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**United Nations Commission  
on International Trade Law****UNCITRAL Digest of case law on the United Nations  
Convention on the International Sale of Goods\****Article 48*

(1) Subject to article 49, the seller may, even after the date for delivery, remedy at his own expense any failure to perform his obligations, if he can do so without unreasonable delay and without causing the buyer unreasonable inconvenience or uncertainty of reimbursement by the seller of expenses advanced by the buyer. However, the buyer retains any right to claim damages as provided for in this Convention.

(2) If the seller requests the buyer to make known whether he will accept performance and the buyer does not comply with the request within a reasonable time, the seller may perform within the time indicated in his request. The buyer may not, during that period of time, resort to any remedy which is inconsistent with performance by the seller.

(3) A notice by the seller that he will perform within a specified period of time is assumed to include a request, under the preceding paragraph, that the buyer make known his decision.

(4) A request or notice by the seller under paragraph (2) or (3) of this article is not effective unless received by the buyer.

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\* 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 48 (1) gives the seller the so-called right to cure which allows the seller to cure any failure to perform its obligations under the contract or under the Convention even after the date for performance, provided that the exercise of that right does not cause the buyer unreasonable inconvenience.

## The right to remedy a failure of performance (article 48 (1))

2. Article 48 (1) permits the seller to cure any failure of performance of whatever contractual obligation. Article 48 (1) grants the seller the right to cure only “subject to article 49”. Avoidance of the contract therefore excludes the seller’s right to cure. Generally, it has been determined that it is for the buyer to decide whether or not the contract should be avoided. If a right to avoidance is established the buyer may exercise it without being restricted by the seller’s right to cure.<sup>1</sup> This solution is also supported by article 48 (2) according to which the seller must ask for the buyer’s consent for cure<sup>2</sup>. Therefore the buyer who is entitled to avoid the contract need not wait first for cure but may declare the contract avoided at once<sup>3</sup> (but see also the notice procedure under paragraphs. 2–4, *infra*). There are courts, however, that have adopted a different view, namely that the buyer must first allow the seller to cure any failure (even a fundamental one) and courts that have denied a fundamental breach where the buyer had not given the seller the opportunity to remedy the failure of performance.<sup>4</sup> It has to be noted, however, that a breach is rarely fundamental when the failure of performance could easily be remedied.<sup>5</sup> But this rule should not be misunderstood to mean that in each case the seller must first be offered an opportunity to cure.<sup>6</sup>

<sup>1</sup> See, e.g., CLOUT, case No. 90 [Pretura circondariale de Parma, Italy, 24 November 1989] (see full text of the decision); CLOUT case No. 2 [Oberlandesgericht Frankfurt a.M., Germany, 17 September 1991] (see full text of the decision); CLOUT case No. 165 [Oberlandesgericht Oldenburg, Germany, 1 February 1995]; CLOUT case No. 235 [Bundesgerichtshof, Germany, 25 June 1997]; CLOUT case No. 304 [Arbitration—International Chamber of Commerce No. 7531 1994].

<sup>2</sup> See also CLOUT case No. 304 [Arbitration—International Chamber of Commerce No. 7531 1994] (see full text of the decision).

<sup>3</sup> 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), 41: “5. If there has been a fundamental breach of contract, the buyer has an immediate right to declare the contract avoided. He need not give the seller any prior notice of his intention to declare the contract avoided or any opportunity to remedy the breach under [then] article 44 6. However, in some cases the fact that the seller is able and willing to remedy the non-conformity of the goods without inconvenience to the buyer may mean that there would be no fundamental breach unless the seller failed to remedy the non-conformity within an appropriate period of time.”

<sup>4</sup> See, e.g., CLOUT case No. 339 [Landgericht Regensburg, Germany, 24 September 1998].

<sup>5</sup> See for example ICC Court of Arbitration, France, award No. 7754, *ICC International Court of Arbitration Bulletin* 2000, 46.

<sup>6</sup> 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), 41, para. 6 (“in some cases”).

3. The right to cure is only granted under certain circumstances, namely when the failure to perform can be remedied without unreasonable delay, without unreasonable inconvenience to the buyer and without uncertainty that the seller will compensate any costs the buyer may have had to advance. It has been held that these conditions are satisfied when, e.g., defective motors can easily be adjusted in due time and at minimal costs.<sup>7</sup>

4. It has been concluded from articles 46 and 48 that the seller has to bear the costs which the buyer incurs when the seller remedies defects of the delivered goods.<sup>8</sup>

5. The willingness of the seller to cure a failure of performance has been taken into account as a factor in determining whether a lack of quality amounts to a fundamental breach of contract.<sup>9</sup>

### **Right to claim damages**

6. Even if the seller cures any failure of performance the buyer retains the right to claim damages. Therefore it has been held that a buyer was entitled to 10 per cent of the overall value of the sale as estimated damages when delivery was delayed and the buyer had to arrange for the transportation of the goods.<sup>10</sup>

### **Request to remedy a failure of performance (article 48 (2)–(4))**

7. The seller who has failed to perform its obligation cannot force the buyer to accept a later performance. Article 48 (2) and (3) offer, however, a mechanism that can eventually lead to almost that result. The seller may give notice of its willingness to perform. According to article 48 (3) such notice is deemed to be a request whether the buyer will accept cure within the time indicated in the notice; if the buyer consents or does not react within a reasonable time<sup>11</sup> the seller may cure; the buyer must then accept performance and is barred from resorting to remedies inconsistent with performance. Where the buyer refuses the seller's request or notice to cure, such request or notice does not have the effects provided for paragraphs (2) and (3); rather, the buyer remains free to resort to any remedy available to him.

8. Both a request and a notice by the seller under article 48 (2) and (3) must specify the time within which the seller will perform. If they do not indicate the time frame for the proposed cure they do not have the effect paragraphs (2) and (3) accord them.<sup>12</sup>

<sup>7</sup> ICC Court of Arbitration, France, award No. 7754, *ICC International Court of Arbitration Bulletin* 2000, 46.

<sup>8</sup> CLOUT case No. 125 [Oberlandesgericht Hamm, Germany, 9 June 1995] (costs for replacing defective windows).

<sup>9</sup> CLOUT case No. 282 [Oberlandesgericht Koblenz, Germany, 31 January 1997].

<sup>10</sup> CLOUT case No. 151 [Cour d'appel, Grenoble, France, 26 April 1995] (a dismantled second-hand hangar of which certain parts were defective and had to be repaired twice).

<sup>11</sup> For example, see Amtsgericht Nordhorn, Germany, 14 June 1994, Unilex.

<sup>12</sup> 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), 41, para. 14.

9. As an exception to the dispatch principle in article 27 the buyer must receive the request or notice of the seller (para. (4)), otherwise the request or notice will be ineffective. But article 27 applies to the buyer's reply which is effective if dispatched by appropriate means.<sup>13</sup>

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<sup>13</sup> *Id.*, para. 16.

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