



**United Nations Commission
on International Trade Law**

**UNCITRAL Digest of case law on the United Nations
Convention on the International Sale of Goods***

Article 45

- (1) If the seller fails to perform any of his obligations under the contract or this Convention, the buyer may:
 - (a) Exercise the rights provided in articles 46 to 52;
 - (b) Claim damages as provided in articles 74 to 77.
- (2) The buyer is not deprived of any right he may have to claim damages by exercising his right to other remedies.
- (3) No period of grace may be granted to the seller by a court or arbitral tribunal when the buyer resorts to a remedy for breach of contract.

* The present digest was prepared using the full text of the decisions cited in the Case Law on UNCITRAL Texts (CLOUT) abstracts and other citations listed in the footnotes. The abstracts are intended to serve only as summaries of the underlying decisions and may not reflect all the points made in the digest. Readers are advised to consult the full texts of the listed court and arbitral decisions rather than relying solely on the CLOUT abstracts.

Meaning and purpose of provision

1. This provision gives an overview of the remedies available to the buyer when the seller has committed a breach of contract by non-performance of any of its contractual duties¹. In its paragraph (1) (a), the provision simply refers to other provisions, namely articles 46–52, which specify the conditions under which the rights provided by those provisions may be exercised. On the other hand, article 45 (1) (b) constitutes the basis for the buyer’s right to claim damages and as such has great practical importance². As far as the amount of damages is concerned, it is to be adjudicated according to articles 74–76. Article 45 (2) allows the combination of the right to damages with other remedies. Article 45 (3) limits the ability of courts and arbitral tribunals to grant periods of grace which would depreciate the remedial system of the Convention.

2. Article 45 does not enumerate the buyer’s remedies exhaustively. The Convention provides for further remedies, e.g., in articles 71–73 or 84 (1). Nevertheless, article 45 is exhaustive in the sense that it preempts the buyer from being able to invoke contractual remedies otherwise available under the applicable domestic law, since the Convention excludes recourse to domestic law where the Convention provides a solution³.

Non-performance of an obligation as prerequisite for remedies

3. The availability of any remedy to the buyer presupposes that the seller has failed to perform an obligation deriving either from the contract, from trade usages, from practices between the parties or from the Convention. Even if an additional duty—for instance, the duty to extend a bank guaranty in favour of the buyer⁴—has been breached the buyer is entitled to the remedies available under the Convention. The extent of the seller’s failure to perform is irrelevant for the purposes of deciding whether the buyer is entitled to the remedies. Of course, there are some remedies that are available to the buyer only where the breach is fundamental. Generally, the reasons for the seller’s breach are irrelevant, too, except for the purposes of

¹ See *Official Records of the United Nations Conference on Contracts for the International Sale of Goods, Vienna, 10 March–11 April 1980* (United Nations publication, Sales No. E.81.IV.3), 37 (“index to the remedies available to the buyer”).

² See, e.g., CLOUT case No. 85 [Federal District Court, Northern District of New York, United States, 9 September 1994] (appellate decision: CLOUT case No. 138 [Federal Court of Appeals for the Second Circuit, United States, 6 December 1993, 3 March 1995]); CLOUT case No. 140 [Arbitration-Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry award No. 155/1994 of 16 March 1995]; CRCICA Arbitration Cairo, Egypt, 3 October 1995, Unilex; CLOUT case No. 166 [Arbitration—Schiedsgericht der Handelskammer Hamburg, 21 March, 21 June 1996] (see full text of the decision); ICC Court of Arbitration, France, award No. 8247, *ICC International Court of Arbitration Bulletin*, 2000, 53; CLOUT case No. 236 [Bundesgerichtshof, Germany, 21 July 1997]; CLOUT case No. 248 [Schweizerisches Bundesgericht, Switzerland, 28 October 1998] (see full text of the decision).

³ *Geneva Pharmaceuticals Tech. Corp. v. Barr Labs. Inc.*, United States, 10 May 2002, available on the Internet at <http://www.cisg.law.pace.edu/cisg/wais/db/cases2/020510u1.html>.

⁴ See the case in CRCICA Arbitration Cairo, Egypt, 3 October 1995, Unilex.

article 79 (5). In particular, article 45 (1) does not require that the seller acted with negligence or intent.

4. However if the seller's responsibility for a breach depends on further conditions—in particular on a timely and orderly notice of the buyer (articles 38, 39, 43)—then the additional conditions must be satisfied in order for the buyer to preserve its right to the available remedy.

Rights under articles 46–52

5. Article 45 (1) (a) merely refers to articles 46–52. Although the remedies provided for in these articles all require that a breach of an obligation has occurred they make distinctions as to the kind of breach that occurred. Thus, articles 46 (2), 49 (1) (a) and 51 (2) require a fundamental breach. Article 49 (1) (b) applies only in case of non-delivery; for article 50 it is doubtful whether its application extends also to other cases than delivery of non-conforming goods. Article 51 concerns partial non-performance; article 52 deals with early delivery and with excess delivery.

Claim of damages

6. Article 45 (1) (b) lays down the substantive conditions for a claim of damages of the buyer.⁵ In case of breach of a contractual obligation of any sort by the seller the buyer who has suffered damage as a result of that breach can claim damages. It has been found that the buyer can claim damage which ensued through the delivery of defective goods.⁶ A buyer can also claim damages for any incurred loss when the seller declares in advance that it will be unable to deliver on time thereby committing an anticipatory breach of contract in the sense of article 71.⁷ However, if the contract or the Convention requires further conditions for the entitlement of the buyer—like the notice requirement under articles 38, 39, and 43—these conditions must also be satisfied.⁸

7. In contrast to many national systems the right to claim damages does not depend on any kind of fault, on any breach of express promise or the like but presupposes merely an objective failure of performance.⁹ Only under the conditions of article 79 or in case of article 80 the seller is exempted from liability.¹⁰

⁵ A parallel provision is article 61 (1) (b), which entitles the seller to claim damages for any breach of contract by the buyer.

⁶ See for example CLOUT case No. 125 [Oberlandesgericht Hamm, Germany, 9 June 1995] (seller who had delivered and installed defective windows was held liable to compensate buyer's costs of replacing the defective windows).

⁷ ICC Court of Arbitration, Switzerland, award No. 8786, *ICC International Court of Arbitration Bulletin*, 2000, 70.

⁸ See, e.g., ICC Court of Arbitration, France, award No. 8247, *ICC International Court of Arbitration Bulletin* 2000, 53; CLOUT case No. 364 [Landgericht Köln, Germany, 30 November 1999]; see also *Official Records of the United Nations Conference on Contracts for the International Sale of Goods, Vienna, 10 March–11 April 1980* (United Nations publication, Sales No. E.81.IV.3), 34–36.

⁹ See *Official Records of the United Nations Conference on Contracts for the International Sale of Goods, Vienna, 10 March–11 April 1980* (United Nations publication, Sales No. E.81.IV.3), 37.

¹⁰ For an instance in which the exemption under article 79 was found not to be applicable, see

8. Articles 74–77 to which article 45 (1) (b) refers provide rules for the calculation of the amount of damages but do not form a basis for a claim of damages.¹¹

9. The decisions that applied article 45 (1) (b) evidence no difficulty with the application of this provision as such.¹² Problems may arise as to the existence and extent of an obligation of the seller or to the amount of damages. But since both aspects are dealt with by other provisions (articles 30–44 and 74–77 respectively), article 45 (1) (b) is merely referred to, without being discussed in detail.¹³

Cumulation of remedies (45 (2))

10. The right to claim damages is the remedy that is always available to the buyer if a breach of contract has caused the buyer any damage. This right can be cumulated with any other remedy in order to get compensation for any damage which would otherwise remain. The amount of damages, however, depends on which other remedy has been resorted to by the buyer.¹⁴

No grace periods (45 (3))

11. Article 45 (3) limits the ability of courts and arbitral tribunals to grant a period of grace and to extend the time for performance when the buyer holds the seller liable for a breach of contract.¹⁵ Although such possibility could be regarded as a matter of procedural law and therefore outside the Convention's scope of application, the provision nevertheless explicitly excludes it. The provision addresses only judiciary bodies. The parties are, however, free to extend or otherwise modify the period for performance at any time.

CLOUT case No. 140 [Arbitration-Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, award No. 155/1994 of 16 March 1995].

¹¹ See *Official Records of the United Nations Conference on Contracts for the International Sale of Goods*, Vienna, 10 March–11–April 1980 (United Nations publication, Sales No. E.81.IV.3), 37.

¹² See, e.g., the decisions cited above in footnote 2.

¹³ See as further examples: CLOUT case No. 82 [Oberlandesgericht Düsseldorf, Germany, 10 February 1994] (see full text of the decision); CLOUT case No. 83 [Oberlandesgericht München, Germany, 2 March 1994] (see full text of the decision); CLOUT case No. 168 [Oberlandesgericht Köln, Germany, 21 March 1996] (see full text of the decision); ICC Court of Arbitration, France, award No. 8247, *ICC International Court of Arbitration Bulletin*, 2000, 53; CLOUT case No. 214 [Handelsgericht des Kantons Zürich, Switzerland, 5 February 1997]; Tribunal Cantonal Valais, Switzerland, 28 October 1997, Unilex; CLOUT case No. 293 [Arbitration—Schiedsgericht der Hamburger freundschaftlichen Arbitrage, 29 December 1998]; CLOUT case No. 348 [Oberlandesgericht Hamburg, Germany, 26 November 1999].

¹⁴ See Digest, articles 74–6.

¹⁵ This is possible, e.g., under art. 1184 para. 3 and art. 1244 of the French Code civil and in legal systems which have been influenced by the French civil code.

Further questions

12. The place of performance for all rights and claims under article 45 follows the place of performance of the primary obligation—to deliver, to hand over documents et cetera—which has been breached.¹⁶ Therefore it is important to determine the place of performance of the primary obligation.

13. The Convention does not deal with the statute of limitations.¹⁷ The limitation of the rights and claims granted under article 45 has thus to be determined according to the applicable national law or—as far as applicable—according to the United Nations Convention on the Limitation Period in the International Sale of Goods of 1974 as amended in 1980.

Burden of proof

14. The question of burden of proof is only relevant for a damages claim under article 45 (1) (b) since the other parts of the provision do not grant concrete rights on the basis of which the buyer could sue. For the damages claim the burden is on the buyer who has to prove the breach of an obligation by the seller as well as the damage caused by that breach. According to article 79, the burden then lies on the seller to prove any exempting circumstances.

¹⁶ Bundesgerichtshof, Germany, 11 December 1996; CLOUT case No. 268 [Bundesgerichtshof, Germany, 11 December 1996]; Gerechtshof 's-Hertogenbosch, Netherlands, 9 October 1995, Unilex; Cour d'appel de Paris, France, 4 March 1998; CLOUT case No. 244 [Cour d'appel, Paris, France, 4 March 1998]; CLOUT case No. 245 [Cour d'appel, Paris, France, 18 March 1998].

¹⁷ See Digest, article 1, No. 13.