

A Comparison of the Remedies for Breach of Contract under the CISG and South African Law

Siegfried Eiselen

CISG Database, Pace Institute of International Commercial Law. Reproduced with the permission of Basedow et al. eds, "Aufbruch nach Europa - 75 Jahre Max-Planck-Institut für Privatrecht", Mohr Siebeck: Tübingen (2001)

Contents

1. Introduction	1
2. General Principles	1
3. Specific performance	2
4. Avoidance/Cancellation	4
5. Price Reduction	6
6. Early Delivery or Excess Delivery	6
7. Suspension or Retention of Payment	8
8. Conclusion	9
SiSU Metadata, document information	10

A Comparison of the Remedies for Breach of Contract under the CISG and South African Law, Siegfried Eiselen*

1. Introduction

The Vienna Convention for the International Sale of Goods, 1980 ("CISG") has been heralded as a modern code of sales law specifically developed for international trade. It embodies the collective wisdom and development of sales law of a great number of legal systems and legal families. Its drafters endeavoured to construct a convention which was free of any particular institutions, remedies, concepts or values of any particular legal system or doctrine. In that sense it also embodies a compromise of various approaches, traditions and doctrines.

In contrast to the CISG, the South African law of sale has developed as a domestic sales law from Roman and Roman Dutch law origins. In broad terms this development encompasses the early Roman legislation, practices and directions, the codification of this law by Justinian in the late classical period, the rival and reception of Roman law in Europe and the development of that law by the various schools throughout the middle ages. It further comprises the development by the Roman Dutch law authors and finally the reception and development of this body of law by the South African courts. During the first half of the 20th century, the South African law of contract was also influenced by English law to a certain extent.

The possible introduction of the CISG into South African law

It is of interest to draw a comparison between the remedies available to the buyer after breach of contract by the seller under the CISG and under South African law. The various forms of breach of contract will not be specifically discussed, except as is necessary under the different headings of the remedies.

2. General Principles

In terms of article 45 of the CISG if the seller should fail to perform any of its obligations under the contract or the CISG, the buyer may exercise the rights provided in articles 46 to 52 of the convention and in addition to that claim damages as provided for in article 74 to 77. It is specifically stipulated that the buyer is not deprived of any rights it may have to claim damages when exercising its right to any of the other remedies.

These general principles accord with the South African approach that the innocent buyer is entitled to claim damages over and above any other remedies at the disposal of a party.

*Professor, Department of Private Law, University of South Africa.

The buyer is entitled to claim damages under any circumstances where it has suffered damages even though it may not rely on any other remedy.

In respect of this general approach there seems to be no difference between the provisions of the CISG and South African law. 10

3. Specific performance 11

In terms of article 46(1) of the CISG, the buyer is entitled to require performance by the seller of his obligations unless the buyer has resorted to a remedy which is inconsistent with this requirement. A remedy which would be inconsistent with specific performance would be any remedy aimed at avoidance or cancellation of the agreement. Article 46, however, must be read with the provisions of article 28 which stipulates that where a party is entitled to specific performance, 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. 12

The provisions of article 28 represent a compromise between those legal systems where the right to specific performance is seen as the primary remedy of the buyer and those systems where specific performance is seen as an extraordinary remedy which may only be granted under specific or exceptional circumstances. The latter approach is an approach that is generally found among common law countries such as England, Australia and the United States, whereas the former approach is common to civil law countries which have their origin in Roman and Germanic law. In the common law countries, damages are regarded as the primary remedy. The right to require performance of the contract in the manner agreed is permitted only exceptionally as an alternative remedy where the promisee has a special interest in such performance. The effect of this compromise is that the place where the action is lodged may be determinative on whether the buyer would be entitled to specific performance or not. 13

The position in South African law is somewhat similar, although the point of departure is that the party is entitled to specific performance as the primary remedy, unless there are compelling reasons for not granting specific performance. It is within the discretion of the court deciding the case whether specific performance should be granted or not. In *Haynes v Kingwilliamstown Municipality* 1951 (2) SA 371 (A) at 378 the Court states this discretion as follows:¹ 14

“Although the Court will as far as possible give effect to a plaintiff’s choice to claim specific performance, has a discretion in a fitting case to refuse to decree specific performance and leave the plaintiff to claim and prove his *id quod interest*.” 15

There are no rules governing the exercise of the discretion. However, the discretion is 16

¹1 *Benson v SA Mutual Life Assurance Society* 1986 (1) SA 776 (A) at 781H-I; *Kerr AJ* The Principles of the Law of Contract (5th ed) 1998 at 600-601.

not completely unfettered. It remains a judicial discretion that may not be exercised capriciously or upon wrong principle. It is aimed at preventing an injustice. The basic principle is that the order which the Court makes should not produce an unjust result which will be the case for instance, if in the particular circumstances, the order will operate unduly harshly on the defendant. Other relevant considerations may be legal and public policy or impossibility.

It appears therefore that neither under the CISG nor under South African law can it be said with certainty that the party will be entitled to specific performance under all circumstances. Although the point of departure of the CISG is that a party is entitled to specific performance, this may be negated by the provisions of article 28 which refers this question to the particular Court which would be hearing the case in question. The flexibility provided by South African law is under these circumstances to be preferred to the uncertainty caused by section 28 of the CISG. 17

The general right to specific performance is augmented in article 46 by two more specific provisions which deal with the right to require substitute goods or repair of the goods. Both of these instances deal with situations where there has been performance in fact, but where the performance does not conform with the provisions and requirements of the contract. 18

In terms of article 46(2) if the goods do not conform with the contract, the buyer may require delivery of substitute goods if the following two requirements are met: Only if the lack of conformity constitutes a fundamental breach of contract; and the request for substitute goods is made in conjunction with the notice given under article 39 or within a reasonable time thereafter. Article 39 requires the buyer to give notice to the seller of the non-conformity of the performance within a reasonable time after he has discovered or ought to have discovered the lack of conformity. 19

In terms of article 46(3) if the goods do not conform with the contract, the buyer is entitled to require the seller to remedy the lack of conformity by repair, provided that: 20

(a) The requirement to make repair is not unreasonable having regard to all the circumstances; and 21

(b) The request for repair was made in conjunction with the notice given under article 39 or within a reasonable time thereafter. 22

Under South African law, the duty to deliver substitute performance or to repair the goods in question, is subsumed under the general order for specific performance. An order for specific performance can therefore comprise any of the following orders, namely: 23

(a) An order for the delivery of the goods where the goods have not been delivered or for the balance of the goods where there has only been a part delivery of the goods; 24

(b) Delivery of substituted goods where the goods delivered do not comply and cannot effectively be repaired; 25

(c) For the repair of the goods where the repair will place the goods in the state that they should have been according to the terms of the contract. 26

In terms of article 47 of the CISG, the buyer where he is insisting on specific performance, may fix an additional period of time of reasonable length for performance by the seller of its obligations. If the buyer has fixed an additional period of grace such as this, it may not exercise any of its other remedies under the Convention. However, the buyer is not deprived thereby of any right he may have to claim damages for delay in performance. 27

Although the authorities in South African law do not specifically deal with the right of the buyer to extend a period of grace to the seller where the latter is in default, there is nothing which would prevent a buyer from extending such a period of grace. In such an instance the buyer would be prevented by the rules of estoppel from exercising any of its other contractual remedies during the period of grace. 28

In terms of article 48 the seller may, even after the date delivery, remedy at his own expense any failure to perform its obligations, if it can do so without unreasonable delay and without causing the buyer unreasonable inconvenience or uncertainty of reimbursement by the seller of expenses advanced by the buyer. The seller may also request the buyer to make known whether he will accept performance and if the buyer does not comply with the request within a reasonable period of time, the seller may perform within the time indicated in its request. The buyer may not, during that period of time, resort to any remedy which is inconsistent with performance by the seller. This right to cure a breach of contract, is however subject to the rights of the buyer to avoid or cancel the contract in terms of article 49 of the CISG. Thus, where the buyer is entitled to forthwith avoid the contract, he may do so even if the seller is willing to cure the breach complained of. 29

Under South African law there is no specific right available to the seller to cure any defect in the performance it has rendered. However, if the seller is able to cure its breach before the buyer has exercised any right to cancel the contract, and such cure effects full performance, then the buyer would normally not be entitled to cancel the contract. This will, however, not affect any rights the buyer may have in respect of a claim of damages due to incomplete or late performance. 30

4. Avoidance/Cancellation 31

Diametrically opposed to the right to specific performance, is the right to avoid the contract. Whereas the right to specific performance may be claimed under the Convention in respect of all material breaches of contract, the right of the buyer to declare the contract avoided is much more limited. In terms of article 49 of the Convention the buyer may declare the contract avoided in the following two instances: 32

- If the failure by the seller to perform any of its obligations under the contract or the Convention amounts to a fundamental breach of contract; or 33

- In the case of non delivery, if the seller does not deliver the goods within the additional period of time fixed by the buyer in accordance with paragraph 1 of article 47 or declares that he will not deliver within the period so fixed. 34

In terms of article 25 of the CISG, a breach of contract is considered fundamental if it results in such detriment to the other party as substantially to deprive it of what it 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. The seriousness of the breach does not refer to the extent of the damage, but instead to the importance of the interest which the contract and its individual obligations actually create for the buyer. The contract therefore not only creates obligations, but also determines how important they are for the buyer and thus the importance of the detriment suffered by him. It is, therefore, principally for the parties themselves to make clear what importance is to be attached to each obligation and to the corresponding interest of the buyer. 35

In terms of South African law, a breach of contract in itself does not bring the contract to an end. It provides to the innocent party choice of remedies, which will vary according to the nature and seriousness of the breach. In the case of a major breach of contract, the aggrieved party is entitled to terminate the contract by cancelling it, although he is not obliged to do so. In the case of a minor breach, however, he may not cancel and he is normally only entitled to specific performance and/or damages. The *onus* of proving that the breach is a major breach lies on the party asserting it. [See: Kerr, *supra* note 1 at 530 and 622-623.] 36

In the event of a major breach of contract, the innocent party has an election between cancellation and keeping the contract intact. He must exercise this election within a reasonable period of time. A failure to make the election within a reasonable period of time, will lead to the inevitable conclusion that the innocent party has elected to keep the contract intact.² 37

In the event of late performance, the innocent party may only cancel the contract under the following circumstances: 38

- Where the contract contains a *lex commissoria*, that is, a clause entitling the buyer to cancel the contract immediately upon non performance on the specified date; or 39
- Where the buyer has informed the seller that if the seller should not perform by a specific date in the future, the buyer intends cancelling the contract. The period of time stipulated in this notice must be a reasonable period of time under the circumstances; or 40
- If time is of the essence in the particular circumstances. The particular circumstances attendant upon the contract in question will determine whether time will be regarded 41

² Mahabeer v Sharma NO 1985 (3) SA 729 (A) at 736F-I

as of the essence. However, this will only be done in exceptional circumstances and the buyer under these circumstances has a difficult *onus* to acquit.

The right to avoid the agreement is further restricted in the CISG in article 49(2) which provides that in the case where the seller has delivered the goods, the buyer loses the right to declare the contract avoided unless he does so within a reasonable period of time after he has become aware that late delivery has been made; or in respect of any other breach other than late delivery within a reasonable time after he knew or ought to have known of the breach. If the seller has been afforded extra time to perform in terms of article 47 or 48, the buyer may not avoid the contract before that extra period of time has elapsed. 42

5. Price Reduction 43

In terms of article 50 of the CISG, the buyer is entitled to reduce the price of the goods in the same proportion of the value that the goods actually delivered had at the time of the delivery compared to the value that conforming goods would have had at the time if the goods do not conform with the contract. However, if the seller has remedied any failure to perform its obligations in accordance with article 37 or article 48, the buyer is not entitled to reduce the price. 44

The principle underlying price reduction is that the buyer may keep non-conforming goods delivered by the seller in which case the contract is adjusted to the new situation. Price reduction should therefore be regarded as an adaptation of the contract not as an award of damages. The remedy of price reduction is an alternative remedy to the claim for damages, especially in those circumstances where payment has not been effected. 45

The remedy of price reduction under the CISG is very similar to the so-called *actio quanti minoris* in South African law. In terms of South African law, the buyer is entitled to reduce the price to be paid to the seller where defective goods have been delivered. The extent of the price reduction is calculated according to the cost involved to the buyer in placing the goods in the condition that they should have been to conform with the agreement. This may involve the costs of repair by a third party in the case of the delivery of defective goods, or the costs of purchasing additional goods in the event of short delivery. It is also sometimes calculated as the difference between the purchase price and the actual value of the thing sold or delivered. [See: Kerr, *supra* note 1 at 311; SA Oil and Fat Industries Ltd v Park Rynie Whaling Co Ltd 1916 AD 400 at 413.] 46

6. Early Delivery or Excess Delivery 47

Early or excess delivery is as much a breach of contract as late and under delivery as there is a non compliance with the express provisions of the agreement. In terms of article 48

52(1), if the seller delivers the goods before the date fixed, the buyer may take delivery or refuse to take delivery. A refusal to take delivery, however, must be in accordance with article 7 which requires the buyer to act in good faith. The buyer may thus not refuse to accept early delivery where such conduct would be against the dictates of good faith. If, for instance, the seller should deliver perishable goods at a time when there is no market for such goods in the place delivered, the buyer would be fully entitled to refuse acceptance of the goods at that time.

In article 52(2) it is stipulated that if the seller delivers a quantity of goods greater than that provided for in the contract, the buyer may take delivery or refuse to take delivery of the excess quantity. If the buyer takes delivery of all or part of the excess quantity, he must, however, pay for it at the contract rate. This section makes it clear that the seller cannot force the buyer to take extra goods which were not ordered by the buyer in terms of the agreement. The solution offered, however, is a sensible solution giving the buyer an option either to accept the goods and pay for them at the contract price or to reject them if he does not want the additional goods. In addition to the rights set out in article 53, the buyer is entitled to claim damages consequent upon the early delivery of goods or the delivery of excess goods. Such damages may include the cost of the storage of such goods, the handling of the goods and their re-transportation. 49

In terms of South African law if a specific date has been fixed for performance, it is usually presumed that such a date is fixed for the benefit of the debtor and that he may make early performance. However, some types of performance may only be performed on the date actually due. If performance may be made early or not, is therefore dependent on the particular circumstances. If it is clear that the date of the performance has been fixed for the benefit of the creditor, then performance may only take place on the stipulated date and the creditor will be entitled to reject or refuse performance before that specific date. A refusal by the creditor under these circumstances to accept performance will not be regarded as a breach of contract and such creditor will be fully entitled to insist on proper performance on the date specified. [See: Kerr, *supra* note 1 at 477, 478 and *Bernitz v Euverard* 1943 AD 595 at 602.] 50

In regard to excess performance, the general principles of South African contract law similarly dictate that the seller is not entitled to foist unwanted goods on the buyer. The delivery of excess goods may therefore be refused by the buyer. In the event that the buyer should accept the delivery of the excess goods, payment for such goods will be determined in accordance with the principles of the law of unjustified enrichment and not the law of contract unless a tacit agreement between the parties for the acceptance of the excess goods and payment therefor can be construed under the circumstances. In the latter instance the position would be the same as under the CISG, namely that the goods will be paid for at the same price as under the initial agreement. 51

7. Suspension or Retention of Payment

52

In terms of article 71 of the CISG a party may suspend the performance of its obligations if, after the conclusion of the contract, it becomes apparent that the other party will not perform a substantial part of its obligations as a result of a serious deficiency in its ability to perform or in its creditworthiness, or its conduct in preparing to perform or in performing the contract. If therefore, the seller has breached its obligations in terms of the agreement either by non-performance, or by short performance or by the delivery of non-conforming goods, to the extent that such a breach can be described as the non-performance of a substantial part of its obligations, the seller shall be entitled to withhold payment until such time as the breach has been rectified. In terms of article 71(3), the party suspending performance must immediately give notice of such suspension to the other party and is obliged to continue with its performance if the other party provides adequate assurance of its performance. The suspension of payment under these circumstances will therefore not amount to a breach of contract by the buyer.

53

In terms of the principles of the *exceptio non adimpleti contractus* in South African law, a party who is entitled to receive performance under a reciprocal contract is entitled to withhold its own performance in the event that the other party is unable to effect performance in full. If the seller is obliged to deliver the goods simultaneously with payment or before payment has to be made, the buyer shall be entitled to withhold payment until such time as the seller has complied fully with its obligations or is in a position to fully comply with its obligations under the agreement. Where the breach by the seller cannot be rectified, either by repair or substitute performance, the seller is entitled to claim the adduced payment according to the dictates of fairness, having regard to the particular circumstances. [See: BK Tooling (Edms) Bpk v Scope Precision Engineering (Edms) Bpk 1979 (1) SA 391 (A) at 418F-419C; Kerr, *supra* note 1 at 606.]

54

Under these circumstances, the buyer is entitled to make a claim on the contract for a diminished contract price. Where the benefit of the performance has been accepted by the other party, the Court has a discretion to grant the party in default an action on the contract for the agreed counter performance less, normally, the sum which will enable the aggrieved party to have the subject matter of the contract put into the contract condition. This normally entails the amount necessary to complete the work or remedy the defects. In its approach to the exercise of this discretion, the Court will consider what is equitable in all the circumstances. [See: BK Tooling, *supra* at 427A.]

55

It is clear that the CISG does not contain any mechanism for resolving the impasse that may occur when the buyer suspends its obligation to make payment in circumstances where it becomes impossible for the seller to remedy the deficiencies or the breach. It may be that under these circumstances the seller may be entitled to a claim for reduced payment in accordance with the dictates of good faith as required in article 7 read with the provisions for price reduction in article 15. However, this issue has not yet been clarified.

56

8. Conclusion

57

From the exposition above, it is clear that the remedies provided for in the CISG upon a breach of contract, are quite similar to those provided for in the South African law of contract. There are no unusual or surprising provisions which do not have a similar counterpart in South African law. There is therefore no reason why any South African buyer or seller should prefer the provisions of South African law above those of the CISG; on the contrary, it would seem preferable that contract parties with international contracts should prefer the well established and clear provisions of the CISG. It is important, however, that parties should apprise themselves of the various rights and obligations afforded and placed upon them by the CISG especially in regard to the prerequisites for exercising these remedies. In some instances, a remedy may be lost if a proper notice is not timely given. These obligations are easy to comply with and should in practice not present any difficulties. The requirements present sensible prerequisites protecting the interests of both parties on an equitable basis.

58

In view of the above discussion, it is clear that the provisions in regard to the remedies upon breach of contract do not provide any obstacle in the acceptance of the CISG in South Africa. The rights and duties created are similar to those in existence in South African contract law, but have been adapted to requirements of international trade. From this point of view the introduction of the CISG is imminently desirable.

59

SiSU Metadata, document information

Document Manifest @:

<http://www.sisudoc.org/cisg/en/manifest/a_comparison_of_remedies_for_breach_of_contract_under_cisg_and_south_african_law.siegfried_eiselen.html>

Title: A Comparison of the Remedies for Breach of Contract under the CISG and South African Law

Creator: Siegfried Eiselen

Rights: Copyright: CISG Database, Pace Institute of International Commercial Law. Reproduced with the permission of Basedow et al. eds, "Aufbruch nach Europa - 75 Jahre Max-Planck-Institut für Privatrecht", Mohr Siebeck: Tübingen (2001)

Publisher: SiSU on behalf of CISG Database, Pace Institute of International Commercial Law

Date available: 2002-01-14

Date: 2001

Topics Registered: CISG:breach of contract:remedies

Version Information

Sourcefile: a_comparison_of_remedies_for_breach_of_contract_under_cisg_and_south_african_law.siegfried_eiselen.sst

Filetype: UTF-8 assumed, file encoding check program unavailable

Source Digest: SHA256(a_comparison_of_remedies_for_breach_of_contract_under_cisg_and_south_african_law.siegfried_eiselen.sst)=da652537e67659f4fc3a88a90855d43a90ffac3801539fef8e82efe761b80420

Generated

Document (ao) last generated: 2017-06-15 22:31:30 +0000

Generated by: SiSU 7.1.9 of 2016w30/7 (2016-07-31)

Ruby version: ruby 2.1.2p95 (2014-05-08) [x86_64-linux-gnu]