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Article 37 [Right to Cure up to Date for Delivery]

Christoph J.H. Brunner; Emmanuel O. Igbokwe

If the seller has delivered goods before the date of delivery, he may, up to that date, deliver any missing part or make up any deficiency in the quantity of the goods delivered, or deliver goods in replacement of any lack of conformity in the goods delivered, provided that the exercise of this right does not cause the buyer unreasonable inconvenience or unreasonable expense. However, the buyer retains any right to claim damages as provided for in this Convention.

1 Overview

1 Article 37 deals with the seller's right to cure defects in cases where he has delivered the goods prematurely; this right exists until the prescribed time of delivery. The right to cure defects can be considered a matter of course in cases where the buyer has accepted rather than rejected the goods (Art. 52(1)). (1281) This is because the contract can be avoided prior to the time of delivery only in the case of an anticipated fundamental breach (Art. 72(1)). (1282) Thus, the significance of Art. 37 lies above all in its restrictions to the right to cure defects in case of premature delivery (i.e. the reasonableness threshold and damages). (1283) Article 34 **second sentence** sets out a corresponding rule for the handover of documents. The prerequisites for the right to cure after the time for delivery has passed are set out in Art. 48.

2 Prerequisites; Means of Cure

2 The right to cure defects in case of premature delivery exists under the following conditions:

3 The buyer has accepted the premature delivery **without reservation**, even though he is not obliged to do so according to Art. 52(1).

4 The defects must be cured **before the expiry of the agreed delivery time**. The time of delivery may be fixed in the form of a specific delivery date (Art. 33(a)). If the delivery date has been fixed as a **period of time** (contractually specified period of time pursuant to Art. 33(b) or reasonable period of time pursuant to Art. 33(c)), ● the defects may be cured up until the last possible date of that period. (1284) In cases of contracts of sale with carriage, the delivery date derives, in the absence of any other agreement in the contract, from the place of delivery. In other words, the **time of handover** of the goods to the (first) carrier is considered the time of delivery (cf. Art. 31(a)). (1285)

5 The exercise of the right to cure defects may “**not** cause the buyer **unreasonable inconvenience or unreasonable expense**”. The costs of such subsequent performance must in any case be borne by the seller. (1286) The threshold of reasonableness is set according to the specific circumstances of each individual case and in accordance with the principle of good faith. (1287) Unreasonableness may be assumed if the repair or replacement delivery were to cause a lengthy stoppage of production for the buyer, or considerably hamper the normal course of his business, or if the action undertaken did not appear promising, or if the buyer were obliged to make certain advance payments. (1288) The buyer may, however, reject an unreasonable cure and may rely on his general rights regarding defects as soon as the prescribed time for delivery has passed, or in cases where Art. 72 applies. (1289)

6 Within the reasonableness threshold, the seller has **discretion** to undertake one or more of the suggested **measures to cure the defect** as listed in Art. 37. (1290) Article 37 does not only apply to **all contractual non-conformities within the meaning of Art. 35** (for documents, see Art. 34 second sentence), but also applies – beyond its wording – by analogy to **legal defects**. (1291)

3 Legal Consequences

7 As long as the right to cure pursuant to Art. 37 still exists, the buyer cannot assert any rights under Arts. 45 et seqq., save for the claims for damages pursuant to Art. 37 second sentence (see *infra* para. 8). (1292) However, if it is obvious even before the time for delivery that a subsequent performance is either not possible or will not be successful, the buyer can avoid the contract pursuant to Art. 72 if the non-conformity constitutes a **fundamental breach of contract**. If the attempt to cure defects is unsuccessful, a second attempt is theoretically possible up until the time of delivery; however, the reasonableness threshold will be higher at every subsequent attempt. (1293) **If the buyer unjustifiably refuses or prevents** the seller from curing the defect, even though he

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accepted the goods delivered prematurely without demur, he loses his rights arising from the non-conformity insofar as he deprives the seller of the possibility of proper performance. (1294)

8 Pursuant to Art. 37 **second sentence**, the buyer's rights – in spite of the eventual correct performance – to claim any **damages** arising from the original non-conforming performance remain intact, notwithstanding the subsequent correct performance. (1295) Such damages may include, in particular, expenses incurred by the buyer as a consequence of the cure of defects as well as damages which the non-conforming goods may have caused to other possessions of the buyer (1296) (personal injuries are excluded from the sphere of application of the CISG pursuant to Art. 5). Furthermore, damages resulting from loss of use/downtime might also be claimed. (1297)

4 Burden of Proof

9 The party that wishes to rely on rights arising from Art. 37 must prove that the factual prerequisites of this provision are fulfilled. Accordingly, **the seller** must prove facts which give rise to his right to cure the defects. (1298) Furthermore, if the seller asserts that the buyer unjustifiably prevented the cure, he must prove that the actions he would have undertaken would have been appropriate to cure the defects. (1299) On the other hand, the buyer bears the burden of proof for the inconvenience or disproportionality of the costs. (1300) In line with the general rules, the buyer must prove damages under Art. 37 **second sentence**.

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References

- 1281) Ferrari et al./Ferrari, Art. 37 CISG para. 2; Piltz, para. 4–57.
- 1282) Schlechtriem/Schwenzer/Schwenzer, Art. 37 para. 3.
- 1283) Schlechtriem/Schwenzer/Schwenzer, Art. 37 para. 2; Ferrari et al./Ferrari, Art. 37 CISG para. 5; Lookofsky, CISG 2016, 124.
- 1284) This position is in line with the prevailing view: see, e.g., Staudinger/Magnus, Art. 37 CISG para. 9; Schlechtriem/Schwenzer, Art. 37 para. 5; Kröll et al./Kröll, Art. 37 para. 10; Piltz, para. 4–58; MüKo BGB-Gruber, Art. 37 CISG paras. 5–7; MüKo HGB-Benicke, Art. 37 CISG para. 3; Lookofsky, CISG 2016, 124; Bianca/Bonell/Bianca, Art. 37 CISG para. 2.3; Enderlein, Rights and Obligations of the Seller under the UN Convention on Contracts for the International Sale of Goods, 163 in Sarcevic/Paul Volken (eds.), International Sale of Goods: Dubrovnik Lectures, Oceana (1996), Ch. 5, 133–201.
- 1285) See Secretariat Commentary, Art. 35 para. 2; Staudinger/Magnus, Art. 37 CISG para. 7. Any other possible time for delivery would be considered “consumed” from the time of the handover.
- 1286) Ferrari et al./Ferrari, Art. 37 CISG para. 12; Staudinger/Magnus, Art. 37 CISG para. 17; MüKo HGB-Benicke, Art. 37 CISG para. 8; Bianca/Bonell/Bianca, Art. 37 CISG para. 2.5.
- 1287) MüKo HGB-Benicke, Art. 37 CISG para. 6; Piltz, para. 4–66; Kröll et al./Kröll, Art. 37 para. 13.
- 1288) For further examples of situations in which unreasonableness may be assumed, see Kröll et al./Kröll, Art. 37 para. 15; Staudinger/Magnus, Art. 37 CISG para. 16; Schlechtriem/Schwenzer/Schwenzer, Art. 37 para. 13; Ferrari et al./Ferrari, Art. 37 CISG para. 11.
- 1289) Staudinger/Magnus, Art. 37 CISG para. 18.
- 1290) Staudinger/Magnus, Art. 37 CISG para. 12; Schlechtriem/Schwenzer/Schwenzer, Art. 37 para. 7; MüKo BGB-Gruber, Art. 37 CISG para. 11; Schlechtriem/Schroeter, para. 401. *But see* MüKo HGB-Benicke, Art. 37 CISG para. 7: Benicke argues that the seller does not have full discretion as regards the type of measure to which he will resort in an attempt to cure the defects, but must, in principle, only apply a measure of cure that will be least burdensome on the buyer. For an overview of possible measures to cure defects, see Schlechtriem/Schwenzer/Schwenzer, Art. 37 paras. 7–10.
- 1291) MüKo HGB-Benicke, Art. 37 CISG para. 5; Schlechtriem/Schwenzer/Schwenzer, Art. 37 para. 6; Staudinger/Magnus, Art. 37 CISG para. 13; Ferrari et al./Ferrari, Art. 37 CISG para. 7; Piltz, para. 4–58; MüKo BGB-Gruber, Art. 37 CISG para. 10.
- 1292) Piltz, para. 5–27; Ferrari et al./Ferrari, Art. 37 CISG para. 13; Staudinger/Magnus, Art. 37 CISG para. 19; MüKo HGB-Benicke, Art. 37 CISG para. 9; MüKo BGB-Gruber, Art. 37 CISG para. 16; Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, 25 April 1995 (Arbitral award No. 200/1994), CISG-online 206.
- 1293) Schlechtriem/Schwenzer/Schwenzer, Art. 37 para. 11.
- 1294) Cf. Art. 80; Kröll et al./Kröll, Art. 37 para. 22; Ferrari et al./Ferrari, Art. 37 CISG para. 14; Piltz, para. 4–58; UNCITRAL Digest 2016, Art. 37 para. 1; see also Federal Arbitration Court of the North Caucasus Area, Krasnodar (No. A63-4588/2010), 3 October 2011, available at <<http://cisgw3.law.pace.edu/cases/111003r1.html>>.
- 1295) Piltz, para. 4–58; Schlechtriem/Schroeter, para. 401; Kröll et al./Kröll, Art. 37 para. 24.
- 1296) Ferrari et al./Ferrari, Art. 37 CISG para. 15; Staudinger/Magnus, Art. 37 CISG para. 25, with further references.

- 1297)** MüKo BGB-Gruber, Art. 37 CISG para. 19.
- 1298)** Schlechtriem/Schwenzer/Schwenzer, Art. 37 para. 18; cf. Ferrari et al./Ferrari, Art. 37 CISG para. 16.
- 1299)** MüKo HGB-Benicke, Art. 37 CISG para. 12.
- 1300)** MüKo BGB-Gruber, Art. 37 CISG para. 20; Ferrari et al./Ferrari, Art. 37 CISG para. 16; Staudinger/Magnus, Art. 37 CISG para. 26, with further references.

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