

Article 63

(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 performance.

INTRODUCTION

1. In permitting the seller to fix an additional period of time for the buyer to perform its obligations, article 63 grants the seller a right equivalent to that conferred on the buyer by article 47: the two provisions are conceived in the same fashion and worded in comparable terms. Article 63 is especially useful in regard to the seller's right to declare the contract avoided pursuant to article 64: article 64 (1) (b) states that, if the buyer does not pay the price or take delivery of the goods within the additional period of time set in accordance with article 63, the seller may declare the contract avoided. The fixing of an additional period thus facilitates contract avoidance.¹ However, this mechanism for avoiding the contract applies only in cases of non-payment of the price or failure to take delivery of the goods.

2. Article 63 (2) states that a seller who grants the buyer an additional period of time may not, during that period, resort to any remedy for breach of contract but nevertheless retains the right to claim damages for the delay in performance. The binding effect for the seller of the notice fixing such additional period is intended to protect the buyer, who is entitled to expect, in particular when preparing to perform its obligations, that the seller will accept the requested performance.²

FIXING AN ADDITIONAL PERIOD OF TIME (ARTICLE 63 (1))

3. The seller is entitled to set an additional period of time for the buyer but is not obliged to do so in order to be able to pursue the various remedies provided for by the Convention, including avoidance of the contract.³ Several decisions have emphasized the optional nature of granting an additional period.⁴ However, the opposite interpretation is sometimes adopted by the courts.⁵

4. A seller is authorized to set an additional period of time only upon the expiry of the time for performance of the obligation at issue, as can be seen from the *ratio legis* of the provision.⁶ One decision accordingly stated that "the determination of an additional period of time even before the respective claim has become mature cannot constitute a relevant period in terms of article 63", even if the period fixed elapses after the due date.⁷ Another court ruled similarly

after pointing out that article 63 "presupposes in fact that the buyer has already been declared in breach" before the seller grants the additional period, and that the payment date indicated on the invoice, which was issued at the time of dispatch of the goods, could not be construed as an additional period.⁸ However, faced with a similar difficulty in connection with the sale of motor vehicles where the date for payment of the price was subject to the seller's prior notification of the availability of the vehicles and their chassis numbers, one court accepted that the seller could fix an additional period in the same notice as that by which the price became due; it would, the court observed, have been "pure formalism" to require two separate communications from the seller.⁹

5. The additional period of time granted by the seller is established by means of a notice by the seller to the buyer.¹⁰ The seller must clearly indicate that the buyer has to perform within a fixed or determinable additional period.¹¹ A general demand that the buyer perform or discharge its obligations immediately or promptly does not meet the requirements of article 63 (1).¹² The period may be determined by the date at which performance must be rendered (e.g., by 30 September) or by a time period (e.g., within one month from today).¹³ As was noted in one court decision, it is not necessary for the notice to state that performance of the obligation at issue would be rejected if occurring after expiration of the additional period.¹⁴

6. The additional period of time set by the seller must be of reasonable length to satisfy the requirements of article 63. The reasonableness of the length of the additional period is assessed according to the circumstances of the case, including commercial usages and practices established between the parties.¹⁵ A reasonable period with regard to taking delivery of the goods will generally be longer than that applying to payment of the price.¹⁶ A period of 29 days for taking delivery of 200 tons of bacon was deemed reasonable,¹⁷ as was a period of two and a half months for taking delivery of a printing machine,¹⁸ whereas a period of slightly more than one month fixed unilaterally by the seller after conclusion of the contract of sale, followed by an additional period of seven days, for the buyer to take delivery of 1,600 tons of used cathode ray tubes, representing 110 lorry loads, was deemed unreasonable.¹⁹ Periods of time expressly or implicitly held to be reasonable have included: a period of nearly four months for payment of the price;²⁰ a period of 20 days for opening a letter of credit;²¹ a period of 20 days for payment of the price;²² a period of

13 days for opening a letter of credit or payment of the price and for taking delivery of the goods;²³ a period of 10 days for payment of the price;²⁴ a period of seven days for payment of the price;²⁵ a period of two days for payment of the price where the seller had previously agreed to several deferments of the due date;²⁶ a period of nine days for payment of the price, fixed in a notice by which the price also became due;²⁷ a period of 10 days for payment of the price and taking delivery of the goods;²⁸ a period of 10 days for payment of the price;²⁹ a period of 10 days for payment by letter of credit where the buyer was already several months in arrears;³⁰ and a payment time limit of four months fixed following negotiations between the parties.³¹ Conversely, one court held that a period of seven days where the buyer had previously refused to pay the price was too short; the judges set the reasonable period at two weeks.³² Similarly, a period of three days for presenting bank confirmation of the opening of a letter of credit was deemed in the circumstances too short.³³

7. The legal consequences attaching to an additional period that is too short to constitute a reasonable time are uncertain. According to one view, such a period is devoid of effect. According to another, an additional period of reasonable length replaces a period that was rejected owing to its shortness. One court decision expressly adopted this second approach.³⁴

8. The granting of an additional period of time is not subject to any requirements as to form, in accordance with the general principle of freedom-from-form requirements, as established by article 11;³⁵ the parties, however, may derogate from this.³⁶

EFFECTS OF FIXING AN ADDITIONAL PERIOD OF TIME (ARTICLE 63 (2))

9. The seller affords the buyer a final opportunity by granting an additional period for the buyer to perform its obligations.³⁷ The seller is bound by its undertaking. Thus, the seller “may not, during that period, resort to any remedy for breach of contract” (article 63 (2), first sentence). In particular, the seller’s right to avoid the contract and the right to claim damages for non-performance of the contract are suspended during such period. However, as stated in the second sentence of article 63 (2), the seller, in granting an additional period of time, is not deprived of the right to claim damages for delay in performance.³⁸

10. Suspension of the seller’s remedies ceases upon the expiration of the additional period without performance by the buyer. Such suspension also ceases in the specific case where, as stated in article 63 (2), the seller has received notice from the buyer that it will not perform its obligations within the period fixed. In order to be effective, the notice from the buyer has to have been received by the seller, which derogates from the general rule in article 27 of the Convention. In both cases, the seller will be free to resort to the various remedies provided for in article 61.

11. Should the buyer perform its obligations within the additional period fixed, the seller is deprived of all remedies available for breach of contract by the buyer except the right to claim damages for delay in performance (article 63 (2), second sentence).

Notes

¹ See CLOUT case No. 649 [Tribunale di Padova, Italy, 31 March 2004], available in Italian on the Internet at www.unilex.info, available in English on the Internet at www.cisg.law.pace.edu; CLOUT case No. 243 [Cour d’appel de Grenoble, France, 4 February 1999], available in French on the Internet at www.cisg-france.org (“in the absence of a fundamental breach on the part of the buyer, the seller had to grant the buyer an additional period of time to take delivery”). See, however, CLOUT case No. 629 [Kantonsgericht Zug, Switzerland, 12 December 2002], *Internationales Handelsrecht*, 2004, 65 (the court reasoned in terms of a fundamental breach and did not attach any particular legal consequences to the additional period of time fixed by the seller for the buyer to take over the goods); Supreme Court of Queensland, Court of Appeal, Australia, 12 October 2001 (*Downs Investments v. Perwaja Steel*), [2001] QCA 433, [2002] 2 Qd R 462, available in English on the Internet at www.cisg.law.pace.edu (the court found article 63 to be of little relevance in this case since the buyer was already in fundamental breach when the seller fixed an additional period for the buyer); CLOUT case No. 631 [Supreme Court of Queensland, Australia, 17 November 2000] (*Downs Investments in liq. v. Perwaja Steel*), 2000 WL 33657824 (QSC), [2000] QSC 421, available in English on the Internet at www.austlii.edu.au (the judge reasoned in terms of avoidance of the contract for fundamental breach and did not attach any particular legal consequences to the additional period fixed by the seller for the buyer to open a letter of credit).

² See commentary to draft article 59, paragraph 9, Commentary on the draft Convention on Contracts for the International Sale of Goods prepared by the UNCITRAL secretariat.

³ See the Digest for article 64.

⁴ See Oberlandesgericht Brandenburg, Germany, 18 November 2008, *Internationales Handelsrecht*, 2009, 105, esp. 111, available in German on the Internet at www.globalsaleslaw.org, available in English on the Internet at www.cisg.law.pace.edu; CLOUT case No. 649 [Tribunale di Padova, Italy, 31 March 2004], available in Italian on the Internet at www.unilex.info, available in English on the Internet at www.cisg.law.pace.edu; CLOUT case No. 243 [Cour d’appel de Grenoble, France, 4 February 1999], available in French on the Internet at www.cisg-france.org; CLOUT case No. 281 [Oberlandesgericht Koblenz, Germany, 17 September 1993], *Recht der Internationalen Wirtschaft*, 1993, 934.

⁵ See Landgericht Göttingen, Germany, 20 September 2002, available in German on the Internet at www.globalsaleslaw.org, available in English on the Internet at www.cisg.law.pace.edu; CLOUT case No. 293 [Schiedsgericht der Hamburger Freundschaftlichen Arbitrage, Germany, 29 December 1998], *Neue Juristische Wochenschrift-Rechtsprechungsreport*, 1999, 780; CLOUT case No. 307 [Oberster Gerichtshof, Austria, 11 September 1997], *Österreichische Zeitschrift für Rechtsvergleichung*, 1997, 245, available in German on the Internet at www.globalsaleslaw.org, available in English on the Internet at www.cisg.law.pace.edu.

⁶ See also article 61 (“If the buyer fails to perform any of his obligations ...”).

⁷ See Oberlandesgericht Brandenburg, Germany, 18 November 2008, *Internationales Handelsrecht*, 2009, 105, esp. 111-112, available in German on the Internet at www.globalsaleslaw.org, available in English on the Internet at www.cisg.law.pace.edu.

⁸ CLOUT case No. 649 [Tribunale di Padova, Italy, 31 March 2004], available in Italian on the Internet at www.unilex.info, available in English on the Internet at www.cisg.law.pace.edu.

⁹ Oberlandesgericht München, Germany, 19 October 2006, *Internationales Handelsrecht*, 2007, 30, available in German on the Internet at www.globalsaleslaw.org, available in English on the Internet at www.cisg.law.pace.edu.

¹⁰ See, however, CLOUT case No. 1021 [Foreign Trade Court of Arbitration at the Serbian Chamber of Commerce, Serbia, 15 July 2008] (Milk packaging equipment case), available in Serbian on the Internet at www.globalsaleslaw.org, available in English on the Internet at www.cisg.law.pace.edu (a commitment made by the buyer, during negotiations conducted by the parties, to pay the price within a time limit of nearly four months contained an additional period of time within the meaning of article 63 (1)); International Commercial Arbitration Court at the Chamber of Commerce and Industry of the Russian Federation, Russian Federation, 1 December 1995, available in English on the Internet at www.cisg.law.pace.edu (an agreement concluded during the contract period was viewed as granting the buyer an additional period of time).

¹¹ See, however, Arbitration Court of the International Chamber of Commerce, January 1992 (Arbitral award No. 7585), *ICC International Court of Arbitration Bulletin*, 1995, 60, *Journal du droit international* 1995, 1015, esp. 1017, available in English on the Internet at www.unilex.info (the arbitrator appears to have inferred the existence of an additional period of time simply from the inaction of the seller when faced with non-payment of the price by the buyer).

¹² See commentary to draft article 59, paragraph 7, Commentary on the draft Convention on Contracts for the International Sale of Goods, prepared by the UNCITRAL secretariat.

¹³ See commentary to draft article 59, paragraph 7, Commentary on the draft Convention on Contracts for the International Sale of Goods, prepared by the UNCITRAL secretariat.

¹⁴ Oberlandesgericht München, Germany, 19 October 2006, *Internationales Handelsrecht*, 2007, 30, available in German on the Internet at www.globalsaleslaw.org, available in English on the Internet at www.cisg.law.pace.edu.

¹⁵ See Tribunal de grande instance de Strasbourg, France, 22 December 2006, available in French on the Internet at www.cisg-france.org, available in English on the Internet at www.cisg.law.pace.edu (the judgment referred to the role of usages and practices between the parties).

¹⁶ Since the decision was not published in full, it is not possible to establish the precise length of the period which the judges deemed reasonable in CLOUT case No. 47 [Landgericht Aachen, Germany, 14 May 1993], *Recht der Internationalen Wirtschaft*, 1993, 760, available in German on the Internet at www.globalsaleslaw.org, available in English on the Internet at www.cisg.law.pace.edu.

¹⁷ See Landgericht Bielefeld, Germany, 18 January 1991, available in German on the Internet at www.globalsaleslaw.org.

¹⁸ CLOUT case No. 645 [Corte di Appello di Milano, Italy, 11 December 1998], *Rivista di Diritto Internazionale Privato e Processuale*, 1999, 112.

¹⁹ Tribunal de grande instance de Strasbourg, France, 22 December 2006, available in French on the Internet at www.cisg-france.org, available in English on the Internet at www.cisg.law.pace.edu.

²⁰ CLOUT case No. 1021 [Foreign Trade Court of Arbitration at the Serbian Chamber of Commerce, Serbia, 15 July 2008] (Milk packaging equipment case), available in Serbian on the Internet at www.globalsaleslaw.org, available in English on the Internet at www.cisg.law.pace.edu.

²¹ Arbitration Court of the International Chamber of Commerce, 2003 (Arbitral award No. 11849), *Yearbook Commercial Arbitration*, vol. 31, 2006, 148, available in English on the Internet at www.cisg.law.pace.edu.

²² Oberster Gerichtshof, Austria, 28 April 2000, *Internationales Handelsrecht*, 2001, 208, available in German on the Internet at www.globalsaleslaw.org, available in English on the Internet at www.cisg.law.pace.edu (after two payment reminders had been sent and one additional period of time had elapsed without result).

²³ CLOUT case No. 261 [Bezirksgericht der Saane, Switzerland, 20 February 1997], [1999], *Schweizerische Zeitschrift für Internationales und Europäisches Recht*, 1999, 195, available in German on the Internet at www.globalsaleslaw.org, available in English on the Internet at www.cisg.law.pace.edu (several additional periods of time had previously been fixed).

²⁴ Handelsgericht des Kantons St. Gallen, Switzerland, 29 April 2004, *Schweizerische Zeitschrift für Internationales und Europäisches Recht*, 2005, 121, available in German on the Internet at www.globalsaleslaw.org/content/api/cisg/urteile/962.pdf, available in English on the Internet at www.cisg.law.pace.edu.

²⁵ International Commercial Arbitration Court at the Ukrainian Chamber of Commerce and Industry, Ukraine, 19 September 2005, available in English on the Internet at www.cisg.law.pace.edu; Handelsgericht des Kantons St. Gallen, Switzerland, 11 February 2003, *Schweizerische Zeitschrift für Internationales und Europäisches Recht*, 2004, 107, available in German on the Internet at www.globalsaleslaw.org, available in English on the Internet at www.cisg.law.pace.edu.

²⁶ Oberlandesgericht Graz, Austria, 24 January 2002, available in German on the Internet at www.globalsaleslaw.org, available in English on the Internet at www.cisg.law.pace.edu.

²⁷ CLOUT case No. 826 [Oberlandesgericht München, Germany, 19 October 2006], *Internationales Handelsrecht*, 2007, 30, available in German on the Internet at www.globalsaleslaw.org, available in English on the Internet at www.cisg.law.pace.edu.

²⁸ CLOUT case No. 217 [Handelsgericht Aargau, Switzerland, 26 September 1997], *Schweizerische Zeitschrift für Internationales und Europäisches Recht*, 1998, 78, available in German on the Internet at www.cisg.law.pace.edu, available in English on the Internet at www.cisg.law.pace.edu.

²⁹ CLOUT case No. 333 [Handelsgericht Aargau, Switzerland, 11 June 1999], *Schweizerische Zeitschrift für internationales und europäisches Recht*, 2000, 117, available in German on the Internet at www.unilex.info, available in English on the Internet at www.cisg.law.pace.edu.

³⁰ CLOUT case No. 886 [Handelsgericht des Kantons St. Gallen, Switzerland, 3 December 2002] (Sizing machine case), *Schweizerische Zeitschrift für Internationales und Europäisches Recht*, 2003, 104, English translation available on the Internet at www.cisg.law.pace.edu.

³¹ CLOUT case No. 1021 [Foreign Trade Court of Arbitration at the Serbian Chamber of Commerce, Serbia, 15 July 2008] (Milk packaging equipment case), available in Serbian on the Internet at www.globalsaleslaw.org, available in English on the Internet at www.cisg.law.pace.edu.

³² Oberlandesgericht Karlsruhe, Germany, 14 February 2008, *Internationales Handelsrecht*, 2008, 53, available in German on the Internet at www.globalsaleslaw.org, available in English on the Internet at www.cisg.law.pace.edu.

³³ Landgericht Kassel, Germany, 21 September 1995, available in German on the Internet at www.globalsaleslaw.org, available in English on the Internet at www.cisg.law.pace.edu.

³⁴ Oberlandesgericht Karlsruhe, Germany, 14 February 2008, *Internationales Handelsrecht*, 2008, 53, available in German on the Internet at www.globalsaleslaw.org, available in English on the Internet at www.cisg.law.pace.edu (time limit of two weeks in place of seven days).

³⁵ See the Digest for articles 11 and 96.

³⁶ See China International Economic and Trade Arbitration Commission, People's Republic of China, 28 February 2005, available in English on the Internet at www.cisg.law.pace.edu (the Arbitration Commission noted that the seller had failed to send notice in writing to fix an additional period, which was in contravention of the contract, under whose terms any information sent by one party to the other had to be in written form).

³⁷ Landgericht Kassel, Germany, 21 September 1995, available in German on the Internet at www.globalsaleslaw.org, available in English on the Internet at www.cisg.law.pace.edu.

³⁸ Landgericht Bayreuth, Germany, 10 December 2004, available in German on the Internet at www.globalsaleslaw.org, available in English on the Internet at www.cisg.law.pace.edu.