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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 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;

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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.

(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.

### Meaning and purpose of the provision

1. Article 49 specifies the conditions under which the buyer is entitled to declare the contract avoided. Avoidance under article 49 is available if either the seller's failure to perform its contractual obligations amounts to a fundamental breach (article 49 (1) (a)) or non-delivery of the goods within the additional period of time fixed (article 49 (1) (b)).

2. Avoidance of the contract is a remedy that serves as a means of last resort (*ultima ratio*) which applies when the buyer can no longer be expected to continue the contract<sup>1</sup>, and only terminates the contract when the buyer provides notice of avoidance (article 26). Provided that all prerequisites for termination of the contract by the buyer are met, the buyer is entitled to terminate the contract at any time. However, if the seller has delivered the goods the buyer loses the right to avoid the contract if the buyer does not exercise it within a reasonable time (article 49 (2)).

### General remarks

3. The buyer must declare the contract avoided by means of a notice (article 26). No specific form is prescribed for that notice, unless the reservation under articles 12 and 96 applies. The notice must clearly express that the buyer now treats the contract as terminated. A mere announcement of future termination, statement urging delivery, or the return of the goods without comment does not suffice.<sup>2</sup>

4. Avoidance for delivery of non-conforming goods or of goods with third party rights requires—in addition to the fact that the breach must constitute a fundamental breach of contract—that the buyer has given notice of the lack of conformity or of the third-party claim in accordance with articles 39 and 43. Failure to comply with the notice requirement prevents the buyer from being able to declare the contract avoided.<sup>3</sup>

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<sup>1</sup> In this sense see, e.g., CLOUT case No. 171 [Bundesgerichtshof, Germany, 3 April 1996] (see full text of the decision); 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.

<sup>2</sup> CLOUT case No. 6 [Landgericht Frankfurt a.M., Germany, 16 September 1991]; CLOUT case No. 282 [Oberlandesgericht Koblenz, Germany, 31 January 1997].

<sup>3</sup> See, e.g., CLOUT case No. 196 [Handelsgericht des Kantons Zürich, Switzerland, 26 April 1995].

### Avoidance for fundamental breach (article 49 (1) (a))

5. Under article 49 (1) (a) any fundamental breach as defined in article 25 justifies the avoidance of the contract. The seller's non-performance of any of its obligations must therefore substantially deprive the buyer of what he was objectively entitled to expect under the contract. If that is the case the consequence of the seller's non-performance has to be determined in the light of all of the circumstances of the case.

6. A fundamental breach requires firstly that the seller has violated a duty it was obliged to perform either under the contract, under trade usages, practices established between the parties or under the Convention. The non-performance of an additionally- agreed duty suffices as well, for instance, the violation of duties under an exclusive sales contract.<sup>4</sup> The breach of the additionally-agreed duty entitles the buyer to avoid the contract if the breach is fundamental, i.e. when it deprives the buyer of the main benefit of the contract. 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, where they exist, and on the additional provisions of the Convention. Buyers can, for instance, normally not expect that delivered goods comply with regulations and official standards in their country.<sup>5</sup> Unless otherwise agreed upon it is generally the standard in the seller's country that determine whether the goods are fit for their ordinary purpose (article 35 (2) (a)).<sup>6</sup> Therefore, e.g., the delivery of cadmium-contaminated mussels has not been regarded as a breach, let alone a fundamental breach, since the buyer could not have expected that the seller met the contamination-standards in the buyer's country and since the consumption of the mussels in small portions did not endanger a consumer's health.<sup>7</sup>

7. A fundamental breach further requires that the party in breach has foreseen the result of the breach of contract (article 25). Even if the seller did not foresee that the breach would deprive the buyer of most or all of the benefit of the contract the breach remains fundamental when a reasonable person in the same conditions would have foreseen such a result. Article 25 does not state at what time the result of the breach should be foreseeable. Courts have decided that the time of conclusion of contract is the relevant time.<sup>8</sup>

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<sup>4</sup> See, e.g., 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).

<sup>5</sup> CLOUT case No. 123 [Bundesgerichtshof, Germany, 8 March 1995]; in the same sense (and citing CLOUT case No. 123), see CLOUT case No. 418 [Federal District Court, Eastern District of Louisiana, United States, 17 May 1999]; Oberster Gerichtshof, Austria, 13 April 2000, *Internationales Handelsrecht* 2001, 117.

<sup>6</sup> See the decisions cited in footnote 3.

<sup>7</sup> CLOUT case No. 123 [Bundesgerichtshof, Germany, 8 March 1995].

<sup>8</sup> CLOUT case No. 275 [Oberlandesgericht Düsseldorf, Germany, 24 April 1997].

## Specific instances of fundamental breach

8. Case law has to some extent developed guidelines that may help to determine in similar cases whether or not a breach of contract qualifies as fundamental. It has been found on various occasions that the final non-delivery by the seller constitutes a fundamental breach of contract unless the seller has a justifying reason to withhold its performance.<sup>9</sup> However, if only a minor part of the contract is finally not performed, e.g., one of several instalments is not supplied, the breach is not fundamental unless the delivered part by itself is of no use to the buyer.<sup>10</sup> On the other hand, the serious, final and unjustified refusal of the seller to fulfil its contractual obligations amounts to a fundamental breach.<sup>11</sup> It has been also held that the final non-delivery of 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.<sup>12</sup>

9. As a rule, late performance does not constitute by itself a fundamental breach of contract.<sup>13</sup> Only when the time for performance is of essential importance—either because it is so stipulated between the parties<sup>14</sup> or because it results from the circumstances (e.g., seasonal goods)<sup>15</sup>—can the delay amount to a fundamental breach.

10. The same result has been reached where the delay in the performance came close to non-performance, for instance when the agreed delivery date was one week and the seller had delivered only one third of the goods after two months.<sup>16</sup> But even if there is no fundamental breach, the Convention allows the buyer to fix an additional period of time after the unsuccessful lapse of which the buyer may declare the contract avoided.<sup>17</sup> Therefore in case of delay of performance, the lapse of an additional period for performance turns a non-fundamental breach into a fundamental one.

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<sup>9</sup> CLOUT case No. 90 [Pretura circondariale de Parma, Italy, 24 November 1989] (only partial and very delayed delivery); CLOUT case No. 136 [Oberlandesgericht Celle, Germany, 24 May 1995].

<sup>10</sup> CLOUT case No. 275 [Oberlandesgericht Düsseldorf Germany, 24 April, 1997].

<sup>11</sup> See CLOUT case No. 136 [Oberlandesgericht Celle, Germany, 24 May 1995] (see full text of the decision). In that case the seller had given notice that he had sold the specified good to another buyer. See also Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce, Russia, 4 April 1998, award No. 387/1995, Unilex (final refusal to pay the price).

<sup>12</sup> CLOUT case No. 214 [Handelsgericht des Kantons Zürich, Switzerland, 5 February 1997].

<sup>13</sup> Landgericht Oldenburg, Germany, 23 March 1996, Unilex (one day delay in dispatch of seasonal goods no 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).

<sup>14</sup> CLOUT case No. 277 [Oberlandesgericht Hamburg, Germany, 28 February 1997] (under the circumstances of the case late delivery under a CIF sale was found to be a fundamental breach of contract).

<sup>15</sup> Corte di Appello di Milano, Italy, 20 March 1998, Unilex (in that case the buyer had ordered seasonal knitted goods and pointed to the essential importance of delivery at the fixed date although only after conclusion of the contract); ICC Court of Arbitration, France, award No. 8786, *ICC International Court of Arbitration Bulletin* 2000, 70.

<sup>16</sup> CLOUT case No. 90 [Pretura circondariale di Parma, Italy, 24 November 1989].

<sup>17</sup> See, e.g., CLOUT case No. 82 [Oberlandesgericht Düsseldorf, Germany, 10 February 1994].

11. The greatest problems arise in respect of the delivery of defective goods. Court decisions on this point have concluded that any non-conformity concerning quality remains a mere, non-fundamental breach of contract as long as the buyer—without unreasonable inconvenience—can use the goods or resell them even with a rebate.<sup>18</sup> 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 not regarded as a fundamental breach of contract since the buyer had the opportunity to resell the meat at a lower price or to otherwise process it.<sup>19</sup> On the contrary, if the non-conforming goods cannot be used or resold with reasonable effort this constitutes a fundamental breach and entitles the buyer to declare the contract avoided.<sup>20</sup> The buyer can avoid the contract also where the goods suffered from a serious defect that cannot 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 it).<sup>21</sup> Eventually, a fundamental breach has been found without any reference to alternative possibilities of the buyer to use the goods otherwise or to resell them when the goods had major defects and the buyer needed the goods for manufacture.<sup>22</sup> The same solution was reached where the non-conformity of the goods resulted from the seller adding substances to the goods, the addition of which was illegal both in the country of the seller and the buyer.<sup>23</sup> The rules concerning the delivery of defective goods apply as well if wrong goods are delivered.<sup>24</sup>

12. Special problems arise when the goods are defective, even seriously defective, but repairable. Some courts have held that easy reparability excludes that there can be a fundamental breach.<sup>25</sup> At least when the seller offers and effects speedy repair or replacement without any inconvenience to the buyer courts deny a fundamental

<sup>18</sup> CLOUT case No. 171 [Bundesgerichtshof, Germany, 3 April 1996]; CLOUT case No. 248 [Schweizerisches Bundesgericht, Switzerland, 28 October 1998].

<sup>19</sup> CLOUT case No. 248 [Schweizerisches Bundesgericht, Switzerland, 28 October 1998].

<sup>20</sup> 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).

<sup>21</sup> CLOUT case No. 107 [Oberlandesgericht Innsbruck, Austria, 1 July 1994]; 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 (declaration of avoidance before waiting for result of seller's attempt to cure would be contrary to good faith).

<sup>22</sup> 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 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 (delivery of a machine totally unfit for the particular use which 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, and therefore forming the basis for termination).

<sup>23</sup> 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).

<sup>24</sup> Oberster Gerichtshof, Austria, 29 June 1999, Unilex.

<sup>25</sup> CLOUT case No. 196 [Handelsgericht des Kantons Zürich, Switzerland, 26 April 1995].

breach.<sup>26</sup> This is in line with seller's right to cure as provided for in article 48 of the Convention. But if repair is delayed or causes the buyer unreasonable inconvenience an otherwise fundamental breach remains fundamental. However, the fundamentality of a breach cannot be denied only because the buyer did not first request the seller to cure any defective performance.<sup>27</sup>

13. Defects in the documents constitute a fundamental breach if they essentially impair the buyer's possibility to negotiate the goods.<sup>28</sup> If the buyer itself can easily cure any defects in the document, e.g. by requesting new documents, the breach will not be considered fundamental.<sup>29</sup>

14. The violation of contractual obligations other than the aforementioned ones can also amount to a fundamental breach. The breach is fundamental if it deprives the buyer of the main benefit of the contract and that that result could have been foreseen by the seller. Thus, a court decided that the delivery of false certificates did not constitute a fundamental breach of contract if either the goods were nevertheless merchantable or if the buyer itself could—at the seller's expense—easily get the correct certificates.<sup>30</sup> Likewise, the unjustified denial of contract rights of the other party—e.g. the validity of a retention of title clause and the seller's right to possession of the goods<sup>31</sup> or the unjustified denial of a valid contract after having taken possession of the goods<sup>32</sup>—can amount to a fundamental breach of contract. The same is true when resale restrictions have been substantially violated.<sup>33</sup>

### **Avoidance for non-delivery during additional period of time (article 49 (1) (b))**

15. Article 49 (1) (b) states a second ground for avoidance which applies only in case of non-delivery: that the seller who has not delivered does not do so within the additional period of time the buyer has fixed under article 47 (1). If the seller does not use the time extension for delivery the buyer is entitled to avoid the contract. The same effect is reached if the seller declares that it will not deliver within the fixed time.

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

<sup>27</sup> See Digest, article 48.

<sup>28</sup> CLOUT case No. 171 [Bundesgerichtshof, Germany, 3 April 1996].

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> CLOUT case No. 308 [Federal Court of Australia, 28 April 1995].

<sup>32</sup> CLOUT case No. 313 [Cour d'appel, Grenoble, France, 21 October 1999] (seller retained pattern samples) (see full text of the decision).

<sup>33</sup> 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].

## Period of time for declaration of avoidance of delivered goods (article 49 (2))

16. Generally the buyer is not bound to declare the contract avoided during a certain period of time; he can do so at any time if a ground for avoidance exists.<sup>34</sup> This principle is, however, subject to a qualification under article 49 (2) if the goods have been delivered. In that case, the buyer must declare avoidance within a reasonable time. As far as the time when the reasonable period starts running is concerned, article 49 (2) distinguishes between late delivery and other kinds of breaches of contract. In case of late delivery the period starts when the buyer has become aware of delivery (article 49 (2) (a)). In case of other breaches the reasonable period of time for declaring the contract avoided starts running when the buyer became aware of the breach or ought to have been aware of it or after a period has expired set in accordance with article 47 (1) or with article 48 (2). A period of five months after being informed of the breach has been found not to constitute a reasonable period for declaring avoidance under article 49 (2) (b);<sup>35</sup> neither has a declaration made eight weeks after becoming aware of the breach.<sup>36</sup> On the other hand, five weeks were regarded as a reasonable period of time to declare the contract avoided under article 49 (2) (b).<sup>37</sup> A declaration of avoidance after several time extensions had been granted was found to be timely as well<sup>38</sup>, as was a declaration within 48 hours.<sup>39</sup> Also a declaration three weeks after notice of lack of conformity was considered to be timely.<sup>40</sup>

## Burden of proof

17. It has been observed that the burden is on the buyer to prove that the seller's breach of contract was fundamental and did substantially deprive the buyer of what it was entitled to expect under the contract.<sup>41</sup>

<sup>34</sup> 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 2½ years although the goods were not delivered basing the decision on the principle of good faith.

<sup>35</sup> CLOUT case No. 124 [Bundesgerichtshof, Germany, 15 February 1995]; see also CLOUT case No. 83 [Oberlandesgericht München, Germany, 2 March 1994] (four months).

<sup>36</sup> CLOUT case No. 282 [Oberlandesgericht Koblenz, Germany, 31 January 1997].

<sup>37</sup> CLOUT case No. 165 [Oberlandesgericht Oldenburg, Germany, 1 February 1995].

<sup>38</sup> CLOUT case No. 225 [Cour d'appel, Versailles, France, 29 January 1998].

<sup>39</sup> CLOUT case No. 246 [Audiencia Provincial de Barcelona, Spain, 3 November 1997] (delayed

<sup>40</sup> 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 ("reasonable time" for art. 49 purposes differs from "reasonable time" for art. 39 purposes both in starting point and duration. Whereas the non-conformity must be notified as soon as it is discovered (or ought to have been discovered), avoidance can only be declared after it appears that the non-conformity amounts to a fundamental breach that cannot be otherwise remedied).

<sup>41</sup> CLOUT case No. 171 [Bundesgerichtshof, Germany, 3 April 1996] (see full text of the decision).