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.

INTRODUCTION

1. Article 48 (1) gives the seller the so-called right to "cure," which allows the seller to correct any failure to perform its obligations under the contract or under the Convention, and to do so even after the date for performance required under the contract, provided that the exercise of that right does not cause the buyer unreasonable inconvenience. If the seller has made an early non-conforming delivery, article 37, in comparison, permits the seller to cure up to the required date for delivery.

THE RIGHT TO REMEDY A FAILURE OF PERFORMANCE (ARTICLE 48 (1))

2. Article 48 (1) permits the seller to cure any failure of performance of any contractual obligation. This right to cure, however, is "subject to article 49", the provision governing the buyer's general right to avoid the contract. Avoidance of the contract, therefore, excludes the seller's right to cure. Generally, it is for the buyer to decide whether or not the contract should be avoided. The buyer may exercise a right to avoid without restriction from the seller's right to cure.[1] This approach is supported by article 48 (2) according to which the seller may ask whether the buyer will accept a cure[2] and by article 49 (2) *(b)* (iii), which evidences that the buyer need not accept the seller's offer to cure. Moreover, the buyer who is entitled to avoid the contract need not wait to see if the seller will cure, but may declare the contract avoided as soon as it suffers a fundamental breach[3] (but see the notice procedure discussed in paragraphs 7-9, *infra*). There are courts, however, that have adopted the view that the buyer must first allow the seller to cure any breach (even a fundamental one) before avoiding, and who deny that there is a fundamental breach where the buyer has not given the seller the opportunity to remedy the failure of performance.[4] One court held that even in case of a serious breach the buyer is not entitled to declare the contract avoided as long as the seller has offered remediation and as long as remediation is possible.[5] It should be noted, however, that a breach is rarely fundamental when the failure of performance could easily be remedied.[6] This rule, however, should not be misunderstood to mean that in each case the seller must be offered an opportunity to cure before the buyer can avoid the contract.[7] The contract, however, may stipulate that avoidance is only available after the seller had the opportunity to remedy the defect.[8]

3. The right to cure is only granted in certain circumstances—specifically, where the seller's failure to perform can be remedied without unreasonable delay, without unreasonable inconvenience to the buyer, and without uncertainty that the seller will compensate any costs the buyer may have advanced. It has been held that these conditions are satisfied if, e.g., defective motors can easily be cured in a short time and at minimal costs.[9]

4. It has been concluded, based on articles 46 and 48, that the seller is responsible for costs that the buyer incurs in connection with the seller's cure of defects in delivered goods.[10]

5. The willingness of the seller to cure a failure of performance has been taken into account as a factor in determining whether a lack of quality amounts to a fundamental breach of contract.[11] In the assessment of damages, furthermore, a court has taken into account the fact that the seller did not take the initiative to remedy defective goods; under article 74, the court concluded, the seller should have foreseen all necessary costs connected with the replacement of the defective goods.[12]

6. Where the parties have agreed on a penalty for delayed performance, it has been held that cure under article 48 does not relieve the seller from paying a penalty beginning from the first day of delay.[13]

RIGHT TO CLAIM DAMAGES

7. Even if the seller cures a failure of performance, the last sentence of article 48 (1) provides that the buyer retains the right to claim damages for losses suffered despite the cure. Therefore it has been held that a buyer was entitled to 10 per cent of the overall value of the sale as estimated damages when delivery was delayed and the buyer had to arrange for transportation of the goods.[14]

REQUEST TO REMEDY A FAILURE OF PERFORMANCE (ARTICLE 48 (2)-(4))

8. Under article 48 (2), the seller may give the buyer notice of its willingness to cure a failure of performance within a particular time, and may request that the buyer "make known whether he will accept" the cure. According to article 48 (3), a notice indicating the seller's willingness to cure is deemed to include such a request. If the buyer does not respond to such a request within a reasonable time (or, presumably, consents to the request),[15] the seller may cure within the time indicated and, pursuant to article 48 (2), the buyer may not during that period, resort to remedies inconsistent with the seller's curing performance.

9. A request for the buyer's response to a proposed cure by the seller under article 48 (2) or (3) must specify the time within which the seller will perform. Without such a time frame for the proposed cure, the request does not have the effect specified in article 48 (2).[16]

10. As an exception to the dispatch principle in article 27, under article 48 (4) the buyer must receive a request for the buyer's response to a proposed cure (or a notice of intent to cure deemed to include such a request under article 48 (3)), or the request or notice will not have the effect specified in article 48 (2). Article 27, however, applies to the buyer's reply, which is therefore effective whether or not received, provided it is dispatched by appropriate means.[17]

11. One tribunal has relied on article 48 (2) where the seller had offered to retake the goods and repay the price after the buyer had given notice of defects; since the buyer had not responded to the offer, but had instead resold the allegedly non-conforming goods, the court regarded this as a waiver of the buyer's rights.[18]

Notes

[1] See, for example, CLOUT, case No. 90 [Pretura circondariale de Parma, Italy, 24 November 1989] (see full text of the decision); CLOUT case No. 2 [Oberlandesgericht Frankfurt a.M., Germany, 17 September 1991] (see full text of the decision); CLOUT case No. 165 [Oberlandesgericht Oldenburg, Germany, 1 February 1995]; CLOUT case No. 235 [Bundesgerichtshof, Germany, 25 June 1997]; CLOUT case No. 304 [Arbitration Court of the International Chamber of Commerce, 1994 (Arbitral award No. 7531)].

[2] See CLOUT case No. 304 [Arbitration Court of the International Chamber of Commerce, 1994 (Arbitral award No. 7531)] (see full text of the decision).

[3] See *Official Records of the United Nations Conference on Contracts for the International Sale of Goods, Vienna, 10 March-11 April 1980* (United Nations publication, Sales No. E.81.IV.3), 41:

> "5. If there has been a fundamental breach of contract, the buyer has an immediate right to declare the contract avoided. He need not give the seller any prior notice of his intention to declare the contract avoided or any opportunity to remedy the breach under [then] article 44.
> 6. However, in some cases the fact that the seller is able and willing to remedy the non-conformity of the goods without inconvenience to the buyer may mean that there would be no fundamental breach unless the seller failed to remedy the non-conformity within an appropriate period of time."

[4] See, for example, CLOUT case No. 339 [Landgericht Regensburg, Germany, 24 September 1998].

[5] CLOUT case No. 882 [Handelsgericht des Kantons Aargau, Switzerland, 5 November 2002].

[6] See, for example, Arbitration Court of the International Chamber of Commerce, France, January 1995 (Arbitral award No. 7754), *ICC International Court of Arbitration Bulletin* 2000, 46. See also CLOUT case No. 282 [Oberlandesgericht Koblenz, Germany, 31 January 1997].

[7] See *Official Records of the United Nations Conference on Contracts for the International Sale of Goods, Vienna, 10 March-11 April 1980* (United Nations publication, Sales No. E.81.IV.3), 41, paragraph 6 ("in some cases").

[8] See CLOUT case No. 956 [Federal Court of Australia, Australia, 20 May 2009 (Olivaylle Pty Ltd v. Flottweg GmbH & Co. KGAA), available on the Internet at www.cisg.law.pace.edu (discussing article 48 CISG as an interpretative aid).

[9] Arbitration Court of the International Chamber of Commerce, France, January 1995 (Arbitral award No. 7754), *ICC International Court of Arbitration Bulletin* 2000, 46. But see CLOUT case No. 882 [Handelsgericht des Kantons Aargau, Switzerland, 5 November 2002] (the court differentiated between urgent and non-urgent repair).

[10] CLOUT case No. 125 [Oberlandesgericht Hamm, Germany, 9 June 1995] (costs for replacing defective windows).

[11] CLOUT case No. 282 [Oberlandesgericht Koblenz, Germany, 31 January 1997].

[12] CLOUT case No. 994 [Vestre Landsret, Denmark, 21 December 2004].

[13] CLOUT case No. 1388 [Audiencia Provincial de Madrid, Spain, 18 October 2007].

[14] CLOUT case No. 151 [Cour d'appel, Grenoble, France, 26 February 1995] (sale of a dismantled second-hand hangar of which certain parts were defective and had to be repaired twice).

[15] See also Amtsgericht Nordhorn, Germany, 14 June 1994, Unilex.

[16] See *Official Records of the United Nations Conference on Contracts for the International Sale of Goods, Vienna, 10 March-11 April 1980* (United Nations publication, Sales No. E.81.IV.3), 41, paragraph 14.

[17] Ibid.*, paragraph 16.*

[18] CLOUT case No. 806 [China International Economic and Trade Arbitration Commission, People's Republic of China, 29 December 1999].