

Article 43

[Fixing of additional period for performance]

(1) The buyer may fix an additional period of time of reasonable length for performance by the seller of his obligations.

(2) Unless the buyer has received notice from the seller that he will not perform within the period so fixed, the buyer may not, during that period, resort to any remedy for breach of contract. However, the buyer is not deprived thereby of any right he may have to claim damages for delay in the performance.

PRIOR UNIFORM LAW

ULIS, articles 27 (2), 31 (2), 44 (2) and 51.

Commentary

1. Article 43 states the right of the buyer to fix an additional period of time of reasonable length for performance by the seller of his obligations and specifies one of the consequences of his having fixed such a period.

Fixing additional period, paragraph (1)

2. Article 43 is a companion of article 42 which states the right of the buyer to require performance of the contract by the seller and which anticipates the aid of a court or arbitral tribunal in enforcing that right. If the seller delays performing the contract, the judicial procedure for enforcement may require more time than the buyer can afford to wait. It may consequently be to the buyer's advantage to avoid the contract and make a substitute purchase from a different supplier. However, it may not be certain that the seller's delay constitutes a fundamental breach of contract justifying the avoidance of the contract under article 45 (1) (a).

3. Different legal systems take different attitudes towards the right of buyer to avoid the contract because of the seller's failure to deliver on the contract delivery date. In some legal systems the seller's failure to deliver on the contract delivery date normally authorizes the buyer to avoid the contract. However, in a given case the court or tribunal may decide that the buyer may not avoid the contract at that time because the failure to deliver on the contract delivery date was either not sufficiently serious or the buyer had waived his right to prompt delivery. In other legal systems the seller can request a period of grace from a court or tribunal which, in effect, establishes a new delivery date.¹ In still

other legal systems the general rule is that late delivery of the goods does not authorize the buyer to avoid the contract unless the contract provided for such a remedy or unless, after the seller's breach, the buyer specifically fixed a period of time within which the seller had to deliver the goods.

4. This Convention specifically rejects the idea that in a commercial contract for the international sale of goods the buyer may, as a general rule, avoid the contract merely because the contract delivery date has passed and the seller has not as yet delivered the goods. In these circumstances the buyer may do so if, and only if, the failure to deliver on the contract delivery date causes him substantial detriment and the seller foresaw or had reason to foresee such a result.²

5. As a result of this rule in this Convention there was no reason to allow the seller to apply to a court for a delay of grace, as is permitted in some legal systems. Moreover, the procedure of applying to a court for a delay of grace is particularly inappropriate in the context of international commerce, especially since this would expose the parties to the broad discretion of a judge who would usually be of the same nationality as one of the parties. Therefore, article 27 (3) provides that "No period of grace may be granted to the seller by a court or arbitral tribunal when the buyer resorts to a remedy for breach of contract."

6. Although the buyer can declare the contract avoided in any case in which the delay in delivery constitutes a fundamental breach, this will not always be a satisfactory solution for him. Once the seller is late in performing, the buyer may be legitimately doubtful that the seller will be able to perform by the time that performance will be essential for the buyer. This situation is similar to the problems raised by an anticipatory breach under articles 62, 63 and 64. Furthermore, in most contracts for the sale of goods on the point of time at which the detriment to the buyer would become sufficiently substantial to constitute a fundamental breach would be somewhat imprecise. Therefore, article 43 (1) authorizes the buyer to fix an additional period of time of reasonable length for performance by the seller of his obligations. This may entail the delivery of all or part of the goods, the remedy of any lack of conformity by repair of the goods of the delivery of substitute goods or the performance of any other act which would constitute performance of the seller's obligations. However, article 45 (1) (b) allows the buyer to declare the contract avoided only "if the seller has not delivered the goods" within the additional period of time.

7. The procedure authorized by article 43 (1) of fixing an additional period of time after which the buyer can declare the contract avoided if the goods have not been delivered would have the danger that a buyer could turn an inconsequential delay which would not justify declaring the contract avoided for fundamental breach under article 45 (1) (a) into a basis for declaring the contract avoided under article 45 (1) (b). Therefore, article 43 (1) says that the additional period must be "of reasonable length". This period may be fixed either by specifying the date by which performance must be made (e.g. 30 September) or by specifying a time period (e.g. "within one month from today"). A general demand by the buyer that the seller perform or that he perform "promptly" or the like is not a "fixing" of a period of time under article 43 (1).

8. It should be pointed out that, although the procedure envisaged by article 43 (1) has a certain parentage in the German procedure of "*Nachfrist*" and the French procedure of a "*mise en demeure*," in its current form it does not partake of either one. In particular, the procedure envisaged by article 43 (1) is not mandatory and need not be used in order to declare the contract avoided if the delay in performance amounts to a fundamental breach.

Buyer's other remedies, paragraph (2)

9. In order to protect the seller who may be preparing to perform the contract as requested by the buyer, perhaps at considerable expense, during the additional period of time of reasonable length the buyer may not resort to any remedy for breach of contract, unless the

¹ Cf. article 41 (3). See para. 5 below.

² Article 23, which defines "fundamental breach", and article 45 (1) (a), which authorizes the buyer to declare the contract avoided for fundamental breach.

buyer has received notice from the seller that he will not comply with the request. Once the additional period of time has expired without performance by the seller, the buyer may not only avoid the contract under article 45 (1) (b) but may resort to any other remedy he may have.

10. In particular, the buyer may claim any damages he may have suffered because of the delay in performance. Such damages may arise even though the seller has performed his obligations within the additional period of time fixed by the buyer.