

Article 59

[Fixing of additional 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 the performance.

PRIOR UNIFORM LAW

ULIS, article 66 (2).

Commentary

1. Article 59 states the right of the seller to fix an additional period of time of reasonable length for performance by the buyer of his obligations and specifies one of the consequences of his having fixed such a period.

Fixing additional period, paragraph (1)

2. Article 59 is a companion to article 58 which states the right of the seller to require performance of the contract by the buyer and which anticipates the aid of a court or arbitral tribunal in enforcing that right. If the buyer delays performing the contract, the use of judicial procedures for enforcement may not seem feasible or may require more time than the seller can afford to wait. This may be particularly the case if the buyer's failure to perform consists of delay in procuring the issuance of documents assuring payment, such as a letter of credit or a banker's guarantee, or of securing the permission to import the goods or pay for them in restricted foreign exchange. It may be to the seller's advantage to avoid the contract and make a substitute sale to a different purchaser. However, at that time it may not be certain that the buyer's delay constitutes a fundamental breach of contract justifying the avoidance of the contract under article 60 (1) (a).

3. Different legal systems take different attitudes towards the right of a seller to avoid the contract because of the buyer's failure to pay the price or perform his other obligations on the date specified in the contract. In some legal systems the buyer's failure to perform on the contract date normally authorizes the seller to avoid the contract. However, in a given case the court or tribunal may decide that the seller may not avoid the contract at that time because the failure to perform on the contract date was either not sufficiently serious or the seller had waived his right to prompt performance. In other legal systems the buyer can request a delay of grace from a court or tribunal which, in effect, establishes a new performance date.¹ In still other legal systems the general

¹ Cf. article 57 (3). See para. 5 below.

rule is that late performance does not authorize the seller to avoid the contract unless the contract provided for such a remedy or unless after the buyer's breach the seller specifically fixed a time period within which the buyer had to perform.

4. This Convention specifically rejects the idea that in a commercial contract of sale of goods the seller may, as a general rule, avoid the contract once the contract date for performance has passed and the buyer has not as yet performed one or more of his obligations. In these circumstances the seller may do so if, and only if, the failure to perform on the contract date causes him substantial detriment and the buyer foresaw or had reason to foresee such a result.²

5. As a result of this rule in this Convention there was no reason to allow the buyer to apply to a court for a delay of grace, as is permitted in some legal systems. Moreover, the procedure of applying to a court for a delay of grace is particularly inappropriate in the context of international commerce, especially since this would expose the parties to the broad discretion of a judge who would usually be of the same nationality as one of the parties. Therefore, article 57 (3) provides that "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."

6. Although the seller can declare the contract avoided in any case in which the delay in performance constitutes a fundamental breach, this will not always be a satisfactory solution for him. Once the buyer is late in performing, the seller may be legitimately doubtful that the buyer will be able to perform by the time that performance will be essential for the seller. This situation is similar to the problems raised by an anticipatory breach under articles 62, 63 and 64. Furthermore, in most contracts for the sale of goods the point of time at which the detriment to the seller would become sufficiently substantial to constitute a fundamental breach would be somewhat imprecise. Therefore, article 59 (1) authorizes the seller to fix an additional period of time of reasonable length for performance by the buyer of his obligations. However, article 60 (1) (b) allows the seller to declare the contract avoided only if the buyer has not performed his obligation to pay the price³ or has not taken delivery of the goods,⁴ or if he has declared that he will not do so within the additional period of time.

7. The procedure authorized by article 59 (1) of fixing an additional period of time after which the seller can declare the contract avoided if the buyer has not performed his obligation to pay the price or taken delivery of the goods would have the danger that a seller could turn an inconsequential delay which would not justify declaring the contract avoided for fundamental breach under article 60 (1) (a) into a basis for declaring the contract avoided under article 60 (1) (b). Therefore, article 59 (1) says that the additional period must be "of reasonable length". This period may be fixed either by specifying the date by which performance must be made (e.g. 30 September) or by specifying a time period (e.g. "within one month from today"). A general demand by the seller that the buyer perform or that he perform "promptly" or the like is not a "fixing" of a period of time under article 59 (1).

8. It should be pointed out that, although the procedure envisaged by article 59 (1) has a certain parentage in the German procedure of "*Nachfrist*" and the French procedure of a "*mise en demeure*," in its current form it does not partake of either one. In particular, the procedure envisaged by article 59 (1) is not mandatory and need not be used in order to avoid the contract if the delay in performance amounts to a fundamental breach.

Seller's other remedies, paragraph (2)

9. In order to protect the buyer who may be preparing to perform the contract as requested by the seller, perhaps at considerable expense, during the additional period of time of reasonable length the seller may not resort to any remedy for breach of contract, unless the seller has re-

² Article 23 which defines "fundamental breach", and article 60 (1) (a), which authorizes the seller to declare the contract avoided for fundamental breach.

³ As to the buyer's obligation to pay the price, see article 50 and the commentary thereto.

⁴ As to the buyer's obligation to take delivery of the goods, see article 56 and the commentary thereto.

ceived notice from the buyer that he will not comply with the request. Once the additional period of time has expired without performance by the buyer, the seller may not only avoid the contract under article 60 (1) (b) but may resort to any other remedy he may have.

10. In particular, the seller may claim any damages he may have suffered because of the delay in performance. Such damages may arise even though the buyer has performed his obligations within the additional period of time fixed by the seller.