

SECTION II. EXEMPTIONS

Article 65

[Exemptions]

(1) A party is not liable for a failure to perform any of his obligations if he proves that the failure was due to an impediment beyond his control and that he could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome it or its consequences.

(2) If the party's failure is due to the failure by a third person whom he has engaged to perform the whole or a part of the contract, that party is exempt from liability only if he is exempt under paragraph (1) of this article and if the person whom he has engaged would be so exempt if the provisions of that paragraph were applied to him.

(3) The exemption provided by this article has effect only for the period during which the impediment exists.

(4) The party who fails to perform must give notice to the other party of the impediment and its effect on his ability to perform. If the notice is not received within a reasonable time after the party who fails to perform knew or ought to have known of the impediment, he is liable for damages resulting from such non-receipt.

(5) Nothing in this article prevents either party from exercising any right other than to claim damages under this Convention.

PRIOR UNIFORM LAW

ULIS, article 74.

Commentary

1. Article 65 governs the extent to which a party is exempted from liability for a failure to perform any of his obligations because of an impediment beyond his control.

General rule, paragraphs (1) and (5)

2. Paragraph (1) sets out the conditions under which a party is not liable for a failure to perform any of his obligations. Paragraph (5) provides that exemption from liability under this article prevents the other party from exercising only his right to claim damages, but does not prevent him from exercising any other right he may have.¹

3. Under articles 41 (1) (b) and 57 (1) (b) a party has a right to claim damages for any non-performance of the other party without the necessity of providing fault or a lack of good faith or the breach of an express promise on his part, as is required by some legal systems. However, under article 65 the non-performing party is exempt from liability if he proves (1) that the failure to perform was due to an impediment beyond his control, (2) that he could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract, (3) that he could not reasonably have been expected to have avoided the impediment or its consequences and (4) that he could not reasonably have been expected to have overcome the impediment or its consequences.

4. The impediment may have existed at the time of the conclusion of the contract. For example, goods which were unique and which were the subject of the contract may have already perished at the time of the

conclusion of the contract. However, the seller would not be exempted from liability under this article if he reasonably could have been expected to take the destruction of the goods into account at the time of the conclusion of the contract. Therefore, in order to be exempt from liability, the seller must not have known of their prior destruction and must have been reasonable in not expecting their destruction.

5. It is this later element which is the most difficult for the non-performing party to prove. All potential impediments to the performance of a contract are foreseeable to one degree or another. Such impediments as wars, storms, fires, government embargoes and the closing of international waterways have all occurred in the past and can be expected to occur again in the future. Frequently, the parties to the contract have envisaged the possibility of the impediment which did occur. Sometimes they have explicitly stated whether the occurrence of the impeding event would exonerate the non-performing party from the consequences of the non-performance. In other cases it is clear from the context of the contract that one party has obligated himself to perform an act even though certain impediments might arise. In either of these two classes of cases, article 5 of this Convention assures the enforceability of such explicit or implicit contractual stipulations.

6. However, where neither the explicit nor the implicit terms of the contract show that the occurrence of the particular impediment was envisaged, it is necessary to determine whether the non-performing party could reasonably have been expected to take it into account at the time of the conclusion of the contract. In the final analysis this determination can only be made by a court or arbitral tribunal on a case-by-case basis.

7. Even if the non-performing party can prove that he could not reasonably have been expected to take the impediment into account at the time of the conclusion of the contract, he must also prove that he could neither have avoided the impediment nor overcome it nor avoided or overcome the consequences of the impediment. This rule reflects the policy that a party who is under an obligation to act must do all in his power to carry out his obligation and may not await events which might later justify his non-performance. This rule also indicates that a party may be required to perform by providing what is in all the circumstances of the transaction a commercially reasonable substitute for the performance which was required under the contract.

8. The effect of article 65 (1) in conjunction with article 65 (5) is to exempt the non-performing party only from liability for damages. All of the other remedies are available to the other party, i.e. demand for performance, reduction of the price or avoidance of the contract. However, if the party who is required to overcome an impediment does so by furnishing a substitute performance, the other party could avoid the contract and thereby reject the substitute performance only if that substitute performance was so deficient in comparison with the performance stipulated in the contract that it constituted a fundamental breach of contract.

9. Even if the impediment is of such a nature as to render impossible any further performance, the other party retains the right to require that performance under article 42 or 58. It is a matter of domestic law not governed by this Convention as to whether the failure to perform exempts the non-performing party from paying a sum stipulated in the contract for liquidated damages or as a penalty for non-performance or as to whether a court will order a party to perform in these circumstances and subject him to the sanctions provided in its procedural law for continued non-performance.²

Example 65A: The contract called for the delivery of unique goods. Prior to the time when the risk of loss would have passed pursuant to articles 79 or 80 the goods were destroyed by a fire which was caused by events beyond the control of Seller. In such a case Buyer would not have to pay for the goods for which the risk had not passed but Seller would be exempted from liability for any damage resulting from his failure to deliver the goods.

² Cf. article 26 which provides that if, in accordance with the provisions of this Convention, one party is entitled to require performance of any obligation by the other party, a court is not bound to enter a judgement for specific performance unless the court could do so under its own law in respect of similar contracts of sale not governed by this Convention.

¹ See para. 8 below.

Example 65B: The contract called for the delivery of 500 machine tools. Prior to the passage of the risk of loss, the tools were destroyed in similar circumstances to Example 65 A. In such a case Seller would not only have to bear the loss of the 500 tools but he would also be obligated to ship to Buyer an additional 500 tools. The difference between this example and example 65 A is that in example 65 A Seller cannot provide that which was contracted for whereas under example 65 B Seller can overcome the effect of the destruction of the tools by shipping replacement goods.

Example 65C: If the machine tools shipped in replacement of those destroyed in example 65 B could not arrive in time, Seller would be exempted from damages for late delivery.

Example 65D: The contract called for the goods to be packed in plastic containers. At the time the packing should have been accomplished, plastic containers were not available for reasons which Seller could not have avoided. However, if other commercially reasonable packing materials were available, Seller must overcome the impediment by using those materials rather than refuse to deliver the goods. If Seller used commercially reasonable substitute packing materials, he would not be liable for damages. In addition, Buyer could not avoid the contract because there would have been no fundamental breach of the contract but Buyer could reduce the price under article 46 if the value of the goods had been diminished because of the non-performing packing materials.

Example 65E: The contract called for shipment on a particular vessel. The schedule for the vessel was revised because of events beyond the control of both Buyer and Seller and it did not call at the port indicated within the shipment period. In this circumstance the party responsible for arranging the carriage of the goods must attempt to overcome the impediment by providing an alternative vessel.

10. Although it is probably true that the insolvency of the buyer by itself is not an impediment which exempts the buyer from liability for non-payment of the price, the unanticipated imposition of exchange controls, or other regulations of a similar nature, may make it impossible for him to fulfil his obligation to pay the price at the time and in the manner agreed. The buyer would, of course, be exempted from liability for damages for the non-payment (which as a practical matter would normally mean interest on the unpaid sum) only if he could not overcome the impediment by, for example, arranging for a commercially reasonable substitute form of payment.³

Non-performance by a third person, paragraph (2)

11. It often happens that the non-performance of a party is due to the non-performance of a third person. Paragraph (2) provides that where this is the case, "that party is exempt from liability only if he is exempt under paragraph (1) of this article and if the person whom he has engaged would be so exempt if the provisions of that paragraph were applied to him".

12. The third person must be someone who has been engaged to perform the whole or a part of the contract. It does not include suppliers of the goods or of raw materials to the seller.

Temporary impediment, paragraph (3)

13. Paragraph (3) provides that an impediment which prevents a party from performing for only a temporary period of time exempts the non-performing party from liability for damages only for the period during which the impediment existed. Therefore, the date at which the exemption from damages terminates is the contract date for performance or the date on which the impediment was removed, whichever is later in time.

Example 65F: The goods were to be delivered on 1 February. On 1 January an impediment arose which precluded Seller from delivering the goods. The impediment was removed on 1 March. Seller delivered on 15 March.

Seller is exempted from any damages which may have occurred because of the delay in delivery up to 1 March, the date on which the im-

³ As to the unpaid seller's right to stop delivery of the goods, see articles 54 (1) and 62 (2).

pediment was removed. However, since the impediment was removed after the contract date for delivery, the Seller is liable for any damages which occurred as a result of the delay in delivery between 1 March and 15 March.

14. Of course, if the delay in performance because of the temporary impediment amounted to a fundamental breach of the contract, the other party would have the right to declare the avoidance of the contract. However, if the contract was not avoided by the other party, the contract continues in existence⁴ and the removal of the impediment reinstates the obligations of both parties under the contract.

Example 65G: Because of a fire which destroyed Seller's plant, Seller was unable to deliver the goods under the contract at the time performance was due. He was exempted from damages under paragraph (1) until the plant was rebuilt. Seller's plant was rebuilt in two years. Although a two-year delay in delivery constituted a fundamental breach which would have justified Buyer in declaring the avoidance of the contract, he did not do so. When Seller's plant was rebuilt, Seller was obligated to deliver the goods to Buyer and, unless he decided to declare the contract avoided because of fundamental breach, Buyer was obligated to take delivery and to pay the contract price.^{5 6}

Duty to notify, paragraph (4)

15. The non-performing party who is exempted from damages by reason of the existence of an impediment to the performance of his obligation must notify the other party of the impediment and its effect on his ability to perform. If the notice is not received by the other party within a reasonable time after the party who fails to perform knew or ought to have known of the impediment, the non-performing party is liable for damages resulting from the failure of the notice to be received by the other party.⁷ It should be noted that the damages for which the non-performing party is liable are only those arising out of the failure of the other party to have received the notice and not those arising out of the non-performance.

16. The duty to notify extends not only to the situation in which a party cannot perform at all because of the unforeseen impediment, but also to the situation in which he intends to perform by furnishing a commercially reasonable substitute. Therefore, the seller in example 65 D and the party responsible for arranging the carriage of the goods in example 65 E must notify the other party of the intended substitute performance. If he does not do so, he will be liable for any damages resulting from the failure to give notice. If he does give notice but the notice fails to arrive he will be also liable for damages resulting from the failure of the notice to have been received by the other party.

⁴ See para. 2 of the commentary on article 45 and para. 2 of the commentary on article 60.

⁵ Neither article 65 nor any other provision of this Convention would release the seller from the obligation to deliver the goods on the grounds that there had been such a major change in the circumstances that the contract was no longer that originally agreed upon. The parties could, of course, include such a provision in their contract.

⁶ The Seller would have no right to insist that the buyer take the goods if the delay constituted a fundamental breach of contract or if the delay caused the buyer unreasonable inconvenience or uncertainty of reimbursement by the seller of expenses advanced by the buyer even if the buyer had not declared the avoidance of the contract (article 44 (1)).

⁷ The requirement that the notice be received by the other party places the risk of transmission on the sender of the notice and thus reserves the general rule contained in article 25.