

Article 35

[Cure of lack of conformity prior to date for delivery]

If the seller has delivered goods before the date for 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 non-conforming goods delivered or remedy 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. The buyer retains any right to claim damages as provided for in this Convention.

PRIOR UNIFORM LAW

ULIS, article 37.

Commentary

1. Article 35 deals with the situation in which the seller has delivered goods before the final date which the contract prescribes for delivery but his performance does not conform with the contract.¹ It would be possible to say that the decision whether the seller's performance conforms to the requirements of the contract shall be made once and for all at the time delivery has been made. However, article 35 provides that the seller may remedy the non-conformity by delivering any missing part or make up any deficiency in the quantity of the goods, by delivering replacement goods which are in conformity with the contract, or by remedying any non-conformity in the goods.²

2. The seller has the right to remedy the non-conformity of the goods under article 35 only until the "date for delivery". After the date for delivery his right to remedy is based on article 44. In those international sales which involve carriage of the goods, unless the contract otherwise provides, delivery is effected by handing over the goods to the first carrier.³ Therefore, in those contracts, the date until which the seller may remedy any non-conformity of the quantity or quality of the goods under article 35 is the date by which he was required by the contract to hand over the goods to the carrier.

3. The seller's right to remedy any non-conformity is also limited by the requirement that his exercise of that right does not cause the buyer either unreasonable inconvenience or unreasonable expense.

Example 35 A: The contract required Seller to deliver 100 machine tools by 1 June. He shipped 75 by an appropriate carrier on 1 May which arrived on 15 June. He also shipped an additional 25 machine tools on 30 May which arrived on 15 July. Seller remedied the non-conformity by handing over these machine tools to the carrier before the contract date for delivery of the 100 machine tools, 1 June.

Example 35 B: If the contract in example 35 A did not authorize Seller to deliver by two separate shipments, Seller could remedy the original non-conformity as to quantity only if receiving the missing 25 machine tools in a later second shipment did not cause Buyer "unreasonable inconvenience or unreasonable expense".

¹ The buyer is not required to take delivery of the goods prior to the delivery date: article 48 (1).

² In order for the seller to be made aware of any non-conformity so that he can effectively exercise his right of remedy, the buyer is required by article 36 to examine the goods within as short a period as is reasonable in the circumstances and by article 37 to give the seller notice of the non-conformity.

³ Article 29 (a). For the point of time at which risk of loss passes, see article 79 and commentary to that article.

Example 35C: On arrival of the machine tools described in example 35A at Buyer's place of business on 15 June and 15 July, the tools were found to be defective. It was too late for Seller to cure under article 35 because the date for delivery (1 June) had passed. However, Seller may have a right to remedy the lack of conformity under article 44.

Example 35D: The machine tools described in example 35A were handed over to Buyer by the carrier prior to 1 June, the contractual delivery date. When examined by Buyer the tools were found to be defective. Although Seller had the ability to repair the tools prior to the delivery date, he would have had to do the work at Buyer's place of business. If Seller's efforts to remedy the lack of conformity under such circumstances would cause "unreasonable inconvenience or unreasonable expense" to Buyer, Seller would have no right to effect the remedy.