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Article 33

The seller must deliver the goods:

- (a) If a date is fixed by or determinable from the contract, on that date;
- (b) If a period of time is fixed by or determinable from the contract, at any time within that period unless circumstances indicate that the buyer is to choose a date; or
- (c) In any other case, within a reasonable time after the conclusion of the contract.

Meaning and purpose of the provision

1. Article 33 specifies the time within which the seller has to deliver the goods. In this respect one first has to look at the delivery date or period fixed in the contract thereby letting party autonomy prevail over the provisions of the

* The present digest was prepared using the full text of the decisions cited in the Case Law on UNCITRAL Texts (CLOUT) abstracts and other citations listed in the footnotes. The abstracts are intended to serve only as summaries of the underlying decisions and may not reflect all the points made in the digest. Readers are advised to consult the full texts of the listed court and arbitral decisions rather than relying solely on the CLOUT abstracts.

Convention.¹ If no specific date or period can be inferred from the contract, article 33 (c) fixes as default rule a reasonable time after the conclusion of the contract.

2. Although article 33 addresses merely the duty to deliver, its rules apply as well to other duties of the seller which have also to be performed at the date provided in the contract and, absent any such provision, within a reasonable time.

Fixed date (lit. a)

3. Article 33 (a) presupposes that the parties have fixed a precise day for delivery² or that such date can be inferred from the contract (e.g., “15 days after Easter”) or is determined by any usage or practice. In that case the seller has to deliver precisely on that fixed date.³ Any delivery at a later time constitutes a breach of contract.

4. According to one court, article 33 (a) also covers the situation where the parties have not fixed a specific date of delivery but have agreed that the seller should deliver at the request of the buyer.⁴ If the buyer, however, does not request delivery then the seller is not in breach.⁵

Fixed period for delivery (lit. b)

5. Article 33 (b) requires that the parties have fixed a period of time during which the goods can be delivered or that such period can be inferred from the contract. The seller then may deliver at any date during that period.

6. A period for delivery is, e.g., fixed by a contract provision “until: end December”.⁶ Any delivery between the conclusion of the contract and the end of December would conform to the contract while the delivery after 31 December would constitute a breach of contract. The same is true if delivery is to be “effected in 1993–1994”.⁷ In that case, any delivery between 1 January 1993 and 31 December 1994 corresponds to a timely performance.⁸ The right to choose the concrete date of delivery during the period rests generally with the seller.⁹ For the buyer to be able to choose the delivery date, an agreement to that effect is necessary.¹⁰ In one case, the contract provision for delivery “July, August,

¹ CLOUT case No. 338 [Oberlandesgericht Hamm, Germany, 23 June 1998].

² See the example in Corte di Appello di Milano, Italy, 20 March 1998, Unilex (“Delivery: 3rd December, 1990”).

³ See also the Secretariat Commentary to (then) article 31, p. 31, para. 3.

⁴ CLOUT case No. 338 [Oberlandesgericht Hamm, Germany, 23 June 1998] (see full text of the decision).

⁵ *Id.* (in this case the seller had to deliver according to “delivery graphics” provided by the buyer. But the buyer did never provide those “graphics”) (see full text of the decision).

⁶ See the case in ICC Court of Arbitration, Switzerland, award No. 8786, *ICC International Court of Arbitration Bulletin* 2000, 70.

⁷ See the case in ICC Court of Arbitration, France, award No. 9117, *ICC International Court of Arbitration Bulletin* 2000, 83.

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*; impliedly also CLOUT case No. 338 [Oberlandesgericht Hamm, Germany, 23 June 1998].

September + -” was understood to mean that one third of the shipment was to be delivered during each of the aforementioned months.¹¹

Reasonable time (lit. c)

7. Article 33 (c) applies where neither the contract nor any usage or practice between the parties provides a specific time for delivery. The seller has then to deliver within a reasonable time. “Reasonable” means a time adequate in the circumstances. Therefore, delivery of a bulldozer two weeks after receipt of invoice and payment of first instalment has been held reasonable.¹² Where a contract is concluded in January and provides for delivery “April, delivery date remains reserved”¹³ also a reasonable time has been held to apply since a concrete delivery date had never been fixed. In the case where the buyer had made clear that he was interested in delivery until 15 March the reasonable time has been held to end before 11 April.¹⁴

Meaning of delivery

8. Article 33 requires that the seller has performed in time all acts to which he is obliged under the contract or under articles 31, 32 or 34. Unless otherwise agreed upon article 33 does not require that the buyer be able to take possession of the goods on the date of delivery.¹⁵

Consequences

9. Any delivery after the date or after the end of the period for delivery is a breach of contract to which the rules of the Convention on remedies apply. If the delivery date was essential then late delivery amounts to a fundamental breach and even avoidance of contract can be declared.¹⁶ However, according to one court, a one day delay in the delivery of a small part of the goods does not constitute a fundamental breach even in case of a fixed date of delivery agreed upon the parties.¹⁷ But the parties are always free to write into their contract that any delay of delivery is to be treated as a fundamental breach of contract.¹⁸

¹¹ CLOUT case No. 7 [Amtsgericht Oldenburg in Holstein, Germany, 24 April 1990].

¹² CLOUT case No. 219 [Tribunal Cantonal Valais, Switzerland, 28 October 1997]. Also stating the reasonableness of the time of delivery despite the seasonal character of the Christmas goods: CLOUT case No. 210 [Audiencia Provincial, Barcelona, Spain, 20 June 1997].

¹³ CLOUT case No. 362 [Oberlandesgericht Naumburg, Germany, 27 April 1999].

¹⁴ CLOUT case No. 362 [Oberlandesgericht Naumburg, Germany, 27 April 1999] (the court found that the offer “March 15” was not materially altered by the acceptance “April, delivery date reserved”. Since the offeror did not object to the terms of the acceptance, its contents became part of the contract according to art 19 (2)).

¹⁵ See the Secretariat Commentary to (then) article 31, p. 31, para. 2; also Landgericht Oldenburg, Germany, 27 March 1996, Unilex.

¹⁶ ICC Court of Arbitration, Switzerland, award No. 8786, *ICC International Court of Arbitration Bulletin* 2000, 70.

¹⁷ Landgericht Oldenburg, Germany, 27 March 1996, Unilex.

¹⁸ ICC Court of Arbitration, Switzerland, award No. 8786, *ICC International Court of Arbitration*

10. One arbitral tribunal held that the seller's declaration that it would not be able to deliver the goods on time constituted an anticipatory breach of contract in the sense of article 71.¹⁹

Burden of proof

11. The party asserting that a specific date or period for delivery has been agreed upon has to prove such agreement.²⁰ A buyer who asserts that it is to choose the actual date during a period of delivery must prove a respective agreement or circumstances evidencing that assertion.²¹

Bulletin 2000, 70 (in that case the agreed general conditions of the buyer provided that any delay of delivery constituted a fundamental breach of contract).

¹⁹ ICC Court of Arbitration, Switzerland, January 1997, award No. 8786, *ICC International Court of Arbitration Bulletin* 2000, 72.

²⁰ CLOUT case No. 362 [Oberlandesgericht Naumburg, Germany, 27 April 1999] (see full text of the decision).

²¹ ICC Court of Arbitration, France, March 1998, award No. 9117, *ICC International Court of Arbitration Bulletin* 2000, 90.