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BUYERS' REMEDIES IN GENERAL AND BUYERS' PERFORMANCE-ORIENTED REMEDIES

*Harry M. Flechtner**

This paper will cover several provisions of the CISG that, despite their importance in the substantive scheme of the Convention, have not generated a great deal of case law or controversy. Specifically, I will focus on Articles 45, 46 and 28 of the Convention. Article 45 is the lead provision of Section III (“Remedies for Breach of Contract by the Seller”) of Part III, Chapter II of the CISG; it provides an overview or catalogue of an aggrieved buyer’s remedies (Article 45(1)), along with a rule that coordinates buyers’ remedies (Article 45(2)) and a rule of general applicability for all of the buyers’ remedies (Article 45(3)). Article 46 provides for an aggrieved buyer’s right to demand that the seller actually perform its obligations. Although it appears in an entirely different chapter of the CISG (Chapter I—“General Provisions”—of Part III of the Convention), Article 28 is intimately related to Article 46, because the former limits a court’s obligation to enforce the rights granted under Article 46.

I. ARTICLE 45

A. Article 45(1)

As the discussion of Article 45(1) of the Convention in the UNCITRAL Digest of Case Law on the CISG indicates,¹ this provision is as much informational as substantive. It is designed as an overview or guide to the remedies available to a buyer for breach by the seller. For example, Article 45(1)(a) merely catalogues the performance-oriented remedies (as opposed to damages) available to an aggrieved buyer, and Article 45(1)(b) provides guidance through the damage measures available when the seller breaches. Professor Magnus has pointed out the special importance such “narrative”

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1. See UNCITRAL Digest of Case Law on the United Nations Convention on the International Sale of Goods, Article 45, ¶¶ 1, 5, U.N. Doc. A/CN.9/SER.C/DIGEST/CISG/45, available at <http://daccessdds.un.org/doc/UNDOC/GEN/V04/552/70/PDF/V0455270.pdf?OpenElement> [hereinafter UNCITRAL Digest, Art. 45].

provisions can have in international instruments, where “systematic guidance” through the substantive system may be critical in promoting “uniform interpretation and application.”² Of course, Article 45(1) does include substantive aspects. For example, Article 45(1)(b) is the basis for a buyer’s claim to damages when the seller breaches, whereas the other CISG provisions referred to in Article 45(1)(b)—i.e., Articles 74-77—merely specify how damages should be measured. And the chapeau to Article 45(1) (“If the seller fails to perform any of his obligations under the contract or this Convention, the buyer may . . .”) makes it clear that the CISG dispenses with any requirement that, for example, a seller be “at fault” in committing a breach before particular remedies, such as damages, are available to the buyer.³

As the UNCITRAL Digest points out, tribunals apparently have had little difficulty with the substantive aspects of Article 45(1).⁴ Several decisions rendered after the Digest was assembled have confirmed what a large number of decisions cited in the Digest had already recognized: that a buyer’s right to claim damages for a seller’s breach is grounded in Article 45(1)(b).⁵ Recent decisions have cited Article 45(1)(b) as the foundation for a buyer’s claim to damages for, in particular, a seller’s late delivery,⁶ and delivery of non-conforming goods.⁷ The provision has also been cited as one of the bases (along with Articles 74 and 84(1)) for a buyer’s claim to interest on payments

2. Ulrich Magnus, *Beyond the Digest: Part III (Articles 25-34, 45-52)*, in *THE DRAFT UNCITRAL DIGEST AND BEYOND: CASES, ANALYSIS AND UNRESOLVED ISSUES IN THE U.N. SALES CONVENTION* 319, 330-31 (Franco Ferrari et al. eds., 2004).

3. UNCITRAL Digest, Art. 45, *supra* note 1, ¶¶ 3, 7.

4. *Id.* ¶ 9.

5. See the decisions cited *id.* ¶ 1 n.2. For recent decisions in accord, see, e.g., Oberlandesgericht Düsseldorf, Germany, 28 May 2004, English translation available at <http://cisgw3.law.pace.edu/cases/040528g1.html>; Oberlandesgericht Zweibrücken, Germany, 26 July 2002, English translation available at <http://cisgw3.law.pace.edu/cases/020726g1.html>; Arbitration Tribunal of the Bulgarian Chamber of Commerce and Industry, Bulgaria, 28 Feb. 2002, English translation available at <http://cisgw3.law.pace.edu/cases/020228bu.html>; Handelsgericht Bern, Switzerland, 17 Jan. 2002, English translation available at <http://cisgw3.law.pace.edu/cases/020117s1.html>; Oberster Gerichtshof, Austria, 14 Jan. 2002, English translation available at <http://cisgw3.law.pace.edu/cases/020114a3.html>; CLOUT Case No. 445 [Bundesgerichtshof, Germany, 31 Oct. 2001]; Landgericht Braunschweig, Germany, 30 July 2001, English translation available at <http://cisgw3.law.pace.edu/cases/010730g1.html>; Hof van Beroep, Belgium, 27 June 2001, English translation available at <http://cisgw3.law.pace.edu/cases/010627b1.html>; Landgericht Trier, Germany, 29 Mar. 2001, English translation available at <http://cisgw3.law.pace.edu/cases/010329g1.html>; CLOUT Case No. 360 [Amtsgericht Duisburg, Germany, 13 Apr. 2000].

6. Oberlandesgericht Düsseldorf, Germany, 28 May 2004, English translation available at <http://cisgw3.law.pace.edu/cases/040528g1.html>.

7. Landgericht München, Germany, 6 Apr. 2000, English translation available at <http://cisgw3.law.pace.edu/cases/000406g1.html>.

that it was entitled to recover from the seller.⁸ Several more recent decisions have also confirmed another holding cited in the Digest—that, as demonstrated by Article 45, the CISG contains a comprehensive system of remedies for aggrieved buyers which preempts remedies available under domestic sales laws.⁹ Finally, a decision rendered after the material for the Digest was assembled states that, where the seller was late in delivering the goods but the buyer failed to avoid the contract, Article 45(1)(b) does not support the buyer's claim for restitution of payments made (or for damages for profits lost when a customer of the buyer cancelled its contract to purchase the goods).¹⁰

B. Article 45(2)

Article 45(2) establishes that, under the CISG, an aggrieved buyer's right to damages is cumulative with its other remedies—i.e., the buyer does not forfeit its right to claim damages by invoking any other remedy. Although the UNCITRAL Digest does not cite any cases that have applied Article 45(2), it does note that, where a buyer has availed itself of other remedies, the amount of damages the buyer may recover “depends on which other remedy has been resorted to by the buyer.”¹¹ A recent decision in fact relies on Article 45(2) to confirm the point made in the Digest. The court stated that “[b]y virtue of Article 45, a buyer can both rely on Article 50 in order to claim the right to reduce the price of [non-conforming] goods supplied, as well as on Article 74 in order to claim damages for breach of the contract,” provided that the buyer can prove that “further damage has been suffered . . . beyond the diminution or extinction of the price.”¹² The court proceeded to rule that the buyer could reduce the price of the goods to zero dollars under Article 50, and could in addition recover further damages for breach under Article 74.¹³

8. Oberlandesgericht Karlsruhe, Germany, 19 Dec. 2002, English translation available at <http://cisgw3.law.pace.edu/cases/021219g1.html>.

9. See UNCITRAL Digest, Art. 45, *supra* note 1, ¶ 2 and authority cited in n.3 (Geneva Pharmaceuticals Tech. Corp. v. Barr Labs, Inc., United States, 10 May 2002). For other decisions in accord, see CLOUT Case No. 426 [Oberster Gerichtshof, Austria, 13 Apr. 2000]; CLOUT Case No. 424 [Oberster Gerichtshof, Austria, 9 Mar. 2000].

10. Landgericht München, Germany, 6 Apr. 2000, English translation available at <http://cisgw3.law.pace.edu/cases/000406g1.html>.

11. See UNCITRAL Digest, Art. 45, *supra* note 1, ¶ 10.

12. Supreme Court of Western Australia, Australia, 17 Jan. 2003, text of decision available at <http://cisgw3.law.pace.edu/cases/030117a2.html>.

13. *Id.*

C. Article 45(3)

When a buyer “resorts to a remedy for breach of contract,” Article 45(3) forbids a court or arbitral tribunal to grant the seller a “period of grace.” Once again, the Digest does not cite any cases applying Article 45(3). Although it does not cite Article 45(3), a very recent case may in fact illustrate the application of this rule—at any rate, it is consistent with the rule. In the decision, the court held that, under Article 45(1)(b), a buyer was entitled to damages for the seller’s late delivery without requiring the buyer to have given the seller a “reminder” (referring, presumably, to a reminder that delivery was past due).¹⁴

II. ARTICLES 46 AND 28

Article 46 provides that an aggrieved buyer has the right to require actual performance by the seller of its contractual obligations. This general principle is stated in Article 46(1). The remainder of the Article specifies that the aggrieved buyer’s right to the seller’s performance includes, if particular prerequisites are met, replacement of non-conforming goods (Article 46(2)) and repair of non-conforming goods (Article 46(3)). The availability of such performance-oriented buyers’ remedies, however, is limited by Article 28, which provides that, in enforcing a party’s right to require performance under the CISG, “a court is not bound to enter a judgment for specific performance unless the court would do so under its own law in respect of similar contracts of sale not governed by this Convention.”

The UNCITRAL CISG Case Digest argues that the placement of Article 46 as the first of the buyer’s remedies provisions suggests that the Convention favors remedies that preserve the contractual bond (such as the remedies in Article 46) in contrast to remedies that involve termination of the contract (i.e., avoidance).¹⁵ The Digest also notes, however, that “[d]espite its importance, the right to require performance has not occasioned much case law. In practice other remedies—in particular the right to claim damages—are

14. Oberlandesgericht Düsseldorf, Germany, 28 May 2004, English translation available at <http://cisgw3.law.pace.edu/cases/040528g1.html>.

15. UNCITRAL Digest of Case Law on the United Nations Convention on the International Sale of Goods, Article 46, ¶ 3, U.N. Doc. A/CN.9/SER.C/DIGEST/CISG/46, available at <http://daccessdds.un.org/doc/UNDOC/GEN/V04/552/70/PDF/V0455270.pdf?OpenElement> [hereinafter UNCITRAL Digest, Art. 46].

preferred.”¹⁶ Decisions rendered since the Digest was assembled do not contradict that final statement. Indeed, one such decision¹⁷ illustrates how, when disputes reach a point that threatens litigation, an aggrieved party tends not to rely on the performance-based remedies in Article 46. A buyer had demanded that the seller repair defective goods that had been included in a delivery—which, the tribunal that heard the dispute noted, was the buyer’s right under Article 46(3). The seller had promised to comply with the demand. When the seller broke its promise, the buyer was forced to resort to litigation, but the buyer did not seek to enforce its Article 46(3) repair right. Instead, it avoided the contract and sought a refund. The buyer’s decision not to pursue its rights under Article 46(3) makes a great deal of sense. If a seller has refused voluntarily to honor its obligation to repair—in this case, even after expressly promising to do so—a buyer might naturally be skeptical of repair work that the seller is forced to do under order of a court or arbitral tribunal; in addition, the buyer might well be concerned with the delay that seeking such an order would entail. As another recent case noted, if an aggrieved buyer itself repairs or arranges for the repair of non-conforming goods, the buyer can recover the cost of such repairs as damages (subject to the usual limits on damage recoveries, such as the foreseeability requirement of Article 74 and the mitigation rule of Article 77).¹⁸ This course—or the alternative of avoiding the contract and purchasing substitute goods (qualifying the buyer for a refund under Article 81(2) and damages under Article 75)—eliminates doubts about the quality of repair work performed by a seller that has delivered non-conforming goods, as well as the delay of waiting for a tribunal to order repair. Of course, if the seller has repair capabilities not possessed by others, and the buyer cannot easily avoid the contract and replace the goods, forcing the seller to repair pursuant to Article 46(3) may be the buyer’s only practical course—but such cases, apparently, are rare.

This idea that it makes sense for an aggrieved buyer to resort to its performance-based remedies in Article 46 only in special circumstances may explain why Article 28, which arose out of rather intense debate and

16. *Id.* ¶ 4.

17. Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, Russian Federation, 25 June 2003, English translation available at <http://cisgw3.law.pace.edu/cases/030625r1.html>.

18. Oberster Gerichtshof, Austria, 14 Jan. 2002, English translation available at <http://cisgw3.law.pace.edu/cases/020114a3.html>.

negotiation,¹⁹ has to date generated very little case law, and almost no controversy. One of the few cases in which a buyer pursued its right to require actual performance by the seller under Article 46(1) was decided by a U.S. court: it found that the buyer had alleged sufficient facts to show that it would be entitled to an order requiring the seller to perform, despite Article 28, because the buyer's allegations included circumstances that—if proven at trial—would justify an award of specific performance under the restrictive rules of U.S. domestic sales law.²⁰ This case, in fact, is the only Article 28 decision cited in the UNCITRAL Case Digest,²¹ and my research indicates that Article 28 has had no significant impact on any subsequent decision. Thus, in the only significant reported decision on Article 28, a common law court, whose domestic law restricts the availability of specific performance, found that an order requiring the seller to perform under Article 46(1) would be proper. In fact, to my knowledge no decision has ever refused to order a party to perform on the basis of Article 28.

The fact that Article 28 appears to have had no impact in practice may demonstrate that those (rare) occasions when it makes sense for an aggrieved party to seek a performance-oriented remedy are also the occasions when domestic sales laws—even in common law jurisdictions that restrict the availability of specific performance—will grant it. The common law restrictions, in fact, may be designed to prevent a vengeful aggrieved party motivated by a desire to punish the breacher (rather than by the goal of procuring an effective remedy) from pursuing an order requiring performance when that does not make economic sense. The more liberal availability of performance-oriented remedies in civil law jurisdictions, in contrast, may reflect an emphasis on the breaching party's moral obligation to perform its promises. I have argued elsewhere that the absence of actual controversy over Article 28 and the availability of specific performance under the CISG suggests that this is an area ripe for a rapprochement between the approaches

19. See Ulrich Huber, *Article 28*, in COMMENTARY ON THE UN CONVENTION ON THE INTERNATIONAL SALE OF GOODS (CISG) ¶ 5, at 200 (Peter Schlechtriem ed., Geoffrey Thomas trans., 2d ed. 1998); JOHN O. HONNOLD, UNIFORM LAW FOR INTERNATIONAL SALES UNDER THE 1980 UNITED NATIONS CONVENTION § 191 (3d ed. 1999).

20. CLOUT Case No. 417 [U.S. District Court for the Northern District of Illinois, United States, 7 Dec. 1999] (*Magellan International Corp. v. Salzgitter Handel GmbH*, 76 Fed. Supp. 2d 919 (N.D. Ill. 1999)).

21. UNCITRAL Digest of Case Law on the United Nations Convention on the International Sale of Goods, Article 28, ¶ 3, U.N. Doc. A/CN.9/SER.C/DIGEST/CISG/28, available at <http://daccessdds.un.org/doc/UNDOC/GEN/V04/550/53/PDF/V0455053.pdf?OpenElement>.

of the civil law and common law traditions.²² Such a compromise could result in the removal of what has been a significant but, it turns out, almost entirely theoretical irritant in the search for universal commercial law principles.

Whereas Article 28 has had very little impact—either negative or positive—on the application of the CISG, several decisions rendered since the UNCITRAL Digest of Case Law on the CISG was assembled appear, to this author at any rate, to be confused about the meaning and impact of Article 46. In one very recent decision,²³ a buyer had placed equipment orders that were marked “urgent” and the seller had delivered the equipment between two and four months after the orders were placed. When the buyer claimed damages for late delivery, the court noted that the buyer had not made a demand for performance as provided in Article 46(1) (nor, the court noted, had the buyer fixed an addition period of time for delivery under Article 47(1)); as a result, the court held, the buyer had failed to establish that the seller’s deliveries were late. Perhaps the decision illustrates a point made in the UNCITRAL Case Digest, based upon suggestions found in the Secretariat Commentary to the Draft Convention: “under Article 46(1), a clear declaration that the buyer requests the performance of a contractual obligation is needed.”²⁴ But even if such a demand for performance is required before a buyer can assert a right to performance under Article 46(1), the buyer in the case was not asserting such a right—rather, it was seeking damages for late delivery. Requiring such a demand for performance before damages can be recovered, in fact, seems to contradict the case discussed above (in connection with Article 45(3)) in which the court expressly stated that a buyer need not have given the seller a “reminder” in order to recover damages for late delivery.²⁵ At any rate, such a “demand” requirement as a prerequisite to recovering damages seems to have nothing to do with Article 46. Perhaps the court was merely saying that, because the buyer never demanded performance as of a particular date, the buyer had failed to prove that the seller had delivered beyond the contract time for performance—but (again) what that has to do with Article 46(1) (or Article 47(1), which the court also cited) is entirely unclear.

22. Harry M. Flechtner, *The CISG's Impact on International Unification Efforts: The UNIDROIT Principles of International Commercial Contracts and the Principles of European Contract Law*, in *THE 1980 UNIFORM SALES LAW: OLD ISSUES REVISITED IN THE LIGHT OF RECENT EXPERIENCES 195-97* (Franco Ferrari ed., 2003).

23. Cour d'appel de Poitiers, France, 26 Oct. 2004, English translation available at <http://cisgw3.law.pace.edu/cases/041026f1.html>.

24. UNCITRAL Digest, Art. 46, *supra* note 15, ¶ 10 (citation omitted).

25. See Oberlandesgericht Düsseldorf, Germany, 28 May 2004, English translation available at <http://cisgw3.law.pace.edu/cases/040528g1.html>, discussed *supra* text accompanying note 14.

In another confusing recent decision,²⁶ a buyer had complained that a certain model of goods delivered by the seller did not conform to the contract. The seller admitted problems with the goods and offered to replace them, but the buyer refused the offer. The court indicated that the seller's offer to replace the goods complied with Articles 46(2) and (3), and this (the court seemingly concluded) precluded the buyer's claim for lack of conformity. The court's apparent conclusion that the seller's offer to replace the goods prevented the buyer from asserting a claim for lack of conformity might be correct, but its citation of Articles 46(2) and (3) in support thereof is in error. Articles 46(2) and (3) give an aggrieved *buyer* the right to demand repair or substitute goods from the seller; they do not give the breaching seller the right to repair or replace non-conforming goods. A breaching seller's claim to such a right should be based on the CISG's cure provisions, Articles 37 and 48, which in certain circumstances permit a seller that has made a non-conforming delivery to correct the problem by delivering missing goods, or repairing or replacing non-conforming goods.

The distinction between a breaching seller's right to cure under Articles 37 or 48 and an aggrieved buyer's right under Articles 46(2) and (3) to require the seller to repair or replace the goods is important because the seller's cure provisions impose different conditions than those in Articles 46(2) or (3). Thus a seller who wishes to cure under Article 37 (which applies if the seller is curing "before the date for delivery") must do so without causing the buyer "unreasonable inconvenience or expense"; to cure a non-conforming delivery under Article 48(1) (which applies if the seller is curing "after the date for delivery"), the seller must do so "without causing the buyer unreasonable inconvenience or uncertainty of reimbursement by the seller of expenses advanced by the buyer." These limitations are different from those applicable under Articles 46(2) and (3): Article 46(2) restricts a buyer's right to demand that the seller deliver goods in substitution for a non-conforming delivery to cases where the lack of conformity in the original goods constitutes a fundamental breach of contract; Article 46(3) limits a buyer's right to demand that the seller repair non-conforming goods to situations where such repair is not "unreasonable in the circumstances." The time limitations on a breaching seller's right to cure under Articles 37 and 48(1) also differ from the time limitations imposed on an aggrieved buyer's right to require substitute goods

26. Audiencia Provincial Barcelona, Spain, 28 Apr. 2004, English translation available at <http://cisgw3.law.pace.edu/cases/040428s4.html>.

or repair under Articles 46(2) and (3).²⁷ Thus maintaining the distinction between a buyer's rights to demand substitute goods or repair under Articles 46(2) and (3), and a seller's right to cure a non-conforming delivery under Article 37 or 48, is important to the proper application of the Convention.

In contrast to the decisions discussed above, another recent decision²⁸ gives helpful guidance concerning a buyer's right to require the seller to repair goods under Article 46(3). The court commented thoughtfully on the circumstances that would render a demand for repair unreasonable,²⁹ on who bears the burden of proof concerning the reasonableness of repair,³⁰ and on the alternatives available if a right to repair is unavailable to an aggrieved buyer.³¹ The court also gave a helpful account of the relationship between the time a buyer has to give notice of a lack of conformity in delivered goods as required by Article 39(1), and the time a buyer has to give notice of the remedy it has chosen (including the remedies provided by Articles 46(2) and (3)): "[i]n giving notice of a lack of conformity [pursuant to Art. 39] the buyer does not yet need to communicate the rights he wants to assert. Whether for claims demanding substitute goods or repair (see Art. 46(2) & (3) CISG) or demanding contract avoidance (Art. 49 CISG), the buyer has a further reasonable time period available."³² The clear distinction made here between the reasonable time an aggrieved buyer has to notify the seller of a lack of conformity under Article 39(1), and the further reasonable time the buyer has to give notice of the remedy it has chosen, is an important corrective to some earlier decisions that have failed to maintain this distinction.³³

27. Under Article 37 a seller must cure before the contractual delivery date, whereas under Article 48(1) a seller may cure after the delivery date, but must do so "without unreasonable delay." In contrast, a buyer's demand for substitute goods under Article 46(2) or for repair of non-conforming goods under Article 46(3) must be made "in conjunction with notice given under article 39 or within a reasonable time thereafter."

28. Oberster Gerichtshof, Austria, 14 Jan. 2002, English translation available at <http://cisgw3.law.pace.edu/cases/020114a3.html>.

29. "Particularly, it is unreasonable if the cure is disproportionately expensive for the seller. However, the relation between the cost to cure and the purchase price is irrelevant." *Id.*

30. "The seller has the burden to prove (and to claim) the facts from which the unreasonableness of the cure is alleged, since the obligation to cure is the rule and unreasonableness the exception." *Id.*

31. "If it is unreasonable to cure, in the case of an objectively serious defect the buyer can require delivery of substitute goods (Art. 46(2) CISG) or declare the contract avoided (Art. 49 CISG), which the seller can avert by an offer to promptly deliver substitute goods." *Id.*

32. *Id.*

33. *E.g.*, CLOUT Case No. 196 [Handelsgericht Zürich, Switzerland, 26 Apr. 1995] (stating that a buyer must declare the contract avoided within the time for giving notice of lack of conformity under Article 39(1) of the CISG). See also UNCITRAL Digest of Case Law on the United Nations Convention on the International Sale of Goods, Article 39, ¶ 15, U.N. Doc. A/CN.9/SER.C/DIGEST/CISG/39, available at <http://daccessdds.un.org/doc/UNDOC/GEN/V04/552/11/PDF/V0455211.pdf?OpenElement>.

