

Article 46

(1) The buyer may require performance by the seller of his obligations unless the buyer has resorted to a remedy which is inconsistent with this requirement.

(2) If the goods do not conform with the contract, the buyer may require delivery of substitute goods only if the lack of conformity constitutes a fundamental breach of contract and a request for substitute goods is made either in conjunction with notice given under article 39 or within a reasonable time thereafter.

(3) If the goods do not conform with the contract, the buyer may require the seller to remedy the lack of conformity by repair, unless this is unreasonable having regard to all the circumstances. A request for repair must be made either in conjunction with notice given under article 39 or within a reasonable time thereafter.

OVERVIEW

1. Article 46 gives the buyer a general right to require the seller to perform its contractual obligations in kind. Paragraphs 2 and 3 deal with replacement and repair of non-conforming goods (in the sense of article 35), and articulate some restrictions on these specific remedies; paragraph 1 applies to all other cases.

2. The right to require performance is subject to the restriction regarding specific performance set forth in article 28. If the seized court would not, on the facts of the case before, grant such remedy under its own national law, it will not be bound to do so under the Convention¹ Therefore the courts of those jurisdictions that restrict the availability of specific performance may refuse to grant specific performance of the obligation in dispute, except in circumstances where the court would grant the remedy under its own domestic law, and may award only damages.

3. The fact that the right to performance is provided for first among the remedies described in articles 46-52 reflects that, under the Convention, the contractual bond should be preserved as far as possible; avoidance of the contract should be available only as a last resort (*ultima ratio*),² and only if the continuation of the contract would no longer be tolerable because of a severe breach of contract by the seller (see article 49). The same approach applies when the buyer has breached the contract (articles 62 and 64).

4. Despite its importance, the right to require performance has not often been invoked in reported decisions. In practice, aggrieved parties have generally preferred to pursue other remedies—in particular the right to claim damages. The parties can contract out the remedy of specific performance.³

GENERAL REQUIREMENTS

5. The right to require performance of an obligation presupposes that the obligation exists and has thus far not been fulfilled. With the exceptions stated in articles 40 and 44,

the buyer must also comply with the notice requirement in articles 38 and 39.⁴

6. Furthermore, to invoke his rights under article 46 the buyer must “require” performance. This calls for a clear demand that the disputed obligation should be fulfilled.⁵ Article 46 (2) and (3) specify that notice of a “request” for the remedies they describe must be given within a reasonable time. The buyer is also entitled to set an additional period of time for performance in accordance with article 47.

THE GENERAL RIGHT TO REQUIRE PERFORMANCE (ARTICLE 46 (1))

7. Except in cases governed by article 46 (2) and (3), the buyer has a general right under article 46 (1) to require the seller’s performance, in kind, of any obligation that is due. Thus the buyer is entitled to request that the goods be delivered, that the seller procure a stipulated bank guarantee, or that the seller respect an exclusive sales obligation.⁶ The buyer could demand and, subject to the restrictions imposed by article 28, employ the assistance of the courts to obtain performance of these and other seller obligations.

8. If performance in kind is impossible—e.g., the contract covers a unique good that is destroyed before delivery—then the buyer’s right to require performance is also extinguished.⁷

9. Article 46 (1) restricts the right to compel performance when the buyer has already resorted to a remedy inconsistent with requiring performance. Such inconsistency exists when the buyer has avoided the contract, and also when the buyer has reduced the price pursuant to article 50.⁸ The buyer can, however, combine a request for performance and a claim for any remaining damage—e.g., damage caused by delayed performance.⁹ The buyer having once requested performance can still opt for a different remedy, e.g., can declare the contract avoided if all the requirements for avoidance are met. Only if the buyer has fixed an

additional period of time for performance under article 47 is the buyer for that period excluded from requesting other remedies (although the buyer retains the right to recover damages for delayed performance by the seller)—see article 47 (2).

10. The general right to require performance under article 46 (1) need not be asserted within a particular period of time apart from the normal period of limitation imposed by applicable national law¹⁰ or, so far as it applies, by the Convention on the Limitation Period in the International Sale of Goods. Article 46 (2) and (3), in contrast, limit the time within which the buyer must make a request for the remedies provided in these provisions; article 46 (1) requires a clear declaration that the buyer requests the performance of a contractual obligation,¹¹ but it does not limit the time for such notice. One tribunal held that this gap should be filled by redress to the UNIDROIT Principles (article 7.2.2), which require the request to be made within reasonable time.¹² If a replacement is delivered, the buyer must examine it and give notice of any defect in the normal way (articles 38 and 39). Also articles 40 and 41 apply.¹³

DELIVERY OF SUBSTITUTE GOODS (ARTICLE 46 (2))

11. Article 46 (2) applies if (a) the seller has delivered non-conforming goods; (b) the non-conformity constitutes a fundamental breach of contract; and (c) the buyer has requested replacement of the non-conforming goods “either in conjunction with notice given under article 39 or within a reasonable time thereafter.” If these conditions are met, article 46 (2) entitles the buyer to require delivery of substitute goods.¹⁴

12. Whether the goods are non-conforming must be determined by reference to article 35; a lack of conformity exists if the goods are defective, different from the goods required by the contract (*aliud*), improperly packaged, or deficient in quantity.¹⁵

13. A seller commits a fundamental breach by delivering non-conforming goods if the non-conformity substantially deprives the buyer of what the buyer is entitled to expect under the contract (article 25). A fundamental breach for purposes of article 46 (2) must be determined in the same way as it for purposes of avoidance of contract under article 49 (1) (a), and in accordance with the general definition in article 25. Leading court decisions on what constitutes a fundamental breach (although rendered in respect of article 49) have held that a non-conformity concerning quality is not a fundamental breach of contract if the buyer can, without unreasonable inconvenience, use the goods or resell them, even with a rebate.¹⁶ Thus, e.g., the delivery of frozen meat that contained too much fat and water—and which therefore, according to expert opinion, was worth 25.5 per cent less than meat of the contracted for quality—was deemed not to constitute a fundamental breach of contract because the buyer could resell the meat at a lower price or could process it in an alternative manner.¹⁷ If non-conforming goods cannot be used or resold with reasonable effort, however, there is a fundamental breach.¹⁸ The same is true where the goods suffer from a

serious defect, even though they can still be used to some extent (e.g. flowers that should have flourished the whole summer but in fact did so only for a small part of the season),¹⁹ or where the goods have major defects and the buyer requires the goods for its manufacturing processes.²⁰ Similarly, where the non-conformity resulted from the adulteration of the goods in a fashion that was illegal in the states of both the seller and the buyer, a fundamental breach was found.²¹ However, it was held not to be a fundamental breach that delivered tractor-trailers exceeded the agreed height of 4 m by 10 cm.²²

14. Special problems arise with the fundamental breach standard when the *goods are defective—even seriously defective—but reparable*. Several courts have found that, if the defects are easily repaired, the lack of conformity is not a fundamental breach.²³ At least where the seller offers and effects speedy repair without any inconvenience to the buyer, courts will not find that the non-conformity is a fundamental breach.²⁴ This is in line with seller’s right to cure as provided for in article 48 of the Convention. A tribunal also referred to the proportionality of the costs and efforts a replacement would entail.²⁵

15. Article 46 (2) requires the buyer to give the seller notice requesting substitute goods, and to do so within a limited time. The request for substitute goods can be coupled with the notice of lack of conformity under article 39, in which case the time limits under that provision apply;²⁶ it can, however, also be given within a reasonable time after the article 39 notice.

16. The right to require delivery of substitute goods is subject to the buyer’s obligation to return the delivered goods in substantially the condition in which he received them, pursuant to article 82 (1). Article 82 (2), however, provides for substantial exceptions to this restitutionary obligation.

17. Where the seller offered replacement of defective goods free of charge, and the buyer rejected this offer (and used the goods in a non-suitable way), a court has reduced the buyer’s damages claim.²⁷

REPAIR (ARTICLE 46 (3))

18. Article 46 (3) provides the buyer with a right to demand repair if the delivered goods do not conform to the contract under the standards of article 35. The remedy is available, however, only if it is reasonable in light of all the circumstances. The buyer must also request repair within the same time limits as those applicable to notice under article 46 (2)—i.e., “in conjunction with notice given under article 39 or within a reasonable time thereafter.”²⁸

19. Article 46 (3) applies only if the lack of conformity can be cured by repair. A request for repair would be unreasonable if the buyer could easily repair the goods himself, but the seller remains liable for the costs of such repair.²⁹

20. Repair is effectively provided if after repair the goods can be used as agreed.³⁰ If the repaired goods subsequently become defective the buyer must give notice of the

defects.³¹ It has been held that the time limits of article 39 apply to this notice,³² but a request to repair the new defects can be given within a reasonable time thereafter.³³ A first notice within two weeks, a second notice after a month, and further notices after six and eleven months have been regarded as notices within a reasonable time.³⁴

21. After due notice of a lack of conformity, according to article 45 (1) (b), the buyer can claim damages (see also article 48 (1), second sentence), and is not obliged to request repair, although a court has held that the buyer is entitled to damages only after having given the seller a chance to remedy any non-conformity.³⁵

Notes

¹ See the Digest for article 28.

² See CLOUT case No. 428 [Oberster Gerichtshof, 7 September 2000], also available on the Internet at www.cisg.at.

³ Arbitration Court of the International Chamber of Commerce, 2004 (Arbitral award No. 12173), *Yearbook of Commercial Arbitration* XXXIV (2009) 111 ff.

⁴ See, for example, CLOUT case No. 346 [Landgericht Mainz, Germany, 26 November 1998]; Cour d'appel de Poitiers, France, 28 October 2004, English translation available on the Internet at www.cisg.law.pace.edu.

⁵ See CLOUT case No. 594 [Oberlandesgericht Karlsruhe, Germany, 19 December 2002] (buyer's refusal to further perform and its request for repayment of prepaid price regarded as sufficient). The commentary on the draft Convention prepared by the UNCITRAL secretariat contained an example of an ambiguous request that could be interpreted as either a demand for performance or a modification of the delivery date: "Example 42A: When the goods were not delivered on the contract date, 1 July, Buyer wrote Seller 'Your failure to deliver on 1 July as promised may not be too serious for us but we certainly will need the goods by 15 July.' Seller subsequently delivered the goods by 15 July." *Official Records of the United Nations Conference on Contracts for the International Sale of Goods, Vienna, 10 March-11 April 1980* (United Nations publication, Sales No. E.81.IV.3), 38.

⁶ See the following cases (where, however, the buyers had resorted to other remedies—namely damages or (as far as possible) avoidance): Arbitration Court of the International Chamber of Commerce, January 1997 (Arbitral award No. 8786), *ICC International Court of Arbitration Bulletin* 2000, 70 (late delivery); Cairo Regional Centre for Commercial Arbitration (CRCICA), Egypt, 3 October 1995, Unilex (extension of bank guarantee); CLOUT case No. 2 [Oberlandesgericht Frankfurt a.M., Germany, 17 September 1991] (breach of exclusive sales agreement).

⁷ This was also the result in U.S. District Court, Southern District of New York, United States, 20 August 2008 (Hilaturas Miel, S.L. v. Republic of Iraq, 573 F.Supp.2d 781), available on the Internet at www.cisg.law.pace.edu (because of the hostilities in the Iraq war the seller could no longer perform the contract).

⁸ See *Official Records of the United Nations Conference on Contracts for the International Sale of Goods, Vienna, 10 March-11 April 1980* (United Nations publication, Sales No. E.81.IV.3), 38, at paragraph 7.

⁹ *Ibid.* at paragraph 4.

¹⁰ See, for example, CLOUT case No. 346 [Landgericht Mainz, Germany, 26 November 1998].

¹¹ See *Official Records of the United Nations Conference on Contracts for the International Sale of Goods, Vienna, 10 March-11 April 1980* (United Nations publication, Sales No. E.81.IV.3), 38, at paragraphs 4-5.

¹² International Arbitration Court of the Chamber of Commerce and Industry of the Russian Federation, Russian Federation, 30 January 2007, Unilex.

¹³ Oberlandesgericht Koblenz, Germany, 3 June 2013, *Internationales Handelsrecht* 2014, 60 = CISG-online No. 2469.

¹⁴ See, for example, Cour d'appel de Poitiers, France, 26 October 2004, English translation available on the Internet at www.cisg.law.pace.edu; China International Economic and Trade Arbitration Commission, People's Republic of China, 24 July 2007, English translation available on the Internet at www.cisg.law.pace.edu. See also CLOUT case No. 1080 [Supreme Court, Poland, 11 May 2007] (Shoe leather case), English translation available on the Internet at www.cisg.law.pace.edu.

¹⁵ See the Digest for article 35.

¹⁶ CLOUT case No. 171 [Bundesgerichtshof, Germany, 3 April 1996]; CLOUT case No. 248 [Bundesgericht, Switzerland, 28 October 1998].

¹⁷ CLOUT case No. 248 [Bundesgericht, Switzerland, 28 October 1998].

¹⁸ CLOUT case No. 150 [Cour de cassation, France, 23 January 1996] (artificially sugared wine); CLOUT case No. 79 [Oberlandesgericht Frankfurt a.M., Germany, 18 January 1994] (shoes with cracks in leather); Landgericht Landshut, Germany, 5 April 1995, Unilex (T-shirts which shrunk by two sizes after first washing).

¹⁹ CLOUT case No. 107 [Oberlandesgericht Innsbruck, Austria, 1 July 1994].

²⁰ See CLOUT case No. 138 [U.S. Court of Appeals (2nd Circuit), United States, 6 December 1995] (compressors with lower cooling capacity and higher power consumption than those contracted for, needed by the buyer to manufacture air conditioners); CLOUT case No. 150 [Cour de cassation, France, 23 January 1996] (artificially sugared wine); CLOUT case No. 315 [Cour de cassation, France, 26 May 1999] (metal sheets unfit for the anticipated use by the buyer's customer) (see full text of the decision).

²¹ CLOUT case No. 150 [Cour de cassation, France, 23 January 1996] (artificially sugared wine, which is forbidden under EU law and national laws); CLOUT case No. 170 [Landgericht Trier, Germany, 12 October 1995] (artificially sugared wine).

²² Hof Gent, Belgium, 30 June 2004, English translations available on the Internet at www.cisg.law.pace.edu.

²³ CLOUT case No. 196 [Handelsgericht des Kantons Zürich, Switzerland, 26 April 1995].

²⁴ CLOUT case No. 152 [Cour d'appel, Grenoble, France, 26 April 1995]; CLOUT case No. 282 [Oberlandesgericht Koblenz, Germany, 31 January 1997].

²⁵ China International Economic and Trade Arbitration Commission, People's Republic of China, 11 November 2002, English translation available on the Internet at www.cisg.law.pace.edu.

²⁶ See the Digest for article 39, paragraphs 19-26.

²⁷ CLOUT case No. 553 [Audiencia Provincial de Barcelona, Spain, 28 April 2004] (reduction by 50 per cent).

²⁸ See CLOUT case No. 225 [Cour d'appel, Versailles, France, 29 January 1998]. See also paragraph 15 *supra*.

²⁹ CLOUT case No. 125 [Oberlandesgericht Hamm, Germany, 9 June 1995] (see full text of the decision).

³⁰ CLOUT case No. 152 [Cour d'appel, Grenoble, France, 26 April 1995].

³¹ Landgericht Oldenburg, Germany, 9 November 1994, Unilex.

³² *Ibid.*

³³ CLOUT case No. 225 [Cour d'appel, Versailles, France, 29 January 1998] (see full text of the decision).

³⁴ *Ibid.*

³⁵ Landgericht Köln, Germany, 25 March 2003, English translation available on the Internet at www.cisg.law.pace.edu.