

# CONTRACT RULES 2004

## PART 1 GENERAL

- 1 Name
- 2 Purpose
- 3 General contract law
- 4 Agreements and contracts
- 5 Freedom to contract
- 6 Interpretation of these Rules
- 7 Interpreting statements or conduct
- 8 Delay or error in communications

## PART 2 CONTRACT FORMATION

- 9 Capacity to contract
- 10 Offer to contract
- 11 When offer becomes effective
- 12 Revocability of offer
- 13 Acceptance
- 14 Acceptance with changes
- 15 Time for acceptance
- 16 Late acceptance
- 17 Withdrawal of acceptance
- 18 Time of effect of contract
- 19 Factors denying agreement
- 20 Changes to contract
- 21 Formalities
- 22 Illegality
- 23 Third party benefits

## PART 3 PERFORMANCE & BREACH

- 24 Performance
- 25 Common usages
- 26 Title and risk
- 27 Performance without request
- 28 Performance failure by other party
- 29 Notice of avoidance
- 30 Avoidance before performance
- 31 Breach of contract

## PART 4 SALE OF GOODS

### *Obligations of the Seller*

- 32 Seller's principal obligations
- 33 Place of delivery
- 34 Shipping arrangements
- 35 Time for delivery
- 36 Documents relating to the goods
- 37 Conformity of the goods
- 38 Damage to goods
- 39 Right to cure up to date for delivery
- 40 Time for examining the goods
- 41 Notice for lack of conformity
- 42 Seller's knowledge
- 43 Third-party claims to goods
- 44 Intellectual property claims
- 45 Notice of third-party claim

- 46 Excuse for failure to notify

### *Remedies for buyer*

- 47 Remedies available to buyer
- 48 Buyer's right to compel performance
- 49 Buyer's notice for performance
- 50 Remedy after date for delivery
- 51 Buyer's right to avoid the contract
- 52 Remedy of reduction of price
- 53 Non-conformity of part of the goods
- 54 Early delivery – excess quantity

### *Obligations of the buyer*

- 55 Buyer's principal obligations
- 56 Enabling steps
- 57 Open-price contracts
- 58 Net weight
- 59 Place for payment
- 60 Time for payment
- 61 Buyer's obligation to take delivery
- 62 Loss or damage after risk passed
- 63 Risk when seller is in breach
- 64 Risk when carriage involved
- 65 Sale of goods during transit
- 66 General residual rules on risk
- 67 Effect of avoidance
- 68 Inability to return goods
- 69 Preservation of other remedies
- 70 Restitution of benefits
- 71 Seller's duty to preserve goods
- 72 Buyer's duty to preserve goods
- 73 Deposit of goods in warehouse
- 74 Sale of the goods

### *Remedies for seller*

- 75 Remedies available to seller
- 76 Seller's right to compel performance
- 77 Seller's notice for additional period
- 78 Seller's right to avoid the contract
- 79 Supply of missing specifications

### *Common provisions*

- 80 Suspension of performance
- 81 Avoidance in instalment contracts

## PART 5 REMEDIES

- 82 Remedies
- 83 Measuring damages
- 84 Damages when contract avoided
- 85 Mitigation of loss
- 86 Exemption from damages
- 87 Interest

## **PART 1 GENERAL**

### **1 Name**

These are the Contract Rules 2004.

### **2 Purpose**

The purpose of these Rules is —

- (i) to provide a basic set of rules for all contracts for Tokelau;
- (ii) to establish the principles of the United Nations Convention on Contracts for the International Sale of Goods 1980 [CISG] as the foundation for the contract law of Tokelau;
- (iii) to apply CISG rules to domestic and international contract situations;
- (iv) to extend CISG principles beyond contracts for sales of goods to all contracts;
- (v) to supplement CISG principles where necessary by reference to relevant New Zealand laws.

### **3 General contract law**

- (1) These Rules are the general contract law for Tokelau.
- (2) These Rules do not apply to contracts in relation to land.
- (3) These Rules do not apply to sales on execution or otherwise by authority of law. [CISG 2]

### **4 Agreements and contracts**

- (1) A contract is an agreement between two or more persons that creates, alters, or extinguishes legal rights and duties.
- (2) Every agreement is a contract unless —
  - (i) the terms of the contract are too uncertain;
  - (ii) any person making the agreement does not intend to be legally bound.

### **5 Freedom to contract**

Subject to the rules relating to capacity and illegality, the parties may by express agreement exclude the application of these Rules or derogate from or vary the effect of any of them. [CISG 6]

## 6 Interpretation of these Rules

- (1) In all cases, these Rules shall be interpreted and applied consistently with the purposes set out in these Rules and with CISG.
- (2) In these Rules —
  - “fundamental breach” means a breach of contract committed by one of the parties if it results in such detriment to the other party as to substantially deprive him of what he 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;
  - “third party” means any person who is not a contracting party;
  - “writing” includes telegram, telex, facsimile, and email.
- (3) An offer, declaration of acceptance, or any other indication of intention “reaches” the addressee when it is made orally to him or delivered by any other means to him personally, to his place of business or mailing address, or, if he does not have a place of business or mailing address, to his habitual residence. [CISG 13, 24, 25]

## 7 Interpretation of statements or other conduct

- (1) Statements made by, and other conduct of, a party are to be interpreted according to his intent where the other party knew or could not have been unaware what that intent was.
- (2) If paragraph (1) is not applicable, statements made by and other conduct of a party are to be interpreted according to the understanding that a reasonable person of the same kind as the other party would have had in the same circumstances.
- (3) In determining the intent of a party or the understanding a reasonable person would have had, due consideration is to be given to all relevant circumstances of the case including the negotiations, any practices which the parties have established between themselves, usages, and any subsequent conduct of the parties. [CISG 8]

**8 Delay or error in communications**

Unless otherwise expressly provided in these Rules, if any notice, request, or other communication is given or made by a party in accordance with these Rules and by means appropriate in the circumstances, a delay or error in the transmission of the communication or its failure to arrive does not deprive that party of the right to rely on the communication. [CISG 27]

**PART 2 FORMATION OF THE CONTRACT**

**9 Capacity to contract**

- (1) A contract made by a person who is aged less than 16 years, or by a person with a mental illness, or by a person who lacks capacity to understand the nature of the obligations under the contract, is unenforceable, unless it can be shown that enforcement would be fair or reasonable.
- (2) In determining what is fair or reasonable, all circumstances shall be taken into account and in particular —
  - (i) the nature and value of the benefits to which that person is entitled under the contract;
  - (ii) the burden imposed by the contract obligations;
  - (iii) the actual and apparent ability of that person to carry out the contract obligations;
  - (iv) the actual and apparent age of that person if aged less than 16 years;
  - (v) the actual and apparent intelligence or mental capacity of that person;
  - (vi) whether that person's parent or guardian has consented to or approved the making of the contract;
  - (vii) any misrepresentations made by that person relating to any of the matters referred to in subparagraphs (iii) to (vi).

**10 Offer to contract**

- (1) (i) A proposal for concluding a contract addressed to one or more specific persons constitutes an offer if it is sufficiently definite and indicates the intention of the offeror to be bound in case of acceptance.

- (ii) As to the subject matter, a proposal is sufficiently definite in respect of goods if it expressly or implicitly fixes or makes provision for determining the quantity and the price.
- (2) A proposal other than one addressed to one or more specific persons is to be considered merely as an invitation to make offers, unless the contrary is clearly indicated by the person making the proposal. [CISG 14]

**11 When offer becomes effective**

- (1) An offer becomes effective when it reaches the offeree.
- (2) An offer, even if it is irrevocable, may be withdrawn if the withdrawal reaches the offeree before or at the same time as the offer. [CISG 15]

**12 Revocability of offer**

- (1) An offer may be revoked if the revocation reaches the offeree before the offeree has dispatched an acceptance.
- (2) An offer cannot be revoked —
  - (i) if it indicates, whether by stating a fixed time for acceptance or otherwise, that it is irrevocable; or
  - (ii) if it was reasonable for the offeree to rely on the offer as being irrevocable and the offeree has acted in reliance on the offer.
- (3) An offer, even if it is irrevocable, is terminated when a rejection reaches the offeror. [CISG 16, 17]

**13 Acceptance**

- (1) A statement made by or other conduct of the offeree indicating assent to an offer is an acceptance.
- (2) Silence or inactivity does not in itself amount to acceptance.
- (3) Acceptance of an offer becomes effective at the moment the indication of assent reaches the offeror.
- (4) An acceptance is not effective if the indication of assent does not reach the offeror within the time fixed for acceptance or, if no time is fixed, within a reasonable time, due account being taken of the circumstances of the transaction, including the rapidity of the means of communication employed by the offeror.

- (5) An oral offer must be accepted immediately unless the circumstances indicate otherwise.
- (6) However, if, by virtue of the offer or as a result of practices which the parties have established between themselves or of usage, the offeree may indicate assent by performing an act, such as one relating to the dispatch of the goods or payment of the price, without notice to the offeror, the acceptance is effective at the moment the act is performed, provided that the act is performed within the period of time laid down in this rule.

[CISG 18]

#### **14 Acceptance with changes**

- (1) A reply to an offer which purports to be an acceptance but contains additions, limitations, or other modifications is a rejection of the offer and constitutes a counter-offer.
- (2) A reply to an offer which purports to be an acceptance but contains additional or different terms which do not materially alter the terms of the offer constitutes an acceptance, unless the offeror, without undue delay, objects orally to the discrepancy or dispatches a notice to that effect. If the offeror does not so object, the terms of the contract are the terms of the offer with the modifications contained in the acceptance.
- (3) Additional or different terms relating, among other things, to the price, payment, quality and quantity of the goods, place and time of delivery, extent of one party's liability to the other, or the settlement of disputes are considered to alter the terms of the offer materially. [CISG 19]

#### **15 Time for acceptance**

- (1) A period of time for acceptance fixed by the offeror in a telegram or a letter begins to run from the moment the telegram is handed in for dispatch or from the date shown on the letter or, if no such date is shown, from the date shown on the envelope. A period of time for acceptance fixed by the offeror by telephone, telex, or other means of instantaneous communication, begins to run from the moment that the offer reaches the offeree.

- (2) Official holidays or non-business days occurring during the period for acceptance are included in calculating the period. However, if a notice of acceptance cannot be delivered at the address of the offeror on the last day of the period because that day falls on an official holiday or a non-business day at the place of business of the offeror, the period is extended until the first business day which follows. [CISG 20]

**16 Late acceptance**

- (1) A late acceptance is nevertheless effective as an acceptance if without delay the offeror orally so informs the offeree or dispatches a notice to that effect.
- (2) If a letter or other writing containing a late acceptance shows that it has been sent in such circumstances that if its transmission had been normal it would have reached the offeror in due time, the late acceptance is effective as an acceptance unless, without delay, the offeror orally informs the offeree that he considers the offer as having lapsed or dispatches a notice to that effect. [CISG 21]

**17 Withdrawal of acceptance**

An acceptance may be withdrawn if the withdrawal reaches the offeror before or at the same time as the acceptance would have become effective. [CISG 22]

**18 Time of effect of contract**

A contract is concluded at the moment when an acceptance of an offer becomes effective in accordance with these Rules. [CISG 23]

**19 Factors denying agreement**

In relation to mistake, misrepresentation, duress, undue influence, unconscionability, and frustration, the law of Tokelau is, subject to these Rules, the law of New Zealand for the time being in force.

**20 Changes to contract**

- (1) A contract may be modified or terminated by agreement of the parties.
- (2) A contract in writing which contains a provision requiring any modification or termination by agreement to be in writing may not be otherwise modified or terminated by agreement. However, a party may

be precluded by his conduct from asserting such a provision to the extent that the other party has relied on that conduct. [CISG 29]

## **21 Formalities**

- (1) Unless otherwise expressly provided, a contract need not be concluded in or evidenced by writing and is not subject to any other requirement as to form.
- (2) A contract may be proved by any means, including witnesses.
- (3)
  - (i) A credit contract for more than \$500 is unenforceable, unless it contains in writing, the following —
    - (I) amount of credit provided; and
    - (II) interest charges; and
    - (III) due date(s) of payments; and
    - (IV) default conditions; and
    - (V) any other charges relating to the credit contract.
  - (ii) Credit is provided under a contract if a right granted by a person to another person defers payment of a debt, or incurs a debt and defers its payment.
- (4) A guarantee of the obligations of another person is unenforceable, unless it contains in writing —
  - (i) the approval of the guarantor; and
  - (ii) the conditions of the guarantee. [CISG 11, 12]

## **22 Illegality**

- (1) A contract which is illegal is unenforceable.
- (2) A contract is illegal when the agreement is —
  - (i) to do something which is an offence, or is intended to enable something which is an offence; or
  - (ii) contrary to public policy.

## **23 Third party benefits**

- (1) A third party may take a benefit under a contract provided that the third party is designated in the contract by name, description, or reference to a class.

- (2) A third party may enforce the contract unless upon its proper interpretation the contracting parties did not intend to create an obligation enforceable by that third party.
- (3) The contracting parties cannot revoke the benefit if the third party has declared the intention to accept the benefit.

### **PART 3 PERFORMANCE AND BREACH OF CONTRACT**

#### **24 Performance**

- (1) Performance must be in accordance with the standards of good faith and as may be reasonably expected in the circumstances.
- (2) Subject to paragraph (1), the method of performance must accord with the terms of the contract.

#### **25 Common usages**

- (1) The parties are bound by any usage to which they have agreed and by any practices which they have established between themselves.
- (2) The parties are considered, unless otherwise agreed, to have impliedly made applicable to their contract or its formation a usage of which the parties knew or ought to have known and which is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade concerned. [CISG 9]

#### **26 Title and risk**

- (1) Subject to these Rules or express agreement by the parties, title to property passes at the time agreed by the parties, or if they did not agree on any time, on the physical transfer of the property to the contracting party or the agent of the contracting party.
- (2) Risk passes with the title.

#### **27 Performance without request**

Each party must perform their obligations on the date fixed by or determinable from the contract and these Rules without the need for any request or compliance with any formality on the part of the other party. [CISG 59]

**28 Failure of performance caused by other party**

A party may not rely on a failure of the other party to perform, to the extent that such failure was caused by the claimant party's act or omission. [CISG 80]

**29 Notice of avoidance**

A declaration of avoidance of the contract is effective only if made by notice to the other party. [CISG 26]

**30 Avoidance before date for performance**

(1) If, before the date for performance of the contract, it is clear that one of the parties will commit a fundamental breach of contract, the other party may declare the contract avoided.

(2) If time allows, the party intending to declare the contract avoided must give reasonable notice to the other party in order to permit him to provide adequate assurance of his performance.

(3) The requirements of paragraph (2) do not apply if the other party has declared that he will not perform his obligations. [CISG 72]

**31 Breach of contract**

A contracting party who fails to perform all or part of the contract obligations, or performs late or in a way other than that provided by the contract, commits a breach of contract.

**PART 4 SALE OF GOODS**

***Obligations of the Seller***

**32 Seller's principal obligations**

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 these Rules. [CISG 30]

**33 Place of delivery**

If the seller is not bound to deliver the goods at any particular place, the obligation to deliver consists —

(i) if the contract of sale involves carriage of the goods: in handing the goods over to the first carrier for transmission to the buyer;

## *Contract*

- (ii) if, in cases not within subparagraph (i), the contract relates to specific goods, or unidentified goods to be drawn from a specific stock or to be manufactured or produced, and at the time of the conclusion of the contract the parties knew that the goods were at, or were to be manufactured or produced at, a particular place: in placing the goods at the buyer's disposal at that place;
- (iii) in other cases: in placing the goods at the buyer's disposal at the place where the seller had his place of business at the time of the conclusion of the contract. [CISG 31]

### **34 Shipping arrangements**

- (1) If the seller, in accordance with the contract or these Rules, hands the goods over to a carrier and if the goods are not clearly identified to the contract by markings on the goods, by shipping documents or otherwise, the seller must give the buyer notice of the consignment specifying the goods.
- (2) If the seller is bound to arrange for carriage of the goods, he must make such contracts as are necessary for carriage to the place fixed by means of transportation appropriate in the circumstances and according to the usual terms for such transportation.
- (3) If the seller is not bound to effect insurance in respect of the carriage of the goods, he must, at the buyer's request, provide him with all available information necessary to enable him to effect such insurance. [CISG 32]

### **35 Time for delivery**

The seller must deliver the goods —

- (i) if a date is fixed by or determinable from the contract, on that date;
- (ii) if a period of time is fixed by or determinable from the contract, at any time within that period unless circumstances indicate that the buyer is to choose a date; or
- (iii) in any other case, within a reasonable time after the conclusion of the contract. [CISG 33]

**36 Documents relating to the goods**

If the seller is bound to hand over documents relating to the goods, he must hand them over at the time and place and in the form required by the contract. If the seller has handed over documents before that time, he may, up to that time, cure any lack of conformity in the documents, if the exercise of this right does not cause the buyer unreasonable inconvenience or unreasonable expense. However, the buyer retains any right to claim damages as provided for in these Rules. [CISG 34]

**37 Conformity of the goods**

- (1) The seller must deliver goods which are of the quantity, quality and description required by the contract and which are contained or packaged in the manner required by the contract.
- (2) Except where the parties have agreed otherwise, the goods do not conform with the contract unless they —
  - (i) are fit for the purposes for which goods of the same description would ordinarily be used;
  - (ii) are fit for any particular purpose expressly or impliedly made known to the seller at the time of the conclusion of the contract, except where the circumstances show that the buyer did not rely, or that it was unreasonable for him to rely, on the seller's skill and judgement;
  - (iii) possess the qualities of goods which the seller has held out to the buyer as a sample or model;
  - (iv) are contained or packaged in the manner usual for such goods or, where there is no such manner, in a manner adequate to preserve and protect the goods.
- (3) The seller is not liable under paragraph (2)(i)–(iv) for any lack of conformity of the goods if at the time of the conclusion of the contract the buyer knew or could not have been unaware of such lack of conformity. [CISG 35]

**38 Damage to goods: effect on conformity**

- (1) The seller is liable in accordance with the contract and these Rules for any lack of conformity which exists at the time when the risk passes to the buyer, even though the lack of conformity becomes apparent only after that time.
- (2) The seller is also liable for any lack of conformity which occurs after the time indicated in paragraph (1) and which is due to a breach of any of his obligations, including a breach of any guarantee that for a period of time the goods will remain fit for their ordinary purpose or for some particular purpose or will retain specified qualities or characteristics. [CISG 36]

**39 Right to cure up to date for delivery**

If the seller has delivered goods before the date for delivery, the seller may, up to that date, deliver any missing part or make up any deficiency in the quantity of the goods delivered, or deliver goods in replacement of any non-conforming goods delivered or remedy any lack of conformity in the goods delivered, provided that the exercise of this right does not cause the buyer unreasonable inconvenience or unreasonable expense. However, the buyer retains any right to claim damages as provided for in these Rules. [CISG 37]

**40 Time for examining the goods**

- (1) The buyer must examine the goods, or cause them to be examined, within as short a period as is practicable in the circumstances.
- (2) If the contract involves carriage of the goods, examination may be deferred until after the goods have arrived at their destination.
- (3) If the goods are redirected in transit or redispached by the buyer without a reasonable opportunity for examination by him and at the time of the conclusion of the contract the seller knew or ought to have known of the possibility of such redirection or redispach, examination may be deferred until after the goods have arrived at the new destination. [CISG 38]

**41 Notice for lack of conformity**

- (1) The buyer loses the right to rely on a lack of conformity of the goods if he does not give notice to the seller specifying the nature of the lack of

conformity within a reasonable time after he has discovered it or ought to have discovered it.

- (2) In any event, the buyer loses the right to rely on a lack of conformity of the goods if he does not give the seller notice at the latest within a period of two years from the date on which the goods were actually handed over to the buyer, unless this time limit is inconsistent with a contractual period of guarantee. [CISG 39]

**42 Seller's knowledge of non-conformity**

The seller is not entitled to rely on rules 40 and 41 if the lack of conformity relates to facts of which he knew or could not have been unaware and which he did not disclose to the buyer. [CISG 40]

**43 Third-party claims to goods**

The seller must deliver goods which are free from any right or claim of a third party, unless the buyer agreed to take the goods subject to that right or claim. However, if such right or claim is based on industrial property or other intellectual property, the seller's obligation is governed by rule 44. [CISG 41]

**44 Third-party claims based on a patent or other intellectual property**

- (1) The seller must deliver goods which are free from any right or claim of a third party based on industrial property or other intellectual property, of which at the time of the conclusion of the contract the seller knew or could not have been unaware, provided that the right or claim is based on industrial property or other intellectual property —
- (i) under the law of the country where the goods will be resold or otherwise used, if it was contemplated by the parties at the time of the conclusion of the contract that the goods would be resold or otherwise used in that country; or
  - (ii) in any other case, under the law of the country where the buyer has his place of business.
- (2) The obligation of the seller under paragraph (1) does not extend to cases where —
- (i) at the time of the conclusion of the contract the buyer knew or could not have been unaware of the right or claim; or

- (ii) the right or claim results from the seller's compliance with technical drawings, designs, formulae or other such specifications furnished by the buyer. [CISG 42]

**45 Notice of third-party claim**

- (1) The buyer loses the right to rely on the provisions of rules 43 or 44 if he does not give notice to the seller specifying the nature of the right or claim of the third party within a reasonable time after he has become aware or ought to have become aware of the right or claim.
- (2) The seller is not entitled to rely on paragraph (1) if the seller knew of the right or claim of the third party and the nature of it. [CISG 43]

**46 Excuse for failure to notify**

Notwithstanding rule 41(1) and rule 45(1), the buyer may reduce the price in accordance with rule 52 or claim damages, except for loss of profit, if he has a reasonable excuse for his failure to give the required notice. [CISG 44]

***Remedies for buyer***

**47 Remedies available to buyer**

- (1) If the seller fails to perform any of his obligations under the contract or these Rules, the buyer may —
  - (i) exercise the rights provided in rules 48 to 54;
  - (ii) claim damages as provided in rules 82 to 85.
- (2) The buyer is not deprived of any right he may have to claim damages by exercising his right to other remedies.
- (3) No period of grace may be granted to the seller by a court or arbitral tribunal when the buyer resorts to a remedy for breach of contract. [CISG 45]

**48 Buyer's right to compel performance**

- (1) The buyer may require performance by the seller of his obligations unless the buyer has resorted to a remedy which is inconsistent with this requirement.
- (2) If the goods do not conform with the contract, the buyer may require delivery of substitute goods only if the lack of conformity constitutes a

fundamental breach of contract and a request for substitute goods is made either in conjunction with notice given under rule 41, or within a reasonable time thereafter.

- (3) If the goods do not conform with the contract, the buyer may require the seller to remedy the lack of conformity by repair, unless this is unreasonable having regard to all the circumstances. A request for repair must be made either in conjunction with notice given under rule 41, or within a reasonable time thereafter. [CISG 46]

**49 Buyer's notice of final period for performance**

- (1) The buyer may fix an additional period of time of reasonable length for performance by the seller of his obligations.
- (2) Unless the buyer has received notice from the seller that he will not perform within the period so fixed, the buyer may not, during that period, resort to any remedy for breach of contract. However, the buyer is not deprived thereby of any right he may have to claim damages for delay in performance. [CISG 47]

**50 Remedy after date for delivery**

- (1) Subject to rule 51 the seller may, even after the date for delivery, remedy at his own expense any failure to perform his obligations, if he 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. However, the buyer retains any right to claim damages as provided for in these Rules.
- (2) If the seller requests the buyer to make known whether he will accept performance and the buyer does not comply with the request within a reasonable time, the seller may perform within the time indicated in his request. The buyer may not, during that period of time, resort to any remedy which is inconsistent with performance by the seller.
- (3) A notice by the seller that he will perform within a specified period of time is assumed to include a request, under paragraph (2), that the buyer make known his decision.
- (4) A request or notice by the seller under paragraph (2) or (3) is not effective unless received by the buyer. [CISG 48]

**51 Buyer's right to avoid the contract**

- (1) The buyer may declare the contract avoided —
- (i) if the failure by the seller to perform any of his obligations under the contract or these Rules amounts to a fundamental breach of contract; or
  - (ii) in 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 rule 49(1), or declares that he will not deliver within the period so fixed.
- (2) However, in cases where the seller has delivered the goods, the buyer loses the right to declare the contract avoided unless he does so —
- (i) in respect of late delivery, within a reasonable time after he has become aware that delivery has been made;
  - (ii) in respect of any breach other than late delivery, within a reasonable time —
    - (I) after he knew or ought to have known of the breach;
    - (II) after the expiration of any additional period of time fixed by the buyer in accordance with rule 49(1), or after the seller has declared that he will not perform his obligations within such an additional period; or
    - (III) after the expiration of any additional period of time indicated by the seller in accordance with rule 50(2), or after the buyer has declared that he will not accept performance. [CISG 49]

**52 Remedy of reduction of price**

If the goods do not conform with the contract and whether or not the price has already been paid, the buyer may reduce the price in the same proportion as the value that the goods actually delivered had at the time of the delivery bears to the value that conforming goods would have had at that time. However, if the seller remedies any failure to perform his obligations in accordance with rule 39 or rule 50 or if the buyer refuses to accept performance by the seller in accordance with those rules, the buyer may not reduce the price. [CISG 50]

**53 Non-conformity of part of the goods**

- (1) If the seller delivers only a part of the goods or if only a part of the goods delivered is in conformity with the contract, rules 48 to 52 apply in respect of the part which is missing or which does not conform.
- (2) The buyer may declare the contract avoided in its entirety only if the failure to make delivery completely or in conformity with the contract amounts to a fundamental breach of the contract. [CISG 51]

**54 Early delivery – excess quantity**

- (1) If the seller delivers the goods before the date fixed, the buyer may take delivery or refuse to take delivery.
- (2) 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 pay for it at the contract rate. [CISG 52]

*Obligations of the buyer*

**55 Buyer's principal obligations**

The buyer must pay the price for the goods and take delivery of them as required by the contract and these Rules. [CISG 53]

**56 Enabling steps**

The buyer's obligation to pay the price includes taking such steps and complying with such formalities as may be required under the contract or any law to enable payment to be made. [CISG 54]

**57 Open-price contracts**

Where a contract has been validly concluded but does not expressly or implicitly fix or make provision for determining the price, the parties are considered, in the absence of any indication to the contrary, to have impliedly made reference to the price generally charged at the time of the conclusion of the contract for such contracts under comparable circumstances in the trade concerned. [CISG 55]

**58 Net weight**

If the price is fixed according to the weight of the goods, in case of doubt it is to be determined by the net weight. [CISG 56]

**59 Place for payment**

(1) If the buyer is not bound to pay the price at any other particular place, he must pay it to the seller —

- (i) at the seller's place of business; or
- (ii) if the payment is to be made against the handing over of the goods or of documents, at the place where the handing over takes place.

(2) The seller must bear any increases in the expenses incidental to payment which is caused by a change in his place of business subsequent to the conclusion of the contract. [CISG 57]

**60 Time for payment – inspection of the goods**

(1) If the buyer is not bound to pay the price at any other specific time, he must pay it when the seller places either the goods or documents controlling their disposition at the buyer's disposal in accordance with the contract and these Rules. The seller may make such payment a condition for handing over the goods or documents.

(2) If the contract involves carriage of the goods, the seller may dispatch the goods on terms whereby the goods, or documents controlling their disposition, will not be handed over to the buyer except against payment of the price.

(3) The buyer is not bound to pay the price until he has had an opportunity to examine the goods, unless the procedures for delivery or payment agreed upon by the parties are inconsistent with his having such an opportunity. [CISG 58]

**61 Buyer's obligation to take delivery**

The buyer's obligation to take delivery consists —

- (i) in doing all the acts which could reasonably be expected of him in order to enable the seller to make delivery; and
- (ii) in taking over the goods. [CISG 60]

**62 Loss or damage after risk passed to buyer**

Loss of or damage to the property after the risk has passed does not discharge a buyer from the obligation to pay the price, unless the loss or damage is due to an act or omission of the seller. [CISG 66]

**63 Risk when seller is in breach**

If the seller has committed a fundamental breach of contract, rules 64, 65, and 66 do not impair the remedies available to the buyer on account of the breach. [CISG 70]

**64 Risk when the contract involves carriage**

- (1) If the contract of sale involves carriage of the goods and 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.
- (2) 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.
- (3) The fact that the seller is authorised to retain documents controlling the disposition of the goods does not affect the passage of the risk.
- (4) Nevertheless, the risk does not pass to the buyer until the goods are clearly identified in the contract, whether by markings on the goods, by shipping documents, by notice given to the buyer or otherwise. [CISG 67]

**65 Sale of goods during transit**

The risk in respect of goods sold in transit passes to the buyer from the time of the conclusion of the contract. However, 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. Nevertheless, if at the time of the conclusion of the contract of sale the seller knew or ought to have known that the goods had been lost or damaged and did not disclose this to the buyer, the loss or damage is at the risk of the seller. [CISG 68]

**66 General residual rules on risk**

- (1) In cases not within rules 64 and 65, 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 take delivery.
- (2) However, if the buyer is bound to take over the goods at a place other than a place of business of the seller, 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.
- (3) If the contract relates to goods not then identified, the goods are considered not to be placed at the disposal of the buyer until they are clearly identified to the contract. [CISG 69]

**67 Effect of avoidance**

- (1) Avoidance of the contract releases both parties from their obligations under it, subject to any damages which may be due.
- (2) Avoidance does not affect any provision of the contract for the settlement of disputes or any other provision of the contract governing the rights and obligations of the parties consequent upon the avoidance of the contract.
- (3) A party who has performed the contract either wholly or in part may claim restitution from the other party of whatever the first party has supplied or paid under the contract.
- (4) If both parties are bound to make restitution, they must do so concurrently. [CISG 81]

**68 Inability to return goods in same condition**

- (1) A buyer loses the right to declare the contract avoided or to require the seller to deliver substitute goods if it is impossible for him to make restitution of the goods substantially in the condition in which he received them.
- (2) Paragraph (1) does not apply —
  - (i) if the impossibility of making restitution of the goods or of making restitution of the goods substantially in the condition in which the buyer received them is not due to his act or omission;

- (ii) if the goods or part of the goods have perished or deteriorated as a result of the examination provided for in rule 40; or
- (iii) if the goods or part of the goods have been sold in the normal course of business or have been consumed or transformed by the buyer in the course of normal use before he discovered or ought to have discovered the lack of conformity. [CISG 82]

**69 Preservation of other remedies**

A buyer who has lost the right to declare the contract avoided or to require the seller to deliver substitute goods in accordance with rule 68 retains all other remedies under the contract and these Rules. [CISG 83]

**70 Restitution of benefits**

- (1) If the seller is bound to refund the price, he must also pay interest on it, from the date on which the price was paid.
- (2) The buyer must account to the seller for all benefits which he has derived from the goods or part of them —
  - (i) if he must make restitution of the goods or part of them; or
  - (ii) if it is impossible for him to make restitution of all or part of the goods or to make restitution of all or part of the goods substantially in the condition in which he received them, but he has nevertheless declared the contract avoided or required the seller to deliver substitute goods. [CISG 84]

**71 Seller's duty to preserve goods**

If the buyer is in delay in taking delivery of the goods or, where payment of the price and delivery of the goods are to be made concurrently, if he fails to pay the price, and the seller is either in possession of the goods or otherwise able to control their disposition, the seller must take such steps as are reasonable in the circumstances to preserve them. He is entitled to retain them until he has been reimbursed his reasonable expenses by the buyer. [CISG 85]

**72 Buyer's duty to preserve goods**

- (1) If the buyer has received the goods and intends to exercise any right under the contract or these Rules to reject them, he must take such steps to preserve them as are reasonable in the circumstances. He is entitled to

retain them until he has been reimbursed his reasonable expenses by the seller.

- (2) If goods dispatched to the buyer have been placed at his disposal at their destination and he exercises the right to reject them, he must take possession of them on behalf of the seller, provided that this can be done without payment of the price and without unreasonable inconvenience or unreasonable expense. This provision does not apply if the seller or a person authorized to take charge of the goods on his behalf is present at the destination. If the buyer takes possession of the goods under this paragraph, his rights and obligations are governed by paragraph (1).

[CISG 86]

### **73 Deposit of goods in warehouse**

A party who is bound to take steps to preserve the goods may deposit them in a warehouse of a third person at the expense of the other party provided that the expense incurred is not unreasonable.

[CISG 87]

### **74 Sale of the goods**

- (1) A party who is bound to preserve the goods in accordance with rules 71 or 72 may sell them by any appropriate means if there has been an unreasonable delay by the other party in taking possession of the goods or in taking them back or in paying the price or the cost of preservation, provided that reasonable notice of the intention to sell has been given to the other party.
- (2) If the goods are subject to rapid deterioration or their preservation would involve unreasonable expense, a party who is bound to preserve the goods in accordance with rules 71 or 72 must take reasonable measures to sell them. To the extent possible he must give notice to the other party of his intention to sell.
- (3) A party selling the goods has the right to retain out of the proceeds of sale an amount equal to the reasonable expenses of preserving the goods and of selling them. He must account to the other party for the balance.

[CISG 88]

***Remedies for seller***

**75 Remedies available to seller**

- (1) If the buyer fails to perform any of his obligations under the contract or these Rules, the seller may —
  - (i) exercise the rights provided in rules 76 to 79;
  - (ii) claim damages as provided in rules 82 to 85.
- (2) The seller is not deprived of any right he may have to claim damages by exercising his right to other remedies.
- (3) No period of grace may be granted to the buyer by a court or arbitral tribunal when the seller resorts to a remedy for breach of contract.

[CISG 61]

**76 Seller's right to compel performance**

The seller may require the buyer to pay the price, take delivery or perform his other obligations, unless the seller has resorted to a remedy which is inconsistent with this requirement.

[CISG 62]

**77 Seller's notice fixing additional final period for performance**

- (1) The seller may fix an additional period of time of reasonable length for performance by the buyer of his obligations.
- (2) Unless the seller has received notice from the buyer that he will not perform within the period so fixed, the seller may not, during that period, resort to any remedy for breach of contract. However, the seller is not deprived thereby of any right he may have to claim damages for delay in performance.

[CISG 63]

**78 Seller's right to avoid the contract**

- (1) The seller may declare the contract avoided —
  - (i) if the failure by the buyer to perform any of his obligations under the contract or these Rules amounts to a fundamental breach of contract; or
  - (ii) if the buyer does not, within the additional period of time fixed by the seller in accordance with rule 77(1), perform his obligation to pay the price or take delivery of the goods, or if he declares that he will not do so within the period so fixed.

- (2) However, in cases where the buyer has paid the price, the seller loses the right to declare the contract avoided unless he does so —
- (i) in respect of late performance by the buyer, before the seller has become aware that performance has been rendered; or
  - (ii) in respect of any breach other than late performance by the buyer, within a reasonable time —
    - (I) after the seller knew or ought to have known of the breach; or
    - (II) after the expiration of any additional period of time fixed by the seller in accordance with rule 77(1), or after the buyer has declared that he will not perform his obligations within such an additional period. [CISG 64]

**79 Supply of missing specifications**

- (1) If under the contract the buyer is to specify the form, measurement or other features of the goods and he fails to make such specification either on the date agreed upon or within a reasonable time after receipt of a request from the seller, the seller may, without prejudice to any other rights he may have, make the specification himself in accordance with the requirements of the buyer that may be known to him.
- (2) If the seller makes the specification himself, he must inform the buyer of the details and must fix a reasonable time within which the buyer may make a different specification. If, after receipt of such a communication, the buyer fails to do so within the time so fixed, the specification made by the seller is binding. [CISG 65]

***Common provisions***

**80 Suspension of performance**

- (1) A party may suspend the performance of his obligations 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 —
- (i) a serious deficiency in his ability to perform or in his creditworthiness; or
  - (ii) his conduct in preparing to perform or in performing the contract.

- (2) If the seller has already dispatched the goods before the grounds described in paragraph (1) become evident, he may prevent the handing over of the goods to the buyer even though the buyer holds a document which entitles him to obtain them. The present paragraph relates only to the rights in the goods as between the buyer and the seller.
- (3) A party suspending performance, whether before or after dispatch of the goods, must immediately give notice of the suspension to the other party and must continue with performance if the other party provides adequate assurance of his performance. [CISG 71]

## **81 Avoidance in 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 of contract 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 of contract 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 who declares the contract avoided in respect of any delivery may, at the same time, declare it 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. [CISG 73]

## **PART 5 REMEDIES**

### **82 Remedies**

Where a contracting party commits a breach of the contract the other party may seek any or all of —

- (i) monetary compensation for the loss suffered by the breach;
- (ii) the award of any profit gained by the other contracting party from the breach;

- (iii) an order compelling or restraining the doing of some act under the Crimes, Procedure and Evidence Rules 2003, rule 105(1);
- (iv) a declaration under the Crimes, Procedure and Evidence Rules 2003, rule 105(3).

**83 Measuring damages**

Damages for breach of contract consist of a sum equal to the loss, including loss of profit, suffered by the other party as a consequence of the breach. Such damages may not exceed the loss which the party in breach foresaw or ought to have foreseen at the time of the conclusion of the contract, in the light of the facts and matters of which he then knew or ought to have known, as a possible consequence of the breach of contract. [CISG 74]

**84 Damages when contract avoided**

- (1) If the contract is avoided and if, in a reasonable manner and within a reasonable time after avoidance, the buyer has bought goods in replacement or the seller has resold the goods, the party claiming damages may recover the difference between the contract price and the price in the substitute transaction as well as any further damages recoverable under rule 83.
- (2) If the contract is avoided and there is a current price for the goods, the party claiming damages may, if he has not made a purchase or resale under paragraph (1), recover the difference between the price fixed by the contract and the current price at the time of avoidance as well as any further damages recoverable under paragraph (1). If, however, the party claiming damages has avoided the contract after taking over the goods, the current price at the time of such taking over shall be applied instead of the current price at the time of avoidance.
- (3) For the purposes of paragraph (2), the current price is the price prevailing at the place where delivery of the goods should have been made or, if there is no current price at that place, the price at such other place as serves as a reasonable substitute, making due allowance for differences in the cost of transporting the goods. [CISG 75, 76]

**85 Mitigation of loss**

A party who relies on a breach of contract must take such measures as are reasonable in the circumstances to mitigate the loss, including loss of profit, resulting from the breach. If he fails to take such measures, the party in breach may claim a reduction in the damages in the amount by which the loss should have been mitigated. [CISG 77]

**86 Exemption from damages**

- (1) 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.
- (2) If the party's failure is due to the failure by a third person whom he has engaged to perform the whole or a part of the contract, that party is exempt from liability only if —
  - (i) he is exempt under paragraph (1); and
  - (ii) the person whom he has so engaged would be so exempt if paragraph (1) were applied to him.
- (3) The exemption provided by this rule has effect for the period during which the impediment exists.
- (4) The party who fails to perform must give notice to the other party of the impediment and its effect on his ability to perform. If the notice is not received by the other party within a reasonable time after the party who fails to perform knew or ought to have known of the impediment, he is liable for damages resulting from such non-receipt.
- (5) Nothing in this rule prevents either party from exercising any right other than to claim damages under these Rules. [CISG 79]

**87 Interest**

If a party fails to pay the price or any other sum that is in arrears, the other party is entitled to interest on it, without prejudice to any claim for damages recoverable under rule 83. [CISG 78]