

## Article 47

(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 performance.

## OVERVIEW

1. Article 47 (1) gives the buyer the right to fix an additional period of time (or *Nachfrist* according to its similarity to an institution in German law)<sup>1</sup>—beyond that provided for in the contract—within which the seller must perform its obligations. The provision thus complements the right to require performance under article 46, but it has a particular association with the right to avoid the contract under article 49. In fact, article 47 has practical significance primarily in connection with the latter provision: article 49 (1) (b) provides that, if the seller fails to deliver by the expiration of the additional period of time fixed in accordance with article 47, the buyer can declare the contract avoided. Thus the fixing of an additional period of time paves the way for the avoidance of the contract. This mechanism for avoiding the contract, however, applies only in cases of non-delivery in its strict sense.<sup>2</sup> Where the seller has delivered non-conforming goods, the fixing of an additional period for performance is neither necessary nor helpful to acquire a right to avoid the contract. In such cases, this right solely depends on whether the breach is fundamental.<sup>3</sup>

2. Article 47 (2) states that a buyer who fixes an additional period of time pursuant to the provision binds itself not to resort to other remedies during that period, although it retains the right to claim damages for delay in performance that occurs during the period.<sup>4</sup> This binding effect is intended to protect the seller who, in response to the buyer's notice fixing an additional period for performance, may as a result prepare the performance during that period, perhaps at considerable expense, and thus should be entitled to expect that the buyer will accept the requested performance if it is not otherwise defective.<sup>5</sup> Only if the seller informs the buyer that it will not perform during the additional period is the buyer free to resort to other available remedies during the period, since in that case the seller needs no protection.

3. Article 47 allows the buyer to fix an additional period of time for performance of any obligation the seller has not performed. The provision thus can be applied to all obligations the seller has agreed to fulfil. The granting of an additional period under article 47 functions as a step toward avoidance of the contract, however, only if the seller has violated its duty to deliver the goods.

FIXING OF ADDITIONAL PERIOD OF TIME  
(ARTICLE 47 (1))

4. The buyer is entitled, but not obliged, to fix an additional period for the seller's performance under article 47 (1).<sup>6</sup> Where the seller has not delivered the goods by the due date, however, the buyer can benefit from fixing an additional period for the seller to perform his delivery obligations: the seller's failure to deliver within the period properly so fixed allows the buyer to avoid the contract without having to show that the seller's delay was a fundamental breach.<sup>7</sup> There are even cases stating that, if a buyer has not granted an additional period of time in a late delivery situation, the buyer has no right to avoid the contract.<sup>8</sup>

5. The additional period of time fixed by the buyer must be of reasonable length to satisfy the requirements of article 47 (1). An additional period of two weeks for the delivery of three printing machines from Germany to Egypt was deemed to be too short, whereas a period of seven weeks was regarded as reasonable.<sup>9</sup> In a Danish-German car sale an additional period of three to four weeks for delivery was found to be reasonable.<sup>10</sup> An international arbitration court found that an additional period of 10 days was not reasonable when the period of production of the goods under the contract was eight months.<sup>11</sup> With respect to the reasonable time, all relevant circumstances of the case have to be taken into account (including the conduct of the parties, negotiations and practices between them, and usages (article 8 (3)).<sup>12</sup> If the buyer fixes an unreasonably short period for delivery courts have substituted a reasonable period.<sup>13</sup> Courts have also found the reasonableness requirement satisfied if the buyer, having previously fixed an unreasonably short period, thereafter waits for delivery until a reasonable period of time has expired before dispatching its notice of avoidance.<sup>14</sup>

6. The buyer must make clear that the seller has to perform within the additional time fixed in order to properly invoke article 47 and be entitled to avoid the contract if the seller does not deliver within the additional time.<sup>15</sup> A clear expression that the buyer is granting a final deadline is necessary (e.g. "final delivery date: 30 September 2002").<sup>16</sup> It has therefore been decided that a mere reminder demanding prompt delivery is not sufficient, since no additional time period for delivery had been fixed.<sup>17</sup> On the other hand, it

has been held sufficient for purposes of article 47 (1) if the buyer accepts a new delivery date proposed by the seller provided the buyer makes clear that performance by that date is essential.<sup>18</sup> The same result was reached in a case where the buyer accepted several requests from the seller to extend the time for delivery.<sup>19</sup> Where a buyer tolerated the late delivery of several instalments of an instalment sale, it was held that the buyer's behaviour was equivalent to the granting of an additional period of time.<sup>20</sup>

7. There is generally no requirement as to the form the buyer must employ in fixing the additional period of time—an approach that is consistent with article 11; where a reservation under article 96 is applicable, however, form requirements may have to be met. Where such a reservation does not apply, it is irrelevant whether the buyer's extension of time was communicated in writing or orally, or was done by implication.<sup>21</sup>

8. Whether an extension of time is the mere fixing of an additional time for performance (leaving the original delivery date, etc., intact), or is a modification of the original contract, is a matter of interpretation.<sup>22</sup> In the latter case, the

lapse of the modified time for delivery is not necessarily the basis for avoidance of the contract.

#### EFFECT OF FIXING AN ADDITIONAL PERIOD OF TIME (ARTICLE 47 (2))

9. The fixing of an additional period of time under article 47 (1) initially benefits the seller, who thereby gains an extension of time for performance. Article 47 (2) provides that the buyer may not avoid the contract or reduce the price (see article 50) while the additional period of time lasts, unless the seller has declared that it is not able or willing to perform within the additional period<sup>23</sup> or has made its performance dependant of conditions not stipulated in the contract.<sup>24</sup> If the seller performs during the additional period of time the buyer must accept the performance. The buyer nevertheless retains the right to claim damages for losses caused by the delay of performance. If the seller does not perform within the additional period, the buyer may resort to any available remedy, including avoidance, under the conditions set by article 49. However, the additional time period does not prevent the parties from modifying their contract by agreement.<sup>25</sup>

## Notes

<sup>1</sup> CLOUT case No. 956 [Federal Court of Australia, Australia, 20 May 2009 (Olivaylle Pty Ltd v. Flottweg AG, formerly Flottweg GmbH, & Co. KGAA)], [2009] FCA 522, (2009) 255 ALR 632, available on the Internet at [www.cisg.law.pace.edu](http://www.cisg.law.pace.edu).

<sup>2</sup> See, for example, CLOUT case No. 990 [China International Economic and Trade Arbitration Commission, People's Republic of China, 19 December 1997]; Kantonsgericht Zug, Switzerland, 14 December 2009, CISG-online No. 2026. See also the Digest for article 49, paragraph 21.

<sup>3</sup> Oberlandesgericht Koblenz, Germany, 21 November 2007, CISG-online No. 1733.

<sup>4</sup> See CLOUT case No. 846 [U.S. Court of Appeals (3rd Circuit), United States, 19 July 2007].

<sup>5</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), 39-40.

<sup>6</sup> Oberlandesgericht Hamburg, Germany, 4 July 1997, Unilex.

<sup>7</sup> See article 49 (1) (b); see also CLOUT case No. 846 [U.S. Court of Appeals (3rd Circuit), United States, 19 July 2007].

<sup>8</sup> See, for example, CLOUT case No. 7 [Amtsgericht Oldenburg in Holstein, Germany, 24 April 1990]; CLOUT case No. 82 [Oberlandesgericht Düsseldorf, Germany, 10 February 1994]; CLOUT case No. 120 [Oberlandesgericht Köln, Germany, 22 February 1994].

<sup>9</sup> CLOUT case No. 136 [Oberlandesgericht Celle, Germany, 24 May 1995].

<sup>10</sup> CLOUT case No. 362 [Oberlandesgericht Naumburg, Germany, 27 April 1999] (see full text of the decision).

<sup>11</sup> International Commercial Arbitration Court at the Russian Federation Chamber of Commerce and Industry, Award No. 14/2014, 3 December 2014.

<sup>12</sup> Hof Arnhem, the Netherlands, 7 October 2008, CISG-online No. 1749 (8-12 weeks offered by buyer regarded as reasonable).

<sup>13</sup> CLOUT case No. 136 [Oberlandesgericht Celle, Germany, 24 May 1995] (see full text of the decision); Landgericht Ellwangen, Germany, 21 August 1995, Unilex; CLOUT case No. 362 [Oberlandesgericht Naumburg, Germany, 27 April 1999] (see full text of the decision).

<sup>14</sup> Landgericht Ellwangen, Germany, 21 August 1995, Unilex; CLOUT case No. 362 [Oberlandesgericht Naumburg, Germany, 27 April 1999] (see full text of the decision).

<sup>15</sup> See Kantonsgericht des Kantons Zug, Switzerland, 14 December 2009, CISG-online No. 2026. See also *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), 39, paragraphs 6-7.

<sup>16</sup> *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), 39, paragraph 7.

<sup>17</sup> CLOUT case No. 275 [Oberlandesgericht Düsseldorf, Germany, 24 April 1997].

<sup>18</sup> CLOUT case No. 277 [Oberlandesgericht Hamburg, Germany, 28 February 1997] (see full text of the decision).

<sup>19</sup> CLOUT case No. 225 [Cour d'appel, Versailles, France, 29 January 1998].

<sup>20</sup> CLOUT case No. 246 [Audiencia Provincial de Barcelona, Spain, 3 November 1997].

<sup>21</sup> See the decisions cited in the preceding paragraph.

<sup>22</sup> CLOUT case No. 846 [U.S. Court of Appeals (3rd Circuit), United States, 19 July 2007].

<sup>23</sup> See CLOUT case No. 293 [Schiedsgericht der Hamburger freundschaftlichen Arbitrage, Germany, 29 December 1998].

<sup>24</sup> Ibid.

<sup>25</sup> CLOUT case No. 846 [U.S. Court of Appeals (3rd Circuit), United States, 19 July 2007].