

SECTION II. CONFORMITY OF THE GOODS AND
THIRD PARTY CLAIMS

Article 33

[Conformity of the goods]

(1) The seller must deliver goods which are of the quantity, quality and description required by the contract and which are contained or packaged in the manner required by the contract. Except where otherwise agreed, the goods do not conform with the contract unless they:

(a) are fit for the purposes for which goods of the same description would ordinarily be used;

(b) are fit for any particular purpose expressly or impliedly made known to the seller at the time of the conclusion of the contract, except where the circumstances show that the buyer did not rely, or that it was unreasonable for him to rely, on the seller's skill and judgement;

(c) possess the qualities of goods which the seller has held out to the buyer as a sample or model;

(d) are contained or packaged in the manner usual for such goods.

(2) The seller is not liable under subparagraphs (a) to (d) of paragraph (1) of this article for any non-conformity of the goods if at the time of the conclusion of the contract the buyer knew or could not have been unaware of such non-conformity.

PRIOR UNIFORM LAW

ULIS, articles 33 and 36.

Commentary

1. Article 33 states the extent of the seller's obligation to deliver goods which conform to the contract.

2. This article differs from ULIS in one important respect. Under ULIS the seller had not fulfilled his obligation to "deliver the goods" where he handed over goods which failed to conform to the requirements of the contract in respect of quantity, quality or description. However, under this Convention, if the seller has handed over or placed at the buyer's disposal goods which meet the general description of the contract, he has "delivered the goods" even though those goods do not conform in respect of quantity or quality.¹ It should be noted, however, that, even though the goods have been "delivered", the buyer retains his remedies for the non-conformity of the goods.²

3. However, the seller's obligation under articles 39 and 40 to deliver goods free from any right or claim of a third party, including a right or claim based on industrial or intellectual property, is independent of the seller's obligation to deliver goods which conform to the contract.³

Seller's obligations as to conformity of the goods, paragraph (1)

4. Paragraph (1) states the standards by which the seller's obligation to deliver goods which conform to the contract is measured. The first sentence emphasizes that the goods must conform to the quantity, quality and description required by the contract and must be contained or packaged in the manner required by the contract. This provision recognizes that the overriding source for the standard of conformity is the contract between the parties. The remainder of paragraph (1) describes specific aspects of the seller's obligations as to conformity which apply "except where otherwise agreed."

Fit for ordinary purposes, subparagraph (1) (a)

5. Goods are often ordered by general description without any indication to the seller as to the purpose for which those goods will be used. In such a situation the seller must furnish goods which are fit for all the purposes for which goods of the same description are ordinarily used. The standard of quality which is implied from the contract must be ascertained in the light of the normal expectations of persons buying goods of this contract description. The scope of the seller's obligation under this subparagraph is not determined by whether the seller could expect the buyer himself to use the goods in one of the ways in which such goods are ordinarily used. In particular, the obligation to furnish goods which are fit for all the purposes for which goods of the contract description are ordinarily used also covers a buyer who has purchased the goods for resale rather than use. For goods to be fit for ordinary purposes, they must be honestly resalable in the ordinary course of business. If the goods available to the seller are fit for only some of the purposes for which such goods are ordinarily used, he must ask the buyer the particular purposes for which these goods are intended so that he can refuse the order if necessary.

6. The seller is not obligated to deliver goods which are fit for some special purpose which is not a purpose "for which goods of the same description would ordinarily be used" unless the buyer has "expressly or impliedly made known to the seller at the time of the conclusion of the contract" such intended use.⁴ This problem may arise if the buyer intends to use the goods for a purpose for which goods of this kind are sometimes, but not ordinarily used. In the absence of some indication from the buyer that such a particular purpose is intended, the seller would have no reason to attempt to supply goods appropriate for such purpose.

Fit for particular purpose, subparagraph (1) (b)

7. Buyers often know that they need goods of a general description to meet some particular purpose but they may not know enough about such goods to give exact specifications. In such a case the buyer may describe the goods desired by describing the particular use to which the goods are to be put. If the buyer expressly or impliedly makes known to

the seller such purpose, the seller must deliver goods fit for that purpose.

8. The purpose must be known to the seller by the time of the conclusion of the contract so that the seller can refuse to enter the contract if he is unable to furnish goods adequate for that purpose.

9. The seller is not liable for failing to deliver goods fit for a particular purpose even if the particular purpose for which the goods have been purchased has in fact been expressly or impliedly made known to him if "the circumstances show that the buyer did not rely, or that it was unreasonable for him to rely, on the seller's skill and judgement". The circumstances may show, for example, that the buyer selected the goods by brand name or that he described the goods desired in terms of highly technical specifications. In such a situation it may be held that the buyer had not relied on the seller's skill and judgement in making the purchase. If the seller knew that the goods ordered by the buyer would not be satisfactory for the particular purpose for which they have been ordered it would seem that he would have to disclose this fact to the buyer.⁵ If the buyer went ahead and purchased the goods it would then be clear that he did not rely on the seller's skill and judgement.

10. It would also be unreasonable for the buyer to rely on the seller's skill and judgement if the seller did not purport to have any special knowledge in respect of the goods in question.

Sample of model, subparagraph (1) (c)

11. If the contract is negotiated on the basis of a sample or model, the goods delivered must possess the qualities which are possessed by the goods the seller has held out as the sample or model. Of course, if the seller indicates that the sample or model is different from the goods to be delivered in certain respects, he will not be held to those qualities of the sample or model but will be held only to those qualities which he has indicated are possessed by the goods to be delivered.

Packaging, subparagraph (1) (d)

12. Subparagraph (1) (d) makes it one of the seller's obligations in respect of the conformity of the goods that they "are contained or packaged in the manner usual for such goods". This provision which sets forth a minimum standard, is not intended to discourage the seller from packaging the goods in a manner that will give them better protection from damage than would the usual manner of packaging.

Buyer's knowledge of the non-conformity, paragraph (2)

13. The obligations in respect of quality in subparagraphs (1) (a) to (d) are imposed on the seller by this Convention because in the usual sale the buyer would legitimately expect the goods to have such qualities even if they were not explicitly stated in the contract. However, if at the time of contracting the buyer knew or could not have been unaware of a non-conformity in respect of one of those qualities, he could not later say that he had expected the goods to conform in that respect.

14. This rule does not go to those characteristics of the goods explicitly required by the contract and, therefore subject to the first sentence of paragraph (1). Even if at the time of the conclusion of the contract the buyer knew that the seller would deliver goods which would not conform to the contract, the buyer has a right to contract for full performance from the seller. If the seller does not perform as agreed, the buyer may resort to any of his remedies which may be appropriate.⁶

¹ The necessity that the seller hand over or place at the buyer's disposal goods which meet the contract description in order to have "delivered the goods" is discussed in paragraph 3 of the commentary on article 29.

² Article 41 (1).

³ For the significance of this rule, see articles 39 and 40 and the commentary to these articles.

⁴ Article 33 (1) (b). See paragraphs 7 to 10 below.

⁵ This appears to follow from the requirement of the observance of good faith in article 5.

⁶ Article 41 (1).