

Article 44

[Seller's right to remedy failure to perform]

(1) Unless the buyer has declared the contract avoided in accordance with article 45, 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 such delay as will amount to a fundamental breach of contract and without causing the buyer unreasonable inconvenience or uncertainty of reimbursement by the seller of expenses advanced by the buyer. 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 paragraph (2) of this article, that the buyer make known his decision.

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

PRIOR UNIFORM LAW

ULIS, article 44 (1).

Commentary

1. Article 44 regulates the right of the seller to remedy any failure to perform his obligations under the contract and this Convention after the date for delivery. It is a companion article to article 35 which regulates the right of the seller to remedy any failure to perform his obligations prior to the date for delivery and to articles 42 and 43 which regulate the buyer's right to require performance. The date for delivery is established in accordance with article 31.

General rule, paragraph (1)

2. Paragraph (1) permits the seller to remedy any failure to perform his obligations after the date for delivery subject to three conditions: (1) the seller must be able to perform without such delay as will amount to a fundamental breach of contract, (2) the seller must be able to perform without causing the buyer unreasonable inconvenience or unreasonable uncertainty of reimbursement by the seller of expenses advanced by the buyer, and (3) the seller must exercise his right to remedy his failure to perform prior to the time the buyer has declared the contract avoided.

3. The seller may remedy his failure to perform under this article even though the failure to perform amounts to a fundamental breach, so long as that fundamental breach was not a delay in performance. Thus, even if the failure of the goods to operate at the time of delivery

constituted a fundamental breach of contract, the seller would have the right to remedy the non-conformity in the goods by repairing or replacing them, unless the buyer terminated the seller's right by declaring the contract avoided.

4. Once the seller has remedied his failure to perform or has remedied it to the extent that it no longer constitutes a fundamental breach of contract, the buyer may no longer declare the contract avoided.

5. In some cases the failure of the goods to operate or to operate in accordance with the contract specifications would constitute a fundamental breach only if that failure was not remedied within an appropriate period of time. Until the passage of that period of time, the buyer could not preclude the seller from remedying the non-conformity by declaring the contract avoided.

6. The rule that the seller may remedy his failure to perform only if he can do so without such delay as would amount to a fundamental breach of contract applies to two different situations: where there is a complete or substantial failure to deliver the goods and where the goods as delivered, have such a non-conformity that either at the moment of delivery, or at some later time, the condition of those goods, if not remedied, would constitute a fundamental breach of contract. The seller no longer has the right to remedy the failure to perform after the delay amounts to a fundamental breach even if the buyer has not as yet declared the contract avoided.

7. Of course, even if the seller no longer has the right to remedy his failure to perform under this article, the parties can agree to his doing so.

8. If the seller has failed to deliver only a small portion of the goods or there is such a minor non-conformity in the goods that the seller's failure will never amount to a fundamental breach of contract, the seller's right to remedy his failure is limited only by the provision that he cannot remedy the failure if doing so would cause unreasonable inconvenience to the buyer or uncertainty of reimbursement by the seller of expenses advanced by the buyer.

9. At some point of time the buyer must be able to use or resell the goods free of the spector that the seller will claim the right to remedy his failure to perform. It is clear from the text of article 44 (1) that the simple fact that the buyer has declared the price reduced or claimed damages is not enough to cut off the seller's right to remedy his failure to perform.¹ However, the fact that the buyer has declared the price reduced or claimed damages may be a factor in determining whether it would now be unreasonably inconvenient to the buyer for the seller to remedy his failure to perform.

10. It might also be unreasonably inconvenient to the buyer if the seller needed extensive access to the buyer's place of business in order to remedy the failure to perform.

11. Article 44 (1) recognizes that the buyer may have to incur certain expenses in order for the seller to remedy his failure to perform. This in itself does not give the buyer a reason to refuse to allow the seller to remedy his failure to perform. However, if the amount of expenses incurred prior to reimbursement by the seller would be an unreasonable inconvenience to the buyer or if there was an unreasonable uncertainty that the buyer would be reimbursed for those expenses, the buyer may refuse to allow the seller to remedy his failure to perform.

12. The seller's right to remedy his failure to perform under article 44 (1) is a strong right in that it goes against the terms of the contract. For instance, if the seller has not delivered by the contract delivery date of 1 June but delivers on 15 June, he has cured his failure to deliver but he has not and cannot cure his failure to deliver by 1 June. Nevertheless, article 44 (1) authorizes him to remedy his failure in this manner if he can do so before the delay amounts to a fundamental breach.

¹ The fact that the buyer has declared a reduction of the price pursuant to article 46 will not prevent the seller from curing the defect since the remedy of price reduction is expressly subject to the seller's right to cure under article 44 (1). The buyer's right to claim damages is expressly preserved in article 44 (1) (as it is in article 35) so a claim for damages, by itself, will not cut off the seller's right to cure. The original damage claim will, of course, be modified by the cure.

Notice by the seller, paragraphs (2) and (3)

13. If the seller intends to cure the non-conformity he will normally so notify the buyer. He will also often inquire whether the buyer intends to exercise his remedies of avoiding the contract or declaring the price to be reduced or whether he wishes, or will accept, cure by the seller.

14. The first sentence of article 44 (2) makes it clear that the seller must indicate the time period within which the proposed cure will be effected. If there is no indication of this period but merely an offer to cure, the seller can draw no conclusions nor derive any rights from a failure by the buyer to respond.

Risk of loss or error in transmission, paragraph (4)

15. The seller in breach bears the risk of loss or error in transmission of a request or notice under articles 44 (2) and 44 (3). However, the reply by the buyer is governed by the rule in article 25, i.e. if it is given by "means appropriate in the circumstances" it is effective even if it does not arrive or is delayed or contains errors in transmission.

16. Paragraph (2) provides that if the seller sends the buyer such a notice, the buyer must reply within a reasonable time. If the buyer does not reply, the seller may perform and the buyer may not resort to any remedy inconsistent with performance by the seller during the period of time the seller indicated would be necessary to cure the defect. Even if the seller's notice said only that he would perform the contract within a specific period of time, paragraph (3) provides that the buyer must make known his decision or else he will be bound by the terms of the seller's notice unless he can show that for some reason the seller's notice should not be treated as including a request to the buyer to respond.