

*Article 34*

[Seller's liability for lack of conformity]

(1) The seller is liable in accordance with the contract and this Convention for any lack of conformity which exists at the time when the risk passes to the buyer, even

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though the lack of conformity becomes apparent only after that time.

(2) The seller is also liable for any lack of conformity which occurs after the time indicated in paragraph (1) of this article and which is due to a breach of any of his obligations, including a breach of any express guarantee that the goods will remain fit for their ordinary purpose or for some particular purpose, or that they will retain specified qualities or characteristics for a specific period.

rather than "for the consequences of any lack of conformity", which appeared in ULIS article 35, paragraph 2. This makes it clear that the defect or flaw in the goods does not have to have existed at the time the risk passed if the lack of conformity in question is due to a breach of any of the obligations of the seller.

PRIOR UNIFORM LAW

ULIS, article 35.

Commentary

1. Article 34 deals with the time at which is to be judged the conformity of the goods to the requirements of the contract and this Convention.

*Basic rule, paragraph (1)*

2. Paragraph (1) contains the basic rule that the seller is liable in accordance with the contract and this Convention for any lack of conformity which exists at the time the risk passes even though the lack of conformity becomes apparent only after that date. The rule that the conformity of the goods to the contract is to be measured as of the time risk passes is a necessary implication of the rules on risk of loss or damage.

3. Although the conformity of the goods is measured at the time the risk passes, the buyer may not know of a non-conformity until much later. This may occur because the non-conformity becomes evident only after the goods have been used. It may also occur because the contract involves the carriage of goods. In such a case the risk may pass when the goods are handed over to a carrier for transmission to the buyer.<sup>1</sup> The buyer, however, will normally not be able to examine the goods until after they have been handed over to him by the carrier at the point of destination, some time after the risk has passed. In either case if the non-conformity existed at the time the risk passed, the seller is liable.

*Example 34A:* A contract called for the sale of "No. 1 quality corn, FOB seller's city". Seller shipped No. 1 corn, but during transit the corn was damaged by water and on arrival the quality was No. 3 rather than No. 1. Buyer has no claim against Seller for non-conformity of the goods since the goods did conform to the contract when risk of loss passed to Buyer.

*Example 34B:* If the corn in example 34A had been No. 3 quality when shipped, Seller would have been liable even though Buyer did not know of the non-conformity until the corn arrived at Buyer's port or place of business.

*Damage subsequent to passage of risk, paragraph (2)*

4. Paragraph (2) provides that even after the passage of the risk the seller remains liable for any damage which occurs as a breach of one of his obligations. Although this is most evidently true when the damage occurs because of some positive act on the part of the seller, it is also true when the obligation which has been breached is an express guarantee given by the seller that the goods will retain some particular characteristics for a specified period after the risk of loss has passed. Since article 34 (1) states that conformity of the goods is to be judged at the time risk passes, it was considered necessary to state specifically that the seller was liable for any breach of an express guarantee of quality.

5. It should be noted that article 34 (2) states that the seller is liable "for any lack of conformity" which occurs after the risk has passed

<sup>1</sup> Article 79 (1). If the goods are not clearly marked with an address or otherwise identified to the contract, article 79 (2) provides that the risk does not pass to the buyer until the seller sends the buyer a notice of the consignment which specifies the goods.