

Article 67

[Buyer's loss of right to avoid or to require delivery of substitute goods]

(1) The buyer loses his right to declare the contract avoided or to require the seller to deliver substitute goods if it is impossible for him to make restitution of the goods substantially in the condition in which he received them.

(2) Paragraph (1) of this article does not apply:

(a) if the impossibility of making restitution of the goods or of making restitution of the goods substantially in the condition in which he received them is not due to an act or omission of the buyer; or

(b) if the goods or part of the goods have perished or deteriorated as a result of the examination provided for in article 36; or

(c) if the goods or part of the goods have been sold in the normal course of business or have been consumed or transformed by the buyer in the course of normal use before he discovered the lack of conformity or ought to have discovered it.

PRIOR UNIFORM LAW

ULIS, article 79.

Commentary*Loss of right by buyer to avoid or require substitute goods,
paragraph (1)*

1. Article 67 states that "the buyer loses his right to declare the contract avoided or to require the seller to deliver substitute goods if it is impossible for him to make restitution of the goods substantially in the condition in which he received them".

2. The rule in paragraph (1) recognizes that the natural consequences of the avoidance of the contract or the delivery of substitute goods is the restitution of that which has already been delivered under the contract. Therefore, if the buyer cannot return the goods, or cannot return them substantially in the condition in which he received them, he loses his right to declare the contract avoided under article 45 or to require the delivery of substitute goods under article 42.

3. It is not necessary that the goods be in the identical condition in which they were received; they need be only in "substantially" the same condition. Although the term "substantially" is not defined, it indicates that the change in condition of the goods must be of sufficient importance that it would no longer be proper to require the seller to retake the goods as the equivalent of that which he had delivered to the buyer even though the seller had been in fundamental breach of the contract.¹

Exceptions, paragraph (2)

4. Paragraph (2) states three exceptions to the above rule. The buyer should be able to avoid the contract or require substitute goods even though he cannot make restitution of the goods substantially in the condition in which he received them (1) if the impossibility of doing so is not due to his own act or omission, (2) if the goods or part of them have perished or deteriorated as a result of the normal examination of the goods by the buyer provided for in article 36, and (3) if part of the goods have been sold in the normal course of business or have been consumed or transformed by the buyer in the course of normal use before the lack of conformity with the contract was discovered or ought to have been discovered.

5. A fourth exception to the rule stated in article 67 (1) is to be found in article 82 which states that if the seller has committed a fundamental breach of contract, the passage of the risk of loss under article 79, 80 or 81 does not impair the remedies available to the buyer on account of such breach.²

¹ The buyer may require the delivery of substitute goods under article 42 or, with the exception of article 45 (1) (b), declare the avoidance of the contract only if the seller is in fundamental breach of the contract.

² See para. 2 of the commentary to article 82.