Article 26

A declaration of avoidance of the contract is effective only if made by notice to the other party.

OVERVIEW

1. Article 26 provides that avoidance of contract must be declared by the party who intends to terminate the contract, and that the declaration must be effected by notice to the other party. The Convention does not provide for an automatic (*ipso facto*) avoidance of contract.[1] It has nevertheless been held that notice of avoidance is unnecessary where a seller has "unambiguously and definitely" declared that it will not perform its obligations, since notice in such a situation would be a "mere formality," the date of avoidance can be determined from the obligor's declaration of the intention not to perform, and requiring notice of avoidance would be contrary to the mandate in article 7(1) to interpret the Convention in a fashion that promotes the observance of goods faith in international trade.[2]

2. The purpose of the notice requirement is to ensure that the other party becomes aware of the status of the contract. It has been held, however, that article 26 does not mean that the required notice must be made by instituting legal proceedings.[3]

FORM OF NOTICE

3. The notice need not be given in a particular form (see also article 11). It therefore can be made in writing or even orally.[4] Also, a notice in a statement of claim filed with a court suffices.[5] The same is true for a notification by facsimile.[6]

4. Article 26 does not mention the possibility of implicit notice, but several courts have dealt with this issue. One court found that the buyer's mere purchase of substitute goods did not constitute a valid (implicit) notice of declaration of avoidance;[7] another court decided that the buyer did not give valid notice of avoidance by sending back the delivered goods without further explanation.[8]

CONTENTS OF NOTICE

5. The notice must express with sufficient clarity that the party will not be bound by the contract any longer and considers the contract terminated.[9] Therefore, an announcement that the contract will be avoided in the future if the other party does not react,[10] or a letter demanding either price reduction or taking the delivered goods back,[11] or the mere sending back of the goods[12] does not constitute a valid notice because the announcement, the alternative formulation, or the return of the goods does not state in unequivocal terms that the contract is now at an end. The same is true if a party merely requests damages,[13] or if it declares avoidance with respect to a different contract.[14] It appears, however, that the phrase "declaration of avoidance" or even the term "avoidance" need not be used, nor need the relevant provision of the Convention be cited, provided that a party communicates the idea that the contract is presently terminated because of the other side's breach. Thus, one court found that the buyer effectively gave notice by declaring that it could not use the defective goods and that it placed them at the disposal of the seller.[15] The same was ruled with respect to a letter in which the buyer stated that no further business with the seller would be conducted.[16] A buyer's written refusal to perform combined with a demand for repayment has also been deemed sufficient notice of avoidance.[17] Even formulations such as "de maat is vol" ("the glass is full") in connection with the request for repayment of the purchase price were considered sufficient.[18] Notice of non-conformity of the goods and notice of avoidance can be combined and expressed in one declaration.[19]

ADDRESSEE OF THE NOTICE

6. The notice must be directed to the other party, which is normally the other party to the original contract, or its authorized agent. If the contractual rights have been assigned to a third party the declaration must be addressed to this new party.[20]

TIME FOR COMMUNICATION OF NOTICE

7. In certain circumstances, articles 49 (2) and 64 (2) require that notice of avoidance be communicated within a reasonable time. It has been held that notice after several months is clearly not reasonable under article 49 (2).[21] However, where there were negotiations between the parties on the non-conformity, it was held that a declaration of avoidance was still timely if given at the end of unsuccessful negotiations.[22] To meet any applicable time limit, dispatch of the notice within the period is sufficient (see article 27).

8. A court held that a buyer cannot claim damages according to article 75 with respect to cover purchases if it declares avoidance only after those cover purchases were made.[23]

BURDEN OF PROOF

9. It has been found that the party who claims to have declared avoidance and who relies on it must prove the declaration.[24]

Notes

[1] See CLOUT case No. 176 [Oberster Gerichtshof, Austria, 6 February 1996] (see full text of the decision); CLOUT case No. 294 [Oberlandesgericht Bamberg, Germany, 13 January 1999]; Court of Arbitration of the International Chamber of Commerce, France, August 1999 (Arbitral award No. 9887), *ICC International Court of Arbitration Bulletin* 2000, 109.

[2] CLOUT case No. 595 [Oberlandesgericht München, Germany, 15 September 2004].

[3] CLOUT case No. 1039 [Audiencia Provincial de Navarra, Spain, 27 December 2007].

[4] CLOUT case No. 176 [Oberster Gerichtshof, Austria, 6 February 1996].

[5] CLOUT case No. 308 [Federal Court of Australia, 28 April 1995].

[6] CLOUT case No. 1029 [Cour d'appel Rennes, France, 27 May 2008].

[7] CLOUT case No. 294 [Oberlandesgericht Bamberg, Germany, 13 January 1999].

[8] CLOUT case No. 6 [Landgericht Frankfurt a.M., Germany, 16 September 1991].

[9] Ibid. See also Oberster Gerichtshof, Austria, 6 February 1996, Zeitschrift für Rechtsvergleichung 1996, 248, CISG-online No. 224; Court of Arbitration of the International Chamber of Commerce, France, 1 March 1999, CISG-online No. 708; CLOUT case No. 746 [Oberlandesgericht Graz, Austria, 29 July 2004].

[10] Landgericht Zweibrücken, Germany, 14 October 1992, Unilex.

[11] Oberlandesgericht München, Germany, 2 March 1994, *Recht der Internationalen Wirtschaft* 1994, 515. However, it has been held that a mere request to take the goods back is sufficient: see CLOUT case No. 905 [Cantonal Court of the Canton of Valais, Switzerland, 21 February 2005]; similarly, Amtsgericht Charlottenburg, Germany, 4 May 1994, CISG-online No. 386.

[12] CLOUT case No. 6 [Landgericht Frankfurt a.M., Germany, 16 September 1991].

[13] CLOUT case No. 176 [Oberlandesgericht München, Germany, 8 February 1995].

[14] CLOUT case No. 6 [Landgericht Frankfurt a.M., Germany, 16 September 1991] (see full text of the decision).

[15] CLOUT case No. 235 [Bundesgerichtshof, Germany 25 June 1997].

[16] CLOUT case No. 293 [Schiedsgericht der Hamburger freundschatlichen Arbitrage, Germany, 29 December 1998].

[17] CLOUT case No. 594 [Oberlandesgericht Karlsruhe, Germany 19 December 2002].

[18] Rechtbank van Koophandel Kortrijk, Belgium, 4 June 2004, CIG-online No. 945.

[19] CLOUT case No. 235 [Bundesgerichtshof, Germany, 25 June 1997].

[20] CLOUT case No. 6 [Landgericht Frankfurt a.M., Germany, 16 September 1991] (see full text of the decision).

[21] See CLOUT case No. 124 [Bundesgerichtshof, Germany, 15 February 1995] (notice after five months: too late); CLOUT case No. 84 [Oberlandesgericht Frankfurt a.M., Germany, 20 April 1994] (two months: too late); CLOUT case No. 83 [Oberlandesgericht München, Germany, 2 March 1994] (four months: too late); CLOUT case No. 6 [Landgericht Frankfurt a.M., Germany, 16 September 1991] (one day: in time) (see full text of the decision).

[22] See CLOUT case No. 734 [Audiencia Provincial de Castellón, sección 3a, Spain, 21 March 2006].

[23] CLOUT case No. 730 [Audiencia Provincial de Valencia, sección 8a, Spain, 31 March 2005].

[24] See CLOUT case No. 938 [Kantonsgericht des Kantons Zug, Switzerland, 30 August 2007].