

Article 33

The seller must deliver the goods:

- (a) If a date is fixed by or determinable from the contract, on that date;
- (b) If a period of time is fixed by or determinable from the contract, at any time within that period unless circumstances indicate that the buyer is to choose a date; or
- (c) In any other case, within a reasonable time after the conclusion of the contract.

OVERVIEW

1. Article 33 specifies the time at or within which the seller must deliver the goods. Under articles 33 (a) and (b), the time of delivery is governed first by the provisions of the contract, consistently with the general principle of party autonomy adopted in the Convention.¹ If no delivery date or delivery period can be inferred from the contract, article 33 (c) states a default rule requiring delivery “within a reasonable time after the conclusion of the contract.”

2. Although article 33 addresses only the duty to deliver, its approach is applicable to other duties of the seller, which also must be performed at the time provided in the contract or, absent such a provision, within a reasonable time.

DELIVERY DATE FIXED OR DETERMINABLE FROM THE CONTRACT

3. Article 33 (a) presupposes that the parties have fixed a date for delivery,² or that such a date can be inferred from the contract (e.g., “15 days after Easter 2011”) or determined by reference to a usage or practice as provided in article 9. In that case the seller must deliver on that fixed date.³ Delivery at a later time constitutes a breach of contract. It has been held that a date can be inferred from the contract if the parties agreed that delivery should be made after the opening of a letter of credit.⁴

4. According to one court, article 33 (a) also applies where the parties did not at the time of contract conclusion fix a specific date of delivery, but instead agreed that the seller should deliver at the request of the buyer.⁵ If the buyer does not request delivery, however, the seller is not in breach.⁶

FIXED PERIOD FOR DELIVERY

5. Article 33 (b) applies where either the parties have fixed a period of time during which the seller can deliver the goods, or such a period can be inferred from the contract. In such cases, article 33 (b) provides that the seller may deliver at any date during that period.

6. For purposes of article 33 (b), a period for delivery is fixed, e.g., by a contract clause providing for delivery “until:

end December”.⁷ Under this clause, delivery at some point between the conclusion of the contract and the end of December would conform to the contract, whereas delivery after 31 December would constitute a breach of contract. Similarly, if delivery is to be “effected in 1993–1994”,⁸ delivery any time between 1 January 1993 and 31 December 1994 constitutes timely performance.⁹ Where the contract provides for a delivery period the right to choose the specific date of delivery generally rests with the seller.¹⁰ For the buyer to have the right to specify a delivery date within the period, an agreement to that effect is necessary,¹¹ as the last clause of article 33 (b) suggests. Where the parties agreed on delivery “ex factory” a court held that the buyer could choose at which date during the delivery period to take the goods.¹² In one case, a court assumed *arguendo* that a contract provision calling for delivery in “July, August, September + -” might require delivery of one third of the contracted-for quantity during each of the specified months.¹³ Another court held that a delivery period “autumn 1993” was sufficiently specific, and it obliged and allowed delivery to occur until the end of the meteorological autumn (21 December).¹⁴

DELIVERY WITHIN A REASONABLE TIME AFTER CONCLUSION OF THE CONTRACT

7. Article 33 (c) applies where a specific time or period for delivery cannot be derived from the contract or from usages or practices between the parties. In that case, article 33 (c) requires the seller to deliver “within a reasonable time after the conclusion of the contract”. “Reasonable” means a time adequate in the circumstances. Delivery of a bulldozer two weeks after the seller received the first instalment on the price has been held reasonable.¹⁵ It was held that a delivery time of 10 months in the case of a loader whose agreed refurbishment could last 120 to 180 days might be reasonable under the circumstances.¹⁶ Where a contract concluded in January contained the delivery term “April, delivery date remains reserved”,¹⁷ the court held that article 33 (c) applied and delivery was due within a reasonable time after the contract was concluded because a concrete delivery date or period could not be determined from the contract: because the buyer had made it clear that he needed delivery by 15 March, the reasonable time was held to have expired before 11 April.¹⁸ Article 33 (c) has been also applied to interpret a standard contract term that allowed the seller to change the agreed delivery date:¹⁹ by this approach, the court

found that the term must be understood to limit the seller to dates that resulted in delivery within a reasonable period after the conclusion of the contract.²⁰

WHAT CONSTITUTES DELIVERY

8. To timely fulfil the obligation to deliver, the seller must perform, in compliance with the deadlines established under article 33, all delivery obligations required by the contract or under articles 31, 32 or 34. Unless otherwise agreed, article 33 does not require that the buyer be able to take possession of the goods on the date of delivery.²¹

CONSEQUENCES OF LATE DELIVERY

9. Delivery after the date or period for delivery is a breach of contract to which the Convention's rules on remedies apply. If timely delivery was of the essence of the contract, late delivery amounts to a fundamental breach, and the contract can be avoided as provided in article 49.²² According to one decision, a one day delay in the delivery of a small portion of the goods does not constitute a fundamental breach even where the parties had agreed upon a fixed date for delivery.²³ The parties, however, can provide

in their contract that any delay in delivery is to be treated as a fundamental breach.²⁴

10. It has been held, however, that no breach of contract occurred where the seller failed to meet a delivery date, mentioned during negotiations, that was prior to the time the contract was concluded: citing article 33 (c), the court held that "the CISG requires delivery within a reasonable time after the conclusion of the contract, not before."²⁵

11. A seller's declaration that it would not be able to deliver the goods on time, it has been held, constituted an anticipatory breach of contract in the sense of article 71.²⁶

BURDEN OF PROOF

12. A party asserting that a date or a period for delivery has been agreed upon must prove such agreement.²⁷ A buyer who asserts that it has the right to choose a specific delivery date within an agreed period for delivery must prove an agreement or circumstances supporting the assertion.²⁸ In a case where the parties did not specify the delivery date in the contract, a court held that if the buyer accepts the goods without protest that was an expression that delivery was made within a reasonable time.²⁹

Notes

¹ CLOUT case No. 338 [Oberlandesgericht Hamm, Germany, 23 June 1998].

² See the example in Corte di Appello di Milano, Italy, 20 March 1998, Unilex ("Delivery: 3rd December, 1990").

³ See the Secretariat Commentary to (then) article 31, p. 31, paragraph 3.

⁴ Tribunale di Forlì, Italy, 16 February 2009, English translation available on the Internet at www.cisg.law.pace.edu.

⁵ CLOUT case No. 338 [Oberlandesgericht Hamm, Germany, 23 June 1998] (see full text of the decision). See also CLOUT case No. 883 [Kantonsgericht Appenzell Ausserrhoden, Switzerland, 10 March 2003] (parties agreed that delivery date should be fixed later; after seller postponed fixing a date several times, the buyer fixed a date that the court accepted as delivery date).

⁶ CLOUT case No. 338 [Oberlandesgericht Hamm, Germany, 23 June 1998] (contract provided that the seller would deliver according to delivery schedules drawn up by the buyer, but the buyer apparently never provided the schedules) (see full text of the decision).

⁷ See Court of Arbitration of the International Chamber of Commerce, January 1997 (Arbitral award No. 8786), *ICC International Court of Arbitration Bulletin* 2000, 70.

⁸ See Court of Arbitration of the International Chamber of Commerce, France, March 1998 (Arbitral award No. 9117), *ICC International Court of Arbitration Bulletin* 2000, 83.

⁹ Ibid. See also U.S. District Court, New Jersey, United States, 4 April 2006 (Valero Marketing & Supply Company v. Greeni Trading Oy), available on the Internet at www.cisg.law.pace.edu, reversed on other grounds in CLOUT case No. 846 [U.S. Court of Appeals (3rd Circuit), United States, 19 July 2007].

¹⁰ Court of Arbitration of the International Chamber of Commerce, France, March 1998 (Arbitral award No. 9117), *ICC International Court of Arbitration Bulletin* 2000, 83.

¹¹ Ibid.; impliedly also CLOUT case No. 338 [Oberlandesgericht Hamm, Germany, 23 June 1998].

¹² CLOUT case No. 1128 [Tribunal Supremo, Spain, 9 December 2008], also available on the Internet at <http://www.cisgspanish.com>.

¹³ CLOUT case No. 7 [Amtsgericht Oldenburg in Holstein, Germany, 24 April 1990].

¹⁴ CLOUT case No. 943 [Hof 's-Hertogenbosch, the Netherlands, 20 December 2005].

¹⁵ CLOUT case No. 219 [Tribunal cantonal du Valais, Switzerland, 28 October 1997]. Another decision found that the seller delivered within a reasonable time despite the seasonal (Christmas-related) character of the goods: CLOUT case No. 210 [Audiencia Provincial, Barcelona, Spain, 20 June 1997].

¹⁶ U.S. District Court, Colorado, United States, 6 July 2010 (Alpha Prime Development Corporation v. Holland Loader Company, LLC), available on the Internet at www.cisg.law.pace.edu (the buyer had no immediate need for the loader and the court decided only that summary judgment was inappropriate).

¹⁷ CLOUT case No. 362 [Oberlandesgericht Naumburg, Germany, 27 April 1999].

¹⁸ CLOUT case No. 362 [Oberlandesgericht Naumburg, Germany, 27 April 1999] (the court found that the buyer's offer, which required delivery by "March 15", was not materially altered by the seller's acceptance stating a delivery term of "April, delivery date reserved"; since the offeror did not object to the terms of the acceptance, a contract had been formed under article 19 (2) and the varying term in the acceptance became part of the contract).

¹⁹ CLOUT case No. 362 [Oberlandesgericht Naumburg, Germany, 27 April 1999] (see full text of the decision).

²⁰ Ibid.

²¹ See the Secretariat Commentary to (then) article 31, p. 31, paragraph 2. See also Landgericht Oldenburg, Germany, 27 March 1996, Unilex.

²² Court of Arbitration of the International Chamber of Commerce, January 1997 (Arbitral award No. 8786), *ICC International Court of Arbitration Bulletin* 2000, 70.

²³ Landgericht Oldenburg, Germany, 27 March 1996, Unilex. See also Rechtbank Arnhem, the Netherlands, 29 July 2009, English editorial remarks available on the Internet at www.cisg.law.pace.edu (if the buyer complains of a two day delay after first having accepted the goods (a minibus), no right of avoidance exists).

²⁴ Court of Arbitration of the International Chamber of Commerce, January 1997 (Arbitral award No. 8786), *ICC International Court of Arbitration Bulletin* 2000, 70 (the general conditions of the buyer, to which the parties had agreed, provided that any delay in delivery constituted a fundamental breach of contract).

²⁵ U.S. District Court, Western District of Pennsylvania, United States, 25 July 2008 (Norfolk Southern Railway Co. v. Power Source Supply, Inc.), available on the Internet at www.cisg.law.pace.edu.

²⁶ Court of Arbitration of the International Chamber of Commerce, January 1997 (Arbitral award No. 8786), *ICC International Court of Arbitration Bulletin* 2000, 72.

²⁷ CLOUT case No. 362 [Oberlandesgericht Naumburg, Germany, 27 April 1999] (see full text of the decision).

²⁸ Court of Arbitration of the International Chamber of Commerce, France, March 1998 (Arbitral award No. 9117), *ICC International Court of Arbitration Bulletin* 2000, 90.

²⁹ CLOUT case No. 210 [Audiencia Provincial de Barcelona sección 16a, Spain, 20 June 1997].