

Article 42

[Buyer's right to require performance]

(1) The buyer may require performance by the seller of his obligations unless the buyer has resorted to a remedy which is inconsistent with such requirements.

(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 and a request for substitute goods is made either in conjunction with notice given under article 37 or within a reasonable time thereafter.

PRIOR UNIFORM LAW

ULIS, articles 24 to 27, 30, 31, 42, 51 and 52.

Commentary

1. Article 42 describes the buyer's right to require the seller to perform the contract after the seller has in some manner failed to perform as agreed.

General rule, paragraph (1)

2. Paragraph (1) recognizes that after a breach of an obligation by the seller, the buyer's principal concern is often that the seller perform the contract as he originally promised. Legal actions for damages cost money and may take a considerable period of time. Moreover, if the buyer needs the goods in the quantities and with the qualities ordered, he may not be able to make substitute purchases in the time necessary. This is particularly true if alternative sources of supply are in other countries, as will often be the case when the contract was an international contract of sale.

3. Therefore, paragraph (1) grants the buyer the right to require the seller to perform the contract. The seller must deliver the goods or any missing part, cure any defects or do any other act necessary for the contract to be performed as originally agreed.

4. In addition to the right to require performance of the contract, article 41 (2) ensures that the buyer can recover any damages he may have suffered as a result of the delay in the seller's performance.

5. It may at times be difficult to know whether the buyer has made demand that the seller perform under this article or whether the buyer has voluntarily modified the contract by accepting late performance pursuant to article 27.

6. The application of paragraphs 4 and 5 of this commentary can be illustrated as follows:

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 on 15 July. It is difficult to tell whether Buyer's statement was a demand for performance by 15 July or a modification of the contract delivery date from 1 July to 15 July. If it is interpreted as a demand for performance, Buyer can recover any damages he may have suffered as a result of the

late delivery. If Buyer's statement is interpreted as a modification of the delivery date, Buyer could receive no damages for late delivery.

7. In order for the buyer to exercise the right to require performance of the contract, he must not have resorted to a remedy which is inconsistent with that right, e.g. by declaring the contract avoided under article 45 or by declaring a reduction of the price under article 46.

8. The style in which article 42 in particular and Section III on the buyer's remedies in general is drafted should be noted. That style conforms to the view in many legal systems that a legislative text on the law of sales governs the rights and obligations between the parties and does not consist of directives addressed to a tribunal. In other legal systems the remedies available to one party on the other party's failure to perform are stated in terms of the injured party's right to the judgement of a court granting the requested relief.¹ However, these two different styles of legislative drafting are intended to achieve the same result. Therefore, when article 42 (1) provides that "the buyer may require performance by the seller", it anticipates that, if the seller does not perform, a court will order such performance and will enforce that order by the means available to it under its procedural law.

9. Although the buyer has a right to the assistance of a court or arbitral tribunal to enforce the seller's obligation to perform the contract, article 26 limits that right to a certain degree. If the court could not give a judgement for specific performance under its own law in respect of similar contracts of sale not governed by this Convention, it is not required to enter such a judgement in a case arising under this Convention, even though the buyer had a right to require the seller's performance under article 42. However, if the court could give such a judgement under its own law, it would be required to do so if the criteria of article 42 are met.²

10. Among the other means which may be available to a buyer to enforce the seller's obligation to perform the contract would be in a clause in the sales contract that if the seller fails to perform his obligations in certain respects, such as a failure to deliver on time, the seller must pay the buyer a specific sum of money. Such a clause, sometimes referred to as a "liquidated damages clause" and sometimes as a "penalty clause," can serve both the function of estimating the damages which the buyer would suffer as a cause of the breach so as to ease the problems of proof and of creating a penalty sufficiently large to reduce the likelihood that the seller will fail to perform. All legal systems appear to recognize the validity and social utility of a clause which estimates future damages, especially where proof of actual damage would be difficult. However, while some legal systems approve of the use of a "penalty clause" to encourage performance of the principal obligation, in other legal systems such a clause is invalid. Article 42 does not have the effect of making such clauses valid in those legal systems which do not otherwise recognize their validity.³

11. Subject to the rule in paragraph (2) relating to the delivery of substitute goods, this article does not allow the seller to refuse to perform on the grounds that the non-conformity was not substantial or that performance of the contract would cost the seller more than it would benefit the buyer. The choice is that of the buyer.

Substitute goods, paragraph (2)

12. If the goods which have been delivered do not conform to the contract, the buyer may want the seller to deliver substitute goods which do conform. However, it could be expected that the costs to the seller of shipping a second lot of goods to the buyer and of disposing of the non-conforming goods already delivered might be considerably

¹ United Kingdom: Sale of Goods Act 1893, sect. 52 (in part). "In any action for breach of contract to deliver specific or ascertained goods the court may, if it thinks fit, on the application of the plaintiff, by its judgement or decree direct that the contract shall be performed specifically, without giving the defendant the option of retaining the goods on payment of damages."

United States of America: Uniform Commercial Code, sect. 2-716 (1). "Specific performance may be decreed where the goods are unique or in other proper circumstances."

² See also paragraph 3 of the commentary to article 26.

³ Article 4 provides in part that "this Convention is not concerned with . . . the validity of the contract or any of its provisions . . ."

greater than the buyer's loss from having non-conforming goods. Therefore, paragraph (2) provides that the buyer can "require delivery of substitute goods only if the lack of conformity constitutes a fundamental breach and a request for substitute goods is made either in conjunction with notice under article 37 or within a reasonable time thereafter."

13. If the buyer does require the seller to deliver substitute goods, he must be prepared to return the unsatisfactory goods to the seller. Therefore, article 67 (1) provides that, subject to three exceptions set forth in article 67 (2), "the buyer loses his right . . . to require the seller to deliver substitute goods if it is impossible for him to make restitution of the goods substantially in the condition in which he received them".

Buyer's right to remedy the lack of conformity

14. In place of requesting the seller to perform pursuant to this article, the buyer may find it more advantageous to remedy the defective performance himself or to have it remedied by a third party. Article 73, which requires the party who relies on a breach of contract to mitigate the loss, authorizes such measures to the extent that they are reasonable in the circumstances.