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.

INTRODUCTION

1. This provision gives an overview of the remedies available to the buyer when the seller has committed a breach by non-performance of any of its duties under the contract or the Convention. 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 importance. 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; such grace periods would interfere with 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 invoking remedies for breach of contract otherwise available under the applicable domestic law, since the Convention excludes recourse to domestic law where the Convention provides a solution.

NON-PERFORMANCE OF AN OBLIGATION AS A 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 not specifically addressed in the Convention—for instance, the duty to extend a bank guaranty in favour of the buyer—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 remedies. Of course, some remedies are available to the buyer only where the breach is fundamental. Generally, the reasons for the seller’s breach are irrelevant, except to the extent the seller can claim an exemption under article 79 (5). In particular, article 45 (1) does not require that the seller have acted with negligence, fault or intent in order for the buyer to claim the remedies mentioned in the provision.

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

RIGHTS UNDER ARTICLES 46-52

5. Article 45 (1) (a) merely refers to articles 46-52. Although all the remedies provided for in these articles require that a breach of an obligation has occurred, the provisions make distinctions as to the kind of breach. 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, and it is doubtful whether article 50 applies to cases other than delivery of non-conforming goods. Article 51 addresses partial non-performance; article 52 deals with early delivery and excess delivery.

CLAIM OF DAMAGES

6. Article 45 (1) (b) lays down the substantive conditions for a claim to damages by the buyer. In case of breach of a contractual obligation of any sort by the seller, the buyer who has suffered loss as a result of that breach can claim damages. Thus, for example, the buyer can claim damages for losses caused by the delivery of defective goods. A buyer can also claim damages for an ensuing 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. However, if the contract or the Convention imposes further conditions on the buyer’s entitlement to damages—such as the requirement of notice under articles 38, 39, and 43—these conditions must also be satisfied.

1. 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.

2. As far as the amount of damages is concerned, it is to be adjudicated according to articles 74-76.

3. 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; such grace periods would interfere with the remedial system of the Convention.

4. 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 invoking remedies for breach of contract otherwise available under the applicable domestic law, since the Convention excludes recourse to domestic law where the Convention provides a solution.

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7. In contrast to many national systems, the right to claim damages under the Convention does not depend on any kind of fault, breach of express promise, or the like; it presupposes merely an objective failure of performance. Only under the conditions described in article 79 or in a case falling within article 80 is the seller exempted from liability for damages.\(^{10}\)

8. Articles 74-77 to which article 45 (1) (b) refers provide rules for the calculation of the amount of damages, but those provisions do not form a basis for a claim of damages.\(^{11}\)

9. The decisions that have 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 in these cases, 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 invoked along with any other remedy in order to compensate for losses that occur despite the other remedy.\(^{14}\) The amount of damages, however, depends on the other remedy to which the buyer has resorted.\(^{15}\)

**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.\(^{16}\) Although this possibility could be regarded as a matter of procedural law and therefore outside the Convention’s scope of application, article 45 (3) nevertheless explicitly excludes it. The provision is addressed to courts and arbitral tribunals. The parties themselves are free to extend or otherwise modify the period for performance at any time.

**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.\(^{17}\) 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.\(^{18}\) The prescription period applicable to the rights and claims provided for in article 45 must thus be determined by reference to the applicable national law or—where it governs—to the United Nations Convention on the Limitation Period in the International Sale of Goods.

**BURDEN OF PROOF**

14. Because the other parts of article 45 do not grant concrete rights on the basis of which the buyer can sue, the question of the burden of proof under the provision is only relevant for a claim to damages under article 45 (1) (b). For damage claims the burden is on the buyer, who must prove a breach of an obligation by the seller as well as the losses caused by that breach. According to article 79, the burden is on the seller to prove any exempting circumstances.\(^{19}\)

**Notes**


4. See *CRCICA Arbitration Cairo, Egypt*, 3 October 1995, Unilex.

5. A parallel provision, article 61 (1) (b), 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).


For an instance in which the article 79 exemption was found not inapplicable, see 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].


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

See as 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]; CLOUT case No. 219 [Tribunal Cantonal Valais, Switzerland, 28 October 1997], also in Unilex; CLOUT case No. 293 [Arbitration—Schiedsgericht der Hamburger freundschaftlichen Arbitrage, 29 December 1998]; CLOUT case No. 348 [Oberlandesgericht Hamburg, Germany, 26 November 1999].

See the Digest for article 46, para. 9.

See the Digests for articles 74-76.

Granting such grace periods 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.


See the Digest for article 4, para. 13.

See the Digest for article 79, para. 20.