

Article 44

Notwithstanding the provisions of paragraph (1) of article 39 and paragraph (1) of article 43, the buyer may reduce the price in accordance with article 50 or claim damages, except for loss of profit, if he has a reasonable excuse for his failure to give the required notice.

OVERVIEW

1. When it applies, article 44 softens—although it does not eliminate—the consequences suffered by a buyer that has failed to give the notice called for by either article 39 (1) (which requires notice of lack of conformity in delivered goods) or article 43 (1) (which requires notice of third party claims relating to the goods).¹ Normally, a buyer that does not comply with these notice provisions loses its remedies against the seller for the alleged lack of conformity or third party claim. Under article 44, however, if a buyer has “a reasonable excuse” for its failure to give proper notice under articles 39 (1) or 43 (1), some of the buyer’s remedies are restored: “the buyer may reduce the price in accordance with article 50 or claim damages, except for loss of profit” However other remedies that the buyer would have if it had satisfied the notice requirements are not restored, such as remedies associated with avoidance of contract. Thus in one decision in which the buyer had a “reasonable excuse,” as per article 44, for its failure to give proper notice under article 39 (1), an arbitral panel permitted the buyer to recover damages for a lack of conformity, although pursuant to article 44 the tribunal denied any damages for loss of profit.² In another arbitration ruling, a buyer that had failed to notify the seller of a lack of conformity within the time permitted by the contract was permitted to reduce the price as per article 50, although the panel noted that the buyer would be denied remedies premised on avoidance of the contract.³

SCOPE OF ARTICLE 44

2. The relief granted by article 44 is restricted to failure to comply with the notice requirements of articles 39 (1) or 43 (1). Article 44 does not by its terms grant a buyer relief from the two-year cut-off of notice of lack of conformity imposed by article 39 (2). A buyer that has failed to meet the notice deadline imposed by article 39 (2) cannot apply article 44 to escape the consequences, even if the buyer has a “reasonable excuse” for the failure.⁴ In addition a court has found that, because article 44 does not refer to the buyer’s obligation to examine goods under article 38, a buyer cannot invoke article 44 if the reason it failed to comply with the notice requirements of article 39 (1) is because it did not examine the goods in a timely fashion, even if the buyer has a reasonable excuse for the tardy examination.⁵ On appeal, however, this decision was reversed on other grounds,⁶ and at least two other decisions appear to contradict it: they applied article 44 where a buyer gave untimely notice because it

delayed its examination of the goods but had a reasonable excuse for the delay.⁷ Apparently taking an expansive view of the scope of article 44, one of the latter decisions applied the provision to a buyer that failed to meet a deadline for notice of a lack of conformity that was imposed not by article 39 (1), but by a contractual provision.⁸

“REASONABLE EXCUSE” REQUIREMENT: IN GENERAL

3. Article 44 applies if the buyer “has a reasonable excuse” for failing to give the notice required by either article 39 (1) or article 43 (1). These notice provisions incorporate flexible standards in order to accommodate differing circumstances in the wide variety of transactions to which CISG applies. Article 44 comes into play only if the flexible notice standards of articles 39 (1) and 43 (1) are not satisfied. Therefore, the “reasonable excuse” standard of article 44—which, it has been asserted, “does not relate to fault as a technical legal term”⁹—must take an even more particularized¹⁰ and “subjective”¹¹ approach to the buyer’s circumstances. Specifically, it has been stated that “the buyer’s conduct is excused if, under the circumstances of the individual case, he equitably deserves a certain understanding and a certain consideration.”¹² Thus although one decision indicated that a reasonable excuse under article 44 requires that the buyer have acted “with the care and diligence required under the circumstances,” the court stressed that this should be assessed by reference to the buyer’s “concrete possibilities”.¹³ Another decision emphasized the particular situation of the buyer by asserting that an individual engaged in business (an independent trader, artisan or professional) is more likely to have a reasonable excuse for failing to give required notice than is a business entity engaged in a fast-paced business requiring quick decisions and prompt actions.¹⁴ Yet another decision implied that the small size of the buyer’s operation, which did not permit it to spare an employee full time to examine the goods, might form the basis for a reasonable excuse for delayed notice, although the court found that the buyer’s claimed excuse was not in fact the cause of its failure to begin examining the goods until more than three months after it should have.¹⁵ The following criteria have also been identified as relevant in determining the application of article 44: whether the consequence of the failure to make proper notice “has such slight repercussions that a buyer is customarily forgiven for it and therefore does not justify the substantial consequences of a complete exclusion of warranties,”¹⁶ as well as the result of a “balancing

of interests according to the criteria of fairness.”¹⁷ It has also been asserted that, because it creates an exception to the notice rules in article 39 (1) and article 43 (1), article 44 should be interpreted narrowly.¹⁸

“REASONABLE EXCUSE” REQUIREMENT:
BURDEN OF PROOF

4. It has been expressly asserted that the buyer bears the burden of proving the applicability of article 44—in particular, the burden of proving the existence of a “reasonable excuse” for the buyer’s failure to comply with the notice requirements of articles 39 (1) or 43 (1).¹⁹ Several other decisions appear to have implied the same rule when they held that a lack of sufficient evidence of a reasonable excuse meant that the buyer’s article 44 argument should be rejected.²⁰

“REASONABLE EXCUSE” REQUIREMENT:
APPLICATION

5. Article 44 has been invoked in a number of decisions, but seldom successfully: in a substantial majority of decisions, the deciding tribunal found that the “reasonable excuse” requirement was not satisfied.²¹ In one case, for example, a buyer argued that it had a reasonable excuse for failing to give timely notice of a non-conformity because the goods had been held up in customs when they arrived in the buyer’s country, and the installation of processing machinery needed for a trial run of the goods had been delayed. The court, however, ruled that the buyer had failed to show that it could not have gotten access to the goods in order to examine them when they first arrived in the port of destination; furthermore, the buyer had failed to show that the delay in the installation of the processing machinery was not due to its own neglect.²² In another case the buyer argued that the seller had delivered fish of a different type than the buyer had ordered. The buyer also argued that the fish had other non-conformities, and that its reasonable excuse for not giving timely notice of the additional non-conformities was that it considered the contract avoided because seller had delivered the wrong type of fish. The court, however, found that the buyer had acquiesced in the seller’s written description of the fish that were delivered; thus the buyer could not object to the type of fish supplied, and its excuse for failing to give notice of the other non-conformities was also not valid under article 44.²³ Another decision asserted that, because the buyer’s business was in general fast-paced, requiring quick decisions and prompt action, the buyer did not have a reasonable excuse for failing to give timely notice of a lack of conformity.²⁴ Another court found that a buyer who did not examine furs until they had been processed by a third party, and who as a result failed to give timely notice of a lack of conformity in the furs, did not have a reasonable excuse for its late notice because an expert could have examined a sample of the goods when they were delivered, and there existed means of communication between the parties that were adequate to convey prompt notice.²⁵ It has also been held that the buyer’s decision to store goods for several years before they were installed, which delayed discovery of the lack of conformity, was not a “reasonable excuse” under article 44 because the buyer had not brought

these circumstances forward during contract negotiations, and thus they did not become part of the basis of the parties’ legal relationship.²⁶ Where a buyer had examined goods at their point of origin, furthermore, the fact that article 38 (2) might have permitted the buyer to defer examination until the goods arrived at their destination did not provide a reasonable excuse for the buyer’s failure to notify the seller until more than a reasonable time after the buyer discovered the lack of conformity.²⁷ A buyer also failed to prove a reasonable excuse for late notice based on the fact that the lack of conformity involved a “complicated set of circumstances with reference to three different legal systems” as well as “language complications”; the court held that the buyer failed to prove that these factors justified the extra time it took buyer to give notice.²⁸ Another buyer was unsuccessful in arguing that it had a reasonable excuse for failing to give timely notice that barley could not be resold as organic barley: the buyer asserted that it had to wait until national regulatory authorities declared that the goods did not qualify as organic before giving notice; the court, however, held that the failure of the seller to include a required certificate of organic origin with the delivery of the barley—the reason the goods did not qualify as organic—by itself made the delivery non-conforming, and there was no reason the buyer should have waited to give notice of this lack of conformity.²⁹ It has been held that giving notice of one non-conformity did not give a buyer a reasonable excuse for failing to notify the seller of other non-conformities.³⁰

6. In several cases, however, a buyer successfully pleaded a reasonable excuse for failing to satisfy the article 39 (1) notice requirement, and as a result was able to invoke the remedies that article 44 preserves for the buyer.³¹ In one decision, coke fuel was examined by an independent inspector, appointed jointly by both parties, at the time it was loaded on the carrier, and the inspector issued a certificate of analysis. When the delivery arrived, however, the buyer discovered that the delivery differed in both quantity and quality from the certificate of analysis, and the buyer thereupon notified the seller of the problem. The tribunal ruled that the buyer’s notice was not timely under article 39 (1), but that the erroneous certificate of analysis gave the buyer a reasonable excuse for the delay: because the certificate was the product of an independent body appointed by both parties, the buyer was not bound by it or responsible for its errors, and thus it could invoke article 44.³² In another arbitration proceeding, a provision of the contract required claims of non-conformity to be brought forward within 50 days of the date stamped on a bill of lading issued when the goods were dispatched. Inspection of the goods at the port of shipment became unfeasible, and the buyer did not examine the goods until they arrived at their destination. As a result, the buyer did not give notice of lack of conformity within the 50-day deadline, but the court found that the buyer had a reasonable excuse for the delay and applied article 44 to permit the buyer to reduce the price of the goods pursuant to article 50 of the Convention.³³ And where the buyer notified the seller immediately after in fact discovering seller’s responsibility for a lack of conformity (although this was more than a reasonable time after the court found the buyer ought to have discovered the lack of conformity), and the seller suffered no apparent prejudice from delay in notice, article 44 excuse was held appropriate.³⁴

Notes

¹ Most cases that have applied article 44 have involved situations in which a buyer failed to give proper notice of lack of conformity as required by article 39 (1). For a case considering the application of article 44 where the buyer had failed to give proper notice as required by article 43 (1), see CLOUT case No. 822 [Bundesgerichtshof, Germany, 11 January 2006]. Article 44 is not the only provision that limits the impact of a buyer's failure to give the required notice. Articles 40 and 43 (2) contain similar (but not identical) provisions excusing the buyer's failure to notify based upon the seller's awareness of a lack of conformity or of a third party's claim to the goods.

² Arbitration Court of the International Chamber of Commerce, June 1999 (Arbitral award No. 9187), Unilex.

³ CLOUT case No. 474 [Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, Russian Federation, 24 January 2000 (Arbitral award No. 54/1999)].

⁴ Oberlandesgericht Linz, Austria, 24 September 2007, English translation available on the Internet at www.cisg.law.pace.edu.

⁵ CLOUT case No. 230 [Oberlandesgericht Karlsruhe, Germany, 25 June 1997]. In other words, according to this decision only a failure or delay in actually dispatching notice is subject to the "reasonable excuse" doctrine of article 44; failure to comply with the article 38 (1) examination requirement, no matter what the reason, is not within the scope of article 44. Note that the "dispatch principle" of article 27, under which a delay or error in transmitting a notice or its failure to arrive does not deprive the notice of effect, apparently would apply to notice under articles 39 (1) or 43 (1).

⁶ CLOUT case No. 270 [Bundesgerichtshof, Germany, 25 November 1998]. In this appeal the court found that the seller had waived its right to rely on the buyer's failure to give proper notice, and for this reason the court expressly left open the issue of whether buyer could invoke article 44.

⁷ Arbitration Court of the International Chamber of Commerce, June 1999 (Arbitral award No. 9187), Unilex; CLOUT case No. 474 [Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, Russian Federation, 24 January 2000 (Arbitral award No. 54/1999)].

⁸ *Ibid.*

⁹ CLOUT case No. 1236 [Oberlandesgericht Saarbrücken, Germany, 17 January 2007], English translation available on the Internet at www.cisg.law.pace.edu.

¹⁰ CLOUT case No. 822 [Bundesgerichtshof, Germany, 11 January 2006] (see full text of the decision) ("the circumstances of the individual case"). See also CLOUT case No. 1236 [Oberlandesgericht Saarbrücken, Germany, 17 January 2007, English translation available on the Internet at www.cisg.law.pace.edu ("the circumstances of the individual case"); CLOUT case No. 596 [Oberlandesgericht Zweibrücken, Germany, 2 February 2004] (see full text of the decision) ("the circumstances of the particular case").

¹¹ See CLOUT case No. 822 [Bundesgerichtshof, Germany, 11 January 2006] (see full text of the decision) ("regard to the personal circumstances of the buyer"). See also CLOUT case No. 1236 [Oberlandesgericht Saarbrücken, Germany, 17 January 2007], English translation available on the Internet at www.cisg.law.pace.edu ("due consideration of personal circumstances affecting the buyer").

¹² CLOUT case No. 822 [Bundesgerichtshof, Germany, 11 January 2006] (see full text of the decision). Compare CLOUT case No. 1236 [Oberlandesgericht Saarbrücken, Germany, 17 January 2007], English translation available on the Internet at www.cisg.law.pace.edu ("[a] reasonable excuse is present if the conduct of the buyer deserves some fair understanding and forbearance due to the circumstances of the individual case"); CLOUT case No. 596 [Oberlandesgericht Zweibrücken, Germany, 2 February 2004] (see full text of the decision) (article 44 applies if "in the circumstances of the particular case" the buyer deserves "a degree of understanding and leniency").

¹³ CLOUT case No. 285 [Oberlandesgericht Koblenz, Germany, 11 September 1998] (see full text of the decision). See also CLOUT case No. 542 [Oberster Gerichtshof, Austria, 17 April 2002] (asserting that, although article 44 excuse applies only if the buyer's failure to give timely notice is "due to reasons that would have excused an average buyer in the normal course of business conducted in good faith," the provision also requires that "the buyer acted with the diligence subjectively expected by it according to the circumstances").

¹⁴ CLOUT case No. 167 [Oberlandesgericht München, Germany, 8 February 1995] (see full text of the decision).

¹⁵ CLOUT case No. 192 [Obergericht des Kantons Luzern, Switzerland, 8 January 1997] (see full text of the decision).

¹⁶ CLOUT case No. 822 [Bundesgerichtshof, Germany, 11 January 2006] (see full text of the decision). Compare CLOUT case No. 1236 [Oberlandesgericht Saarbrücken, Germany, 17 January 2007], English translation available on the Internet at www.cisg.law.pace.edu ("if the failure to make the required notification is so insignificant . . . that it can be waived in the course of usual and fair business dealing, and should therefore not be subject to the severe consequences of a full exclusion of liability").

¹⁷ CLOUT case No. 1236 [Oberlandesgericht Saarbrücken, Germany, 17 January 2007], English translation available on the Internet at www.cisg.law.pace.edu. Among the factors to be considered in the article 44 balancing test, according to this decision, are "the severity of the failure to comply with the duty, the consequences of a full exclusion of liability, the detriment inflicted on the seller due to the failure to notify, and the buyer's efforts in complying with the requirements relating to the notification."

¹⁸ CLOUT case No. 822 [Bundesgerichtshof, Germany, 11 January 2006] (see full text of the decision); CLOUT case No. 1236 [Oberlandesgericht Saarbrücken, Germany, 17 January 2007], English translation available on the Internet at www.cisg.law.pace.edu; CLOUT case No. 542 [Oberster Gerichtshof, Austria, 17 April 2002].

¹⁹ CLOUT case No. 608 [Tribunale Rimini, Italy, 26 November 2002] (Al Palazzo S.r.l v. Bernardaud di Limoges S.A.), (see full text of the decision); CLOUT case No. 285 [Oberlandesgericht Koblenz, Germany, 11 September 1998] (see full text of the decision); CLOUT case No. 292 [Oberlandesgericht Saarbrücken, Germany, 13 January 1993] (see full text of the decision).

²⁰ CLOUT case No. 775 [Landgericht Frankfurt, Germany, 11 April 2005] (see full text of the decision); CLOUT case No. 280 [Oberlandesgericht Jena, Germany, 26 May 1998] (see full text of the decision); CLOUT case No. 303 [Arbitration Court of the International Chamber of Commerce, 1994 (Arbitral award No. 7331)] (see full text of the decision); CLOUT case No. 378 [Tribunale di Vigevano, Italy, 12 July 2000] (see full text of the decision); Arbitration Court of the International Chamber of Commerce, 1997 (Arbitral award No. 8611), Unilex.

²¹ In the following cases, the court found that the buyer did not have a reasonable excuse for its failure to satisfy the notice requirement of article 39 (1): CLOUT case No. 802 [Tribunal Supremo, Spain, 17 January 2008] (see full text of case); CLOUT case No. 822 [Bundesgerichtshof, Germany, 11 January 2006] (see full text of the decision); CLOUT case No. 597 [Oberlandesgericht Celle, Germany, 10 March 2004]; Oberlandesgericht München, Germany, 13 November 2002, English translation available on the Internet at www.cisg.law.pace.edu; CLOUT case No. 596 [Oberlandesgericht Zweibrücken, Germany, 2 February 2004]; CLOUT case No. 542 [Oberster Gerichtshof, Austria, 17 April 2002]; Arrondissementsrechtsbank 's-Hertogenbosch, the Netherlands, 15 December 1997, Unilex; CLOUT case No. 285 [Oberlandesgericht Koblenz, Germany, 11 September 1998]; CLOUT case No. 280 [Oberlandesgericht Jena, Germany, 26 May 1998] (see full text of the decision); CLOUT case No. 167 [Oberlandesgericht München, Germany, 8 February 1995]; CLOUT case No. 192 [Obergericht des Kantons Luzern, Switzerland, 8 January 1997] (see full text of the decision); CLOUT case No. 303 [Arbitration Court of the International Chamber of Commerce, 1994 (Arbitral award No. 7331)]; CLOUT case No. 230 [Oberlandesgericht Karlsruhe, Germany, 25 June 1997] (see full text of the decision); CLOUT case No. 378 [Tribunale di Vigevano, Italy, 12 July 2000] (see full text of the decision); Court of Arbitration of the International Chamber of Commerce, 1997 (Arbitral award No. 8611), Unilex; CLOUT case No. 273 [Oberlandesgericht München, Germany, 9 July 1997]; CLOUT case No. 292 [Oberlandesgericht Saarbrücken, Germany 13 January 1993] (see full text of the decision); CLOUT case No. 263 [Bezirksgericht Unterrheintal, Switzerland, 16 September 1998] (see full text of the decision); CLOUT case No. 997 [Sø og Handelsretten, Denmark, 31 January 2002], English translation available on the Internet at www.cisg.law.pace.edu. The number of cases in which a buyer was able successfully to invoke article 44, in contrast, is quite small. See Court of Arbitration of the International Chamber of Commerce, June 1999 (Arbitral award No. 9187), Unilex; CLOUT case No. 474 [Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, Russian Federation, 24 January 2000 (Arbitral award No. 54/1999)]. It should be noted, however, that in one decision in which the court found article 44 inapplicable the court nevertheless implied that the buyer had adduced facts that would have constituted a reasonable excuse had they been causally connected to the buyer's failure to satisfy the article 39 (1) notice requirement. See CLOUT case No. 192 [Obergericht des Kantons Luzern, Switzerland, 8 January 1997].

²² CLOUT case No. 285 [Oberlandesgericht Koblenz, Germany, 11 September 1998].

²³ CLOUT case No. 997 [Sø og Handelsretten, Denmark, 31 January 2002], English translation available on the Internet at www.cisg.law.pace.edu.

²⁴ CLOUT case No. 167 [Oberlandesgericht München, Germany, 8 February 1995] (see full text of the decision).

²⁵ Arrondissementsrechtsbank 's-Hertogenbosch, the Netherlands, 15 December 1997, Unilex.

²⁶ CLOUT case No. 596 [Oberlandesgericht Zweibrücken, Germany, 2 February 2004].

²⁷ CLOUT case No. 802 [Tribunal Supremo, Spain, 17 January 2008] (see full text of case).

²⁸ CLOUT case No. 822 [Bundesgerichtshof, Germany, 11 January 2006] (see full text of the decision).

²⁹ Oberlandesgericht München, Germany, 13 November 2002, English translation available on the Internet at www.cisg.law.pace.edu. The possibility that the seller would supply the certificate of organic origin after the delivery, the court also held, did not give the buyer a reasonable excuse for its late notice, because a belated certificate was not permitted by the contract nor by applicable regulations.

³⁰ CLOUT case No. 597 [Oberlandesgericht Celle, Germany, 10 March 2004].

³¹ CLOUT case No. 1236 [Oberlandesgericht Saarbrücken, Germany, 17 January 2007], English translation available on the Internet at www.cisg.law.pace.edu; Arbitration Court of the International Chamber of Commerce, June 1999 (Arbitral award No. 9187), Unilex; CLOUT case No. 474 [Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, Russian Federation, 24 January 2000 (Arbitral award No. 54/1999)]. In another case, a court implied that the small size of the buyer's operation, which did not permit it to spare an employee full time to examine the goods, might constitute a reasonable excuse for delayed notice, although the court found that the buyer's excuse in this case was not causally connected to its failure to even begin examining the goods until more than three months after it should have. See CLOUT case No. 192 [Obergericht des Kantons Luzern, Switzerland, 8 January 1997].

³² Arbitration Court of the International Chamber of Commerce, June 1999 (Arbitral award No. 9187), Unilex.

³³ CLOUT case No. 474 [Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, Russian Federation, 24 January 2000 (Arbitral award No. 54/1999)].

³⁴ CLOUT case No. 1236 [Oberlandesgericht Saarbrücken, Germany, 17 January 2007], English translation available on the Internet at www.cisg.law.pace.edu.