

# Problems of non-performance of the international sale of goods contract and the proposed solutions according to Vienna Convention (CISG)

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## **Abstract:**

The non-performance of international sales contracts is one of the essential and significant issues in private international law. The provisions of the 1980 Vienna Convention (CISG) are considered among the most effective legal frameworks for resolving disputes arising between seller and buyer, due to their compatibility with the nature of international commercial transactions.

When one of the parties fails to fulfill the agreed contractual obligations, the aggrieved party is entitled to invoke one of the remedies provided by the Convention, whether financial such as damages or price reduction or non-financial such as termination or specific performance.

This study aims to explore these remedies and assess the most appropriate one for resolving disputes, depending on the nature of the breach. An analysis of several provisions of the Convention reveals its emphasis on specific performance by enabling the obligee to demand repair or replacement of the goods while limiting the use of contract termination due to the significant consequences it may entail.

The Convention also grants the right to claim a price reduction or damages in certain cases, thus ensuring a balance between the interests of the parties and maintaining the stability of international commercial transactions.

**Keywords:** Sales contract, Vienna Convention, non-performance of contract, specific performance, avoidance, damages, price reduction.

## **Introduction**

International trade holds significant importance within the international economic community. This importance is reflected through the conclusion of international commercial contracts by merchants. With the development of technology, electronic commerce has emerged, leading to the conclusion of international commercial contracts through electronic means.

In view of the divergence among national legislations concerning the provisions governing the non-performance of international contracts for the sale of goods, which constitutes a significant impediment to international trade, it has become imperative to establish a set of uniform rules regulating international

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commercial transactions. Such rules should be derived from international custom and the fundamental principles upon which the law of international trade is founded.

The International Institute for the Unification of Private Law (UNIDROIT) began its work on the unification of the law governing international sales in 1930. This effort led to the signing of the two Hague Conventions in 1964. The first convention established a uniform law on the international sale of corporeal movables, while the second convention set forth a uniform law on the formation of contracts for the international sale of corporeal movables.<sup>1</sup> However, despite the preparation of these two conventions, only a limited number of States ratified them, which ultimately led to their failure to achieve the desired unification of the rules governing the international sale of goods. Efforts toward unification nevertheless continued, culminating in the adoption of the United Nations Convention on Contracts for the International Sale of Goods (CISG) in 1980, which entered into force in 1988.

The 1980 Vienna Convention established important provisions governing the international sale of goods. Through these provisions, it sought to address and resolve the contentious and disputed issues arising between the seller and the buyer by laying down a set of common rules applicable to both parties. In its Part III, the Convention sets out substantive provisions governing the obligations of the contracting parties as well as the remedies arising from their non-performance.

Upon the conclusion of an international contract for the sale of goods, certain rights and obligations arise, which the seller and the buyer have mutually agreed upon in accordance with the principle that “contracts are the law of the parties.” However, in cases where one of the parties refuses or fails to perform the contract, the other party is entitled to invoke one of the remedies provided for under the 1980 Vienna Convention. The notion of non-performance of obligations arising from an international sales contract thus constitutes the cornerstone of this study under the United Nations Convention (Vienna). Accordingly, **what are the remedies established by the Convention, and are they sufficient to resolve disputes related to the performance of international contracts for the sale of goods?**

contract of sale of goods, as well as the circumstances under which these obligations are not performed and the legal consequences that such non-performance entails. It also aims to encourage States to engage in the international trading system by adopting the provisions of the Convention, given their compatibility with the requirements of international commercial transactions.

Accordingly, the study of this topic necessitates a purely analytical and doctrinal examination of the Convention’s provisions in order to arrive at practical solutions to the issue of non-performance of contractual obligations by either the seller or the buyer. Consequently, the structure of this research has been divided into two main sections: the first deals with the obligations of the contracting parties (First Chapter), and the second addresses the effects of their non-performance (Second Chapter).

## **1. The Obligations of the Parties to the International Contract for the Sale of Goods:**

The provisions of the United Nations Convention on Contracts for the International Sale of Goods (CISG) are governed by the principle of the binding force of contracts. Once a contract has been validly concluded and its terms have been agreed upon, both the seller and the buyer are bound to perform it. Neither party may repudiate or modify its obligations except with the consent of the other party or pursuant to a legal provision.

The Convention sets out the obligations of both parties to the contract in Part III, under the title “Sale of Goods.” Since the contract of sale is a contract of exchange, it gives rise to reciprocal obligations on the part of the seller and the buyer, whereby each becomes both a creditor and a debtor in relation to the other. Accordingly, the seller is bound to deliver the goods, together with the documents relating thereto, and to ensure that they conform to the terms agreed upon in the contract. In return, the buyer is obliged to pay the price and to take delivery of the goods.

### **1.1. Obligations of the Seller :**

Article 30 of the Vienna Convention provides that: “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.” From this provision, the seller’s principal obligations can be inferred, namely: the obligation to transfer the ownership of the goods, the obligation to deliver them, and the obligation of conformity.

#### **1.1.1 Obligation to deliver the goods and documents:**

The obligation to deliver the goods constitutes one of the seller's primary obligations. It must be performed even if it is not expressly stipulated by the parties in the contract. There are two forms of delivery: actual delivery and legal delivery.

**Actual delivery** refers to the act of placing the goods at the buyer's disposal in such a manner that enables the buyer to take possession of and make use of them. This obligation is subject to two conditions: the goods must be placed at the buyer's disposal, and the seller must notify or inform the buyer accordingly. This approach is consistent with Article 435(1) of the Egyptian Civil Code. The mode of actual delivery, which consists of either the physical delivery of the goods or placing them at the buyer's disposal, varies depending on the nature of the sale.<sup>2</sup>

**Legal delivery** refers to the form of delivery that occurs by mere agreement of the parties over the goods, without the need for any physical act. In this sense, delivery is deemed valid even in the absence of material transfer, provided that the seller has notified the buyer accordingly. This principle is adopted by the Algerian Civil Code under Article 361, which provides: *"Delivery shall be effected by placing the sold item at the buyer's disposal in such a manner that enables him to take possession of and make use of it without hindrance, even if he has not physically received it, provided that the seller has informed him thereof"*.

In certain cases, the goods may remain in the possession of the seller even after the conclusion of the contract, where the seller retains them as a pledgee, a depositary, or for the purpose of preservation or repair. In such situations, the seller is nevertheless deemed to have duly fulfilled his obligation to deliver the goods.<sup>3</sup>

The Vienna Convention does not expressly define the notion of delivery; rather, it clarifies its meaning through its legal provisions. From Article 30, it may be inferred that delivery consists in the buyer's obtaining of material control over the goods — that is, the act of placing the sold goods at the buyer's disposal in such a way that enables him to take peaceful possession thereof and to make use of them without hindrance, in accordance with the requirements of the contract and the law.

The determination of the place of delivery under the Vienna Convention depends primarily on the agreement of the contracting parties. In most cases, the parties refer to the International Commercial Terms (Incoterms) to specify such place. However, where the place of delivery has not been expressly agreed upon, the provisions of Article 31 of the Convention shall apply. Accordingly, the seller must hand the goods over to the carrier for transmission to the buyer if the contract of sale involves carriage of the goods. Where the sale concerns specific goods, or goods identified by reference to a specific stock or to be manufactured or produced, the seller is obliged to place them at the buyer's disposal at that particular place. In all other cases, the seller must place 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.

As for the time of delivery, the Convention requires the seller to deliver the goods on the date fixed by or determinable from the contract. In the absence of such a date, delivery must take place within a reasonable time after the conclusion of the contract, the determination of which lies within the discretion of the judge or the arbitrator.

### 1.1.2 Obligation of conformity:

The United Nations Convention on Contracts for the International Sale of Goods (CISG) regulates the seller's obligation of conformity, which essentially encompasses material, legal, and documentary conform.<sup>4</sup> The seller must deliver goods whose quantity, quality, and description, as well as their packaging or wrapping, are in conformity with the terms of the contract of sale.<sup>5</sup>

If the seller and the buyer have not agreed on the specific characteristics of the conformity of the goods, the provisions of Article 35 shall apply.

Accordingly, the seller shall be liable for any lack of conformity discovered at the time of delivery or thereafter.

In order for the buyer to rely on the lack of conformity, he must examine the goods within the shortest possible period of time. However, such examination may be deferred if the goods are redirected or reshipped to another destination.

The buyer must also notify the seller of the lack of conformity within a reasonable time from the date on which he discovered it.<sup>6</sup>

### 1.2 Obligations of the Buyer:

The conclusion of the contract gives rise to essential obligations incumbent upon the buyer, namely the obligation to pay the price and the obligation to take delivery of the goods forming the subject matter of the contract. These obligations are consistent with those established under the provisions of the Algerian Civil Code.

#### **1.2.1. Obligation to pay the prices:**

If the seller is bound to deliver the goods, the buyer, in turn, is obliged to take delivery of them and to pay the price. The price may be determined expressly or implicitly, provided that it corresponds to the usual price at the time of the conclusion of the contract for goods of the same kind (Article 55 of the Convention).

If the price is determined according to the weight of the goods, in the event of a dispute between the parties to the contract, any doubt shall be resolved by calculating the price on the basis of the **net weight** of the goods.<sup>7</sup>

As for the time and place of payment of the price, the buyer must perform this obligation when the payment becomes due, without the need for any notice from the seller. Payment may be made either before or after the delivery of the goods. In the absence of an agreement on the time of payment, reference shall be made to commercial usage, as confirmed by the Hague Convention.

The United Nations Convention on Contracts for the International Sale of Goods affirms that, as a general rule, payment of the price shall be made at the place designated by the parties. In the absence of such designation, the obligation shall be performed at the seller's principal place of business at the time of the conclusion of the contract. However, if the seller changes his place of business after the conclusion of the contract, he shall bear any additional expenses incurred by the buyer, unless the payment is to be made concurrently with the delivery of the goods or the related documents, in which case the buyer's obligation to pay the price shall be performed at the place of delivery (Article 57 of the Vienna Convention).

#### **1.2.2 Obligation to take delivery of the goods and documents:**

The buyer must receive the goods together with the documents relating thereto. However, the buyer may refuse to take delivery of the goods if such delivery does not achieve the intended purpose for instance, where the seller commits an error by delivering non-conforming or incomplete goods, or through negligence in handling the goods, which constitutes a fundamental breach of contract.

Certain types of sales require the conclusion of a contract of carriage for the delivery of the goods, such as an **F.O.B. (Free on Board)** sale. Under this arrangement, the buyer is responsible for reserving space on board the vessel, thereby enabling the seller to load the goods onto it.

### **2. Effects of Non-Performance of the Contract**

A breach of contract by one of the parties shall constitute a fundamental breach if it causes such detriment to the other party as to substantially deprive him of what he was legitimately entitled to expect under the terms of the contract.

This section is particularly important as it addresses the issue raised in our study concerning the remedies available to the party harmed by non-performance of the contract, while identifying the appropriate remedy according to the degree of the fundamental breach.

#### **2.1 Non-Monetary Remedies**

In cases where the debtor could have foreseen the damage, the creditor must prove the harm suffered as a result of the non-performance of the contract, particularly the substantial deprivation of the contractual benefits. Such harm may not, in some instances, rise to the level of a fundamental breach. Conversely, the breaching party may demonstrate that it could not have reasonably foreseen the damage suffered by the aggrieved party.<sup>8</sup>

Financial remedies include **specific performance** and **rescission of the contract**:

**2.1.1 Specific Performance:** Specific performance constitutes a primary remedy, as it limits the recourse to contract termination and aims to preserve the commercial transaction between the contracting parties. Such performance may be requested by either party, provided that it is feasible and does not impose an excessive or disproportionate burden on the obligor.

The Vienna Convention has expanded the role of the national court, as reflected in Article 28, which allows it to order specific performance, possibly as a safeguard to ensure the application of a non-monetary remedy.

In the event that the goods fail to conform to the contract, the buyer is entitled to require the seller to remedy the non-conformity, provided that such performance does not impose an unreasonable or disproportionate burden on the seller. The request for such remedy must be made either at the time the buyer notifies the seller of the non-conformity or within a reasonable period thereafter.

In cases where the non-conformity can be remedied, some courts have resorted to specific performance and applied the provisions of Article 48(1) of the Convention, since such remedy eliminates the existence of a fundamental breach. A notable example is the 1995 decision of the Grenoble Court in France, which rejected a Portuguese buyer's request to terminate the contract and upheld the French seller's request to repair the goods, provided that the defect could be remedied. In that case, the defect did not constitute a fundamental breach. <sup>9</sup>

Pursuant to paragraph 2 of Article 47 of the Vienna Convention, the buyer is also entitled to require the replacement of goods in the event of a non-conformity amounting to a fundamental breach, provided that such replacement is carried out within a reasonable period.

### **2.1.2 Termination (Rescission) :**

Either party may request termination of the contract if specific performance is impossible or imposes an undue burden on the seller. Pursuant to Article 49 of the Vienna Convention, the buyer is entitled to terminate the contract if the seller's failure to perform any of the obligations imposed on him by the contract or the Convention amounts to a fundamental breach. Termination is also permitted in the case of non-delivery, if the seller fails to deliver the goods within the additional period fixed by the buyer, or if the seller declares that he will not deliver within that period.

However, the Vienna Convention seeks to limit the use of this remedy, as it is a severe measure that may undermine the contractual relationship and require significant additional expenditures, such as returning the goods to their country of origin or arranging a new transport contract, which could risk their damage or loss. Consequently, termination is generally regarded as a last-resort remedy, to be exercised only after the remedies of specific performance, price reduction, or damages have been exhausted.

Accordingly, termination of the contract is linked to the existence of a fundamental breach, where the defect in performance cannot be remedied. This was illustrated by the 1994 decision of the International Chamber of Commerce (ICC) Arbitration concerning a dispute between a Chinese seller and an Austrian buyer. The contract involved the sale of scaffolding equipment for construction, but after delivery, serious defects were discovered in the equipment that threatened the safety of the construction site and workers. The contract was therefore terminated due to non-conformity of the goods, constituting a fundamental breach under Article 49(1) of the Vienna Convention. The Chamber did not consider the seller's interest or right to repair or replace the goods.

Moreover, the court has discretionary authority to order either partial or full termination of the contract. It is required to grant the buyer's request even if the buyer has refused partial termination as a remedy. <sup>10</sup>

## **2.2 Monetary Remedies**

Finally, this section includes the remedies of price reduction and damages, which are often the most appropriate means of resolving certain disputes arising from the non-performance of an international sales contract for goods. These remedies do not affect the continued existence of the contract. <sup>11</sup>

The creditor (buyer) has the right to request a reduction of the price to prevent the deterioration or loss of the goods due to the distance between the contracting parties. The creditor also has the right to claim damages, either as a primary remedy for non-performance of the contract or as a supplementary remedy in connection with the other remedies.

### **2.2.1 Price Reduction:**

In the event that the goods do not conform to the contract, whether the price has been paid or not, the buyer is entitled to request a reduction of the price equal to the difference between the value of the goods actually delivered at the time of delivery and the value of conforming goods at that time. However, if the seller remedies the non-conformity, the buyer is not entitled to reduce the price (see Article 50 of the Vienna Convention).

The Vienna Convention provides for the remedy of price reduction in order to preserve and maintain the contractual relationship between the seller and the buyer, even if the seller fails to fulfill his obligation

to deliver conforming goods, and to avoid resorting to the termination of the international sales contract, which is a burdensome remedy in international trade. Price reduction constitutes the third legal remedy granted to the buyer under the Convention. Its scope of application arises in cases of non-conformity, where the goods are defective, incomplete, or do not fully meet the specifications stipulated in the contract.<sup>12</sup>

According to the Convention, the price is to be reduced by the difference between the value of the goods at the time of delivery and the value of conforming goods at that time, reflecting the extent of non-conformity. The seller is therefore obliged to refund the corresponding part of the price to the buyer. For example, if the seller agrees to sell 500 tons of rice to a foreign buyer, but upon delivery and inspection by the buyer it is found that only 200 tons were delivered, the buyer has the right to request a price reduction, and the seller is obliged to refund the portion of the price corresponding to the missing quantity.

#### **2.2.2 Damages:**

Damages are the most commonly used remedy in international sales disputes, as they provide the easiest means of compensating for loss. Damages should cover both the loss suffered by the creditor and the profit that was foregone. The obligor who has not acted fraudulently or with gross negligence is only liable for the loss that could reasonably have been foreseen at the time of the conclusion of the contract. This principle is reflected, for example, in Article 317 of the Civil Code.<sup>13</sup>

Under Anglo-Saxon law, damages are considered the primary remedy for non-performance of the contract, in accordance with English Sale of Goods Act 1979. However, the United Nations Convention on Contracts for the International Sale of Goods (CISG) considers damages as an exceptional remedy, to be applied only after other remedies, such as specific performance or price reduction, have been considered, provided that these remedies are feasible.

In any case, either party to the contract may claim damages for all or part of the goods. The Convention distinguishes between judicial damages and legal interest in accordance with Articles 74 and 78, while leaving the regulation of contractual damages to the agreement of the contracting parties.

Accordingly, damages constitute a remedy of a special nature, as the injured party may claim them either as a supplementary remedy in conjunction with other remedies, or as a primary remedy when they are sufficient without resorting to the other available remedies.

It is well established that the burden of proving the damage lies with the obligor, even if the existence of the damage was foreseeable, in accordance with Article 25 of the CISG. In 1999, the International Chamber of Commerce (ICC) Arbitration held that the defendant could provide exonerating evidence, as the damage was neither foreseeable nor could it have been expected by a reasonable person.

#### **Conclusion**

After examining this study, it can be concluded that in the event of a dispute arising from the seller's failure to perform its obligations such as delivery of the goods and documents or conformity of the goods or the buyer's failure to perform its obligations, such as payment of the price or taking delivery of the goods and documents, either party may request one of the remedies provided by the United Nations Convention on Contracts for the International Sale of Goods (CISG) of 1980. These remedies include non-monetary remedies, such as specific performance and termination, as well as monetary remedies, including price reduction and damages. Each remedy may be invoked in preference to another, depending on which is most appropriate in light of the circumstances and as determined by the applicable provisions. Through our analysis of certain provisions of the Convention, we conclude that specific performance is established as the primary remedy, in order to preserve the contractual relationship. Its application aligns with the nature of international trade and protects parties from serious damages arising from the distance between seller and buyer, which may lead to deterioration or loss of goods. Termination is treated as an exceptional remedy, to be used only as a last resort, while monetary remedies are reinforced as the most effective and straightforward means of compensating for loss.

Thus, the 1980 Vienna Convention remains the cornerstone for addressing disputes arising from non-performance of international sales contracts for goods, as it takes into account the nature of such contracts and seeks to minimize potential harm to the parties. A prime example of this is found in Article 48. Therefore, we propose that Algeria accede to and ratify the Convention, in order to fill the legal gap regarding the regulation of international sales contracts for goods.

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