

Article 49

(1) The buyer may declare the contract avoided:

(a) If the failure by the seller to perform any of his obligations under the contract or this Convention amounts to a fundamental breach of contract; or

(b) In case of non-delivery, if the seller does not deliver the goods within the additional period of time fixed by the buyer in accordance with paragraph (1) of article 47 or declares that he will not deliver within the period so fixed.

(2) However, in cases where the seller has delivered the goods, the buyer loses the right to declare the contract avoided unless he does so:

(a) In respect of late delivery, within a reasonable time after he has become aware that delivery has been made;

(b) In respect of any breach other than late delivery, within a reasonable time:

(i) After he knew or ought to have known of the breach;

(ii) After the expiration of any additional period of time fixed by the buyer in accordance with paragraph (1) of article 47, or after the seller has declared that he will not perform his obligations within such an additional period; or

(iii) After the expiration of any additional period of time indicated by the seller in accordance with paragraph (2) of article 48, or after the buyer has declared that he will not accept performance.

OVERVIEW

1. Article 49 is one of the most important CISG provisions. It specifies the conditions under which the buyer is entitled to declare the contract avoided and can, by unilateral act, terminate the contractual relationship. Avoidance under article 49 is available in two situations: 1) if the seller's failure to perform its contractual obligations amounts to a fundamental breach of contract as defined in article 25 (article 49 (1) (a)); or 2) where the goods have not been delivered, if the seller fails to deliver them within an additional period of time fixed in accordance with article 47 (article 49 (1) (b)).

2. Avoidance of the contract is a remedy of last resort (*ultima ratio*) that is available when the buyer can no longer be expected to continue the contract.¹ A contract is avoided only when the buyer provides notice of avoidance (article 26). In cases of non-delivery, the buyer is entitled to avoid the contract at any time after all prerequisites for avoidance have been met. If the seller has delivered the goods, however, the buyer loses the right to avoid the contract if the buyer does not exercise it within the reasonable time periods specified in article 49 (2). The buyer may also lose its right of avoidance if a return of the goods in their original condition is no longer possible (see article 82 and the exceptions stated there).²

3. In many circumstances, avoidance, along with the rights that accompany it (see the next paragraph), is only one of the remedies available to the buyer; other potential remedies include the right to request performance (article 46), to reduce

the price (article 50), or to claim damages as appropriate where the contract is not avoided. If different remedies are available to the buyer, the buyer is free to choose among them.³

4. Rightful avoidance of the contract plays a role not only as a remedy in itself, but also with respect to other provisions. It is a prerequisite for the assessment of damages under articles 75 and 76,⁴ as well as for the right to request restitution of performance that has already been rendered under the contract (article 81 (2)).

AVOIDANCE IN GENERAL

5. The buyer must declare the contract avoided. There is no automatic termination of contract.⁵ The declaration must be by means of a notice (article 26). No specific form is prescribed for that notice,⁶ although form requirements may be relevant if the reservation under articles 12 and 96 applies. A notification by facsimile has been held to suffice;⁷ it is not necessary to institute legal proceedings to make the declaration.⁸ The notice must clearly express that the buyer now treats the contract as at an end.⁹ A mere announcement of future termination, a statement urging delivery, or merely returning the goods without comment does not suffice.¹⁰ A communication that asked the seller to cease deliveries until certain price issues were solved was also held insufficient.¹¹ Commencing a law suit claiming avoidance of contract has been treated as notice of avoidance.¹² The same has been found if the buyer refuses the goods or requests the repayment of the price¹³ or cancels the order.¹⁴

6. In a case where the seller seriously and finally refused performance of the contract and it was clear that the buyer did not insist on performance, a court has regarded the buyer's express declaration of avoidance as dispensable.¹⁵

7. Because the declaration of avoidance must be unequivocal it has been held that it cannot be made under a condition.¹⁶ However, a binding declaration of future avoidance should the seller fail to perform within an additional period of time was held perfectly valid.¹⁷

8. Where a buyer wishes to avoid because the seller has delivered goods that are non-conforming or subject to third party rights, not only must the seller's breach constitute a fundamental breach of contract but also the buyer must have given notice of the lack of conformity or of the third-party claim in accordance with articles 39 and 43 (1) (unless such notice was excused under articles 40 or 43 (2)). The buyer loses the right to avoid the contract if he fails to comply with the notice requirement.¹⁸

9. A tribunal held that the buyer can revoke its declaration of avoidance (which normally brings the contract to an end) if the seller has unjustifiably refused the avoidance.¹⁹ In a similar vein, another court held that even after a declaration of avoidance the contract still existed where the buyer later accepted the goods and resold them.²⁰

AVOIDANCE FOR FUNDAMENTAL BREACH (ARTICLE 49 (1) (a))

10. Under article 49 (1) (a) any fundamental breach as defined in article 25 justifies the avoidance of the contract. Thus in order for the buyer to have proper grounds to avoid the contract under article 49 (1) (a), the seller must have failed to perform an obligation (i.e., have breached), and the seller's non-performance must substantially deprive the buyer of what he was objectively entitled to expect under the contract. The consequences of the seller's non-performance must be determined in light of all of the circumstances of the case. Some courts omit nevertheless to verify within the context of the avoidance of the contract whether the breach is fundamental.²¹

11. A fundamental breach requires, first, that the seller has violated a duty it was obliged to perform either under the contract, according to trade usages or practices established between the parties, or under the Convention. It is, however, no breach where the seller rightfully withholds delivery because the buyer did not make the agreed prepayment²² or itself declared the contract avoided without being entitled thereto.²³ The seller's non-performance of an agreed-upon duty beyond the core duty of delivering conforming goods (see article 30) can also suffice—for instance, the violation of duties under an exclusive sales contract.²⁴ Breach of an additionally-agreed duty entitles the buyer to avoid the contract if the breach is fundamental, i.e. if it deprives the buyer of the main benefit of the contract. In order to be "fundamental," the breach must frustrate or essentially deprive the buyer of its justified contract expectations; what expectations are justified depends on the specific contract and the risk allocation envisaged by the contract provisions, on usages and established practices between the parties (where they exist),

and on the additional provisions of the Convention. For instance, buyers are not normally justified in expecting that delivered goods will comply with regulations and official standards in the buyer's country.²⁵ Unless otherwise agreed, it is generally the standards in the seller's country that determine whether goods are fit for their ordinary purpose (article 35 (2) (a)).²⁶ Therefore, e.g., the delivery of mussels with a cadmium level exceeding standards in the buyer's country was not regarded as a breach, let alone a fundamental breach, since the buyer could not reasonably have expected the seller to meet those standards (which were not shown to apply in the country of the seller) and since the consumption of the mussels in small amounts did not endanger a consumer's health.²⁷ There are, however, exceptions where it has been stated that the standards or provisions of the buyer's country are impliedly applicable—namely, where the same standards or provisions exist in the seller's country as well, where the buyer informed the seller about such standards or provisions relying on the seller's expert knowledge (see also article 35 (2) (b)), or the seller had knowledge of those standards or provisions due to special circumstances.²⁸

12. A fundamental breach occurs only if the party in breach could reasonably foresee the substantial deprivation of expectations resulting from the breach (article 25). Even if the seller did not in fact foresee that the breach would deprive the buyer of most or all of the benefit of the contract, the breach remains fundamental if a reasonable person in the same conditions would have foreseen such a result. Article 25 does not state the time as of which the foreseeability of the consequences of the breach should be determined. One decision has determined that the time of the conclusion of the contract is the relevant time.²⁹

SPECIFIC INSTANCES OF FUNDAMENTAL BREACH

13. Guidelines have developed in case law that may help, to some extent, in determining whether or not a breach of contract qualifies as fundamental.³⁰ It has been found on various occasions that final non-delivery by the seller constitutes a fundamental breach of contract unless the seller has a justifying reason to withhold its performance.³¹ However, if only a minor part of the contract is left unperformed—e.g., one of several instalments is not supplied—the breach is not fundamental unless the performed part is, absent the missing performance, of no use to the buyer.³² On the other hand, the serious, definitive and unjustified refusal of the seller to fulfil its contractual obligations amounts to a fundamental breach.³³ It has been also held that a complete and final failure to deliver the first instalment in an instalment sale gives the buyer reason to believe that further instalments will not be delivered, and that therefore a fundamental breach of contract was to be expected.³⁴

14. As a rule, late performance does not by itself constitute a fundamental breach of contract.³⁵ Only when the time for performance is of essential importance—either because that is so stipulated between the parties³⁶ or because timely performance is critical in the circumstances (e.g., seasonal goods)³⁷—will delay amount to a fundamental breach. In a case where the parties had agreed on the "fastest possible" delivery, a delay after the buyer had already prepaid a certain sum has been regarded as a fundamental breach.³⁸

15. A fundamental breach has also been found where the length of a delay in performance approached, in its effect, non-performance—for instance where the agreed delivery date was one week and the seller had delivered only one third of the goods after two months.³⁹ Even if a delay in delivery is not shown to be a fundamental breach, article 47 of the Convention allows the buyer to fix an additional reasonable period of time for delivery beyond the contractual due date, and if the seller fails to deliver by the end of the additional period the buyer may declare the contract avoided under article 49 (1) (b).⁴⁰ A seller's failure to deliver within an additional period set pursuant to article 47, therefore, is the equivalent of a fundamental breach of contract.

16. The most challenging issues in determining whether a breach is fundamental arise with respect to the delivery of defective goods. Court decisions on this point have concluded that a non-conformity relating to quality remains a mere non-fundamental breach of contract as long as the buyer, without unreasonable inconvenience, can use the goods⁴¹ or resell them, even if the resale requires a rebate.⁴² Thus, e.g., the delivery of frozen meat with an excessive fat and water content—and which, therefore, was worth 25.5 per cent less than meat of the contracted-for quality, according to expert opinion—was not regarded as a fundamental breach of contract since the buyer could resell the meat at a lower price or could otherwise make use of it.⁴³ On the other hand, if the non-conforming goods cannot be used or resold using reasonable efforts, the delivery constitutes a fundamental breach and entitles the buyer to declare the contract avoided.⁴⁴ It has been held that a buyer who normally does not deal with goods of inferior quality is not obliged to accept them, but may avoid the contract.⁴⁵ The buyer was also permitted to avoid the contract where the goods suffered from a serious defect that could not be repaired, even though they were still useable to some extent (e.g. flowers which should bloom the whole summer but did so only for part of the season).⁴⁶ A fundamental breach has also been found, without reference to whether resale or alternative use was possible for the buyer, when the goods had major defects and the buyer required the goods for manufacturing its own products.⁴⁷ The same result was reached where the non-conformity resulted from the seller adding substances to the goods, the addition of which was illegal in the country of both the seller and the buyer.⁴⁸ The rules governing the delivery of non-conforming goods apply equally if the seller delivers the wrong goods (i.e., an *aliud*).⁴⁹

17. Special problems arise when the goods are defective, even seriously defective, but repairable. Some courts have held that a lack of conformity that can easily be repaired does not constitute a fundamental breach.⁵⁰ If the seller offers and effects speedy repair or replacement without inconvenience to the buyer, several decisions have denied a fundamental breach.⁵¹ This is consistent with the seller's right to cure under article 48 of the Convention. If repair is delayed or causes the buyer unreasonable inconvenience, however, a breach that would otherwise qualify as fundamental remains fundamental. Furthermore, a fundamental breach cannot be denied merely because the buyer did not first request the seller to cure the defective performance.⁵²

18. Where goods for human consumption are defective so that they are dangerous when consumed, the courts regularly

allow avoidance even if the goods could easily be replaced or if the seller immediately tenders conforming goods.⁵³ It was also held to constitute a fundamental breach where the seller delivered genetically modified soya contrary to a contractual guarantee.⁵⁴

19. Defects in documents relating to the goods constitute a fundamental breach if they fundamentally impair the buyer's ability to resell or otherwise deal in the goods.⁵⁵ If the buyer itself can easily cure the defects in the document, e.g. by requesting new documents, however, the breach will not be considered fundamental.⁵⁶ The mere delayed delivery of the required documents is generally no fundamental breach even if the documents are delivered after the expiry of a letter of credit under which they should be presented unless the parties have made time of the essence.⁵⁷

20. Violation of contractual obligations other than the aforementioned ones can also amount to a fundamental breach. Such a breach is fundamental if it deprives the buyer of the main benefit of the contract and that result could reasonably have been foreseen by the seller. Thus a court has held that the delivery of false certificates of origin did not constitute a fundamental breach if the goods were nevertheless merchantable and if the buyer itself could easily get the correct certificates.⁵⁸ Likewise, the unjustified denial of contract rights of the other party—e.g. denying the validity of a retention of title clause and of the seller's right to possession of the goods,⁵⁹ or the unjustified denial of a valid contract after having taken possession of the goods⁶⁰—can amount to a fundamental breach of contract. Avoidance has also been permitted when resale restrictions were violated in a substantial fashion.⁶¹ A tribunal found a fundamental breach in the seller's unilateral change of the means of transport (sea transport instead of agreed air transport, which delayed delivery of medical equipment by 12 days) and delayed delivery of documents (which impaired customs clearance).⁶²

AVOIDANCE FOR NON-DELIVERY DURING ADDITIONAL PERIOD OF TIME (ARTICLE 49 (1) (b))

21. Article 49 (1) (b) states a second ground for avoidance of contract, applicable only in cases of non-delivery: the buyer can avoid if the seller does not deliver within the additional period of time for delivery that the buyer has fixed under article 47 (1).⁶³ The buyer can also avoid the contract if the seller declares that it will not deliver within the additional period so fixed. In the latter case, a court held, the buyer can avoid the contract immediately after the seller's final refusal to perform even if the additional period (*Nachfrist*) has not yet lapsed.⁶⁴ It was likewise held that avoidance is available where the seller makes delivery dependant on a further consideration to which it is not entitled.⁶⁵ If the seller categorically denies its obligation to perform, the buyer is entitled to avoidance without any further *Nachfrist*.⁶⁶

22. Where a delay in delivery does not constitute a fundamental breach (see paragraphs 14-15 above), the buyer must fix a (reasonable) additional period of time in order to have the right to avoid. Only after the additional time has lapsed

can the buyer avoid the contract.⁶⁷ No fixing of an additional period of time, however, is necessary where the time for delivery is of the essence of the contract.⁶⁸

PERIOD OF TIME FOR DECLARATION OF AVOIDANCE WHEN GOODS HAVE BEEN DELIVERED (ARTICLE 49 (2))

23. Generally the buyer is not required to declare the contract avoided within a certain period of time; he can do so at any time if a ground for avoidance exists.⁶⁹ This principle is, however, subject to a limitation under article 49 (2) if the goods have been delivered. In such a case, the buyer must declare avoidance within a reasonable time. The moment as of which the reasonable time begins to run differs depending on whether the breach involves late delivery or a different kind of breach. In case of late delivery the period starts when the buyer becomes aware that delivery was made (article 49 (2) (a)). In case of other breaches the reasonable period of time for declaring the contract avoided starts running when the buyer becomes aware or ought to have been aware of the breach.⁷⁰ To be aware, it was held, means that the buyer knows the fact of the breach and its scope, so that the buyer can assess whether or not the breach is fundamental.⁷¹ If, however, the buyer has fixed an additional period for delivery in accordance with article 47 (1), or if the seller has set a period for cure in accordance with article 48 (2), the buyer's reasonable time for avoidance begins to run from the expiration of the fixed period. Five months after the buyer was informed of the breach has been found not to constitute a reasonable period for declaring avoidance under article 49 (2) (b);⁷² an avoidance declaration made eight weeks after the buyer became aware of the breach has been held too late;⁷³ and avoidance eight months after the latest time that the buyer knew or ought to have known of the seller's alleged breach has been deemed untimely.⁷⁴ On the other hand, a month, five weeks, and one to two months has been regarded as a reasonable period of time to declare the contract avoided under article 49 (2) (b).⁷⁵ A declaration of avoidance made after several extensions of time for performance had been granted was found to be timely,⁷⁶ as was a declaration given

within 48 hours after late delivery of an installment.⁷⁷ A declaration of avoidance made three weeks after notice of lack of conformity under article 39, furthermore, was considered timely.⁷⁸ In one case the court found that the buyer had not exceeded a reasonable period for the submission of the claim of avoidance of the contract, since it had sent its reply to the seller six days after receiving a letter from the seller, which was the point at which the fundamental breach of the contract had taken place.⁷⁹ In another case, surprisingly, a court has accepted that a period of two years was reasonable, which recalls oddly the time limit for reporting a lack of conformity (article 39 (2) of the CISG).⁸⁰

24. Even if avoidance is time-barred under article 49 (2), a court has held, the buyer may request price reduction under article 50.⁸¹ This reduction may be to zero where the goods have no value at all.⁸² In that situation, price reduction could have almost the same effect as avoidance, except that it does not oblige the buyer to return the goods.⁸³

BURDEN OF PROOF

25. It has been observed that, to justify avoidance of contract, the burden is on the buyer to prove that the seller's breach of contract was fundamental and substantially deprived the buyer of what it was entitled to expect under the contract.⁸⁴ Furthermore, the buyer must prove that it declared avoidance and dispatched the required notice.⁸⁵ However, where the seller argues that the fundamental breach was not foreseeable, it is generally his burden to prove this fact. If then the buyer counter-argues that the seller should have known specific requirements in the buyer's production procedure, the buyer must at least substantiate the circumstances which allow this inference.⁸⁶

OTHER PROCEDURAL ASPECTS

26. Under U.S. procedural law, a dispute between the parties over the fundamentality of a breach has prevented the court from rendering a summary judgment.⁸⁷

Notes

¹ See, for example, CLOUT case No. 171 [Bundesgerichtshof, Germany, 3 April 1996] (see full text of the decision); CLOUT case No. 428 [Oberster Gerichtshof, Austria, 7 September 2000], *Internationales Handelsrecht* 2001, 42; see also Tribunale di Busto Arsizio, Italy, 13 December 2001, published in *Rivista di Diritto Internazionale Privato e Processuale*, 2003, 150-155, also available on Unilex; CLOUT case No. 1399 [Oberlandesgericht Hamburg, Germany, 25 January 2008], *Internationales Handelsrecht* 2008, 98. See also Cámara Nacional de Apelaciones en lo Comercial de Buenos Aires (Sala A), Argentina, 31 May 2007, CISG-online No. 1517 (principle of performance and conservation of the contract).

² See CLOUT case No. 594 [Oberlandesgericht Karlsruhe, Germany, 19 December 2002]. See also the Digest for article 82.

³ Oberlandesgericht Koblenz, Germany, 12 December 2006, *Internationales Handelsrecht* 2007, 36.

⁴ See, for example, CLOUT case No. 470 [Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, Russian Federation, 22 October 1998].

⁵ CLOUT case No. 938 [Kantonsgericht des Kantons Zug, Switzerland, 30 August 2007].

⁶ Ibid.

⁷ CLOUT case No. 1029 [Cour d'appel de Rennes, France, 27 May 2008].

⁸ CLOUT case 1039 [Audiencia Provincial de Navarra, Sección 3, Spain, 27 December 2007].

⁹ CLOUT case No. 938 [Kantonsgericht des Kantons Zug, Switzerland, 30 August 2007].

¹⁰ CLOUT case No. 6 [Landgericht Frankfurt a.M., Germany, 16 September 1991]; CLOUT case No. 282 [Oberlandesgericht Koblenz, Germany, 31 January 1997].

¹¹ CLOUT case No. 470 [Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, Russian Federation, 22 October 1998].

¹² See CLOUT case No. 481 [Cour d'appel Paris, France, 14 June 2001]; CLOUT case No. 535 [Oberster Gerichtshof, Austria, 5 July 2001].

¹³ Kantonsgericht des Kantons Zug, Switzerland, 14 December 2009, CISG-online No. 2026; CLOUT case No. 535 [Oberster Gerichtshof, Austria, 5 July 2001].

¹⁴ CLOUT case No. 1029 [Cour d'appel de Rennes, France, 27 May 2008].

¹⁵ CLOUT case No. 595 [Oberlandesgericht München, Germany, 15 September 2004].

¹⁶ CLOUT case No. 892 [Kantonsgericht Schaffhausen, Switzerland, 27 January 2004].

¹⁷ *Ibid.*

¹⁸ See, for example, CLOUT case No. 196 [Handelsgericht des Kantons Zürich, Switzerland, 26 April 1995]. A buyer who has "a reasonable excuse" for failing to give the notice required by articles 39 (1) or 43 (1) retains certain remedies, but not the right to avoid the contract. See the Digest for article 44, paragraph 1.

¹⁹ CLOUT case No. 999 [Ad hoc Arbitral Tribunal, Denmark, 10 November 2000].

²⁰ CLOUT case No. 935 [Handelsgericht des Kantons Zürich, Switzerland, 215 June 2007].

²¹ CLOUT case No. 1029 [Cour d'appel de Rennes, France, 27 May 2008]; CLOUT case No. 1503 [Cour d'appel de Lyon, France, 27 March 2014].

²² See CLOUT case No. 808 [China International Economic and Trade Arbitration Commission, People's Republic of China, 4 June 1999]; CLOUT case No. 861 [China International Economic and Trade Arbitration Commission, People's Republic of China, 29 September 1997].

²³ CLOUT case No. 877 [Bundesgericht, Switzerland, 22 December 2000].

²⁴ See, for example, CLOUT case No. 2 [Oberlandesgericht Frankfurt a.M., Germany, 17 September 1991]; CLOUT case No. 282 [Oberlandesgericht Koblenz, Germany, 31 January 1997]; CLOUT case No. 217 [Handelsgericht des Kantons Aargau, Switzerland, 26 September 1997]; CLOUT case No. 154 [Cour d'appel, Grenoble, France, 22 February 1995] (*failure to disclose destination of goods sold*).

²⁵ CLOUT case No. 123 [Bundesgerichtshof, Germany, 8 March 1995]. See also CLOUT case No. 418 [U.S. District Court, Eastern District of Louisiana, United States, 17 May 1999] (citing CLOUT case No. 123); CLOUT case No. 426 [Oberster Gerichtshof, Austria, 13 April 2000]; CLOUT case No. 606 [Audiencia Provincial de Granada, Spain, 2 March 2000]; CLOUT case No. 752 [Oberster Gerichtshof, Austria, 25 January 2006].

²⁶ See the decisions cited in the preceding footnote.

²⁷ CLOUT case No. 123 [Bundesgerichtshof, Germany, 8 March 1995].

²⁸ See CLOUT case No. 123 [Bundesgerichtshof, Germany, 8 March 1995]. See also CLOUT case No. 418 [U.S. District Court, Eastern District of Louisiana, United States, 17 May 1999] (citing CLOUT case No. 123 and applying one of the exceptions formulated there).

²⁹ CLOUT case No. 275 [Oberlandesgericht Düsseldorf, Germany, 24 April 1997].

³⁰ See also the Digest for article 25.

³¹ CLOUT case No. 90 [Pretura circondariale di Parma, Italy, 24 November 1989] (partial and very delayed delivery); CLOUT case No. 136 [Oberlandesgericht Celle, Germany, 24 May 1995]; CLOUT case No. 808 [China International Economic and Trade Arbitration Commission, People's Republic of China, 4 June 1999] (buyer did not open valid letter of credit before delivery date); CLOUT case No. 796 [Juzgado de Primera Instancia, n° 3 de Badalona, Spain, 25 May 2006]; CLOUT case No. 936 [Bundesgericht, Switzerland, 17 July 2007] (refusal of delivery alleging that buyer lacked creditworthiness, but without sufficient reason).

³² CLOUT case No. 275 [Oberlandesgericht Düsseldorf, Germany, 24 April, 1997].

³³ See CLOUT case No. 136 [Oberlandesgericht Celle, Germany, 24 May 1995] (see full text of the decision) (seller gave notice that he had sold the goods to another buyer). Cf. Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce, Russian Federation, 4 April 1997 (Arbitral award No. 387/1995), Unilex (buyer's final refusal to pay the price).

³⁴ CLOUT case No. 214 [Handelsgericht des Kantons Zürich, Switzerland, 5 February 1997].

³⁵ Landgericht Oldenburg, Germany, 23 March 1996, Unilex (one day delay in dispatch of seasonal goods not a fundamental breach); Corte di Appello di Milano, Italy, 20 March 1998, Unilex (late delivery); CLOUT case No. 275 [Oberlandesgericht Düsseldorf, Germany, 24 April 1997] (late delivery).

³⁶ CLOUT case No. 277 [Oberlandesgericht Hamburg, Germany, 28 February 1997] (on the facts of the particular case late delivery under a CIF sale was found to be a fundamental breach of contract); CLOUT case No. 935 [Handelsgericht des Kantons Zug, Switzerland, 25 June 2007], *Internationales Handelsrecht* 2008, 31.

³⁷ Corte di Appello di Milano, Italy, 20 March 1998, Unilex (buyer ordered seasonal knitted goods and pointed out the essential importance of delivery at the contract date, although it did so only after conclusion of the contract); Arbitration Court of the International Chamber of Commerce, France, January 1997 (Arbitral award No. 8786), *ICC International Court of Arbitration Bulletin* 2000, 70.

³⁸ Oberlandesgericht Düsseldorf, Germany, 21 April 2004, *Internationales Handelsrecht* 2005, 24.

³⁹ CLOUT case No. 90 [Pretura circondariale di Parma, Italy, 24 November 1989].

⁴⁰ See, for example, CLOUT case No. 82 [Oberlandesgericht Düsseldorf, Germany, 10 February 1994]. See also paragraph 15 *infra*.

⁴¹ See, for example, CLOUT case No. 1399 [Oberlandesgericht Hamburg, Germany, 25 January 2008], *Internationales Handelsrecht* 2008, 98.

⁴² CLOUT case No. 171 [Bundesgerichtshof, Germany, 3 April 1996]; CLOUT case No. 248 [Bundesgericht, Switzerland, 28 October 1998].

⁴³ CLOUT case No. 248 [Bundesgericht, Switzerland, 28 October 1998].

⁴⁴ Cour d'appel de Paris, France, 25 January 2012, available in French on the Internet at www.cisg-france.org and, on appeal: CLOUT case No. 1505 [Cour de cassation, France, 17 December 2013] (erroneous labelling of two boxes of meat having revealed uncertainties and inconsistencies regarding production and expiry dates); 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 cuts or cracks in the leather); Landgericht Landshut, Germany, 5 April 1995, Unilex (T-shirts which shrink by two sizes after the first washing); CLOUT case No. 892 [Kantonsgericht Schaffhausen, Switzerland, 27 January 2004] (a variety of particular defects that, together, made model locomotives unresaleable).

⁴⁵ Bundesgericht, Switzerland, 18 May 2009, *Internationales Handelsrecht* 2010, 27.

⁴⁶ CLOUT case No. 107 [Oberlandesgericht Innsbruck, Austria, 1 July 1994]; see also Tribunale di Busto Arsizio, Italy, 13 December 2001, available in *Rivista di Diritto Internazionale Privato e Processuale*, 2003, 150–155, also available in Unilex (declaration of avoidance before waiting for result of seller's attempt to cure would be contrary to good faith).

⁴⁷ 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, where buyer needed the compressors for manufacturing its 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 manufacturing processes of the buyer's customer) See also Tribunale di Busto Arsizio, Italy, 13 December 2001, available in *Rivista di Diritto Internazionale Privato e Processuale*, 2003, 150–155, also available in Unilex (delivery of a machine totally unfit for the particular purpose that was made known to the seller, and which was incapable of reaching the promised production level, represented a "serious and fundamental" breach of the contract, since the promised production level had been an essential condition for the conclusion of the contract; the breach therefore justified avoidance of the contract).

⁴⁸ CLOUT case No. 150 [Cour de cassation, France, 23 January 1996] (artificially sugared wine, forbidden under EU-law and national laws); CLOUT case No. 170 [Landgericht Trier, Germany, 12 October 1995] (artificially sugared wine).

⁴⁹ CLOUT case No. 422 [Oberster Gerichtshof, Austria, 29 June 1999], Unilex. See CLOUT case No. 597 [Oberlandesgericht Celle, Germany, 10 March 2004] (see full text of the decision).

⁵⁰ CLOUT case No. 196 [Handelsgericht des Kantons Zürich, Switzerland, 26 April 1995]; CLOUT case No. 937 [Tribunal cantonal du Jura, Switzerland, 26 July 2007] (no fundamental breach where easy and cheap repair can remedy the defect).

⁵¹ CLOUT case No. 152 [Cour d'appel, Grenoble, France, 26 April 1995]; CLOUT case No. 282 [Oberlandesgericht Koblenz, Germany, 31 January 1997].

⁵² See the Digest for article 48.

⁵³ Hof 's-Gravenhage, the Netherlands, 23 April 2003, *Nederlands Jurisprudentie* 2003 No. 713.

⁵⁴ CLOUT case NO. 887 [Appellationsgericht des Kantons Basel-Stadt, Switzerland, 22 August 2003].

⁵⁵ CLOUT case No. 171 [Bundesgerichtshof, Germany, 3 April 1996].

⁵⁶ Ibid.

⁵⁷ Bundesgericht, Switzerland, 2 April 2015, www.servat.unibe.ch.

⁵⁸ Ibid.

⁵⁹ CLOUT case No. 308 [Federal Court of Australia, Australia, 28 April 1995].

⁶⁰ CLOUT case No. 313 [Cour d'appel, Grenoble, France, 21 October 1999] (seller retained pattern samples) (see full text of the decision).

⁶¹ CLOUT case No. 2 [Oberlandesgericht Frankfurt a.M., Germany, 17 September 1991]; CLOUT case No. 154 [Cour d'appel, Grenoble, France, 22 February 1995]; CLOUT case No. 282 [Oberlandesgericht Koblenz, Germany, 31 January 1997]; CLOUT case No. 217 [Handelsgericht des Kantons Aargau, Switzerland, 26 September 1997].

⁶² Tribunal of International Commercial Arbitration of the Ukrainian Chamber of Commerce and Trade, Ukraine, 5 July 2005, English translation available on the Internet at www.cisg.law.pace.edu.

⁶³ See, for example, CLOUT case No. 892 [Kantonsgericht Schaffhausen, Switzerland, 27 January 2004]. For the requirements for fixing an additional period of time see the Digest for article 47.

⁶⁴ See also Kantonsgericht des Kantons Zug, Switzerland, 14 December 2009, CISG-online No. 2026.

⁶⁵ CLOUT case No. 933 [Bundesgericht, Switzerland, 20 December 2006].

⁶⁶ Ibid.

⁶⁷ See, for example, CLOUT case No. 990 [China International Economic and Trade Arbitration Commission (CIETAC), People's Republic of China, 19 December 1997].

⁶⁸ CLOUT case No. 935 [Handelsgericht des Kantons Zug, Switzerland, 25 June 2007], *Internationales Handelsrecht* 2008, 31.

⁶⁹ But see also CLOUT case No. 133 [Oberlandesgericht München, Germany, 8 February 1995], where the court denied the buyer's right to declare the contract avoided after two and a half years even though the goods had not been delivered. The court based its decision on the principle of good faith.

⁷⁰ See Bundesgericht, Switzerland, 18 May 2009, *Internationales Handelsrecht* 2010, 27 (if attempts at repair are finally unsuccessful, the period starts when the buyer knew or should have known that fact). One court grappled with the question of when the reasonable time under article 49 (2) began to run where the buyer had received delivery of allegedly non-conforming goods; but it was unclear whether the lack of conformity arose during the seller's production of the goods as a result of transporting the goods (the buyer bore the risk of damage occurring during transportation), and the buyer arranged to have experts examine the goods to determine the source of the problem. The court

suggested that the reasonable time might begin to run as soon as the buyer discovered the goods were defective, even before the experts had an opportunity to determine the cause: the court noted that only examination by a judicial expert would definitively establish the source of the non-conformity, and thus the period for declaring avoidance could not depend on the buyer being certain that the seller was responsible. The court did not rely solely on this view, however, as it noted that the buyer's avoidance was too late even if the reasonable time commenced when the last report by the experts was issued. See CLOUT case No. 481 [Cour d'appel Paris, France, 14 June 2001].

⁷¹ Bundesgericht, Switzerland, 18 May 2009, *Internationales Handelsrecht* 2010, 27.

⁷² CLOUT case No. 124 [Bundesgerichtshof, Germany, 15 February 1995]; see also CLOUT case No. 83 [Oberlandesgericht München, Germany, 2 March 1994] (four months).

⁷³ CLOUT case No. 282 [Oberlandesgericht Koblenz, Germany, 31 January 1997].

⁷⁴ CLOUT case No. 481 [Cour d'appel Paris, France, 14 June 2001]. See also CLOUT case No. 470 [Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, Russian Federation, 22 October 1998] (five or six months; too late); CLOUT case No. 944 [Hof 's-Hertogenbosch, the Netherlands, 11 October 2005].

⁷⁵ CLOUT case No. 905 [Tribunal cantonal du canton de Valais, Switzerland, 21 February 2005] (one month); CLOUT case No. 165 [Oberlandesgericht Oldenburg, Germany, 1 February 1995] (five weeks); Bundesgericht, Switzerland, 18 May 2009, *Internationales Handelsrecht* 2010, 27 (one to two months).

⁷⁶ CLOUT case No. 225 [Cour d'appel, Versailles, France, 29 January 1998].

⁷⁷ CLOUT case No. 246 [Audiencia Provincial de Barcelona, Spain, 3 November 1997] (delayed).

⁷⁸ CLOUT case No. 348 [Oberlandesgericht Hamburg, Germany, 26 November 1999] (see full text of the decision); see also Tribunale di Busto Arsizio, Italy, 13 December 2001, published in *Rivista di Diritto Internazionale Privato e Processuale*, 2003, 150-155, also available on Unilex (a "reasonable time" for article 49 purposes differs from a "reasonable time" for article 39 purposes both in starting point and duration; the time for notice of non-conformity under article 39 begins to run as soon as the lack of conformity is discovered (or ought to have been discovered), but avoidance can be declared only after it appears that the non-conformity amounts to a fundamental breach that cannot be otherwise remedied).

⁷⁹ CLOUT case No. 1110 [Highest Arbitrazh Court, no. VAS-21560/2004-27-724, 2 April 2007].

⁸⁰ CLOUT case No. 1504 [Cour d'appel de Douai, France, 6 February 2014], on referral of CLOUT case No. 1512 [Cour de cassation, France, 8 November 2011].

⁸¹ CLOUT case No. 747 [Oberster Gerichtshof, Austria, 23 May 2005].

⁸² Supreme Court of Western Australia, Australia, 17 January 2003 (*Ginza Pte Ltd v. Vista Corporation Pty Ltd*), available on the Internet at www.cisg.law.pace.edu; CLOUT case No. 747 [Oberster Gerichtshof, Austria, 23 May 2005]; CLOUT case No. 774 [Bundesgerichtshof, Germany, 2 March 2005]; CLOUT case No. 938 [Kantonsgericht des Kantons Zug, Switzerland, 30 August 2007].

⁸³ CLOUT case No. 747 [Oberster Gerichtshof, Austria, 23 May 2005].

⁸⁴ CLOUT case No. 1506 [Cour d'appel de Nancy, France, 6 November 2013]; CLOUT case No. 171 [Bundesgerichtshof, Germany, 3 April 1996] (see full text of the decision).

⁸⁵ CLOUT case No. 1506 [Cour d'appel de Nancy, France, 6 November 2013]; CLOUT case No. 938 [Kantonsgericht des Kantons Zug, Switzerland, 20 August 2007].

⁸⁶ Bundesgericht, Switzerland, 2 April 2015, www.servat.unibe.ch (late delivery of documents, no fundamental breach).

⁸⁷ U.S. District Court, Southern District of Ohio, United States, 26 March 2009 (*Miami Valley Paper, LLC v. Lebbing Engineering & Consulting GmbH*), available on the Internet at www.cisg.law.pace.edu, also in CISG-online No. 1880.