

Article 51

(1) If the seller delivers only a part of the goods or if only a part of the goods delivered is in conformity with the contract, articles 46 to 50 apply in respect of the part which is missing or which does not conform.

(2) The buyer may declare the contract avoided in its entirety only if the failure to make delivery completely or in conformity with the contract amounts to a fundamental breach of the contract.

OVERVIEW

1. Article 51 deals with partial non-delivery and delivery of partially non-conforming goods. In such cases, article 51 (1) permits the buyer's remedies to be applied just to that part of a delivery that was not properly performed. Among the buyer's remedies that can be applied to the non-conforming part of a delivery is avoidance of the contract, provided there has been a fundamental breach with respect to the non-conforming portion of the delivery (see paragraph 4 below). Where partial avoidance is employed, the rest of the contract remains unimpaired. Under article 51 (2), the entire contract can be declared avoided only if the partial non-performance amounts to a fundamental breach of the entire contract.¹ Article 51 thus restricts the availability of avoidance to the defective part of the delivery, unless the demanding standard for avoidance of the entire contract is satisfied (see paragraph 7 below); other requirements for avoidance that restrict the availability of the remedy—including the requirement of notice declaring avoidance and an exercise of the remedy within a reasonable time—also apply.

PREREQUISITES

2. Article 51 presupposes that the seller has breached the contract either by delivering fewer goods than contracted for² or by delivering goods that, in part, do not conform with the contract under article 35.³ The application of article 51 requires that the delivered goods consist of separable parts, each of which could be used alone and independently⁴ e.g., some tons of cucumber,⁵ a shipment of tiles,⁶ textiles,⁷ quantities of stainless steel wire,⁸ scaffold fittings,⁹ computer software missing certain modules,¹⁰ many pairs of shoes,¹¹ or even a complete automatic assembly line for batteries for which the contracted spare parts were missing.¹² In case of a defective piece of machinery, article 51 has been found to apply when the piece forms an independent part of the contracted-for goods.¹³ It has been held that, as an initial matter, it is the parties' agreement that determines whether separable goods should be treated as a single entity or as multiple units.¹⁴ Where the good forms a single entity, for instance a spinning factory, article 51 is not applicable. If separable parts of the entity are defective, partial avoidance with respect to the defective part was held to be excluded.¹⁵

3. The availability of remedies pursuant to article 51 presupposes that the buyer has given notice of the lack of conformity as required by article 39.¹⁶ This notice requirement also applies in cases where the seller has delivered only a part of the goods.¹⁷

REMEDIES FOR PARTIAL NON-PERFORMANCE

4. With regard to a non-conforming part of delivered goods, article 50 provides that the buyer is entitled to any of the remedies referred to in articles 46-50. The requirements for these provisions to apply must, however, be satisfied in each case. Thus if the buyer wants to declare avoidance with regard to a part of delivered goods that do not conform with the contract then their lack of quality must constitute a fundamental breach—i.e., the non-conforming goods must be of no reasonable use to the buyer.¹⁸ On the other hand, the fixing of an additional period of time for the delivery of conforming goods cannot help establish a right of avoidance because article 49 (1) (b) applies only in case of non-delivery, but not in case of delivery of defective goods.¹⁹ Partial delay in delivery does not generally constitute a fundamental partial breach of contract, and therefore does not entitle the buyer to avoid the part of the contract relating to the delayed portion. The buyer may, however, fix an additional period of time for delivery of the missing part, and may declare the contract partially avoided when delivery is not effected during the period so fixed (article 49 (1) (b)). Partial non-delivery by the contractual delivery date amounts to a fundamental breach with regard to the missing part only if the buyer has a special interest in delivery exactly on time, and if the seller could foresee that the buyer would prefer non-delivery instead of late delivery.²⁰ It has been held that a delivery that included some defective shoes (approximately 20 per cent of those that the buyer resold) constituted a fundamental breach of the entire contract, because the buyer justifiably feared that a significant percentage of the shoes that remained unsold would also prove to be defective (the defects became apparent only after some months of use); the court also took into account the possibility that further sales of possibly defective shoes would impair the buyer's reputation.²¹

Similarly, a delivery of 15.000 pressure cookers, part of which were defective in a way that was difficult to detect, was regarded as entirely non-conforming.²²

5. Article 51 (1) refers only to the remedies provided for in articles 46-50. This does not mean that the remedy of damages, which is authorized in article 45 (1) (b), is excluded. On the contrary, this remedy remains unimpaired and can be exercised in addition to or instead of the remedies referred to in article 51 (1). Even if the buyer has lost its right to declare a part of the contract avoided because of lapse of time, it may still claim damages under article 74.²³

6. If the buyer has rightfully declared avoidance for a part of the delivered goods, the consequences as stated in articles 81-84 apply.²⁴ The buyer is, however, obliged to pay for the conforming part.²⁵

AVOIDANCE OF THE ENTIRE CONTRACT (ARTICLE 51 (2))

7. As provided in article 51 (2), in case of partial non-delivery or partial non-conforming delivery the buyer can avoid the entire contract only if the seller's breach constitutes a fundamental breach of the entire contract. Thus to justify avoidance of the whole contract the partial breach must deprive the buyer of the main benefit of the whole contract (article 25). Such an effect from a partial breach, however, is the exception rather than the rule.²⁶ Where the seller had delivered only half of the contracted-for goods, it was held that this might constitute a fundamental breach of the entire contract.²⁷

8. A court has held that the principle expressed in article 51 (2) can be applied to analogous cases where the seller failed to perform duties other than that to deliver conforming goods.²⁸

Notes

¹ CLOUT case No. 302 [Arbitration Court of the International Chamber of Commerce, 23 August 1994 (Arbitral award No. 7660) (see full text of the decision)].

² See CLOUT case No. 630 [Arbitration Court of the International Chamber of Commerce, Switzerland, July 1999 (Arbitral award No. 9448)].

³ Article 35, however, also covers delivery of a smaller quantity of goods than that contracted for.

⁴ CLOUT case No. 302 [Arbitration Court of the International Chamber of Commerce, 23 August 1994 (Arbitral award No. 7660)]; CLOUT case No. 749 [Oberster Gerichtshof, Austria, 21 June 2005]; Arrondissementsrechtbank Zwolle, Netherlands, 29 January 2003, CISG-online No. 928. See also CLOUT case No. 774 [Bundesgerichtshof, Germany, 2 March 2005] (the court accepted that one of several instalments of meat deliveries was not defective while the others were; the court held that the buyer could reduce the price only for the latter).

⁵ CLOUT case No. 48 [Oberlandesgericht Düsseldorf, Germany, 8 January 1993].

⁶ CLOUT case No. 50 [Landgericht Baden-Baden, Germany, 14 August 1991].

⁷ CLOUT case No. 82 [Oberlandesgericht Düsseldorf, Germany, 10 February 1994].

⁸ CLOUT case No. 235 [Bundesgerichtshof, Germany, 25 June 1997]; CLOUT case No. 990 [China International Economic and Trade Arbitration Commission, People's Republic of China, 19 December 1997].

⁹ CLOUT case No. 304 [Arbitration Court of the International Chamber of Commerce, 1994 (Arbitral award No. 7531)].

¹⁰ See CLOUT case No. 749 [Oberster Gerichtshof, Austria, 21 June 2005], where the court remanded the case so that the court of first instance could determine "the impact of the missing module on the usability of the other software components."

¹¹ Oberlandesgericht Koblenz, Germany, 21 November 2007, CISG-online No. 1733.

¹² CLOUT case No. 302 [Arbitration Court of the International Chamber of Commerce, 23 August 1994 (Arbitral award No. 7660)].

¹³ Ibid.; CLOUT case No. 749 [Oberster Gerichtshof, Austria, 21 June 2005].

¹⁴ CLOUT case No. 749 [Oberster Gerichtshof, Austria, 21 June 2005].

¹⁵ Bundesgericht, Switzerland, 16 July 2012, *Internationales Handelsrecht* 2014, 99 = CISG-online No. 2371.

¹⁶ CLOUT case No. 48 [Oberlandesgericht Düsseldorf, Germany, 8 January 1993]; CLOUT case No. 50 [Landgericht Baden-Baden, Germany, 14 August 1991]; CLOUT No. 432 [Landgericht Stendal, Germany, 12 October 2000].

¹⁷ CLOUT case No. 48 [Oberlandesgericht Düsseldorf, Germany, 8 January 1993].

¹⁸ See CLOUT case No. 235 [Bundesgerichtshof, Germany, 25 June 1997] (parts of delivered steel wire were sub-standard and therefore not useable for the buyer's purposes) (see full text of the decision). Compare the Digest for article 49, paragraphs 14 and 15.

¹⁹ See the Digest for article 49, paragraph 21.

²⁰ CLOUT case No. 275 [Oberlandesgericht Düsseldorf, Germany, 24 April 1997].

²¹ Oberlandesgericht Koblenz, Germany, 21 November 2007, CISG-online No. 1733.

²² Cour d'appel de Paris, France, 4 June 2004, CISG-online No. 872.

²³ CLOUT case No. 82 [Oberlandesgericht Düsseldorf, Germany, 10 February 1994]; Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce, Russian Federation, 23 November 1994 (Arbitral award No. 251/1993), Unilex.

²⁴ See Kantonsgericht des Kantons Zug, Switzerland, 14 December 2009, CISG-online No. 2026.

²⁵ CLOUT case No. 749 [Oberster Gerichtshof, Austria, 21 June 2005].

²⁶ CLOUT case No. 302 [Arbitration Court of the International Chamber of Commerce, 23 August 1994 (Arbitral award No. 7660)].

²⁷ Only obiter since the court found that the parties agreed on the termination of the contract: CLOUT case No. 990 [China International Economic and Trade Arbitration Commission, People's Republic of China, 19 December 1997].

²⁸ CLOUT case No. 1399 [Oberlandesgericht Hamburg, Germany, 25 January 2008], CISG-online No. 1681 (contract to deliver and install furniture and machinery for an ice-café; seller failed to perform the installation duty; buyer not permitted to avoid the entire contract since buyer installed the goods itself and then used them).