

Article 28

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 would do so under its own law in respect of similar contracts of sale not governed by this Convention.

OVERVIEW: MEANING AND PURPOSE OF THE PROVISION

1. The article constitutes a compromise between legal systems that deal differently with the right of a party to claim specific performance of the contract. According to article 28, a court is not obliged to grant specific performance under the Convention if it would not do so for similar sales contracts under its domestic law.
2. “Specific performance” means requiring the other party to perform its obligations under the contract through court action (see also articles 46 and 62). For example, the buyer may obtain a court order requiring the seller to deliver the quantity and quality of steel contracted for,¹ or the seller may obtain an order requiring the buyer to pay.²
3. There is little case law on this provision; only a few cases, and even fewer with relevant discussion of article 28, have been reported thus far.³ In one case, a court stated that

where the Convention entitles a party to claim specific performance, article 28 allows the seized court to look to the availability of such relief under its own substantive law in a like case.⁴ If the national law would also grant specific performance in the case, there is no conflict with the Convention and no problem arises.⁵ If the national law would, however, disallow specific performance, alternative relief—in most cases, damages—could be granted instead.⁶ Article 28, however, merely provides that the court “is not bound” to adopt the solution of its national law regarding specific performance in the context of an international sale of goods governed by the Convention.

4. It has been held that a damages claim and a claim for specific performance are not necessarily inconsistent remedies; the creditor may therefore resort to both.⁷ And an arbitration tribunal found that the party to whom a duty is owed must raise a claim for specific performance within a reasonable time after it became aware of the non-performance of the duty.⁸

Notes

¹ CLOUT case No. 417 [U.S. District Court, Northern District of Illinois, United States, 7 December 1999].

² Obergericht des Kantons Bern, Switzerland, 1 December 2004, CISG-online No. 1192.

³ Zürich Arbitration, Switzerland, 31 May 1996 (specific performance denied because relevant national law (Russian or Swiss) did not provide for such remedy); CLOUT case No. 417 [U.S. District Court, Northern District of Illinois, United States, 7 December 1999]; Obergericht des Kantons Bern, Switzerland, 1 December 2004, CISG-online No. 1192; Arbitration Court of the International Chamber of Commerce, France, 2004 (Arbitral award No. 12173), *Yearbook of Commercial Arbitration* 2009, 111 (stating that a claim for liquidated damages does not exclude a claim for specific performance); International Arbitration Court of the Chamber of Commerce and Industry of the Russian Federation, Russian Federation, 30 January 2007 (Arbitral award No. 147/2005), Unilex (stating that a claim for specific performance must be made within reasonable time after the party became aware of non-performance; merely mentioning article 28 without further consideration): CLOUT case No. 636 [Cámara Nacional de Apelaciones en lo Comercial de Buenos Aires, Argentina, 21 July 2002].

⁴ CLOUT case No. 417 [U.S. District Court, Northern District of Illinois, United States, 7 December 1999] (“Simply put, [CISG article 28] looks to the availability of such relief under the UCC”). To the same effect with respect to Swiss internal law, Obergericht des Kantons Bern, Switzerland, 1 December 2004, CISG-online No. 1192.

⁵ That was the outcome in CLOUT case No. 417 [U.S. District Court, Northern District of Illinois, United States, 7 December 1999].

⁶ Zürich Arbitration, Switzerland, 31 May 1996 (damages granted instead of specific performance; it was held that ordering specific performance of an obligation to produce and deliver aluminum for a further eight or ten years would be inappropriate).

⁷ Arbitration Court of the International Chamber of Commerce, France, 2004 (Arbitral award No. 12173), *Yearbook of Commercial Arbitration* 2009, 111.

⁸ International Arbitration Court of the Chamber of Commerce and Industry of the Russian Federation, Russian Federation, 30 January 2007 (Arbitral award No. 147/2005, Unilex).