

*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.

## OVERVIEW

1. Article 37 of CISG deals with non-conforming deliveries made by the seller before the date specified in the contract. The first sentence of article 37 specifies that, in the case of a delivery of insufficient quantity, the seller can cure by “deliver[ing] any missing part” or by “mak[ing] up any deficiency in the quantity of the goods delivered.” In the case of a delivery of goods deficient in quality, the seller can cure by delivering replacement goods<sup>1</sup> or by “remedy[ing] any lack of conformity in the goods delivered.”<sup>2</sup> The second sentence of article 37 specifies that the buyer retains any right to damages provided by the Convention, although the amount of such damages presumably must reflect any cure accomplished by the seller under the first sentence of the provision. The second sentence of article 37 was invoked by an arbitral tribunal where

a seller had made a delivery of confectionary products before the buyer had furnished a banker’s guarantee required by the contract.<sup>3</sup> Although the buyer accepted the delivery, it failed to pay for the goods, arguing that the seller had breached the contract by delivering before the guarantee was in place and that this default should be considered a fundamental breach of contract justifying the buyer’s non-payment. The arbitral tribunal, however, ruled that the breach by the seller did not permit the buyer to refuse to pay, noting that under the last sentence of article 37 the buyer could claim damages for any losses caused by the early delivery.

2. Failure by the seller to remedy a lack of conformity pursuant to article 37 has been described as a pre-condition to a buyer’s right to reduce the price of delivered goods under article 50 CISG.<sup>4</sup>

**Notes**

<sup>1</sup> A seller’s right under article 37 to deliver goods to replace non-conforming goods should be compared to a buyer’s right under article 46 (2) of CISG to require the seller to deliver goods in substitution for non-conforming goods.

<sup>2</sup> A seller’s right under article 37 to “remedy” non-conforming goods should be compared to a buyer’s right under article 46 (3) of CISG to require the seller to repair non-conforming goods.

<sup>3</sup> CLOUT case No. 141 [Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, Russian Federation, 25 April 1995 (Arbitral award No. 200/1994)].

<sup>4</sup> Audiencia Provincial de Barcelona, Spain, 24 March 2009, English translation available on the Internet at [www.cisg.law.pace.edu](http://www.cisg.law.pace.edu). To similar effect, Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, Russian Federation, 23 March 2005, English translation available on the Internet at [www.cisg.law.pace.edu](http://www.cisg.law.pace.edu).