the failure by the seller to perform any of his obligations under the contract and this Convention amounts to a fundamental breach of contract; or

(b) if the seller has not delivered the goods within the additional period of time fixed by the buyer in accordance with paragraph (1) of article 43 or has declared that he will not deliver within the period so fixed.

(2) However, in cases where the seller has made delivery, the buyer loses his right to declare the contract avoided unless he has done so within a reasonable time:

(a) in respect of late delivery, after he has become aware that delivery has been made; or

(b) in respect of any breach other than late delivery, after he knew or ought to have known of such breach, or after the expiration of any additional period of time fixed by the buyer in accordance with paragraph (1) of article 43, or after the seller has declared that he will not perform his obligations within such an additional period.

PRIOR UNIFORM LAW

ULIS, articles 26, 30, 32, 43, 44 (2), 51, 52 (3), 52 (4) and 55 (1).

Commentary

1. Article 45 describes the buyer's right to declare the contract avoided. The seller's right to declare the contract avoided is described in article 60.

such as the non-conformity of the goods to the contract, article 45 (2) (b) provides that the buyer loses his right to declare the contract avoided if he has not done so within a reasonable time after he knew or ought to have known of the breach.²

12. Article 45 (2) (b) may also take away the right of the buyer to declare the contract avoided in cases where he has fixed an additional period for performance under article 43 (1). If the seller performs after the additional period fixed pursuant to article 43 or if he performs after he has declared that he would not perform within that additional period of time, the buyer loses the right to declare the contract avoided if he does not do so within a reasonable time after the expiration of that additional period or within a reasonable time after the seller has declared that he would not perform within that additional period of time.

13. Since the buyer does not lose his right to declare the contract avoided under article 45 (2) until all the goods have been delivered, under this provision all the instalments in an instalment contract must be delivered before the buyer loses the right to declare the contract avoided. However, under article 64 (2) the buyer's right to declare the contract avoided in respect of future instalments must be exercised "within a reasonable time" after that failure to perform by the seller which justifies the declaration of avoidance.

14. In addition to article 45 (2), several other articles provide for the loss or suspension of the right to declare the contract avoided.

15. Article 67 (1) provides that "the buyer loses his right to declare the contract avoided . . . if it is impossible for him to make restitution of the goods substantially in the condition in which he received them" unless the impossibility is excused for one of the three reasons listed in article 67 (2).

16. Article 37 provides that a buyer loses his right to rely on a lack of conformity of the goods, including the right to avoid the contract, if he does not give the seller notice thereof within a reasonable time after he has discovered the lack of conformity or ought to have discovered it and at the latest within a period of two years from the date on which the goods were actually handed over to the buyer.

17. If the seller wishes to cure any defect after the delivery date, the buyer's right to avoid the contract may be suspended for the period of time indicated by the seller as necessary to effect the cure.³

Right to avoid prior to the date of delivery

18. For the buyer's right to avoid the contract prior to the contract date of delivery, see articles 63 and 64 and the commentaries thereon.

Effects of avoidance

19. The effects of avoidance are described in articles 66 to 69. The most significant consequence of avoidance for the buyer is that he is no longer obligated to take delivery and pay for the goods. However, avoidance of the contract does not terminate either the seller's obligation to pay any damages caused by his failure to perform or any provisions in the contract for the settlement of disputes.⁴ Such a provision was important because in many legal systems avoidance of the contract eliminates all rights and obligations which arose out of the existence 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 and clauses specifying "penalties" or "liquidated damages" for breach, terminate with the rest of the contract.

² See article 36.

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

⁴ Article 66 (1).