

The Buyer's Remedy under CISG and Ethiopian Sales Law: A Comparative Legal Study

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Abstract: The law of sale regulate the contract of sale in which an agreement whereby the seller to transfer or agrees to transfer the property in goods to the buyer and the latter agrees to pay the price of the goods to the seller. This study is a comparative legal analysis between the CISG and Ethiopian sales law which focus on the buyer's remedies for breach of contract by the seller. The major finding of this study revealed that, except few provisions, Ethiopia's sales law governing buyer's remedies are incompatible with CISG provisions. This study also recommends Ethiopia to accede the CISG for their trader's to access the world market and to encourage their involvement in the world market.

Keywords: Buyer's remedy, Civil Code, CISG, Ethiopia

Acronyms

CC – Civil Code

CISG - United Nations Convention on Contracts for the International Sale of Goods

I. INTRODUCTION

Remedies are the center for breach of contract under Contracts for the International Sale of Goods (here after the CISG) and national sales law. There is a breach of contract whenever a party does not perform any obligation under the contract. The non-performance may consist in a defective performance or in a failure to perform at the time performance is due, performance of too early, too late or never are considered non performance of contract.

Under the CISG, all remedies presuppose breach of a contractual duty. It does not matter whether the duty is specifically agreed by the parties or follows from the text of the CISG or from usages or is made by a judge. Though the breach of a duty is a necessary condition, it is as such not sufficient to entitle the innocent party to a specific remedy. Under the CISG, none of the remedies requires fault of the breaching party. Especially in the area of damages, this is in stark contrast to most civil law jurisdictions, which followed the Roman law tradition to require fault as a basis for claiming damages.¹ Under the CISG, in the common law tradition, a purely objective breach suffices. No subjective element such as intent or negligence is needed for determining breach or its consequences.

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Contracting parties assume obligation which emanates from their express agreement, from the incidental effects of the contract and from the gap filling provisions. When the contracting parties do not comply with these obligations, it can be said that there is non-performance of the contract. The CISG and Ethiopian sales law provide remedies in the event of breach. Accordingly, aggrieved parties can cancel the contract, sue for performance, or collect damages, including consequential damages (Article 1717 CC). Under the CISG (Art. 28, 46, & 62) the buyer can choose between damages and specific performance without any discretion left to the court.

Ethiopia yet not adopted CISG. The convention is applicable on international sale contracts made by an Ethiopian only, when parties wish to be ruled by CISG in their choice of law clause of the contract or when the rules of private international law leads to the convention.² In all other cases, for an international sale contract made between an Ethiopian and a foreigner, the governing law might be not the CISG.

This is a comparative legal study and employs a methodology of comparative legal analysis of Ethiopian sales law with CISG. This research has a general objective of examining CISG with Ethiopian sales law to depict whether or not Ethiopians legislations are drafted in a way of promoting contract of international sales good. The study will focus in assessing the buyer's remedy in Ethiopian sales law and CISG regulating buyer's remedy. It may hopefully contribute much in creating awareness to the buyer's and the public about the remedies of buyer's in international and domestic trade in goods. The study will also serve as a basis for those who want to conduct further research.

This study contains three parts. The first part analyzed the buyer's remedy under CISG and the second part critically discussed by comparing the buyer's remedy under Ethiopian sales law and CISG. At the end some conclusions were made up on the analysis made.

II. THE BUYER'S REMEDY UNDER CISG

A breach of contract under the CISG is a term used to describe a party's non performance of an obligation under a contract. The remedies for breach of a contract by the seller are addressed in CISG Articles 45 through 52. Article 45 outlines the basic remedies of the buyer for the seller's breach.

Article 45 sets forth remedies available to a buyer in the event that a seller fails to perform any of his or her primary obligations under a contract or the CISG. CISG permits several remedies which include right to performance of contract, right to avoid the contract, right to reduce price and right to claim damages.

A. *The Buyer's Right to Require the Performance of Contract*

The CISG adopts the general civil law principle that the injured party is entitled to require the performance of contract. Indeed, although the construction of the right to require performance as a remedy comes from common law, the importance attributed by the CISG to the buyer's right to require performance is consistent with the traditional preference of civil law systems for specific relief. The CISG acknowledges that, after a breach of contract, the buyer's principal concern is often that the seller performs the contract as he originally promised.³ Article 46(1) CISG provides the buyer with the unequivocal right to require performance by the seller of his obligations stressing '*the idea of pacta sunt servanda*'. Article 46(1) CISG presupposes that the seller has failed to perform one of his obligations under the CISG or under the contract. The seller has to bear the costs for performance and if performance can be made in different ways under the contract or the CISG, it should be for the seller to choose the appropriate form of performance.⁴

Article 46 sets out the buyer's right to compel the seller's performance. Although the extent to which the common law restricts performance is often exaggerated, the common law is generally more restrictive than the civil law, and this article clearly favors the civil law preference for allowing specific performance.⁵ Under Article 46, the buyer may demand delivery of substitute goods if the lack of conformity of the goods constitutes a fundamental breach and if he gives notice under article 39 or within a reasonable time thereafter.

The seller's duties of performance are described in Article 30 of CISG. According to this provision, the seller must deliver the goods, hand over any documents relating to them and transfer the property in the goods as required by the contract and this Convention. If the seller does not comply with any of these duties, the buyer has the right to require a performance. The buyer may thus demand that the contract be executed by the seller as agreed.⁶

B. *The Buyer's Right to Fix Additional Time for Performance*

Fixing an additional period of time is a rule addressed to the parties and is not the judges or arbitrators that grant to the parties as a period of grace.⁷ Article 47 CISG provides the buyer's right to fix an additional period of time for performance by the seller and is mirrored in article 63 CISG which provides the seller's right to do so in relation to the buyer.

Under Article 47, the buyer may fix a reasonable period of additional time for performance by the seller. During that time, the buyer may not resort to other remedies unless the

seller has noticed the buyer that he will not perform within the period fixed by the buyer.⁸ The buyer may unilaterally fix a time extension to overcome the presumption that a delayed performance does not generally constitute a fundamental breach and to limit the time for the seller to cure its breach. Article 48 allows the seller to cure any nonconformity and even after the date for delivery, remedy at his own expense any failure to perform his obligations. He can do so without unreasonable delay and without causing the buyer unreasonable inconvenience. However, the seller must notify the buyer of its intent to deliver late. The buyer is then obligated to notify the seller if he intends to accept the late delivery. In the event that the buyer does not respond, then the seller is automatically granted the time extension. From the buyer's perspective, the time extension provision in Article 47 can be used to limit the seller's right to cure and to ensure that the seller's failure to deliver at the expiration of the extended time period is a fundamental breach under the CISG. The elevation of untimely performance to the status of fundamental breach allows the buyer to avoid the contract.⁹

C. *The Buyer's Right to Declare the Avoidance of Contract*

The buyer's right to avoid the contract is stated under CISG article 49. As provided by Article 26 CISG, the buyer must declare the contract avoided by means of a notice to the seller. In particular article 26 CISG provides that a declaration of avoidance of the contract is effective only if made by notice to the other party. Since the right of avoidance is made dependent on a declaration means that the entitled party can consciously decide to continue to claim performance of the contract, even when there are grounds for avoidance. It follows that there is no automatic or *ipso facto* avoidance of the contract in the CISG, 'an awkward and overbroad remedy'.¹⁰ The buyer's right to avoid the contract under Article 49 arises as a result of a fundamental breach of contract or non-delivery by the seller within the additional period of time fixed by the buyer under Article 47. If the goods are delivered late, the buyer must declare the contract avoided within a reasonable period of time after he becomes aware of the late delivery. In the case of a lack of conformity, other than late delivery, the buyer must avoid the contract within a reasonable time after he knew or should have known of the breach, after the seller has failed to cure the breach within the period set by the buyer under Article 47, after the expiration of any additional time period indicated by the seller under Article 48, or after the buyer has indicated that he will not accept performance under Article 48. The limitation of the avoidance remedy to the above events is consistent with the CISG's underlying policy of contract continuance. The importance of completing transactions is based upon the recognition of the high costs of contract avoidance associated with international sales.¹¹

D. *The Buyer's Right to Reduce the Price*

Right to reduce the price of goods is also one of the buyer's remedy used to preserve the contract in alignment with the

general pro-contractual spirit of the CISG¹². According to Article 50 CISG, where nonconforming goods have been delivered, the buyer may elect to keep nonconforming goods delivered by the seller and reduce the price accordingly. The contract is adjusted just as if the subject matter of the contract had from the outset been the nonconforming goods actually delivered. The effect of price reduction is to preserve the contract in alignment with the general pro-contractual spirit of the CISG¹³. The buyer can elect to keep nonconforming goods delivered by the seller and unilaterally reduce the price just as if the subject matter of the contract had from the outset been the nonconforming goods actually delivered. By reducing the price, according to Article 45(2) CISG, the buyer is not deprived of any right to claim damages by exercising his right to reduce the price. However, where damages are claimed in combination with price reduction, damages can only be awarded for loss other than the reduced value of the goods since this loss is already reflected in the price reduction.¹⁴ Under Article 50, the buyer can reduce the price of goods that do not conform to the contract, even if the price has already paid. To reduce the price, the buyer must simply disclose the reduction, which does not preclude a claim for damages sustained due to the nonconformity. The reduction must be proportionate to the value at the time of delivery that the nonconforming goods bore to the value of the conforming goods.¹⁵

E. The Buyer's Right to Claim Damages

Damages are the most important remedy in practice, because they provide for monetary relief, which is more easily enforced against local assets or against an issuer of a letter of credit than specific reliefs, such as performance, substitution, or repair.¹⁶ Article 74 CISG uses a simple but powerful formula that 'damages consist of a sum equal to the loss, including loss of profit suffered as a consequence of the breach'. The provision aims at putting the aggrieved party in a good position as if the party in breach had properly performed the contract. This is the essential basic concept is the principle of full compensation.¹⁷

The CISG provides a basis for a claim of damages in Article 45(1) (b) for the buyers. Under the practical aspects, damages are the most relevant and most popular remedy. Article 74 CISG provide loss, including loss of profit, the CISG neither provides for nominal or *de minimis* damages where the aggrieved party suffered no loss at all and damages are a symbolic sum for the violation of a right nor for punitive or supra compensatory damages. It is the consensus view of international case law and legal writing that the loss in the sense of Article 74 can include immaterial or intangible loss, for instance, the loss of good will.¹⁸

The aim of compensating the damage caused by the breach does also not allow for stripping the gain that the debtor made by its breach. It is the creditor's actual loss that counts and sets the standard for compensation. They are almost always available where a breach has occurred and the other party is

almost never exempted from liability. The requirements the claimant must meet are limited in number and often reasonably easy to prove. Uncertain ties and restrictions often linked to the remedies of avoidance and specific performance do not play a role in the assessment of damages. To make good the damage caused by a breach will in most cases satisfy the aggrieved party's interest. Moreover, the creditor can combine damages with any other remedy insofar as the other remedy leaves uncompensated losses unsettled. It is the common understanding of the CISG's damages provisions that damages consist of a sum of money and that creditors cannot claim restitution in kind.¹⁹

III. THE CRITICAL COMPARISON OF THE REMEDY OF BUYER'S UNDER ETHIOPIAN SALES LAW AND CISG

The contract of sale is an agreement whereby the seller transfers or agrees to transfer the property in goods to the buyer and the latter agrees to pay the price of the goods to the seller.²⁰ The law of sales regulates this relationship of the buyer and seller. In Ethiopian sales law the subject matter of sales contract is restricted to corporeal chattels (goods) excluding immovable and incorporeal properties.²¹ However, special corporeal chattels like aircrafts and ships are regulated under special laws. The exclusion was made for economic reasons and it is because of their special requirement of transferring ownership. In this instance, it has similarity with CISG.

The functions of the civil code (here after CC) governing sale of goods are facilitating transaction, regulating market, filling contractual gaps, encouraging optimal cooperation and performance. The CISG also designed among other things to facilitate and promote international trade by making uniform laws, which result in legal certainty and predictability. Ethiopian sales law²² primarily acknowledges three types of remedies in case of contractual breach just like CISG. These remedies are specific performance (1776), cancellation of contract which is avoidance under CISG (1784 & 1785) and claiming damages. In the following the buyer's remedy under Ethiopian sales law and CISG are critically analyzed.

A. Remedies of Buyer's for Non Performance of a Contract

Contracting parties assume obligation which emanates from their express agreement, from the incidental effects of the contract and from the gap filling provisions. When the contracting parties do not comply with these obligations, it can be said that there is non-performance of the contract. Non-performance as defined under CISG and the Ethiopian CC, Art. 1771 cum. 2329 ff, a sale contract is said to be non-performed when a party fails to carry out his/her obligations under the contract. The some provisions of CISG and Ethiopian sales law²³ provide similar remedies for the buyer's in the event of breach. Accordingly, aggrieved parties can cancel the contract, sue for performance, or collect damages, including consequential damages.²⁴ Under the CISG

(Art. 28, 46, & 62) the buyer can choose between damages and specific performance without any discretion left to the court.

Under Ethiopian sales law forced performance can be required when certain failures happen that is when there is failure to deliver, when there is non-conformity or defects, and non-payment. Specific performance of a contract shall not be ordered unless it is of special interest to the party requiring it and the contract can be enforced without affecting the personal liberty of the debtor.²⁵ Under the CISG whether the buyer can claim specific performance or not depends upon the domestic law of the forum (Art. 28) and it's subject to the condition of not having recourse to other remedies that are inconsistent with it (Art. 46(1)). If specific performance is available, it includes requiring delivery of substitute goods when breach is fundamental or requiring repair unless unreasonable (Art. 46(2) and (3)).

B. The Right of Buyer's to Declare the Avoidance of Contract

Avoidance is the action by which contracting parties make an already formed contract ineffective for the response of non-performance. It is also known as termination/cancellation of the contract. But, under the CC beyond the difference in terminology, there is a substantive difference between termination and cancellation i.e. termination does not have retrospective unlike cancellation. Under the civil code (Art. 1785 cum Art. 2336 & 2347), there is a pre-condition of fundamental breach and taking into consideration of good faith for the cancellation of a contract. Similarly, the requirement of fundamental breach is provided under CISG (Art. 25 & Art. 49). In the civil code, fundamental breach is required if the parties want to cancel the contract. But, parties can terminate the contract even in the absence of breach through agreement. The civil code (Art. 2354 & ff.), provide the effects of termination/cancellation of a contract. Unlike civil code, the CISG does not contain any rule on effects on the already transferred property (whether it automatically restituted or not). Unlike the CISG the civil code expressly lists broad grounds of cancellation and recognized two kinds of cancellation i.e. judicial & unilateral.²⁶ The court may cancel a contract if an application for that effect is instituted by a party and upon the fulfillment of good faith and fundamental breach.²⁷ Accordingly, under the civil code, the buyer can cancel a contract if there is a lapse of compulsory date for delivery (Art. 2337), whole ownership not transferred to the buyer (Art. 2341), dispossession (Art. 2342), partial delivery (Art. 2343) and defects (Art. 2344). Both parties can also cancel the contract in cases of anticipatory breach (2352 CC.) and impossibility of performance (2353). But, in all these cases regard shall be made in preserving the contract by giving remedies to the innocent contractant. The CC and CISG expressly provide that cancellation by the buyer and the seller in separate provisions.

Concerning cancellation of the contract, similar with CISG parties can only resort to it when there is a fundamental non-

performance. The cumulative reading of Art. 1785 and 2336-2353 tell us that a creditor cannot cancel a contract unless it is reasonable to believe that s/he would not enter in to the contract without the term which the other party has failed to execute. In short a fundamental breach of the term of a contract is needed.

C. The Right of Buyer's to Reduce the Price

CISG (Art. 50) deal with the right to reduce the price in case of performance not conforming to the contract and to give effect to the provision of cure by non performing party. CISG gives the buyer the ability to unilaterally declare a price reduction even before he has paid the price. Similar provisions to reduce the price are absent in the civil code.

D. The Buyer's Right to Claim Damages

Non-performance as defined under CISG and the Ethiopian civil code, Art. 1771 cum. 2329 ff, a sale contract is said to be non-performed when a party fails to carry out his/her obligations under the contract. The CISG and Ethiopian sales law²⁸ provided remedies in the event of breach. Accordingly, aggrieved parties can cancel the contract, sue for performance, or collect damages, including consequential damages.²⁹ The principle of full compensation embodied under the CISG is also stated under the civil code (Art. 1799). The amount of damages will be assessed on case by case bases depending on the cause of the breach and the loss resulted. Damages will be assessed in the civil code differently when the contract is upheld (2391 & 1790-1805) and when it is cancelled (2362-2367). The rules are similar with CSIG, the difference is, in case of late payment the civil code grants 9% interest to the seller, but under the convention no rate is fixed. The party shall not be released from liability only when s/he can show that performance was prevented by force majeure.³⁰ Moreover, the grounds of force majeure are different in these legal instruments. Under article 79 of CSIG a party is relieved from paying damages if the breach is caused by force majeure, unforeseen circumstances that absolutely prevent the performance of the contract. But the grounds of *force majeure* are listed under the CC but not under CSIG. These cases of *force majeure* which are prescribed under the Ethiopian sales law includes but not limited to natural catastrophe, death of the debtor, an official ban preventing performance, and war.³¹

E. The Buyer's Right to Claim Interest

CISG (Art. 78) deals with interest payments but makes no reference to the rate of interest. The civil code (Art 2361(2), provides for rate of interest. To fill the gaps under the CISG, national law may apply. But, the question is which national law *lexcontractus* or *lexmonatae* will apply? According to CISG Advisory Council Opinion 14 "In the absence of an agreement, the applicable rate of interest is the rate which the court at the creditor's place of business would grant in a similar contract of sale not governed by the CISG".³²

IV. CONCLUSION

The contract of sale is an agreement whereby the seller transfers or agrees to transfer the property in goods to the buyer and the latter agrees to pay the price of the goods to the seller. The law of sales regulates the relationship of the buyer and seller. In case of non performance of contract the law provides different remedy for the buyer's. Among them performance of contract, price reduction, claiming damage, declare of avoidance of contract and fixing additional time for performance of the contract are some of them. These remedies are stated under Ethiopian Civil Code and CISG in different ways.

Ethiopian Sales law and CISG governing buyer's remedy are incompatible on some the provisions. One of the remedy of buyer's is a performance of contract. This right is given to the discretion of the aggrieved party under the CISG, but it is the duty of the court under the Ethiopian sales law. The civil code provided for the buyer's remedy punitive damage and penalty clauses which are not existed in CISG. In case of partial performance or nonconformity, price reduction as an alternative remedy for non-performance is provided under the CISG for the buyer's remedy, but the civil codes lack clarity on this issue. The buyer's right to claim interest, buyer's right to declare the avoidance of the contract and on the content of *force majeure* the civil code and the CISG are incompatible.

Ethiopia has a structured sales law but for it to be competitive in the global level, I recommend for the country to accede to the CISG and adopt the rules from there. The CISG is an instrument that is created to remove legal barriers to trade and promote the development of international trade in goods. This will fortify the country's hope to join World Trade Organization.

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