

Article 64

[Avoidance of instalment contracts]

(1) In the case of a contract for delivery of goods by instalments, if the failure of one party to perform any of his obligations in respect of any instalment constitutes a fundamental breach with respect to that instalment, the other party may declare the contract avoided with respect to that instalment.

(2) If one party's failure to perform any of his obligations in respect of any instalment gives the other party good grounds to conclude that a fundamental breach will occur with respect to future instalments, he may declare the contract avoided for the future, provided that he does so within a reasonable time.

(3) A buyer, avoiding the contract in respect of any delivery, may, at the same time, declare the contract avoided in respect of deliveries already made or of future deliveries if, by reason of their interdependence, those deliveries could not be used for the purpose contemplated by the parties at the time of the conclusion of the contract.

PRIOR UNIFORM LAW

ULIS, article 75.

Commentary

1. Article 64 describes the right to avoid the contract where the contract calls for the delivery of goods by instalments. The contract calls for the delivery by instalments if it requires or authorizes the delivery of goods in separate lots.

2. In a contract for delivery by instalments a breach by a party in respect of one or more instalments can affect the other party in respect of that instalment, in respect of future instalments and in respect of instalments already delivered. The three paragraphs of article 64 treat these three aspects of the problem.

Failure to perform in respect of one instalment, paragraph (1)

3. Paragraph (1) authorizes a party to declare a contract avoided in respect of a single instalment where the other party has committed a fundamental breach in respect of that instalment.¹

¹ A similar result is achieved by article 47 but only in cases where the seller is in breach. Article 64 (1), however, may be utilized by both buyer and seller.

Example 64A: The contract called for the delivery of 1,000 tons of No. 1 grade corn in 10 separate instalments. When the fifth instalment was delivered, it was unfit for human consumption. Even if in the context of the entire contract one such delivery would not constitute a fundamental breach of the entire contract, the buyer could avoid the contract in respect of the fifth instalment. As a result, the contract would in effect be modified to a contract for the delivery of 900 tons at a proportionately reduced price.

4. There are no particular difficulties in determining whether a breach in respect of an instalment is fundamental where each instalment consists of goods that are usable or resaleable independently of the other instalments, as in example 64 A. However, it may be more difficult where the individual instalments are parts of an integrated whole. This would be the case, for example, where the sale is of a large machine which is delivered in segments to be assembled at the buyer's place. In such a case the determination as to whether the breach in respect of that instalment was fundamental should be made in the light of the detriment suffered by the buyer in respect of the entire contract, including the ease with which the failure in respect of the individual instalment can be remedied by repair or replacement. If the breach is fundamental and, because of their interdependence, instalments already delivered or to be delivered could not be used for the purpose contemplated by the parties at the time of the conclusion of the contract, article 64 (3) authorizes the buyer to declare the contract avoided in respect of those deliveries.

Avoidance in respect of future deliveries, paragraph (2)

5. Paragraph (2) considers the situation where the failure of one party to perform any of his obligations under the contract in respect of any instalment gives the other party good grounds to conclude that a fundamental breach will occur with respect to future instalments. In such a case he may declare the contract avoided for the future, provided only that he declares the avoidance of the future performance within a reasonable time of the failure to perform. It should be noted that article 64 (2) permits the avoidance of the contract in respect of future performance of an instalment contract even though it is not "clear" that there will be a fundamental breach of the contract in the future as would be required by article 63.

6. It should be noted that the test of the right to avoid under article 64 (2) is whether a failure to perform in respect of an instalment gives the other party good reason to fear that there will be a fundamental breach in respect of future instalments. The test does not look to the seriousness of the current breach. This is of particular significance where a series of breaches, none of which in itself is fundamental or would give good reason to fear a future fundamental breach, taken together does give good reason for such a fear.

Avoidance in respect of past or future deliveries, paragraph (3)

7. In some contracts it will be the case that none of the deliveries can be used for the purpose contemplated by the parties to the contract unless all of the deliveries can be so used. This would be the case, for example, where, as described in paragraph 4 above, a large machine is delivered in segments to be assembled at the buyer's place. Therefore, paragraph (3) provides that a buyer who avoids the contract in respect of any delivery, an action which can be taken under article 64 (1), may also avoid in respect of deliveries already made or of future deliveries "if, by reason of their interdependence, those deliveries could not be used for the purpose contemplated by the parties at the time of the conclusion of the contract". The declaration of avoidance of past or future deliveries must take place at the same time as the declaration of avoidance of the current delivery.

8. For the goods to be interdependent they need not be part of an integrated whole, as in the example of the large machine. For example, it may be necessary that all of the raw material delivered to the buyer be of the same quality, a condition which might be achievable only if they were from the same source. If this was the case, the various deliveries would be interdependent and article 64 (3) would apply.