

# LAWS4210

# Commercial Law

Performance of the Contract and Remedies in domestic and international contracts for the sale of goods

# Domestic Sale of Goods

Performance of the Contract

# Performance of the Contract

- ▶ Part 4 *Sale of Goods Act 1923* (NSW)
  - ▶ Provisions of this Part only apply where the contract is silent on the matters dealt with in the Part.
  - ▶ In other words, the provisions of this section are ‘default measures’.
  - ▶ The *delivery* of the goods takes place independently of the *transfer of property in the goods*.
  - ▶ Term ‘delivery’ is defined in s.5, NSWSGA, to mean ‘voluntary transfer of **possession** from one person to another.’ Thus, we are talking here about **possession** of physical goods, not who has **property rights** in the goods.

# Property, Possession and Delivery

- ▶ In *Gamer's Motor Centre (Newcastle) Pty Ltd v Natwest Wholesale Australia Pty Ltd* (1987) 163 CLR 236 ('*Gamer's*') the focus of discussion was whether or not the reference to 'delivery' in s.28(2) of the NSWGA included *constructive* delivery as well as *actual* delivery. In the case of constructive delivery, the physical possession of the goods remains unchanged, but the party who has possession of the goods usually then holds them on behalf of the buyer rather than the seller.
- ▶ As you will have seen from the judgments in *Gamer's* the *reason* the court was deliberating on the meaning of the term 'delivery' was for the purpose of properly construing the provisions of s.28(2) which it was doing, in turn, for the purpose of determining who had *property* in the cars, the subject of the initial dispute.

# Property, Possession and Delivery

- ▶ In Part 4 of the NSWSGA, the term ‘delivery’ is used in the context of the *parties’ performance* of the contract as distinct from the context in which it is used in Part 3 of the Act, relating to the *effect of the contract*.
- ▶ At a minimum, as indicated by s.30, NSWSGA, the seller’s obligation is to **deliver up the goods the subject of the contract**. The buyer’s corresponding obligation is to pay for those goods. As you would realise, this is a statutory statement of the basic obligations of the buyer and seller under general law.

# Performance of the contract

- ▶ Failure by the seller to deliver the goods *in accordance with the contract* amounts to a breach of contract.
- ▶ Failure by the buyer to take delivery of the goods or pay for the goods *in accordance with the contract*, amounts to a breach of contract.
- ▶ *In the absence of anything to the contrary set out in the contract itself*, delivery of the goods is to take place according to the rules set out in the Act (see, eg., ss.32, 35 NSWSGA) *(these rules are also set out in your textbook but **please** be sure to also read the legislation as your primary source)*.

# Delivery by instalments

- ▶ *Hammer and Barrow v Coca-Cola* [1962] NSLR 723
- ▶ H&B, a manufacturing company, contracted with CC to supply 200 000 yoyos (a type of toy) to be used as part of an advertising campaign to be run by CC.
- ▶ 85 000 yoyos were delivered in separate consignments but 80% of these goods were found to be defective. As a result of this CC terminated the contract (in the judgment, the term 'rescission' is used. However it is used, as Richmond J notes at the beginning of his judgment, in the sense of 'rescision *in futuro*', ie rescinding future obligations under the contract - ie. Termination).
- ▶ Rescission *in futuro* is to be distinguished from rescission *ab initio*, which is the remedy available for an actionable misrepresentation, for example (relevant to a proper understanding s.38(2), for example).

# Delivery by instalments

- ▶ *Maple Flock Co v Universal Furniture Products (Wembley) Ltd* [1934] 1 KB 148
- ▶ This decision is the leading authority on the operation of s.34(2), NSWSGA (and corresponding provisions in other jurisdictions).
- ▶ MF (plaintiffs) entered into a written contract with UFP (defendants) for the sale of 100 tons of rag flock.
- ▶ Under the terms of the contract, the rag flock was to be delivered in 3 deliveries, each of 1.5 tons, per week, as required by UFP.
- ▶ Each weekly delivery was to be separately paid for.



# Delivery by instalments

- ▶ *Maple Flock Co v Universal Furniture Products (Wembley) Ltd* [1934] 1 KB 148
- ▶ It was also a term of the contract that all flock supplied conformed to Government standard as set by legislation.
- ▶ Under the relevant statute, there was to be no more than 30 parts of chlorine per 100 000 parts of flock. It was a penal offence to use flock not conforming to this standard.
- ▶ Deliveries 16 - 18 inclusive were made. However, following the 18<sup>th</sup> delivery, UFP contacted MF to advise that analysis of a sample from *delivery 16* had revealed a contamination of 250 parts of chlorine in the delivery. The defendants purported to terminate the contract.

# Delivery by instalments

- ▶ *Maple Flock Co v Universal Furniture Products (Wembley) Ltd* [1934] 1 KB 148
- ▶ The issue was whether or not the plaintiffs had repudiated the contract in the sense of s.31(2) UKSGA, 1893 (NSWSGA equivalent: s. 34) by making one defective delivery.
- ▶ The plaintiffs cross-claimed, suing the defendants for damages for breach of contract.
- ▶ The plaintiffs, MF, won on appeal, being awarded damages for breach of contract, together with costs at first instance and on appeal.

# Delivery by instalments

- ▶ *Maple Flock Co v Universal Furniture Products (Wembley) Ltd* [1934] 1 KB 148
- ▶ The CA held that the plaintiff's breach did not amount to a repudiation of the entire contract within the meaning of the relevant section of the act. This was the decision in this case.
- ▶ The *principle* set down in this decision was that, in applying this section to a particular case, **the main tests to be considered are:**
  1. The quantitative ratio which the breach bears to the contract as a whole; and
  2. The degree of probability that such a breach will be repeated.

# Delivery by instalments

- ▶ *Hammer and Barrow v Coca-Cola* [1962] NSLR 723 and *Maple Flock Co v Universal Furniture Products (Wembley) Ltd* [1934] 1 KB 148
- ▶ Consider the way in which Richmond J in *Hammer and Barrow v Coca-Cola* applies the test set down in *Maple Flock Co v Universal Furniture Products (Wembley) Ltd* in order to arrive at his decision.

The background features abstract, overlapping green geometric shapes, primarily triangles and polygons, in various shades of green, creating a modern and dynamic visual effect.

# International Sale of Goods: Obligation of the Buyer and Seller

# Performance of the seller's obligations

- ▶ The seller has 2 basic obligations:
  - ▶ Deliver the goods and documents in conformity with the contract of sale
  - ▶ Guarantee conformity of the goods with the contract

# Performance of the seller's obligations

- ▶ Delivery of the goods and documents is dealt with in arts. 30 - 34.
- ▶ The guarantee of conformity of the goods with the contract is dealt with in arts. 35 - 44.
- ▶ Art. 30: The seller must deliver the goods, hand over any documents relating to them and transfer the property in the goods, as required by the contract and this Convention.

# Performance of the seller's obligations

- ▶ If the seller is not bound to deliver the goods at any particular place, his obligation to deliver consists:
  - ▶ (a) if the contract of sale involves carriage of goods - in handing the goods over to the first carrier for transmission to the buyer;



# Performance of the seller's obligations

- ▶ (b) if, in cases not within the preceding sub-paragraph, 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;
- ▶ (c) 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

# Performance of the seller's obligations

- ▶ The place of delivery must be unambiguous and acceptable to both parties.
- ▶ Art. 33 sets out the rules for determining the time for delivery. As a general rule, property and risk will usually pass from seller to buyer at the time of delivery.

# Performance of the seller's obligations

- ▶ **Article 33**
- ▶ The seller must deliver the goods:
- ▶ (a) if a date is fixed by or determinable from the contract, on that date;
- ▶ (b) 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
- ▶ (c) in any other case, within a reasonable time after the conclusion of the contract.

# Performance of the seller's obligations

- ▶ The seller's obligation to give notice on consignment of goods
  - ▶ Under art.32(1) the seller has the option of either identifying or marking the goods clearly according to the contract, or giving 'the buyer notice of the consignment specifying the goods'.
  - ▶ Art. 67(2) provides that giving notice to the buyer to specify the consignment of the goods has the same effect as clearly marking the goods or describing the goods in shipping documents for the passing of risk.
  - ▶ The purpose of these acts is to enable the buyer to identify the goods for the purpose of delivery.

# Performance of the seller's obligations

- ▶ Seller's obligation to enter a contract of carriage
  - ▶ See art 32 - if the seller is liable to arrange for carriage of the goods then the seller must enter into a contract of carriage on appropriate terms relating to suitable means, route etc
- ▶ Seller's obligation to facilitate insurance
  - ▶ See art 32 - see terms of contract to see who has the obligation to insure but even if that is the buyer art 32 places an obligation on the seller to provide necessary information *if* the buyer requests it.

# Performance of the seller's obligations

- ▶ Seller's obligation to deliver documents
- ▶ Goods and documents generally delivered separately - delivery of documents often linked to payment.
  - ▶ **Article 34**
  - ▶ 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 this Convention.

# Performance of the seller's obligations

- ▶ Seller's obligation and title to sell in general
  - ▶ **Article 41**
  - ▶ 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 article 42.

# Performance of the seller's obligations

- ▶ Seller's obligation and title to sell intellectual property
  - ▶ **Article 42**
  - ▶ (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:
    - ▶ (a) under the law of the State 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 State; or
    - ▶ (b) in any other case, under the law of the State where the buyer has his place of business.
  - ▶ (2) The obligation of the seller under the preceding paragraph does not extend to cases where:
    - ▶ (a) at the time of the conclusion of the contract the buyer knew or could not have been unaware of the right or claim; or
    - ▶ (b) the right or claim results from the seller's compliance with technical drawings, designs, formulae or other such specifications furnished by the buyer.



# Performance of the seller's obligations

- ▶ Seller's obligation that there is conformity of goods with terms of the contract and with the terms of Art 35
- ▶ **Article 35**
  - ▶ (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:
    - ▶ (a) are fit for the purposes for which goods of the same description would ordinarily be used;
    - ▶ (b) 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;
    - ▶ (c) possess the qualities of goods which the seller has held out to the buyer as a sample or model;
    - ▶ (d) 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 subparagraphs (a) to (d) of the preceding paragraph 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.

# Performance of the seller's obligations

- ▶ The seller's obligation in relation to conformity of goods incorporates the following elements:
  - ▶ Fitness for purpose - similar obligation as under domestic SGA
  - ▶ Merchantability of goods - similar to merchantable quality under domestic SGA but term "merchantable quality" not used - fit for the purposes for which goods of the same description would ordinarily be used (this may vary between the buyer's and seller's countries)
  - ▶ Conformity of goods with sample - similar to domestic SGA
  - ▶ Reasonable manner of packaging - no direct domestic equivalent but note that Convention has no obligation in relation to correspondence with description

# Performance of the seller's obligations

- ▶ Seller's obligation and provisos relating to implied terms - see Art 35(3).
- ▶ Seller's obligations and latent defect
- ▶ **Article 36**
- ▶ (1) The seller is liable in accordance with the contract and this Convention 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.

# Performance of the seller's obligations

- ▶ Seller's obligation to ensure conformity after delivery
- ▶ **Article 36**
- ▶ (2) The seller is also liable for any lack of conformity which occurs after the time indicated in the preceding paragraph 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.

# Performance of the seller's obligations

- ▶ Seller's obligations and buyer's right of examination
- ▶ **Article 38**
- ▶ (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.

# Performance of the seller's obligations

- ▶ The buyer must examine the goods as soon as practicable.
- ▶ *Oberlandesgericht Karlsruhe (I U 280/96, 25 June 1997)*; (<http://cisgw3.law.pace.edu/cases/970625g1.html> )
- ▶ surface protective film was defective - written notice given 24 days after delivery and 1 day after discovery of the defect.
- ▶ Court found that a reasonable period for examination was 3 - 4 days after delivery and reasonable period for notification in the case of durable goods was 8 days after end of examination period.
- ▶ Other courts have adopted different time periods.

# Performance of the seller's obligations

- ▶ Seller's obligations and notice of non-conformity
- ▶ **Article 39**
- ▶ (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.
- ▶ Similar issues in relation to interpretation of “reasonable time” arise as with “as soon as practicable” in art 38.

# Performance of the seller's obligations

- ▶ Seller's obligations and limitation period under the Convention
- ▶ **Article 39**
- ▶ (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 thereof 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.



# Performance of the seller's obligations

- ▶ Seller's obligations and the self-cure remedy before date for delivery
- ▶ **Article 37**
- ▶ If the seller has delivered goods before the date for delivery, he 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 this Convention.

# Performance of the seller's obligations

- ▶ Seller's Obligation and the Self-Cure Remedy after Date for Delivery
- ▶ **Article 48**
- ▶ (1) Subject to article 49, 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 this Convention.
- ▶ (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 the preceding paragraph, that the buyer make known his decision.
- ▶ (4) A request or notice by the seller under paragraph (2) or (3) of this article is not effective unless received by the buyer.

# Performance of the seller's obligations

- ▶ Seller's obligations and exemptions
- ▶ **Article 79**
- ▶ (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 party of the contract, that party is exempt from liability only if:
  - ▶ (a) he is exempt under the preceding paragraph; and
  - ▶ (b) the person whom he has so engaged would be so exempt if the provisions of that paragraph were applied to him.
- ▶ (3) The exemption provided by this article 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 article prevents either party from exercising any right other than to claim damages under this Convention.

# Buyer's obligations

- ▶ Buyer's obligation to pay the price
- ▶ **Article 53**
- ▶ The buyer must pay the price for the goods and take delivery of them as required by the contract and this Convention
- ▶ **Article 54**
- ▶ 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 laws and regulations to enable payment to be made. See *Downs Investments Pty Ltd v Perwaja Steel SDN BHD* [2000] QSC 421 (and the appeal decision at [2002] 2 Qd R 462)

# Buyer's obligations

- ▶ Buyer's obligation and determination of the price
- ▶ **Article 55**
- ▶ 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 goods sold under comparable circumstances in the trade concerned.

# Buyer's obligations

- ▶ Buyer's obligation and place of payment
- ▶ **Article 57**
- ▶ (1) If the buyer is not bound to pay the price at any other particular place, he must pay it to the seller:
  - ▶ (a) at the seller's place of business; or
  - ▶ (b) 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 increase in the expenses incidental to payment which is caused by a change in his place of business subsequent to the conclusion of the contract.

# Buyer's obligations

- ▶ Buyer's obligation and time of payment
- ▶ **Article 58**
- ▶ (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 this Convention. 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.
- ▶ **Article 59**
- ▶ The buyer must pay the price on the date fixed by or determinable from the contract and this Convention without the need for any request or compliance with any formality on the part of the seller.

# Buyer's obligations

- ▶ Buyer's obligation to take delivery
- ▶ **Article 60**
- ▶ The buyer's obligation to take delivery consists:
  - ▶ (a) in doing all the acts which could reasonably be expected of him in order to enable the seller to make delivery; and
  - ▶ (b) in taking over the goods.



# Buyer's obligations

- ▶ Buyer's obligation and exemptions
- ▶ Article 79 applies to buyers as well as sellers.

# Remedies

Domestic contracts for the sale of goods

# Remedies of the unpaid seller

Against the buyer:

- ▶ **51 Action for price**
- ▶ (1) Where under a contract of sale the property in the goods has passed to the buyer, and the buyer wrongfully neglects or refuses to pay for the goods according to the terms of the contract, the seller may maintain an action against the buyer for the price of the goods.
- ▶ (2) Where under a contract of sale the price is payable on a day certain irrespective of delivery, and the buyer wrongfully neglects or refuses to pay such price, the seller may maintain an action for the price, although the property in the goods has not passed and the goods have not been appropriated to the contract.



# Remedies of the unpaid seller

## ► 52 Damages for non-acceptance

- (1) Where the buyer wrongfully neglects or refuses to accept and pay for the goods, the seller may maintain an action against the buyer for damages for non-acceptance. (2) The measure of damages is the estimated loss directly and naturally resulting in the ordinary course of events from the buyer's breach of contract.
- (3) Where there is an available market for the goods in question, the measure of damages is prima facie to be ascertained by the difference between the contract price and the market or current price at the time or times when the goods ought to have been accepted, or if no time was fixed for acceptance, then at the time of the refusal to accept.

# Remedies of the unpaid seller



Against the goods:

- ▶ **42 Unpaid seller's rights**
- ▶ (1) Subject to the provisions of this Act and of any statute in that behalf, notwithstanding that the property in the goods may have passed to the buyer, the unpaid seller of goods as such has by implication of law:
  - ▶ (a) a lien on the goods for the price while the seller is in possession of them, [see s 43 - 45]
  - ▶ (b) in case of the insolvency of the buyer a right of stopping the goods in transitu after the seller has parted with the possession of them, [see ss 46 - 48]
  - ▶ (c) a right of resale as limited by this Act. [see s 50]
- ▶ (2) Where the property in goods has not passed to the buyer the unpaid seller has in addition to the seller's other remedies, a right of withholding delivery similar to and co-extensive with the seller's rights of lien and stoppage in transitu where the property has passed to the buyer.

# Remedies of the buyer

## ► 53 Damages for non-delivery

- (1) Where the seller wrongfully neglects or refuses to deliver the goods to the buyer, the buyer may maintain an action against the seller for damages for non-delivery.
- (2) The measure of damages is the estimated loss directly and naturally resulting in the ordinary course of events from the seller's breach of contract.
- (3) Where there is an available market for the goods in question, the measure of damages is prima facie to be ascertained by the difference between the contract price and the market or current price of the goods at the time or times when they ought to have been delivered, or if no time was fixed, then at the time of the refusal to deliver.

# Remedies of the buyer



- ▶ **54 Remedy for breach of warranty**
- ▶ (1) Where there is a breach of warranty by the seller, or where the buyer elects or is compelled to treat any breach of a condition on the part of the seller as a breach of warranty, the buyer is not by reason only of such breach of warranty entitled to reject the goods, but the buyer may:
  - ▶ (a) set up against the seller the breach of warranty in diminution or extinction of the price, or
  - ▶ (b) maintain an action against the seller for damages for the breach of warranty.
- ▶ (2) The measure of damages for breach of warranty is the estimated loss directly and naturally resulting in the ordinary course of events from the breach of warranty.
- ▶ (3) In the case of breach of warranty of quality such loss is prima facie the difference between the value of the goods at the time of delivery to the buyer and the value they would have had if they had answered to the warranty.
- ▶ (4) The fact that the buyer has set up the breach of warranty in diminution or extinction of the price does not prevent the buyer from maintaining an action for the same breach of warranty if the buyer has suffered further damage.
  
- ▶ **56 Saving of proceedings in equity**
- ▶ Nothing in this Act shall affect any remedy in equity of the buyer or the seller in respect of any breach of a contract of sale or any breach of warranty

# Remedies: International Sale of Goods



# Remedies

- ▶ Both the seller and buyer have certain remedies available to them under the Convention.
- ▶ The Seller is entitled to:
  - ▶ Request the buyer to perform her or his contractual obligations: art.62;
  - ▶ Fix an additional period of time for the buyer to perform (*nachfrist*): art. 63;

# Remedies

- ▶ Request 'specific performance': arts. 28 and 62;
- ▶ Declare the contract avoided: art. 64; (only on the basis of a 'fundamental breach': see Art 25; *Roder Zelt- und Hallenkonstruktionen GmbH v Rosedown Park Pty Ltd* (1995) 57 FCR 216)
- ▶ Suspend the performance of the contract: art. 71;
- ▶ Avoid the contract on the ground of an anticipatory breach: art. 72;
- ▶ Claim damages under arts. 74-78.

# Remedies

- ▶ The buyer is entitled to:
  - ▶ Request the seller to perform her or his contractual obligations: art. 46;
  - ▶ Fix an additional period of time for the seller to perform (*nachfrist*): art. 47;
  - ▶ Request a court to order specific performance: arts. 28 and 46;
  - ▶ Declare the contract avoided: art. 49; (only on the basis of a ‘fundamental breach’: see Art 25; *Roder Zelt- und Hallenkonstruktionen GmbH v Rosedown Park Pty Ltd* (1995) 57 FCR 216)
  - ▶ Reduce the price of the non-conforming goods: art. 50; ( see *Ginza Pte Ltd v Vista Corporation Pty Ltd* [2003] WASC 11)

# Remedies

- ▶ Refuse to take an earlier delivery: art. 51;
- ▶ Refuse to take delivery of greater (or fewer) quantities under art. 52;
- ▶ Suspend the performance of a contract: art. 71;
- ▶ Avoid a contract on the grounds of an anticipated fundamental breach: art. 72;
- ▶ Avoid a contract in proportion to the defective instalments: art 73;
- ▶ Claim damages and interest: arts. 74 - 78.

# Remedies

- ▶ Although the seller has the right to request performance, if the buyer refuses to comply with this request, the seller will have to bring the action before a court or tribunal.
- ▶ See, eg: : *Cases No. 7197* (<http://www.unilex.info/cisg/case/37>) and *Bundesgerichtshof VIII ZR 18/94* (<http://www.unilex.info/cisg/case/107>)

# Remedies

- ▶ The concept of *Nachfrist* comes from German law: it refers to the situation in which the innocent party sends a final notice to the offending party, requiring her or him to perform the contractual obligation within a specified period of time.
- ▶ It is analogous to the *Notice to Complete* at common law.
- ▶ *Nachfrist* is provided for in art. 63.
- ▶ Note that the seller is not *obliged* to give additional time for performance of the contract.

# Remedies

- ▶ Art.64 sets out 2 sets of rules to enable the seller to avoid the contract. Under art. 64(1), where the buyer has failed to pay the price, the seller may declare the contract void:
  - ▶ When the buyer has committed a fundamental breach as defined by the parties, or under art.25; or
  - ▶ When the buyer refuses, or gives notice of refusal, to perform his or her obligations within an additional time period fixed under art.63(1).
- ▶ These courses of action are available in the alternative.

# Remedies

- ▶ Art.64(2) sets out the set of rules for avoiding the contract when the buyer has paid the purchase price.
- ▶ As a general rule, the seller may not avoid the contract once the purchase price has been paid. However, he or she may do so in the following circumstances:
  - ▶ where they do so before becoming aware that the buyer has paid the price;
  - ▶ based on breach of contract, provided this is done within a reasonable time after actually or constructively becoming aware of the breach;
  - ▶ where the buyer fails or refuses to perform her or his obligations within the additional time period fixed under art. 63(1).



# Remedies

- ▶ Article 65 confers a benefit on the seller in the sense that the seller may provide specifications to the buyer if necessary to preserve the agreement.

# Remedies

- ▶ Art. 71 enables the seller to suspend the performance of the contract if the buyer appears unable to perform a substantial part of her or his obligations. However, this inability must be based on at least one of the following:
  - ▶ existence of a serious deficiency in the buyer's ability to perform;
  - ▶ existence of a serious deficiency in the buyer's creditworthiness;
  - ▶ conduct of the buyer in preparing to perform;
  - ▶ conduct of the buyer in performing the contract

# Remedies

- ▶ The Convention does *not* give the unpaid seller a right of stoppage in the way that, eg., Australian sale of goods legislation permits. However, if the seller suspends the operation of the contract, then they can also, under art.71(2) prevent the goods being delivered to the buyer.

# Remedies

- ▶ Anticipated fundamental breach
- ▶ **Article 72 (in the case of the seller this is an alternative to article 64)**
- ▶ (1) If prior to 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 the preceding paragraph do not apply if the other party has declared that he will not perform his obligations

# Remedies

- ▶ **Article 64 (applicable to seller)**
- ▶ (1) The seller may declare the contract avoided:
- ▶ (a) if the failure by the buyer to perform any of his obligations under the contract or this Convention amounts to a fundamental breach of contract; or
- ▶ (b) if the buyer does not, within the additional period of time fixed by the seller in accordance with paragraph (1) of article 63, 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.

# Remedies

- ▶ The seller's and buyer's rights to damages are dealt with respectively in arts. 74 - 78. Art. 74 defines the meaning of 'damage' and sets out the requirement of 'foreseeability'.
- ▶ Damages consist of a sum equal to the loss, including loss of profit, which may include shipping or customs charges arising from the return of non-conforming goods, and the costs for purchasing special materials or tools which have become obsolete due to the return of the non-conforming goods of specific description.

# Remedies

- ▶ The sum of damages is restricted by foreseeability, meaning that the sum should not exceed the loss which the party in breach foresaw or ought to have foreseen at the time of the conclusion of the contract.
- ▶ Art.75 requires the seller to resell the goods in a reasonable manner and within a reasonable time after avoidance of the contract.

# Remedies

- ▶ Art.76 explains the measure of the seller's entitlement to damages where she or he does not resell the goods after avoidance.
- ▶ Art. 77 requires the seller to mitigate his or her loss and art. 78 entitles the seller to interest on any overdue payments.
- ▶ The buyer's remedies are very similar to those of the seller.