

for the settlement of disputes governing the respective rights and obligations of the parties consequent upon the avoidance of the contract. A party who has performed in whole or in part may claim restitution of anything supplied or paid. If both parties are bound to make restitution, they must do so concurrently. In form this entitles the seller to the return of goods delivered and is therefore wider than under the common law,²⁶ but the extent to which this is attainable in practice will be limited by the restriction on specific remedies in article 28 and by the fact that any question of the property in the goods or of the rights of creditors will be governed by domestic law (article 4 and 82(2)(c)).

8. GENERAL PROVISIONS ON RIGHTS AND DUTIES OF PARTIES

(a) Passing of risk

1.63 The general principle in the Convention is that risk passes when goods are taken over by the buyer (article 67(1)). The Convention provides in article 67 a primary rule for cases in which the sale involves carriage of the goods (which is obviously the typical situation in international sales), a special rule for goods sold while in transit (article 68) and, in article 69, a rule for other cases. The passing of property is irrelevant to the passing of risk under the convention.

1.64 Article 67(1) deals only with cases of contracts of sale which involve carriage of goods. In such cases if the seller is not bound to hand them over at a particular place, the risk passes to the buyer when the goods are handed over to the first carrier for transmission to the buyer in accordance with the contract of sale. If the seller is bound to hand the goods over to a carrier at a particular place, the risk does not pass to the buyer until the goods are handed over to the carrier at that place. The fact that the seller is authorised to retain documents controlling the disposition of the goods does not affect the passage of the risk. (If the contract of sale involves carriage, but requires the seller to cause the goods to be handed over to the buyer at a particular place, the matter is governed by article 69 and the risk will pass when the buyer takes over the goods.) The policy of the article is that risk should pass at the beginning of the agreed transit, since the buyer is normally in a better position than the seller to assess any damage which has occurred in transit and to pursue claims in respect of it. If the seller is not obliged by the terms of the contract to insure the goods, he is obliged by article 32(3) of the Convention at the buyers request, to provide him with all available information necessary to enable him to effect such insurance. But article 67(2) states that the risk does not pass to the buyer until the goods are clearly identified to the contract.

26 British Westinghouse Electric and Manufacutring Co. v Underground Electric Rly. Co. of London [1912] A.C. 673 and Payzu Ltd. v Saunders [1919] 2 K.B. 581.

1.65 Article 68 deals with goods sold in transit. In respect of such goods, the risk passes to the buyer from the time of the conclusion of the contract. This is qualified in the same article by the provision that if the circumstances so indicate, the risk is assumed by the buyer from the time the goods were handed over to the carrier who issued the documents embodying the contract of carriage. One such circumstance would be the inclusion in the contract of sale of a provision requiring the seller to transfer an insurance policy to the buyer. Since contracts for the sale of goods in transit customarily include such a provision, this interpretation would give what is ostensibly the secondary rule a wide application. There is an exception in cases where at the time of the conclusion of the contract the seller knew or ought to have known that the goods had been lost or damaged and did not disclose this to the buyer. Such loss or damage is at the risk of the seller unless he discloses it to the buyer. The seller is liable only for that loss or damage which he knew or ought to have known (article 68).

1.66 In all other cases not within articles 67 and 68 the Convention provides that the risk passes to the buyer when he takes over the goods or, if he does not do so in due time, from the time when the goods are placed at his disposal and he commits a breach of contract by failing to deliver (article 69(1)). The general policy in article 69(1) is once again that the seller should bear the risk so long as he has control of the goods. Paragraph (2), however, makes special provision for cases where the buyer is to take over the goods from a place other than a place of business of the seller, most commonly from a public warehouse. In such cases the risk passes when delivery is due and the buyer is aware of the fact that the goods are placed at his disposal at that place. Here the policy considerations are different. The seller is in no better position than the buyer to protect and insure the goods or to pursue any claims arising from them. The policy is therefore that the buyer should bear the risk as soon as he is in a position to collect the goods. The paragraph also applies to the case in which the contract of sale involves carriage of the goods, but which is not covered by article 67 because the seller is required to hand the goods over to the buyer at a particular place. If the contract relates to goods not then identified, the goods are not considered to be placed at the disposal of the buyer until they are clearly identified to the contract (article 69(3)). If the seller has committed a fundamental breach, the articles on risk do not impair the remedies available to the buyer on account of the breach.

(b) Provisions common to the seller and buyer

(1) Suspension of obligations

1.67 Certain provisions are common to both the seller and buyer. Article 71(1)(a)(b) of the Convention provides that a party may suspend the performance of his obligations under certain circumstances. He may do so if, after the conclusion of the contract, it becomes apparent that the other party will not perform a substantial part of his obligations as a result of either (a) a serious deficiency in his ability to perform or his credit worthiness, or (b) his conduct in preparing to perform or

in performing the contract. Paragraph 2 of article 71 provides for stoppage in transit and paragraph 3 requires a party who suspends performance to immediately give notice of the suspension to the other party and to resume performance if the other party provides adequate assurance of his performance.

1.68 Article 71 provides for the case in which, while it is not clear that one party will commit a fundamental breach of contract so as to justify avoidance for anticipatory breach, nevertheless the other party has reason to fear that the first party will be unable to perform. There is no equivalent rule in common law apart from the tightly circumscribed right of stoppage in transit. There is a comparable provision in the United States Uniform Commercial Code. Apart from the nature of the remedy, there are two main differences between avoidance for anticipatory breach and suspension to secure assurance of performance. First, whereas for the drastic remedy of avoidance it must be clear that the other party will not perform, for the remedy of suspension it is sufficient that it become apparent. Secondly, whereas for avoidance for anticipatory breach the prospective non-performance must amount to fundamental breach, for suspension it need be only of a substantial part of the other party's obligations. Thirdly, once the contract has been avoided, there is no longer the possibility of performing. However, when the contract has been suspended the other party may be able to give adequate assurance of his performance in which case the suspending party must continue with his own performance.

(2) Exemptions

1.69 Article 79(1) of the United Nations Sales Convention is concerned with the question of when a party may be exempted from liability for failure to perform any of his obligations if he is unable to perform due to circumstances beyond his control. A party is not liable for a failure to perform any of his obligations if he proves that the failure was due to an impediment beyond his control and that he could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome it or its consequences. He is always responsible for impediments when he could have prevented them but failed to do so. Further more, he is liable even for impediments beyond his control as long as they were either reasonably foreseeable or known to him at the conclusion of the contract. In the case of unforeseeable impediments whose origins are not within his control he must take reasonable measures to avoid or overcome the impediment or its consequences in order to claim an exemption. If a party wishes to restrict his liability, he must specify, in the contract, the particular impediments for which he will not be liable.

1.70 Article 79(2) states that if the failure to perform is due to the failure of a third person whom he engages to perform the whole or a part of the contract, the defaulting party is exempt from liability only if two conditions are fulfilled: first, he must himself be exempt under the conditions mentioned above and, secondly, the third person must also be exempt under the rules above. In the application of this provision it should be observed that a party is always responsible for his own personnel as long as he organises and controls their work. Second, where third

persons are involved, the seller's liability depends on whether he engaged those persons in fulfillment of his contractual obligations. If he did so he can be exempted only where the failure was unforeseeable and beyond his control and the third party personally meets the requirements for exemption in article 79(1). Article 79(1) therefore remains the controlling provision in cases where the third party's performance is a mere precondition for the fulfillment of the obligations of the party claiming exemption.

1.71 Article 79(3) of the Convention provides that the exemption applies for the period during which the impediment exists. The Convention in article 79(4) requires the party who fails to perform to give notice to the other party of the impediment and its effect. If the notice is not received within a reasonable time after the party in default knew, or ought to have known, of the impediment, he is liable for damages resulting from such non-receipt. Article 79(5) of the Convention states that nothing in article 79 prevents either party from exercising any right other than to claim damages under the Convention.

1.72 The provisions on exemptions covers what under the common law would fall under the doctrine of frustration (impossibility). Its treatment differs in a number of ways from the common law doctrine of frustration²⁷. The effect of paragraph 5 is to provide the non-performing party with a defence against an action for damages, but not against the termination of the contract. The exemption from liability is in relation to the performance of any of his obligations, not just to the performance of the contract as a whole. The non-performing party may therefore advise an impediment within the meaning of paragraph (1) as a defence against an action for damages for partial non-performance. This may arise, for example, where the impediment causes delay in delivery. The other party cannot claim damages but, if the delay amounts to a fundamental breach, he may avoid the contract. The central requirement is that the non-performance be due to an impediment beyond his control. The formulation in terms of an impediment to performance excludes cases of frustration, as opposed to impossibility. Paragraph (5) leaves every remedy except that of damages unaffected. Reduction of price and avoidance pose no problems. It is the right to compel performance that would present a difficulty to common law lawyers of course insofar as the impediment makes performance actually impossible, any court will presumably refuse specific performance on the basis of article 28. If, however, the impediment does not make the performance physically impossible, but it is nevertheless held to fall within paragraph (1), it would seem that paragraph (5) preserves the remedy of specific performance in courts in which it would normally be available.

(3) Preservation of the goods

1.73 Article 85 of the Convention provides that if the buyer is

27 For the rule under common law see M.P. Furmston, Cheshire and Fifoot's Law of Contract, supra p.516. See also Krell v Henry [1903] 2 K B.683.

in delay in taking delivery of the goods and the seller is in possession of them or otherwise able to control their disposition, the seller must take such steps as are reasonable in the circumstances to preserve them. The seller's duty to preserve the goods applies especially to those cases in which, even though the seller still has control over the disposition of the goods, the risk of loss has already passed to the buyer. The seller is, however, entitled to be reimbursed for the actions he has taken to preserve the goods and he has the right to keep the goods until he is reimbursed. Similar provisions apply under article 86(1) of the Convention where the goods have been received by the buyer, but he intends to reject them. If the goods have been dispatched to the buyer and placed at his disposal, but he intends to reject them, it is provided by article 86(2) that he must take possession of them on behalf of the seller, provided that he can do so without unreasonable inconvenience and expense. This does not apply where the seller is present at the destination (article 86(2)).

1.74 A party who is under an obligation to take steps to preserve the goods may by the authority of article 87 of the Convention deposit them in a warehouse of a third person at the expense of the other party provided that the expense incurred is not unreasonable. Under article 88(1) of the Convention, a party who has an obligation to preserve the goods may sell them where there has been an unreasonable delay by the party in paying the cost of preservation. The other party must first give notice of the intention to sell. There is an obligation to resell under Article 88(2) of the Convention where the goods are subject to loss or rapid deterioration and where their preservation would involve unreasonable expense. Article 88(3) of the Convention allows the party selling the goods to retain out of the proceeds of the sale an amount equal to the reasonable expenses of preserving and selling them, but he must account to the other party for the balance.