



**United Nations Commission
on International Trade Law**

**UNCITRAL Digest of case law on the United Nations
Convention on the International Sale of Goods***

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.

* The present digest was prepared using the full text of the decisions cited in the Case Law on UNCITRAL Texts (CLOUT) abstracts and other citations listed in the footnotes. The abstracts are intended to serve only as summaries of the underlying decisions and may not reflect all the points made in the digest. Readers are advised to consult the full texts of the listed court and arbitral decisions rather than relying solely on the CLOUT abstracts.

Meaning and purpose of the provision

1. Article 46 gives the buyer a general right to require the seller to perform its contractual obligations in kind. While paragraphs 2 and 3 deal with replacement and repair of non-conforming goods in the sense of article 35 and articulate some restrictions for 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 does not grant such remedy under its own national law, it will not be bound to grant it under the Convention.¹ Therefore the courts of those jurisdictions that do not allow for specific performance may refuse to grant specific performance of the obligation in dispute and may only award damages.
3. The fact that the right to performance is ranking first in the list of remedies mentioned in articles 46–52 reflects that under the Convention the contractual bond should be preserved as far as possible while the termination of the contract should be available as a last resort (*ultima ratio*)² only if the continuation of the contract would be no longer tolerable because of the severe breach of contract the seller has committed (see article 49). The same concept applies when the buyer has breached the contract (articles 62 and 64).
4. Despite its importance, the right to require performance has not been the subject of much case law. In practice other remedies—in particular the right to claim damages—are preferred.

General requirements

5. The right to require performance presupposes that the obligation in dispute exists and has thus far not been fulfilled.
6. Furthermore the buyer must “require” performance. This means a clear demand that the disputed obligation should be fulfilled.³ Under the conditions of article 46 (2) and (3) notice of it 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.

¹ See Digest, article 28.

² See Oberster Gerichtshof, 7 September 2000, available on the Internet at http://www.cisg.at/8_2200v.htm.

³ 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.

The general right to require performance (article 46 (1))

7. Except in cases covered by article 46 (2) and (3), the buyer has a general right under article 46 (1) to ask for the seller's performance of any due obligation in kind. Thus the buyer is entitled to request that the goods be delivered, that the seller extends a stipulated bank guaranty or respects an exclusive sales obligation.⁴ The buyer could claim and—subject to the restrictions imposed by article 28—enforce these obligations with the assistance of the courts.

8. If performance in kind is impossible—e.g., a unique good has been sold and afterwards destroyed—then the buyer's right to require performance is also extinguished.

9. Article 46 (1) restricts the right to compel performance when the buyer has already resorted to a remedy inconsistent with performance. Such inconsistency exists between performance and avoidance, but also between performance and price reduction.⁵ However, the buyer can combine its request for performance and a claim for any remaining damage, e.g., caused by delayed performance.⁶ The buyer having once requested performance can still opt for a different remedy, e.g., 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 is the buyer for that period excluded from requesting other remedies except damages under article 47.

10. The general right to require performance need not be claimed within a certain period of time apart from the normal period of limitation according to the applicable national law⁷ or, as far as it applies, according to the United Nations Convention on the Limitation Period in the International Sale of Goods. This contrasts with the notice requirement in article 46 (2) and (3); but also under article 46 (1) a clear declaration that the buyer requests the performance of a contractual obligation is needed.⁸

Delivery of substitute goods (article 46 (2))

11. Article 46 (2) presupposes (a) that the seller has delivered non-conforming goods; (b) that the non-conformity constitutes a fundamental breach of contract; and (c) that the buyer has requested replacement within a reasonable time. Given these conditions the buyer is entitled to require delivery of substitute goods.

⁴ In these cases the buyers, however, resorted to other remedies, namely damages and as far as possible avoidance: compare, e.g., ICC Court of Arbitration, Switzerland, award No. 8786, *ICC International Court of Arbitration Bulletin* 2000, 70 (late delivery); CRCICA Arbitration Cairo, Egypt, 3 October 1995, Unilex (extension of bank guaranty); CLOUT case No. 2 [Oberlandesgericht Frankfurt a.M., Germany, 17 September 1991] (breach of exclusive sales agreement).

⁵ 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 para. 7.

⁶ *Id* at para. 4.

⁷ See for example CLOUT case No. 346 [Landgericht Mainz, Germany, 26 November 1998].

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 paras. 4–5.

12. The non-conformity of the goods has to be determined according to article 35 which includes the delivery of defective goods, of different goods (*aliud*), defects in packaging, and deficiencies in quantity.⁹

13. A fundamental breach with regard to non-conformity of the goods occurs when the delivery of the defective goods substantially deprives the buyer of what the buyer is entitled to expect under the contract (article 25). A fundamental breach under article 46 (2) has to be determined in the same way as under article 49 and in accordance with the general definition given in article 25. Leading court decisions on the point (although rendered in respect of article 49) have held that a non-conformity concerning quality remains a non-fundamental breach of contract as long as the buyer can—without unreasonable inconvenience—use the goods or resell them even with a rebate.¹⁰ Thus, e.g., the delivery of frozen meat which was too fat and too wet and therefore according to expert opinion worth 25.5 per cent less than meat of the contracted quality was considered not to constitute a fundamental breach of contract since the buyer had the opportunity to resell the meat at a lower price or to process it otherwise.¹¹ On the contrary, if the non-conforming goods cannot be used or resold with reasonable effort this constitutes a fundamental breach.¹² The same is true where the goods suffer from a serious defect—although they may still be used to some extent (e.g. flowers which should flourish the whole summer but did so only for a minor part of it)¹³ or where the goods have major defects and the buyer needs the goods for manufacture.¹⁴ The same solution has been reached where the non-conformity of the goods resulted from added substances the addition of which was illegal both in the country of the seller and the buyer.¹⁵

14. Special problems arise when the *goods are*—even seriously—*defective but repairable*. Several courts have found that easy reparability of defects excludes any fundamentality of the breach.¹⁶ At least when the seller offers and effects speedy repair without any inconvenience to the buyer courts will not find that a breach is fundamental.¹⁷ This is in line with seller's right to cure as provided for in article 48 of the Convention.

⁹ See Digest, article 35.

¹⁰ CLOUT case No. 171 [Bundesgerichtshof, Germany, 3 April 1996]; CLOUT case No. 248 [Schweizerisches Bundesgericht, Switzerland, 28 October 1998].

¹¹ CLOUT case No. 248 [Schweizerisches Bundesgericht, Switzerland, 28 October 1998].

¹² 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 fissures in leather); Landgericht Landshut, Germany, 5 April 1995, Unilex (T-shirts which shrink by two sizes after first washing).

¹³ CLOUT case No. 107 [Oberlandesgericht Innsbruck, Austria, 1 July 1994].

¹⁴ See CLOUT case No. 138 [Federal Court of Appeals for the Second Circuit, United States, 6 December 1993, 3 March 1995] (lower cooling capacity and higher power consumption than contracted of compressors delivered for the manufacture of 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 absolutely unfit for the foreseen kind of manufacture by the buyer's sub-buyer) (see full text of the decision).

¹⁵ In result 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] (also artificially sugared wine).

¹⁶ CLOUT case No. 196 [Handelsgericht des Kantons Zürich, Switzerland, 26 April 1995].

¹⁷ CLOUT case No. 152 [Cour d'appel, Grenoble, France, 26 April 1995]; CLOUT case No. 282

15. Article 46 (2) requires a notice within reasonable time. The request for substitute goods can be coupled with the notice of lack of conformity under article 39 for which then the time limits under that provision apply. It can, however, also be given within a reasonable time afterwards.

16. It has to be noted that the right to require delivery of substitute goods can in principle only be exercised if the buyer is able to return the delivered goods in substantially the condition in which he received them (article 82).

Repair (article 46 (3))

17. Article 46 (3) provides for a right to repair if the delivered goods do not conform to the contract in the sense of article 35. Moreover, repair must be reasonable in the light of all the circumstances. Finally, the buyer must give timely notice of its request for repair.¹⁸

18. It is necessary that the goods are repairable so that the defect can be cured by repair. A request for repair would, however, be unreasonable if, e.g., the buyer could easily repair the goods himself. But the seller remains liable for any costs of such repair.¹⁹

19. Repair is effectively executed when after repair the goods can be used as agreed.²⁰ If the repaired goods subsequently become defective the buyer must give notice of the defects.²¹ It has been held that as to this notice the period of time of article 39 applies.²² However, the request for repair can be notified within a reasonable time thereafter.²³ 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.²⁴

[Oberlandesgericht Koblenz, Germany, 31 January 1997].

¹⁸ As to this requirement see CLOUT case No. 225 [Cour d'appel, Versailles, France, 29 January 1998].

¹⁹ CLOUT case No. 125 [Oberlandesgericht Hamm, Germany, 9 June 1995] (see full text of the decision).

²⁰ CLOUT case No. 152 [Cour d'appel, Grenoble, France, 26 April 1995].

²¹ Landgericht Oldenburg, Germany, 9 November 1994, Unilex.

²² *Id.*

²³ CLOUT case No. 225 [Cour d'appel, Versailles, France, 29 January 1998] (see full text of the decision).

²⁴ *Id.*