

G. General Standards For Performance

1. Fundamental Breach

a. Defined: When one party substantially fails to deliver what the other reasonably anticipated receiving.

2. Avoidance

a. Defined: The right to be excused from having to perform any obligation required by the contract (**not the same as cancellation!**).

1) Requirements:

a) The other party must have committed a fundamental breach.

b) The injured party must notify the other party.

2) Effect of avoidance:

a) Only the obligation to perform is set aside.

b) Avoidance does not affect any provision in the contract concerning:

1] The settlement of disputes (such as arbitration, choice of law, or choice of forum clauses), or

2] Any other provisions governing the rights and duties of the parties “consequent upon the avoidance of the contract.”

3. Requests for **Specific Performance**

a. An injured party may ask a court “to require performance” if the other party fails to carry out its obligations.

b. A court is not obliged to order specific performance unless the court can do so under its own domestic rules.

NOTE: In civil law countries it is an obligation for the court, while in common law countries the court has discretionary power in this regard.

H. Seller's Obligations

1. The Seller's **Basic Obligations** are:
 - a. To **deliver** the goods.
 - b. To **hand over any documents** relating to the goods.
 - c. To insure that the **goods conform** to the contract.
2. If the Contract Fails to Specify How the Seller is to Perform the CISG provides rules to fill in the gaps.

3. Place for Delivery

a. The place agreed in the contract, otherwise:

1) The **first carrier's place of business** if the contract involves the carriage of goods,

or

2) The place where the **parties knew the goods were:**

a) Located, or

b) Were to be manufactured or produced.

4. Time for Delivery

a. The date fixed in the contract, otherwise:

1) Within a **reasonable time** after the making of the contract.

b. If a **time period** is provided, the seller may deliver at any time within that period, unless the contract expressly says that the buyer is to choose the time.

5. The Turning over of Documents

a. At the time and place for delivery, a seller must turn over any documents relating to the goods that the contract requires.

6. **Conformity of Goods**

a. A seller must deliver goods that are:

1) Of the **quantity, quality, and description** required by the contract, and

2) Which are **contained or packaged** in the manner required by the contract.

b. To determine conformity:

1) Use **rules agreed** to by the parties.

2) Otherwise, the goods do not conform to the contract unless they are:

a) **Fit for the ordinary purposes** of such goods.

b) Fit for the **particular purposes** that:

1] Were expressly or impliedly made known to the seller at the time of the conclusion of the contract, and

2] The buyer reasonably relied upon the seller's skill and judgment.

c) Of the same quality as a sample or model provided by the seller.

d) Contained or packaged in a same manner that is:

1] Usual for such goods, or

2] Adequate to preserve and protect the goods.

3) Goods also do not conform if they are subject to third party claims.

a) Third party claims include:

1] Assertions of ownership.

2] Rights in intellectual property.

4) **Waiver**: A buyer may waive a seller's obligation to conform:

a) **Expressly**.

b) **Impliedly**, if the buyer knew or "could not have been unaware" that the goods were non-conforming.

c. **Time for Examining** Goods: The buyer must examine the goods for defects within **as short a period as is practicable** after delivery.

1) If the goods are shipped, the examination may be deferred until after the goods have **arrived at their destination**.

2) If the goods have to be redirected or redispached, examination may be deferred until after the goods have arrived at their new destination.

d. **Notice of Defect:** The buyer must notify the seller of any defects he discovers within a reasonable time after delivery or within a reasonable time after discovering the defect.

1) If the buyer fails to do so he waives his right to require performance.

2) The seller will not be responsible for a defect that arises more than two years after delivery, unless:

a) He knew or ought to have known of a non-conformity and did not disclose it to the buyer (**male fidei**), or

b) The contract establishes a **longer period of guarantee**.

3) **What constitutes notice** is not described in the CISG.

a) It probably must be sufficient to inform the seller of the problem.

e. **Curing Defects**: A seller who delivers goods early may correct or “cure” any defect up to the agreed date for delivery.

1) The cure may not cause the buyer any **unreasonable inconvenience** or **expense**.

2) Even if the seller does make a cure, the buyer retains the right to claim any **damages** that are provided for in the CISG.

I. Buyer's Obligations

1. **Paying the Price**

a. **The buyer must:**

1) Take whatever preliminary steps are necessary under the contract or any laws or regulations to enable payment to be made.

2) Pay the price at the time and place designated in the contract.

a) If no time is specified, the buyer is to pay when the goods or the documents controlling their disposition are delivered.

1] The buyer must pay even if the seller makes no formal request.

2] The buyer may delay payment until he has had time to **examine** the goods.

b) If no place for payment is specified, the buyer is to pay at:

1] The agreed place for the delivery of either the goods or their controlling documents, or

2] The **seller's place of business**.

Case 10-5. THE NATURAL GAS CASE

Austria, Supreme Court, 1996

FACTS: Buyer agreed to buy natural gas for itself and a third party. Seller agreed to ship gas from the US. Buyer agreed to obtain a letter of credit, but told seller that its bank needed to know the place of loading in order to issue the letter. Seller agreed to provide the place of loading, but never did so.

Later, the seller told buyer that its US supplier would not agree to export the gas to buyer in Belgium. The third party bought gas from another source for an additional \$141,131.

Buyer then sued seller to recover the \$141,131 for the third party plus \$15,000 in loss profits for itself. Seller asserted: that it was not liable because the buyer had never obtained the letter of credit; if it was liable, that the buyer had avoided the contract and the damages should be calculated accordingly, that the buyer was not entitled to loss profits and that the buyer/third party failed to mitigate the damages.

ISSUES: (1) Had the buyer breached by not obtaining the letter of credit? (2) Had the seller breached? (3) Was the contract avoided? (4) Was the buyer entitled to lost profits? (5) Had the buyer failed to mitigate?

HOLDINGS: (1) No. (2) Yes. (3) No. (4) Yes.
(5) No.

LAW: (1) A defendant cannot complain that a plaintiff failed to fulfill its obligations when the defendant's own failure to act caused the plaintiff's inaction. CISG Art. 41 says that a seller must deliver goods free from any right or claim of third parties. (2) A non-breaching party's intention to avoid must be clear to the breaching party for there to be an avoidance. (3) A plaintiff is entitled to loss of profits only if the defendant was aware of an intended resale. (4) The defendant has the burden of proving that the plaintiff failed to mitigate.

EXPLANATION:

(1) The buyer did not breach, because the failure to provide a letter of credit was caused by the seller's failure to provide the place of loading.

(2) The seller breached by failing to obtain clearance for the export of the gas and failing to deliver the gas.

(3) The buyer never notified the seller that it was avoiding the contract. Notification of the amount of losses incurred is not a notification of avoidance.

(4) When merchantable goods are sold to a merchant, resale is presumed. Indeed, seller knew that this was the case. Lost profits, therefore, are an appropriate measure of damages.

(5) The seller failed to show how the buyer could have mitigated.

2. Taking Delivery

a. The buyer must:

1) Cooperate with the seller to facilitate the transfer, and

2) Actually “take over the goods.”

b. A buyer who fails to cooperate will be responsible for any resulting costs.

c. A buyer who fails to take delivery assumes the risk for any damage to the goods after that time.

J. **The Passing Of Risk**

1. **Defined: The shifting of responsibility for loss or damage from the seller to the buyer**

a. **Once the risk passes:**

1) The **buyer must pay** the agreed-upon price for the goods involved.

a) Only if the **buyer can show that loss or damage was due to an act or omission of the seller** is he excused from paying the price.

2) The buyer must absorb the cost of any loss, or lodge a claim against his insurer.

b. CISG allocates risk by considering the agreement of the parties and the means of delivery.

2. Agreement of the Parties

a. The parties may agree to allocate risk among themselves and to specify when the risk will pass between them.

1) Commonly this is done through the **use of trade terms.**

3. Means of Delivery

a. Goods Transported by Carrier.

1) Prerequisite for risk to pass: The goods must be clearly identified to the contract.

2) Kinds of contracts:

a) Shipment contracts:

1] Defined: The seller is to deliver the goods to a carrier for shipment and does not require them to be delivered to a particular place.

2] Risk passes when the goods are handed over to the first carrier.

b) Transshipment contracts:

1] Defined: The seller is to deliver the goods to a carrier for shipment at a named place.

2] Risk passes when the goods are handed over to the carrier at that place.

c) In transit contracts:

1] Defined: Contracts made after the goods are already aboard a carrier.

2] Risk passes at the time the contract is made.

a] **Exception: If the seller knew or ought to have known that the goods had been lost or damaged, and he did not disclose this to the buyer, the risk does not pass to the buyer.**

d) Destination contracts:

1] Defined: The seller is to arrange transportation to a named place of destination.

2] Risk passes when the goods are handed over or otherwise placed at the buyer's disposal at the place of destination.

b. Goods Delivered Without Being Transported.

1) Defined: the goods are not shipped but are **handed over directly to the buyer.**

2) Risk passes when the goods are handed over or otherwise placed at the buyer's disposal.

K. Remedies

1. Buyer's Remedies

a. The buyer's remedies are cumulative.

1) “**Cumulative**” means that the right to recover damages is not lost if a buyer exercises any other available remedy.

b. The buyer's remedies are immediate.

1) “**Immediate**” means that a court or arbitral tribunal may not grant the seller grace period in which to comply with a buyer's demand for a remedy.

a) This is **contrary to the practice in some civil law countries.**

c. Remedies unique to the buyer.

1) Specific performance.

a) Specific performance is available only in states where the local law provides for such a remedy.

b) If it is available, the buyer may ask that the seller either:

1] Deliver substitute goods, or

2] Make repairs.

c) Prerequisites:

1] Buyer **cannot have avoided the contract** or resorted to some other inconsistent remedy.

2] Buyer must **first notify the seller** that the goods are non-conforming.

3] If the buyer asks for **substitute** goods, the non-conformity must amount to a **fundamental breach**.

2) **Avoidance.**

a) The CISG's provisions for avoidance by a buyer are patterned after German law, especially in the Convention's adoption of the German *Nachfrist* notice.

b) A buyer may avoid a contract if either:

1] The seller commits a fundamental breach, or

2] The buyer gives the seller a *Nachfrist* notice and the seller rejects it or does not perform within the period it specifies.

a] A buyer's *Nachfrist* notice is the **fixing of an additional period of time** of reasonable length for performance by the seller of his obligations.

(1) The period must be definite and the obligation to perform within that period must be clear.

(2) During the *Nachfrist* period the seller is entitled to correct (i.e., "cure") the non-conformity at his own expense.

(a) A **cure may not be made if the breach is fundamental and the buyer chooses to avoid the contract.**

3] Once the *Nachfrist* period has run, or once the fundamental breach becomes clear, the **buyer has a reasonable time in which to avoid the contract.**

Case 10-6. THE SHOE SELLER'S CASE

Germany, Court of Appeals, Frankfurt am Main, 1994

FACTS: The plaintiff delivered shoes to the defendant. Delivery was late and the shoes did not completely conform to the sample the plaintiff-seller had originally shown to the defendant-buyer. When the defendant-buyer refused to pay on two invoices, the plaintiff-seller brought suit. On appeal, the defendant argued that she was entitled to invoke the remedy of avoidance because of the plaintiff's late delivery and the nonconformity of the goods.

ISSUE: Is the remedy of avoidance available to the defendant?

HOLDING: No.

LAW: (1) Avoidance is only allowed after a buyer gives the seller a *Nachfrist* notice and defines an additional fixed period in which the seller is to make delivery. (2) There is no nonconformity in cases where a buyer is able to use some of the goods.

EXPLANATION: The buyer did not give the seller a *Nachfrist* notice. The buyer also was able to use some of the goods delivered.

ORDER: Decision in favor of the plaintiff is affirmed.

3) Reduction in Price.

a) Prerequisites:

1] The seller must have delivered non-conforming goods.

a] The buyer must have accepted them.

b] The seller must not be responsible for the non-conformity.

2] The buyer must not be entitled to damages.

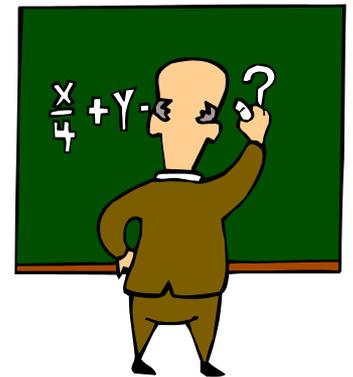
b) Formula for determining the price reduction: The price is to be reduced by that ratio of:

1] The **value** at the time of delivery of the goods actually delivered, to

2] The value that conforming goods would have had at the time of delivery.

4) **Refusing Early Delivery.**

5) **Refusing Excess Quantity.**



• Example

- Idaho potatoes sold at \$3.50/bushel for delivery in Jakarta
 - Damaged in transit by act of nature
 - Undamaged potatoes are worth \$4.00/bushel if purchased in Jakarta
 - Damaged potatoes are worth \$2.80/bushel
- The price reduction ratio is:

$$\frac{\$2.80}{\$4.00} = \frac{7}{10}$$

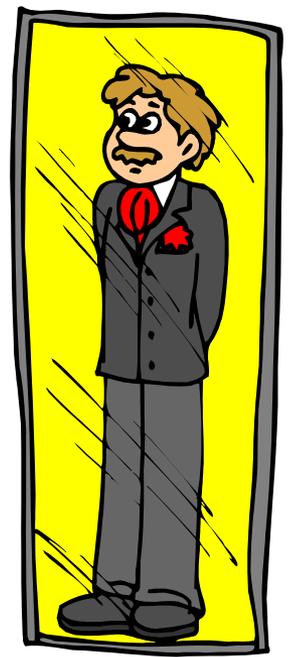
Applying this ratio, the reduced price the buyer pays is:

$$\$3.50 \times 7/10 = \$2.45$$



2. Seller's Remedies

a. Seller's remedies **mirror**
those of the buyer.



b. Seller's remedies are both
cumulative and immediate.

c. Remedies **unique to the seller:**

1) **Specific Performance:**

a) The availability of this remedy depends on the domestic rules applicable to the court hearing the suit.

b) If the remedy is available, a seller may ask the buyer to either:

1] Take delivery and pay the contract price, or

2] Perform any other obligation required by the contract.

2) Avoidance

a) A seller may only avoid a contract:

1] If there has been a fundamental breach, or

2] Following a *Nachfrist* notice, the buyer refuses to cure any defect in his performance.

3) To Obtain Missing Specifications.

a) If the buyer **does not produce the measurements** that the seller needs by the date specified in the contract, or within a reasonable time after the seller asks for them, the CISG allows the seller to ascertain them himself.

b) The seller must:

1] Inform the buyer of what he has done,

2] Set a reasonable time period for the buyer to supply different specification.

a] If the buyer does not respond, the seller's specifications become binding.

3. Remedies Available to Both Buyers and Sellers

a. Suspension of performance.

1) In response to threats of nonperformance: A party may stop performing.

2) In response to threats of nonperformance after the goods have been shipped: A party may prevent the handing over of the goods to the buyer even though the buyer holds a document which entitles him to obtain them.

a) *Caveat*: This relates only to the rights in the goods as between the buyer and the seller.

1] Should a third person acquire legal rights in the goods, the CISG will not apply - instead domestic law applies.

3) **Grounds** for suspending performance.

a) It becomes apparent that the other party will not perform a substantial part of his obligations as a result of:

1] A serious deficiency in his **ability to perform**.

2] A serious deficiency in his **creditworthiness**.

3] A **deficiency in his conduct in preparing to perform**.

4] A **deficiency in his conduct in performing**.

4) **Notice**: The suspending party must give notice.

5) Suspending party must resume his obligations under the contract if the other party provides adequate assurances of his capability to perform.

b. Avoidance in anticipation of a fundamental breach.

1) Distinguish this remedy from those that apply uniquely to the buyer and seller:

a) Those remedies only apply after an offending party has committed a fundamental breach.

b) This remedy applies as soon as “it is clear” that the other party “will commit a fundamental breach.”

2) Likely cases in which this remedy could be invoked:

- a) The specific goods promised to the buyer are **wrongfully sold** to a third party.
- b) The seller's **only employee** capable of producing the goods dies or is fired.
- c) The seller's **manufacturing plant is sold off**.

3) Notice requirement: The party opting to anticipatorily avoid must “if time allows” **notify** the other party so that the latter can “provide adequate assurance of his performance.”

c. Avoidance of an installment contract.

1) Avoidance of a particular installment:

Allowed when there has been a breach of that installment.

2) Avoidance of a subsequent installment:

Allowed when the breach of a prior installment gives a party “good grounds” to believe that a fundamental breach of later installments will occur.

3) Avoidance of entire contract (including past and future installments): Allowed when the installments are interdependent.

d. **Damages.**

1) **Foreseeable** damages: The breaching party is liable for the losses suffered by the other party that the breaching party foresaw or ought to have foreseen at the time of the making of the contract.

a) **Calculating damages:** Two CISG rules -

1] If an avoiding party has entered into a good faith substitute transaction: The difference between the contract price and the price received (or paid) in the substitute transaction.

2] If the avoiding party did not enter into a substitute transaction: The difference between the contract price and the current price at the time of avoidance.

a] **Current price** is either:

(1) The price prevailing at the place where delivery of the goods should have been made, or

(2) If there is not current price at that place, the price at such other places as serves as a reasonable substitute.

b) **Mitigation of damages**: The party claiming damages must take reasonable measures to mitigate the loss.

1] Effect of failure to mitigate: The breaching party may seek a proportionate reduction in the damages.

Case 10-7. DOWNS INVESTMENTS PTY. LTD. v. PERWAJA STEEL SDN BHD

Australia, Supreme Court of Queensland, 2000

FACTS: Wanless, an Australian company, agreed to sell 30,000 tons of scrap metal to Perwaja, a Malaysia company. Their contract called for Perwaja to obtain a letter of credit (L/C) as soon as Wanless chartered a ship to transport the scrap. It also provided that the Brisbane, Queensland law would govern their relationship. Perwaja did not do so and Wanless treated the contract as breached. It arranged to sell the scrap to other buyers at a much lower price and it had to sub-charter the ship it had chartered, losing money on this. Wanless sued to recover damages.

ISSUES: (1) What law governs?

(2) Was there a fundamental breach?

(3) Was Wanless entitled to end the contract?

(4) Could Wanless have performed?

(5) Was Wanless entitled to damages?

(6) Had Wanless acted properly to mitigate damages?

- **LAW**: (1) Queensland has adopted the CISG as the law governing the international sales of goods.
- (2) A fundamental breach is one that results in a detriment that substantially deprives a party of what he was entitled to expect under the contract unless the breach party could not have reasonably foreseen that result.
- (3) The non-breaching party may terminate a contract if the breach is fundamental.
- (4) A non-breaching party must be ready, willing, and able to perform in order to sue for breach.
- (5) A non-breaching party that suffers loss may recover damages.
- (6) Damages are sum loss including loss of profits. The non-breaching party must attempt to mitigate the damages.

EXPLANATION: (1) CISG governs.

(2) The failure to deliver the L/C was a fundamental breach. It was an essential element of the contract necessary to protect Wanless from any effort by Perwaja to renegotiate the terms after Wanless had chartered the ship.

(3) Wanless could terminate as the breach was fundamental. (4) Wanless had been ready, willing, and able to deliver the scrap as it had already chartered and loaded the ship.

(5) Wanless is entitled to damages.

(6) Wanless had tried to mitigate damages in that it promptly sub-chartered the ship. It is entitled to loss profits on the substitute sales plus the loss it suffered from sub-chartering the ship.

ORDER: Wanless entitled to U.S. \$1,280,347.80.

L. Excuses For Nonperformance

1. *Force Majeure*

a. A party is not liable for damages resulting from his failure to perform if he can show that:

1) His failure was due to an impediment **beyond his control**.

2) The impediment was not something he could have reasonably taken into account at the time of contracting (**unforeseeable**), and

3) He remains **unable to overcome** the impediment or its consequences.

b. Rationale for rule: Neither party is really at fault.

c. Typical situations: Natural disasters, war, embargoes, strikes, breakdowns, and the bankruptcy of a supplier.

d. **Limitations.**

1) **Scope:** *Force majeure* only excuses the breaching party from paying damages.

a) Nonbreaching party may obtain any other appropriate remedy (e.g. suspension of performance or avoidance).

2) **Notice:** Breaching party must promptly notify the other party of the impediment and its effect on his ability to perform.

3) **Basis:** If a breaching party's claim is based on the failure of a third person to perform (such as a supplier), the third person must himself be able to claim the excuse of *force majeure*.

4) **Duration:** *Force majeure* may only be used as long as the underlying impediment continues in existence.

Case 10-8. NUOVA FUCINATI, SpA v. FONDMETALL INTERNATIONAL AB

Italy, Civil Court of Monza, 1993.

FACTS: A seller, in Italy, contracted in Sweden to deliver 1,000 tons of ore to a buyer, in Sweden. The seller's costs increased by 43%, so the seller sought to use the excuse of "commercial impracticability" to avoid the contract. The buyer defended by arguing that the contract was governed by the CISG and the excuse of commercial impracticability is not available under the CSIG.

ISSUES: (1) Does the CISG provide for the excuse of commercial impracticability? (2) Does the CISG apply to this case? (3) Is the seller excused because of commercial impracticability?

HOLDINGS: (1) No. (2) No. (3) No.

LAW: (1) CISG provides for the excuse of impossibility of performance (in Art. 79) but does not provide for the excuse of commercial impracticability.

(2) The CISG applies if the parties are from states that are both signatories of the convention, or if the rules of private international law lead to its application.

(3) The Italian code provides for the excuse of commercial impracticability. This requires the seller to show that performance is so economically burdensome that the seller does not have the resources to perform.

EXPLANATION: (1) CISG does not provide for the excuse of commercial impracticability.

(2) The CISG does not apply because (a) Sweden was not a party to the CISG when the contract was signed and (b) because Italy's rules of private international law direct the court to use Swedish law (as the contract was signed in Sweden), and Swedish law at the time did not recognize the CISG.

(3) An increase of 43% in costs to the seller is not so burdensome that the seller cannot perform.

ORDER: The seller's case was dismissed.

Dirty Hands Rule

Dirty Hands: One party may not rely on a failure of the other party to perform to the extent that such failure was caused by the first party's act or omission.

