

# Remedies for breach of contract where only part of the contract has been performed: Comparison between provisions of the CISG (Articles 51 and 73) and counterpart provisions of the Principles of European Contract Law

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### I. INTRODUCTION

CISG Articles 51 and 73 are often considered concurrently as they both deal with the scenario in which only part of a contract has been performed. However, by doing so, some very important distinctions between the two articles may be overlooked. As one would expect, Article 51, which appears under the heading, “Remedies for Breach of Contract by the Seller,” does provide rights that are only exercisable by the buyer. The first two sub-articles of Article 73, on the other hand, are provisions common to both the seller and the buyer.<sup>1</sup>

A further crucial distinction within the subject matter of the two articles is the type of contract considered by each. Article 51 applies where there has been a failure to deliver part of a contract intended to be delivered as a whole. Article 73 applies to installment contracts and the failure to perform an obligation in respect to an installment.<sup>2</sup> Further,

<sup>1</sup>Both CISG Articles 51 and 73 belong to the Convention’s Part III: *Sale of Goods*. Article 51 is listed in Chapter II: *Obligations of the Seller*, Section III: *Remedies for Breach of Contract by the Seller*. Article 73 is listed in Chapter V: *Provisions Common to the Obligations of the Seller and of the Buyer*, Section I: *Anticipatory Breach and Installment Contracts*.

Schlechtriem, commenting on the operation of CISG Art. 73, states that “this provision is concerned with successive deliveries, not installment payments. By analogy, however, Article 73(2) can also apply to missed payments if they coincide with installment deliveries. Otherwise, the entire contract may be avoided under Article 72. Article 73(2) is also applicable to other breaches by the buyer, such as not taking delivery of an installment.” P. Schlechtriem, *Uniform Sales Law – The U.N. Convention on Contracts for the International Sale of Goods*, (1986) at p. 96, relevant excerpt also available online at <http://cisgw3.law.pace.edu/cisg/biblio/schlechtriem-73.html>.

<sup>2</sup>Cf. Karollus, Martin., “Judicial Interpretation and Application of the CISG in Germany 1988–1994,” *Cornell Review of the Convention on Contracts for the International Sale of Goods* (1995) 51–94, also available at <http://cisgw3.law.pace.edu/cisg/biblio/karollus.html>. Karollus provides a critique of the Germany 14 August 1991 Landgericht [District Court] Baden-Baden, case presentation including English translation

although in both scenarios the buyer may ultimately obtain the same remedy, the two Articles follow different paths to that result.<sup>3</sup>

The PECL do not draw a distinction between rights of the seller and buyer in the same manner as the CISG. Nor is the PECL intended to relate solely to contracts for the sale of goods. As a consequence of the latter difference the term “delivery” makes way for “performance.” At first glance, PECL Article 9:302 is most comparable to CISG Article 73 as it considers a failure of performance in the situation where “. . . the contract is to be performed in separate parts and in relation to a part to which counter performance can be apportioned . . .” However, as discussed in this chapter, this language does not exclude those circumstances contemplated by CISG Article 51. Further, despite wording that may initially indicate the contrary, and arguably unlike CISG Article 73(3),<sup>4</sup> PECL Article 9:302 does not release an aggrieved party of any obligations that may have accrued at the time of the failure.

## II. SCHEME OF CISG ARTICLES 51 AND 73 AND PECL ARTICLE 9:302

Leser describes CISG Article 51 as creating a “de facto division” in the contract.<sup>5</sup> This artificial dichotomy was created to promote one of the fundamental tenets of the CISG—to keep contracts “on foot.” An unintended consequence has been competition with CISG Article 73. From a buyer’s perspective, Article 51 offers a considerably more certain method of avoiding the offending part of the contract.

By providing recourse to the *Nachfrist* provisions in CISG Articles 47 and 49(1)(b),<sup>6</sup> Article 51 allows circumstances in which the buyer does not need to show the fundamental breach required by CISG Article 73.<sup>7</sup> CISG Article 51(2) also offers the buyer the ability to avoid the entire contract in instances where failure relating to a part amounts to a fundamental breach of the whole contract.<sup>8</sup> CISG Article 73(3) would instead appear to

available at: <http://cisgw3.law.pace.edu/cases/910814g1.html>. This was a case where the German buyer placed an order for two tile sets A and B with an Italian seller. Both sets contained basic and decorative tiles. The basic tiles belonging to set A were non-conforming, and the buyer sought to avoid the contract in respect of the entirety of set A. In a step that appears to be inconsistent with Article 51, the German Court accepted avoidance of that set, based on the rationale that without the appropriate basic tiles, the decorative tiles in set A were useless. Had Article 51 been followed strictly the only two remedies available would have been either avoidance of the whole contract (i.e., set A and B) or avoidance of the basic tiles of set A only. Karollus supports the court’s decision as such a remedy is contemplated by Article 73, and he argues there is no reason why it should not apply to non-installment contracts as well.

<sup>3</sup>Cf. CISG Article 64 for seller’s rights and remedies for a breach of contract by the buyer.

<sup>4</sup>See note 9 *infra*.

<sup>5</sup>Leser, Hans G., in: Schlechtriem, P. (ed.) *Commentary on the UN Convention on the International Sale of Goods (CISG)*, 2nd edition. Clarendon Press, Oxford, 1998 at p. 545.

<sup>6</sup>See Zeller, B., “Comparison between CISG Articles 47 and 49(1)(b) and counterpart provisions in the PECL,” available at <http://cisgw3.law.pace.edu/cisg/text/peclcomp47.html#er>.

<sup>7</sup>See further Honnold, J., *Uniform Law for International Sales under the 1980 United Nations Convention* (2nd ed. 1991) Kluwer Law and Taxation Publishers, Deventer, Boston, at 501, where he notes that the idea of a *Nachfrist* notice cannot be compatible with CISG Articles 73(2) and 73(3). Honnold does, however, suggest that in certain circumstances – for example delivery of an installment or the failure to establish a letter of credit – it is not repugnant to all scenarios contemplated by CISG Article 73(1).

<sup>8</sup>“The approach in CISG Art. 51 follows logically from its linkage of the right of avoidance to the gravity of the breach.” Jacob S. Ziegel, “Report to the Uniform Law Conference of Canada on Convention on Contracts for the International Sale of Goods” (July 1981) [available online at <http://cisgw3.law.pace.edu/cisg/text/ziegel51.html>]. That approach has been widely recognized in the case law; see, e.g., Germany 24 May 1995 *Oberlandesgericht* [Appellate Court] Celle, English translation available at <http://cisgw3.law.pace.edu/cases/950524g1.html>, where the court reiterated that regarding a delivery or conformity of only part of the goods, the rules of CISG Articles 46 to 50 apply to the part that is missing or non-conforming under Art. 51(1), and further, that if the seller’s offer to deliver conformed with

take the curious position of forcing the buyer to elect between avoiding future or previous deliveries, although this distinction has been dismissed.<sup>9</sup>

As is the case with all of buyer's remedies under the CISG, Articles 51 and 73 are both subject to the examination and notice regimes of Articles 38 and 39 (examination of the goods "within as short a period as is practicable under the circumstances" and "notice to the seller specifying the nature of [any] lack of conformity within a reasonable time after [the buyer] has discovered it or ought to have discovered it"). If the buyer elects the remedy of avoidance where the goods have been delivered, Article 49(2) also requires the buyer to declare the contract avoided "within a reasonable time." Article 51 states that "articles 46 to 50 apply" to it; hence this further reasonable time requirement is an element of an avoidance proceeding pursuant to Article 51. There is no reference to that in Article 73(1).<sup>10</sup> Even so, the general consensus of scholarly opinion tends to favor the

the contract, the buyer would not have the right to avoid the contract unless he could show that a partial delivery was a fundamental breach and therefore the missing part [a used printing press] entitled him to avoid the entire contract under CISG Art. 51(2). *See* also Germany 3 July 1992 Landgericht [District Court] Heidelberg, English translation available online at <http://cisgw3.law.pace.edu/cases/920703g1.html>. In that case, a German buyer concluded a contract for the sale of computer components with a U.S. seller, but after delivery of five parts had been carried out, the buyer refused payment and declared the contract avoided on the grounds that the delivery of eleven parts had been agreed. The German court held that even if delivery of eleven parts had been agreed the dispatch of only five parts would not entitle the buyer to declare the contract in its entirety avoided according to CISG Art. 51(2). *See* further, R. Koch, "The Concept of Fundamental Breach of Contract under the U.N. Convention on Contracts for the International Sale of Goods," *Review of the Convention on Contracts for the International Sale of Goods (CISG)* 1998, Kluwer Law International (1999) 177–354, also available online at <http://cisgw3.law.pace.edu/cisg/biblio/koch.html>.

*See* also ICC Arbitration Case No. 7660 of 1994, available at <http://cisgw3.law.pace.edu/cases/947660i1.html>, where the arbitral tribunal noted that Article 51(1) CISG provided for a partial avoidance of the contract as declared by the buyer and that under Article 51(2) CISG such partial avoidance was the rule rather than the exception in cases of partial non-performance amounting to a non-fundamental breach of the contract (Article 49(1)(a) CISG). In that case, the arbitral tribunal determined that a partial avoidance under Article 51(1) CISG was permissible where the defective piece of machinery formed an independent part of the contracted goods as it was in the case at issue. However, the arbitral tribunal further determined that the buyer's partial avoidance was barred by the 18-month time limit contained in the contract.

<sup>9</sup> *See* further Leser, *supra* note 5 at p. 551. He states that often in these situations as it will be not possible to achieve the purpose of the contract as a whole, there must be a fundamental breach allowing avoidance of the entire contract despite this wording. It is, however, interesting to note that ULIS Article 75 on which CISG Article 73 is modeled did specifically refer to deliveries already made or future deliveries or both. *Cf.* Schlechtriem, commenting on the operation of Art. 73(3). He states, "If, due to the interdependence of the installments, the defective or failed performance makes past or future installments worthless, those installments can be avoided as well. However, this is true only if the purpose of the entire contract was clear to both parties at the conclusion of the contract (Article 73(3)). The buyer's interest in receiving complete performance must, therefore, have been recognizable to the seller." P. Schlechtriem, *Uniform Sales Law – The U.N. Convention on Contracts for the International Sale of Goods* (1986), relevant excerpt also available online at <http://cisgw3.law.pace.edu/cisg/biblio/slechchtriem-73.html>.

*See, e.g.*, Switzerland 30 November 1998, [Commercial Court] Zürich, CLOUT abstract no. 251, also available at <http://cisgw3.law.pace.edu/cases/981130s1.html>, where that court stated that regarding avoidance in installment contracts under CISG Art. 73, installment deliveries do not have to be of the same type of goods.

<sup>10</sup> Though CISG Article 73(2) provides that, in respect of refusal of future installments, a buyer may declare the contract avoided for the future, provided he does so within a reasonable time. *See, e.g.*, Switzerland 5 February 1997, *Handelsgericht* [Commercial Court] Zürich, CLOUT no. 214, also available at <http://cisgw3.law.pace.edu/cases/970205s1.html>. In that case, a German buyer had entered into a contract with a French seller for the delivery to Romania of 2 to 4 million liters of sunflower oil per month at a specified price. Although the buyer had paid a timely installment for the first delivery, the seller did not ship the goods to Romania. The buyer declared the contract avoided and sued the seller for restitution of the first installment and for damages. The Swiss court held that the buyer had a right to declare the contract avoided as the seller did not deliver the goods and this failure to perform its obligation gave reason to believe

buyer applying the CISG Article 51 approach in the absence of a very clearly defined installment contract.<sup>11</sup>

The drafters of the PECL have avoided the competition between CISG Articles 51 and 73 by not including a specific provision that explicitly directs the parties to act in the same manner as CISG Article 51. Although using the same language of CISG Article 51 (i.e., “parts”) a plain reading of PECL Article 9:302 does only allow termination<sup>12</sup> as to the part where there has been fundamental non-performance.<sup>13</sup> Therefore, with the exclusion of this linguistic argument, PECL Article 9:302 does represent a shorter restatement of CISG Article 73. However, it is important not to immediately assume that the PECL promote the rights and remedies afforded by CISG Article 73 and by its silence condemn the approach of CISG Article 51.

### III. ADVANTAGES AND DISADVANTAGES OF THE DIFFERENT PHRASES

When considering these particular articles, several opposing conclusions may be drawn from using the PECL to help interpret the CISG. Those familiar with arguing around the common law doctrine of precedent will appreciate that in this instance the omission of the PECL to explicitly address a CISG Article 51 scenario does not in and of itself suggest a criticism of the approach. Although that view could be taken, it is suggested that the better view is that the combined PECL articles promote the CISG Article 51 position in two ways – by providing a restrictive definition of termination and by requiring fundamental non-performance.

As was foreshadowed in the introduction to this chapter, PECL Article 9:302 allows termination of the “contract as a whole” where non-performance is fundamental to the contract as a whole. However, “contract as a whole” does not, as it might initially appear, mean the entire contract. PECL Article 9:305 describes the effect of termination as it applies to all references to this word within the PECL. With two exceptions, termination of a contract as a whole will only relieve the parties of their future obligations. The Article specifically leaves intact the rights and liabilities that have accrued at the date of termination. The two exceptions are where the value of property already delivered has been fundamentally reduced (PECL Article 9:306) and where recovery of property already delivered can be made (PECL Article 9:308).

It must also be remembered that PECL Article 9:302 only allows termination in instances where there has been fundamental non-performance or, to use the CISG terminology, a fundamental breach. In doing so, the PECL is similarly promoting the notion of keeping contracts “on foot.” Where the failure to perform, or non-performance, is not fundamental, there are a variety of other remedies available to the innocent party. One such remedy is PECL Article 8:106, a *Nachfrist*-type notice. Although this remedy is consistent with the CISG, its applicability in this instance may not be. It is important to be mindful of the rationale that guides PECL Article 9:302 and CISG Articles 51 and 73 – where the failure to perform or deliver a part of the contract does not compromise

that a fundamental breach of contract was to be expected for further installments (Articles 49(1)(b) and 73(1) and (2) CISG).

<sup>11</sup> Leser, *supra* note 5 at p. 551 and authorities cited at his n. 24.

<sup>12</sup> “Termination” is the PECL’s counterpart to the CISG’s term “avoidance.”

<sup>13</sup> About the terminology adopted, the PECL Comments to Article 9:302 state, “‘Termination in relation to a part’ of the contract is a slightly awkward phrase, as the contract is not terminated, but it has the advantage that the general rules on termination (such as the need to give notice under Article 9:303) applies. CISG Article 73 takes the same approach.” Comment B, also available online at <<http://cisgw3.law.pace.edu/cisg/text/peclcomp51.html#9:302>>.

the purpose of the entire contract, it would be unreasonable to allow the entire contract to be ended.<sup>14</sup> If one cannot find a similar theme to CISG Article 51 in the PECL generally, then this rationale may be circumvented by PECL Article 8:106. Frequently, an extremely unfortunate consequence when apportioning counter-performance is the relatively simple matter of identifying a monetary value.<sup>15</sup>

Therefore, when considering PECL Articles 9:302, 9:305, and 9:306 together and in context, it is possible to see that the same philosophy that drives CISG Article 51 emerges. Recourse is first given to what might be described as “non-drastring” remedies. If the failure to perform a part of the contract amounts to fundamental non-performance of the entire contract, then with the assistance of PECL Article 9:306, all obligations including those previously accrued can be avoided.

#### IV. CONCLUSION

The PECL endorse and promote many of the principles outlined in the CISG. Although, in this instance, the Articles are not drafted in an identical or substantially similar manner, it is nonetheless possible to identify support for the notion of restricting a party’s ability to unreasonably end an entire contract.

<sup>14</sup> See further PECL Comments to Article 9:302, Comment A, available online at <http://cisgw3.law.pace.edu/cisg/text/peclcomp51.html#cnpc>.

<sup>15</sup> The PECL Comments to Article 9:302 make it clear that where one party’s obligations consists of distinct parts and the non-performance affects only one of those parts, PECL Article 9:302 is still applicable even though payment is not made separately. Comment C.

*Cf.* Ziegel who, commenting on the operation of CISG Art. 51, points out, “Read literally, Art. 51(1) suggest that the non-conforming goods may be subject to the remedy of avoidance regardless of the commercial viability of the rejected goods. UCC 2-601, by way of contrast, provides that only a ‘commercial unit’ may be accepted or rejected by the buyer. Presumably the Convention did not intend a different result.” Jacob S. Ziegel, “Report to the Uniform Law Conference of Canada on Convention on Contracts for the International Sale of Goods” (July 1981), available online at <http://cisgw3.law.pace.edu/cisg/text/ziegel51.html>.