

REMEDIES AVAILABLE FOR BREACH OF CONTRACT UNDER THE UN CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS

This article, which is complementary to the previous one, examines in detail the remedies available under the UN Convention on Contracts for the International Sale of Goods, which recently came into force in Singapore. Where appropriate, brief comparisons are made with the remedies available under the Sale of Goods Act.

INTRODUCTION

The Convention came into force in Singapore on 1 March 1996, introducing with it a system of remedies which appear, in the main, to resemble those under the Sale of Goods Act.¹ On closer examination, however, the Convention contains remedies which are new, some of which may even be alien to the common law system. This paper will discuss these remedies, and make a brief comparison of them with those under the Sale of Goods Act where appropriate. As breach is the basis of a remedy, it is necessary to first consider what constitutes breach, to appreciate when a remedy is available.

BREACH UNDER THE SALE OF GOODS ACT

Breach under the Sale of Goods Act is determined by reference to non-compliance with terms known either as conditions and warranties. Breach of a condition means that the innocent party may rescind, ie, terminate, the contract. This is so regardless of the mildness or severity of the breach.² Although there are a number of implied conditions imposed by the Act, such as those in sections 12 to 15, these are not exhaustive. Other conditions could arise from the parties' own agreement.

Breach of a warranty, on the other hand, leads to a different result: under section 53, the seller's breach of a warranty allows the buyer either to diminish or extinguish the price, or to obtain damages. The latter would be calculated from the value of the goods at delivery, and their price if the warranty had been complied with. The innocent party is not entitled to treat the contract as discharged.

¹ Cap. 393, 1994 Rev Ed, Singapore Statutes. The Act came into force *vide* s 213/95.

² The most frequently cited example of the strictness of this principle is that of *Arcos Ltd v E Ronaasen & Son* [1933] AC 470. However, it has been argued that as a result of s. 11(3), a tender of defective goods may give rise to a right to treat the contract as repudiated, but not necessarily so in all cases — see *Benjamin's Sale of Goods* (4th Ed, 1992), para. 10-027 – 028 and 12-044.

Additionally, under the common law, a third type of term, known as the innominate or intermediate term, has been identified.³ The breach of such terms do not necessarily lead to the termination of a contract. Where the breach leads to a substantial deprivation of the innocent party's rights, that party may have a right to treat the contract as discharged.

Any action by the innocent party subsequent to a breach must be undertaken cautiously, as it may be interpreted to be a waiver of the breach, which in turn may lead to a loss of rights to remedy.⁴ This may cause an innocent party to withhold any request for redress short of termination, even if such redress might be a more practical and speedy solution to the situation. To some extent, the Convention corrects this by providing a number of self-help remedies which are less drastic and narrow in scope than terminating the contract.

BREACH AND AVOIDANCE UNDER THE CONVENTION

In order to consider the remedies available under the Convention, it is necessary to first look at the situations which may give rise to them, ie, what constitutes breach.

The Convention does not make use of the classification of terms into conditions and warranties under the Sale of Goods Act, previously referred to. Instead, the reference in Art. 25 is to 'fundamental breach':

A breach of contract committed by one of the parties is fundamental if it results in such detriment to the other party as substantially to deprive him of what he is entitled to expect under the contract, unless the party in breach did not foresee and a reasonable person of the same kind in the same circumstances would not have foreseen such a result.

This has specific implications for what the Convention terms as 'avoidance' of contract (eg in Art. 49) and remedies available (eg in Art. 46 and 70). The insertion of the requirement for a reasonable person's foreseeability limits the scope of the concept of 'fundamental breach'.

There has been criticism that this article creates problems. One problem is said to be that it would be easier to prove a 'fundamental breach' under this article, than to prove the same at common law. Another would be because of the last limb of the article, which is alien to common law fundamental breach.⁵ As a result, Article 25 appears to create a kind of

3 See *Hong Kong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha Ltd* [1962] 2 QB 26 and *Cehave NV v Bremer Handelsgesellschaft mbH (The Hansa Nord)* [1976] QB 44.

4 Under the Sale of Goods Act, apart from the common law notion of waiver, a buyer must also take care not to conduct himself, in the face of a breach, in a manner which may indicate acceptance of the goods: s. 35.

5 F M B Reynolds, QC, *A Note of Caution*, in *The Frontiers of Liability (Vol 2)*, ed by P B H Birks, 1994, pp. 22-23.

fundamental breach which is different from that recognised at common law.⁶

References are made in the Convention to consequences of such fundamental breach, relating to the remedies available in such cases. These will be examined below. Additionally, the Convention specifies a number of obligations for the buyer and seller. Breach of these would carry remedies mentioned in the Convention, which will also be examined below.

REMEDIES UNDER THE CONVENTION

In examining the remedies available, the bases for each will be discussed, in order to see when the former arise. The buyer's and seller's remedies will be looked at in turn, followed by remedies common to both. A number of other relevant issues will also be addressed.

1. The Buyer's Remedies

Bases of Remedies

(a) *Lack of conformity of goods*

Unlike the Sale of Goods Act, the Convention does not assume that a breach due to non-conformity is a breach of a condition. The consequences of such a breach must, as a result, be examined before determining the remedy available. One would, for instance, need to ask if the breach constitutes a fundamental breach falling within Art. 25. If so, the buyer may have a right to treat the contract as discharged; if not, he would have to resort to other remedies provided by the Convention.

The terms governing the seller's non-performance in relation to lack of conformity can be found in Arts. 35 to 40. The types of non-conformity are stated in Art. 35. Further conditions which must be noted before the non-conformity forms the basis of a seller's liability are found in Arts. 36 and 39. In particular, it is noteworthy that under Art. 39(1), the buyer may lose his right to rely on non-conformity if he fails to give *notice* to the seller *specifying the nature of the lack of conformity within a reasonable time* after he has discovered it or ought to have discovered it. In addition, Art. 39(2) imposes, on a buyer, a general time-bar of *two years* from handover of the goods, to rely on any non-conformity.⁷ If this period is not observed, the buyer loses his

⁶ The common law formulation is found in *Hong Kong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha Ltd*, *supra*, footnote 3. Liability for such a breach may, at common law, be excused if there is an appropriate exemption clause: see *Benjamin's Sale of Goods*, *supra*, footnote 2, para. 13-038 – 44.

⁷ Unless this is "inconsistent with a contractual period of guarantee".

right to rely on the non-conformity. This places a burden on the buyer to be vigilant and to act promptly if he is to rely on the foregoing Articles.⁸

(b) *Third party rights*

Arts. 41 and 42 require the seller to deliver goods which are free from third party rights or claims, unless the buyer has agreed to take them subject to such rights or claims. If such a third-party right or claim arises, the buyer has a right against the seller, but Art. 43 states that such right is lost if the buyer does not give the requisite notice. Despite this, though, Art. 44 still allows the buyer to reduce the price in accordance with Art. 50, or claim damages (except for loss of profits). By comparison, section 12 of the Sale of Goods Act provides that it is an implied condition that the seller has a “right to sell” the goods, that the goods would be free of any “encumbrance or charge” and that the buyer will enjoy “quiet possession”.

Apart from these Articles, the Convention provides no specific protection of the buyer *against* third-party rights or claims. In contrast, the Sale of Goods Act devotes sections 21 to 26 on *Transfer of Title* to such protection, as exceptions to the so-called *nemo dat* rule.

(c) *Breach of contract in general by seller*

For general non-performance of the seller’s obligations under the contract or the Convention, Arts. 42 to 52 provide the buyer with a variety of remedies. Under Art. 45(1), these are the remedies which are stated in Arts. 46 to 52, and the right to claim damages under in Arts. 74 to 77. Art. 45(2) further states that, by exercising other remedies, the buyer is not deprived of any right he may have to claim damages.

(d) *Fundamental breach*

For cases of fundamental breach as defined in Art. 25, the buyer has the remedy of avoiding the contract under Art. 49(1)(a). The requirements for exercise of this right are in Art. 49(2); non-compliance can lead to loss of the right to declare the contract avoided.

(e) *Non-delivery by Seller*

Non-delivery by the seller is a breach which entitles the buyer to, *inter alia*, avoidance of the contract under Art. 49(1)(b).

⁸ The provisions under the Sale of Goods Act which deal with conformity are sections 12 – 15. Under the Act, it is also possible to lose one’s right for non-conformity, by virtue of waiver under s. 11 or by general waiver under common law: see G H Treitel, *Remedies for Breach of Contract* (1991 Rep), pp. 397–8.

Buyer's Remedies

Based on the above grounds of breach or non-performance, the following are the respective remedies available to the buyer under the Convention. Unlike the Sale of Goods Act, the Convention does not make frequent reference to the buyer's right to reject the goods for breach.⁹ Implicitly, however, the buyer has this right in appropriate cases, as such rejection is alluded to in Art. 86(1).

(a) Reduction of price

Where there is non-conformity in the goods, the buyer is allowed under Art. 50 to reduce the price "in the same proportion as the value of the goods actually delivered had at the time of delivery bears to the value that the conforming goods would have had at that time." There is a proviso in the Article, which disallows such reduction if the conditions in Arts. 37 or 48 apply.¹⁰

It may be recalled that under the Sale of Goods Act, a buyer is allowed to reduce the price in one particular situation, namely, under section 53(1)(a), for a breach of warranty.

(b) Require performance

Art. 46(1) allows a buyer to "require performance", unless he has resorted to a remedy inconsistent with such requirement. The exercise of this right to require performance is rather ambiguous, and has no real equivalent at common law or under the Sale of Goods Act. Perhaps therein lies the advantage, as the Convention is not meant to reproduce the rights under at common law or under the Act.

The right given under Art. 46(1) appears to be a new one, breach of which has uncertain consequences. One view is that the right translates into a right to specific performance of the contract,¹¹ which would be contrary to the common law notion that specific performance is a discretionary remedy. This, however, would have to be read in conjunction with Art. 28, which recognises any limitation on such a remedy under a particular national system.

One instance, perhaps, of the buyer's ability to 'require performance', short of applying to court for specific performance, is the right to request performance by notice within an additional period of time after performance is due, provided under Art. 47. This notice is discussed further below.

⁹ See, for instance, ss. 11, 30 and 35.

¹⁰ Such a right of reduction is also mentioned in Art. 44.

¹¹ See, for instance, Kritzer, *Guide to Practical Applications of the United Nations Convention on Contracts for the International Sale of Goods* (1989) at p. 342, where this is interpreted as the 'Buyer's Right to Compel Performance'.

(c) *Require delivery of substitute goods*

Where non-conformity amounts to a fundamental breach by the seller, Art. 46(2) allows the buyer to require delivery of substitute goods, provided that the requisite notice is given by him. This is, again, a right not existing under the Sale of Goods Act, not at common law. The aim appears to be to allow the parties to carry on with the contract *despite* a fundamental breach. This is said to be one of the features of the Convention which distinguishes it from the Sale of Goods Act, which is inclined to termination of the contract with action for damages following.¹² Under the common law, such requirement of substitute goods may be interpreted as a waiver of the right to terminate for the breach. An exception is in a situation where there is still time for performance under the contract after a defective tender; a party in breach may still make a re-tender in such a case.¹³

By virtue of Art. 45(1)(b) and (2), exercise of this remedy does not preclude an action for damages.

It should be noted that under Art. 82, this remedy is available only if the buyer is able to make restitution of the goods substantially in the condition in which he received them. However, this condition is inapplicable if the impossibility of restitution was not due to the buyer's act or omission, or the goods or part thereof have perished or deteriorated as a result of examination, or if the goods or part thereof have been sold in the normal course of business or have been consumed or transformed by the buyer in the course of normal use before discovery of the non-conformity. This is akin to the common law requirement of *restitutio in integrum*, which is discussed later.¹⁴

Further, under Art. 83, even if the right to require substitute goods has been lost, the buyer retains "all other remedies under the contract and [the] Convention".

(d) *Require repair*

Where it is reasonable, the buyer may, under Art. 46(3), also require repair in the event of non-conformity. Again, the requisite notice must be given. This is another remedy of self-help to allow continuation of the contract, and unlike the preceding remedy, applies whether or not the non-conformity amounts to a fundamental breach. Requiring repair need not be a sign that the buyer has waived his rights in respect of the non-conformity; he may still pursue his right to damages.

¹² Reynolds, *supra*, footnote 5, at p. 23.

¹³ See *supra*, footnote 2.

¹⁴ See *supra*, footnote 26.

Again, by virtue of Art. 45(1)(b) and (2), exercise of this remedy does not preclude an action for damages.

(e) *Fix additional period for performance*

Under Art. 47, which applies to any kind of breach, the buyer may, fix an additional period of time of reasonable length for the seller to perform his obligations. This derives from the civil law *nachfrist* notice.¹⁵

The giving of such a notice allows the buyer to put off termination while preserving that right, and any right to damages. It also allows the buyer to state with certainty when he will exercise the right to terminate. This avoids the difficulties which may be encountered under s. 35 of the Sale of Goods Act, ie, the buyer's acts may be read to amount to 'acceptance' of the goods. Under Art. 47(2), the only limitation placed on the buyer who has given such a notice, is that he must not, during the period, resort to any remedy for breach of contract. This is fair, as the period is intended to give the seller a final opportunity to perform his obligations. Art. 47(2) further provides that even with such performance in the extended period, the buyer retains a right to claim damages for delay in performance.

(f) *Declare contract avoided*

General

Art. 49(1) allows the buyer to avoid the contract in two situations:

- where the failure of the seller to perform his obligations amounts to a fundamental breach;¹⁶
- non-delivery, and there is no delivery within the additional time given by the buyer under Art. 47.

Art. 49(2) sets out the time limits in which the buyer must declare the contract avoided, failing which the right would be lost. However, under Art. 83, loss of the buyer's right to declare the contract avoided (or to require delivery of substitute goods) does not mean the buyer cannot exercise his other remedies under the contract and the Convention.

Under Art. 26, a declaration of avoidance is effective only if made by notice to the other party, ie, to the seller. The implications of avoidance are contained in Section V of the Convention, and are examined below.

¹⁵ See Treitel, *supra*, footnote 8, pp. 327–334.

¹⁶ Note that under Art. 70, if the seller has committed a fundamental breach, the provisions on risk in Arts. 66 – 69 “do not impair the remedies available to the buyer on account of the breach”.

In addition, a declaration of avoidance can also be made where there is breach in the following types of situations and contracts:

Part delivery or part conformity

Under Art. 51, where there is delivery of only a part of the contract goods, or where only part of the goods delivered conform, the buyer may declare the contract avoided *in its entirety* only if the part non-delivery or non-conformity *amounts to a fundamental breach of the contract*.

In addition, under Art. 51(1), the remedies set out in Arts. 46 to 50 apply to such cases of part delivery and part conformity. The remedies apply to the missing or non-conforming parts.

It should be noted that Art. 37 allows the seller in such situations to remedy the missing or non-conforming parts, provided that such remedy “does not cause the buyer unreasonable inconvenience or unreasonable expense”. In addition, the buyer retains any right to claim damages provided under the Convention. A more general version of this right of the seller to remedy his non-performance is found in Art. 48(1), but this is subject to Art. 49. In particular, Art. 49(2)(b)(iii) should be noted.

Instalment deliveries

Art. 73(3) allows a buyer who declares a contract avoided in respect of any delivery to declare, at the same time, that it is avoided in respect of deliveries already made or of future deliveries. There is a proviso: the deliveries must be *interdependent* such that those already delivered or future ones *could not be used for the purpose contemplated by the parties at the time of the conclusion of the contract*.

(g) *Early delivery — buyer may take or refuse delivery*

Under Art. 52, where there is delivery before the date fixed, the buyer has the option of taking delivery, or refusing delivery. For delivery of a quantity of goods greater than that contracted for, the buyer has the same options in respect of the excess.

(h) *Claim damages*

Damages are available for any breach of any magnitude, ie, whether or not it amounts to a fundamental breach.¹⁷ The buyer’s right to claim damages is set out in Art. 45(1)(b) and (2). The provisions which govern the quantification of damages are Arts. 74 to 77.

¹⁷ At common law, damages are available for any breach — *Benjamin’s Sale of Goods*, *supra*, footnote 2, para. 12–017.

Art. 74(1) sets out the basic mode of calculation of damages. It is:

a sum equal to the loss, including loss of profit, suffered by the other party as a consequence of the breach. Such damages may not exceed the loss which the party in breach foresaw or ought to have foreseen at the time of the conclusion of the contract, in the light of the facts and matters of which he then knew or ought to have known, as a possible consequence of the breach of contract.

Apart from the omission of the requirement of reasonableness of the foresight of the party in breach, the above appears to be akin to the rule in *Hadley v Baxendale*.¹⁸

Art. 75 deals specifically with the situation where the buyer has bought substitute goods or the seller has resold the goods. The damages then would be:

the difference between the contract price and the price in the substitute transaction as well as any further damages recoverable under article 74.

This is provided that the contract has been avoided, and the purchase or resale was done in a reasonable manner and within a reasonable time after the avoidance.

Where there is no such purchase or resale, Art. 76 provides that the damages would be the difference between the contract price and the “current price”, either at the time of avoidance, or if the contract was avoided after the goods were taken over, at the time of the taking over.

Art. 76(2) states:

For the purposes of [Art. 76(1)], the current price is the price prevailing at the place where delivery of the goods should have been made or, if there is no current price at that place, the price at such other place as serves as a reasonable substitute, making due allowance for differences in the cost of transporting the goods,¹⁹

¹⁸ (1854) 9 Exch 341. For the relationship between the rule and the Sale of Goods Act, see *Benjamin's Sale of Goods*, *supra*, footnote 2, para. 17–045. It in fact bears a resemblance to the so-called ‘modern statement’ of the *Hadley v Baxendale* rule: *Chitty, The Law of Contracts*, 27th Ed, 1994, para. 26–022 – 23. The obvious difference is in the degree of probability required of the occurrence of the breach in question. The requirement in Art. 74 is that it must be a “possible consequence”, as opposed to the more stringent requirement at common law, ranging from “liable to result” to “a real danger” and “a serious possibility”: *Victoria Laundry (Windsor) Ltd v Newman Industries Ltd* [1949] 2 KB 528; *The Heron II* [1969] 1 AC 350. The “possible consequence” standard is obviously easier to satisfy, so that the foreseeability limitation in Art. 74 is not as strict as that at common law.

¹⁹ The assessment method in Art. 75, employing differences in price by reference to actual substitute transactions, is said to be ‘concrete’, whereas that in Art. 74 (and in *Hadley v Baxendale*) is said to be ‘abstract’ – Treitel, *supra*, footnote 8, pp. 111–120.

Art. 77 requires the innocent party to take reasonable measures to mitigate the loss, including loss of profit. If he fails to do so, the other party can claim a reduction in the damages for the amount by which the loss should have been mitigated.

(i) *Claim expenses for preserving goods retained*

Under Art. 86, if the buyer has received the goods, or they are placed at his disposal and he takes possession of them, and he intends to exercise his right to reject them, he has to take reasonable steps to preserve them. For so doing, he is entitled to retain the goods until he has been reimbursed his reasonable expenses by the seller.

(j) *Refund of Price with Interest*

Where the seller is to refund the price, Art. 84 requires him to also pay interest on it, from the date on which the price was paid by the buyer. The Convention does not spell out when the buyer is entitled to require the refund of the price, but presumably, it would be where he has paid the price, and is either facing non-delivery, or a fundamental breach by the seller entitling him to refuse delivery and terminate the contract. At common law, such an action for the price can be taken only if there has been a total failure of consideration.²⁰

Interaction of Buyer's Remedies

As mentioned, the buyer's remedies are cumulative, ie, the exercise of one does not necessarily preclude the exercise of another. The clearest example of this is in Art. 45(1) and (2).

Exercise of rights in Arts. 46 and 47 in relation to avoidance

Under Art. 46(1), a buyer may require performance of a seller "unless the buyer has resorted to a remedy which is inconsistent with this requirement". For instance, if the breach is a fundamental breach or is non-delivery, the buyer may declare the contract avoided in accordance with Art. 49. Having done so, he frees the parties of their primary obligations, subject to any damages which are due, by virtue of Art. 81.²¹ It would not be consistent for him, then, to call upon the seller to perform.

Again, if the buyer has, for some reason, lost his right to declare the contract avoided, or to require delivery of substitute goods, he retains "all other remedies" under the contract and the Convention, because of Art. 83. This would include any right he has to damages, as well as to the remedies in Arts. 46 and 47.

²⁰ *Benjamin's Sale of Goods*, *supra*, footnote 2, para. 17-082; *Chitty*, *supra*, footnote 18, para. 29-034 – 35.

²¹ See *infra*, footnote 28.

Exercise of rights in Arts. 46 and 47 in relation to damages

As mentioned, Art. 45(2) provides for concurrence of the remedy of damages and other remedies.

2. The Seller's Remedies***Bases of Remedies****(a) Non-payment*

Arts. 53 to 59 spell out the buyer's obligation to pay the price for the goods. This is subject to Art. 58, which provides that he is not bound to pay until he has had an opportunity to examine the goods.²² This does not apply if "the procedures for delivery or payment agreed upon by the parties are inconsistent with his having such an opportunity".

Under Art. 54, the buyer's obligation to pay includes:

taking such steps and complying with such formalities as may be required under the contract or any laws and regulations to enable payment to be made.

The obligation would, for instance, include taking steps to open a letter of credit if the contract so required.

(b) Failure to take delivery

Art. 53 requires the buyer to take delivery of the goods. Failure to do so would constitute a breach by the buyer of this obligation.

(c) Breach of contract in general by the buyer

For general breaches of the contract and of the Convention, the remedies are those set out in Arts. 62 to 65, and damages as set out in Arts. 74 to 77.

Under Art. 61(2), exercise of these remedies does not prevent the seller from claiming damages.

(d) Fundamental breach

Art. 64 refers to fundamental breach by the buyer as a basis for the remedy of avoidance of contract. It has, however, been pointed out that the wording of Art. 25 on fundamental breach is "slanted towards breach by the seller", and that it is unclear how a buyer, with his

²² Under s. 34 of the Sale of Goods Act, the right to examine the goods is linked to acceptance and not payment.

relatively limited obligations, may commit fundamental breach other than by non-payment and refusing to take delivery.²³

The Seller's Remedies

It should be noted that the unpaid seller's lien on goods and right of stoppage in transit found in Part V of the Sale of Goods Act do not appear in the Convention. Instead, the Convention provides the following remedies:

(a) Require performance

Just as the buyer is allowed to require performance of the seller under Art. 46(1), the seller is allowed under Art. 62 to require payment, taking of delivery and performance of obligations, by the buyer. The same proviso applies: the seller must not have resorted to a remedy inconsistent with such requirement.

In the case of non-payment, it would have been equally clear under the Sale of Goods Act that the seller could require payment of the price, which is allowed under section 49(1). That provision, however, requires the the property in the goods to have passed to the buyer, and that he then "wrongfully neglects" to pay. Such requirements do not apply under Art. 62. This makes it easier for a seller to claim the price for goods delivered, irrespective of the passing of property.

Again, any right to specific performance would have to be read subject to Art. 28.

(b) Fix an additional period of reasonable length for performance

Art. 63 is the mirror provision of the buyer's right in Art. 47. The seller, too, may, when faced with a breach by the buyer, fix an additional period for performance which is of reasonable length.

This provision allows the seller to fix a period of certain duration for performance, without such act amounting to a waiver of his right to, say, damages, for the original breach, ie, delay in performance.²⁴

(c) Declare contract avoided

In the case of a fundamental breach, or of non-performance by the buyer despite the seller giving him notice of an additional period for performance under Art. 63, Art. 64 allows the seller to declare the contract avoided.

This right may be lost in the situations set out in Art. 64(2).

²³ Reynolds, *supra*, footnote 5, at p. 22. Apart from these, a contract may in fact impose additional obligations on the buyer, from which fundamental breach can arise.

²⁴ Art. 63(2).

(d) *Making of specification by seller himself*

Art. 65 allows the seller a self-help course of action where the buyer is required to specify the form, measurement or other features of the goods, and fails to do so in the time given. In such a situation, the seller may make such specification himself, but must inform the buyer thereof.

This allows the seller to take decisive action swiftly, without having to wait indeterminately for the buyer to state his specifications. However, the seller must have sufficient information from the buyer to make the specification himself. In many situations, the buyer may not have divulged enough information for this purpose, in which case the remedy in question would not be of great assistance. The provision does allow, however, the seller's specification to become binding after what is a reasonable time from the buyer's receipt of it.

(e) *Damages*

Art 61(1)(b) allows the seller to claim damages for any breach of contract or of the Convention provisions. Arts. 74 to 77 set out in detail how to quantify damages.

As with the Sale of Goods Act,²⁵ a seller who is owed the price may choose to sue for it as a debt. Art. 62 allows the seller to "require" payment of the price, ie he may sue for it, instead of suing for damages.

(f) *Reasonable expenses for preservation of goods*

Under Art. 85, if the buyer is in delay for taking delivery, or fails to pay the price when payment and delivery are to be concurrent, the seller in possession of the goods is to take reasonable steps to preserve them. For so doing, he is entitled retain them until he is reimbursed his reasonable expenses by the buyer. This is a mirror of the buyer's obligation to preserve the goods under Art. 86.

3. Remedies/Points Common to Both

In addition to the remedies above, there are remedies which apply to both parties.

(a) *Suspension of performance in case of anticipatory breach*

In cases of anticipatory breach by either party, Art. 71 allows the other to suspend performance. This applies if "it becomes apparent

²⁵ This is allowed under s. 49(1), provided that property has passed.

that the other party will not perform a substantial part of his obligations” resulting from either:

- (a) a serious deficiency in his ability to perform or in his creditworthiness; or
- (b) his conduct in preparing to perform or in performing the contract.

However, under Art. 71(3), if the other party gives adequate assurance of performance, the innocent party must continue with performance.

(b) *Avoidance of Contract in case of Anticipatory Fundamental Breach*

Under Art. 72, where the anticipatory breach is a fundamental breach, the innocent party may declare the contract avoided. Reasonable notice must, however, be given to the other party to allow him to give adequate assurance of performance, if any is to be given.

(c) *Avoidance of Contract of Instalment Deliveries*

Art. 73 applies to breach in relation to contracts involving instalment deliveries.

(d) *Impediment beyond parties' control*

Art. 79 excuses non-performance due to an impediment beyond the party's control.

Art. 79(5), however, states that the Article does not prevent either party from exercising any right *other than to claim damages* under the Convention.

(e) *Restitution*

The ability to make restitution before one can exercise particular remedies is mentioned in Arts. 81, 82 and 84.

Under Art. 81(2), where a contract is avoided, a party who has performed the contract wholly or in part may claim restitution from the other for whatever has been supplied or paid. This is akin to the common law requirement that parties be able to provide *restitutio in integrum*.²⁶ Further, if both parties are bound to make restitution, they must do so concurrently.

Under Art. 84(2), the buyer has to account to the seller for all benefits he has derived from the goods or part of them in two situations:

- where he must make restitution of the goods or part of them;
- where such restitution is impossible but the buyer has nonetheless declared the contract avoided or required delivery of substitute goods.

²⁶ See Goff & Jones, *The Law of Restitution*, 1993, pp. 198–201.

(f) *Payment of Interest*

Art. 78 provides for the payment of interest in the following manner:

If a party fails to pay the price or any other sum that is in arrears, the other party is entitled to interest on it, without prejudice to any claim for damages recoverable under Article 74.

In addition, the buyer is entitled to interest on the price where the seller is to refund it to him — Art. 84(1).

AN ELABORATION ON AVOIDANCE

Fundamental breach is not the only situation where the remedy of avoidance is available; as an alternative, where a *nachfrist* notice is given and there is no compliance, avoidance is also available.²⁷

What are the implications of such a declaration of avoidance? Arts. 81 to 84 are instructive.

Art. 81 provides:

- (1) Avoidance of the contract releases both parties from their obligations under it, subject to any damages which may be due. Avoidance does not affect any provision of the contract for the settlement of disputes or any other provision of the contract governing the rights and obligations of the parties consequent upon the avoidance of the contract.

The first sentence spells out the effect of contractual rescission at common law, where a party suffering a breach by the other chooses to terminate the contract on the basis that the breach has led to repudiation.²⁸ Primary obligations cease.

The provision further clarifies that avoidance does not negate any dispute resolution clause or any clause which the parties have expressly included to deal with their rights and obligations upon termination of the contract. Examples of the clauses which would be covered in this provision would be an arbitration clause, and a liquidated damages clause.

It should be noted that the vexed questions relating to s. 28 of the Sale of Goods Act which relate to whether an innocent party must show he was himself ready and willing to perform the contract at the time of breach

²⁷ This does not appear expressly in the notice provisions of Arts. 47 and 63, but is the conclusion which can be drawn: see Treitel, *supra*, footnote 8, p. 366.

²⁸ See, for instance, the consequences of rescission in *Photo Production Ltd v Securicor Transport Ltd* [1980] AC 827. See also, *Bunge Corp v Tradax Export SA* [1981] 1 WLR 711. In the context of a CIF contract, the same applies: *Berger & Co Inc v Gill & Duffus SA* [1984] 1 AC 382.

should not arise.²⁹ There is no equivalent of s. 28 under the Convention requiring the concurrence of payment and delivery.

The buyer's right to declare the contract avoided is linked to his ability to make restitution of the goods delivered. This is shown in Art. 82, 83 and 84(2).

COMPARISON OF CONVENTION DAMAGES WITH SALE OF GOODS ACT DAMAGES

The following is a general comparison of the damages under the Convention and the Sale of Goods Act:

Aspect	Convention	Sale of Goods Act
1. When available	For breach of contract: Art. 45(1)(b) Art. 61(1)(b) Art. 74	<ul style="list-style-type: none"> • Upon resale in rescission: s. 48 • Non-acceptance by buyer: s. 50 • Non-delivery by seller: s. 51 • Breach of warranty: s. 53 • Breach of condition: common law • Breach of contract in general: common law
2. Whether conditions attach	<ul style="list-style-type: none"> • Yes, for the buyer who has bought substitute goods and for the seller who has resold: Art. 75 • Yes, if there is a "current price" where there is no such purchase of substitute goods or resale: Art. 76 	Yes – look at "market or current price" if there is an "available market": ss. 50 and 51.
3. Is mitigation required?	Yes: Art. 77	Yes: common law
4. What is the measure of damages?	Art. 74 Art. 75 Art. 76	S. 50 S. 51 S. 53

²⁹ See *Benjamin's Sale of Goods*, *supra*, footnote 2, para. 9-010 – 18.

Aspect	Convention	Sale of Goods Act
5. Time of assessment of damages	<ul style="list-style-type: none"> • Art. 75: for substitute goods – time of substitute purchase • Art. 76: where there is current price – at time of avoidance but if goods taken over before avoidance, at time of taking over • Anticipatory breach: above rules apply 	<ul style="list-style-type: none"> • Non-acceptance, s. 50(3) – time at which goods ought to have been accepted or time of refusal to accept • Non-delivery, s.51(3): at time at which goods ought to have been delivered or time of refusal to deliver • Other breaches: common law rule – time of breach³⁰ • Anticipatory breach: time fixed for performance; if none, time of refusal to perform³¹
6. Is specific performance available instead of damages?	Depends: Arts. 46 and 62 read with Art. 28	Depends: s. 52 and common law
7. Are damages available in conjunction with other remedies?	Yes: Arts. 45(2) and 61(2). For buyer, also Art. 34. See also Art. 83, Art. 37	Depends: was there waiver? Was there rescission?
8. Are special damages available?	Yes: Art. 74	Yes: s. 54
9. Can interest be claimed?	Yes: Arts. 78 and 84(1)	Yes: ss. 54 and 49(3) ³²
10. Does interest preclude claim in damages?	No: Art. 78	Depends: common law ³³

³⁰ Treitel, *supra*, footnote 8, p. 116.

³¹ *Ibid.*, p. 118.

³² See *Benjamin's Sale of Goods*, *supra*, footnote 2, para. 16-006 – 7.

³³ *Ibid.*

Aspect	Convention	Sale of Goods Act
11. Can refund of price be claimed instead of damages?	Yes: by implication in Art. 84(1)	Yes: ss. 49 and 54, and common law – where buyer can show total failure of consideration ³⁴
12. What can be claimed by party in breach, as being deductible from claim by innocent party?	<ul style="list-style-type: none"> • What should have been mitigated: Art. 77 • Reduction in price by buyer: Arts 44 and 50 • Benefits derived by buyer from goods delivered: Art. 84(2) • Reasonable expenses for preservation of goods which have been retained from proceeds of sale: Art. 88(3) 	<ul style="list-style-type: none"> • Same: common law³⁵ • Reduction of price for breach of warranties: s. 53(1) • Expenses paid to innocent party where there is total failure of consideration and payment is not a deposit³⁶
13. What expenses can be claimed by innocent party?	Reasonable expenses in preservation of goods: Arts. 85 and 86 Warehouse expenses: Art. 87 Seller to bear additional expenses relating to payment: Art. 57(2)	Expectation loss v reliance loss ³⁷ s. 37(1): “reasonable charge for care and custody of the goods” in favour of seller ³⁸
14. Damages for instalment contracts	General rules apply	Ss. 30 and 31 and common law

³⁴ *Ibid.*, para. 12–065.

³⁵ *Ibid.*, para. 16–044 – 46.

³⁶ Goff & Jones, *supra*, footnote 26, pp. 413 and 428–429.

³⁷ Treitel, *supra*, footnote 8, pp. 82–87, and *Benjamin’s Sale of Goods*, *supra*, footnote 2, para. 17–057 – 58.

³⁸ See *Benjamin’s Sale of Goods*, *supra*, footnote 2, para. 16–078A.

Aspect	Convention	Sale of Goods Act
15. Are damages available for delay in performance?	Yes: Arts. 47(2), 48(1), 63(2), 59 read with Art. 61(1)(b)	Yes: common law ³⁹

REMEDIES FOR SPECIFIC CONTRACTS

Many issues are not expressly dealt with by the Convention. It also does not help that one writer has said that:

The common law and the Sale of Goods Act [as explained in the book] provide little or no guidance to...[the] application [of the Convention].⁴⁰

Apart from the battery of remedies available to buyers and sellers in general, what special considerations, if any, apply to the following contracts?

Common international sale contracts, such as CIF and FOB contracts, are not expressly dealt with. However, by implication, transactions which involve a transfer not only of goods, but of documents as well, are clearly envisaged by the Convention. This is clear if one refers to Arts. 34 and 57(2). Arts. 71(2) and (3) allow the seller to withhold delivery of the goods in certain situations, notwithstanding that the buyer may hold documents entitling him to delivery. An important question, for instance, would be what damages are recoverable under the Convention for the type of situation which arose in *Kwei Tek Chao v British Traders Ltd.*⁴¹

Another situation which is not expressly addressed is the damages for breach of a contract which is part of a string of contracts or where there are sub-sales by the buyer.⁴²

Sales involving *Romalpa* clauses⁴³ are given no mention in the Convention. The basis of such clauses under the Sale of Goods Act is said to be the

³⁹ See *ibid.*, para. 17–036.

⁴⁰ The authors of *Benjamin's Sale of Goods*, *supra*, footnote 2, para. 12–080.

⁴¹ [1954] 2 QB 459. See *ibid.*, para. 19–168. The date of shipment appearing in the bills of lading there were forged and, as a result, the buyers did not find out about the shipment being late until *after* they had paid against the documents, but before arrival of the goods. The buyers were awarded damages for the breach in respect of the falsely dated shipping documents. It may be argued that the failure to submit proper documents is a “fundamental breach” under Art. 25 of the Convention, and damages would be calculated from the time of avoidance in accordance with Art. 76 if there is no substitute transaction as envisaged by Art. 75.

⁴² For the issues which arise in such situations, see *Benjamin's Sale of Goods*, *ibid.*, para. 15–092, 17–026 – 034 and 17–042.

⁴³ *Aluminium Industrie v Romalpa Aluminium Ltd* [1976] 1 WLR 676 was the landmark case in which such a clause was considered by an English court. There has been a number of cases involving such clauses since.

seller's right under s. 19 to reserve to himself a right of disposal over the goods until the conditions he imposes have been fulfilled. In the *Romalpa* type of clause, such a condition would typically be payment of the price or all monies due to the seller. There appears to be no equivalent of s. 19 under the Convention. This does not, however, mean that parties cannot insert such a clause and have it enforced, as Art. 81(1) clearly allows parties to insert terms to govern their respective rights and obligations where the contract is avoided. If such a clause is inserted, it would, in appropriate cases, presumably be given effect under the Convention as part of the parties' bargain.

Questions relating to termination of a contract for misrepresentation are also not expressly dealt with, nor is the question as to the status of a penalty clause in a sale contract. On the latter, it may be asked whether such a clause should be enforced as part of the parties' bargain; the common law would not, but some civil law jurisdictions may, find it enforceable.⁴⁴ Besides these issues, the Convention is also silent on the rate of interest payable, and the currency of payment where the price has not been fixed by the parties and the court has to determine it under Art. 55.

Art. 7(2) addresses the law applicable where the Convention does not expressly deal with a question:

Questions concerning matters governed by this Convention which are not expressly settled in it are to be settled in conformity with the general principles on which it is based or, in the absence of such principles, in conformity with the law applicable by virtue of the rules of private international law.⁴⁵

In considering the role of common law, or, indeed, any other law in Singapore, in relation to the Convention, s. 4 of the Act incorporating the Convention should be noted.

In addition, Arts. 8(3) and 9 allow a court to look at any usage which have been agreed or established between the parties. In addition, it would also be appropriate under Art. 9(2) to look at:

any usage of which the parties knew or ought to have known and which in international trade is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade concerned.

⁴⁴ Treitel, *supra*, footnote 8, Chapter VII, gives a comparative account of the Anglo-American, French and German interpretations of a penalty and its enforceability.

⁴⁵ See Kritzer, *supra*, footnote 11, pp. 117-9 for a discussion of gap-filling interpretation of the Convention.

CONCLUSION

Despite the ambiguities which have been discussed, it should be remembered that the Convention itself directs that uniformity is the aim, as Article 7(1) states:

In the interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade.

It is necessary, therefore, to achieve such uniformity, if it is not to be illusory, to keep abreast of interpretations of the Convention Articles in the jurisdictions which have adopted it. This assumes that such other jurisdictions will do the same, to ensure that there is consistency in applying the Convention.

The issue of remedies is but one facet of the Convention. It is, however, an important one as it has many practical implications for those using the Convention, as well as those advising its users. In areas of ambiguity, it is possible for parties to agree to vary, or even exclude, the Convention articles, in accordance with Article 6. However, if this is frequently resorted to, it defeats the purpose of adopting the Convention in the first place. It cannot, then, fulfil its aim to be a kind of Esperanto for international sale of goods law.⁴⁶

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⁴⁶ As suggested by Johan Steyn, *A Kind of Esperanto?*, in *The Frontiers of Liability*, *supra*, footnote 5.

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