

*Article 82***[Effect of fundamental breach on passage of risk]**

If the seller has committed a fundamental breach of contract, the provisions of articles 79, 80 and 81 do not impair the remedies available to the buyer on account of such breach.

## PRIOR UNIFORM LAW

ULIS, article 97 (2).

**Commentary**

1. Article 82 provides that the passage of the risk of loss under articles 79, 80 and 81 does not impair any remedies which the buyer may have which arise out of a fundamental breach of contract by the seller.

2. The primary significance of article 82 is that the buyer may be able to insist on the delivery of substitute goods under article 42 or 43 or to declare the contract avoided under article 45 (1) (a) or (b) even though the goods have been lost or damaged after the passage of the risk of loss under article 79, 80 or 81. In this respect article 82 constitutes an exception to article 67 (1) as well as to articles 79, 80 and 81 in that, subject to three exceptions enumerated in article 67 (2), "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".

3. Article 82 must be read in connection with articles 37 and 45 (2) because in some examples the buyer will lose his right to declare the contract avoided or to require the seller to deliver substitute goods because he did not act within the time-limits required by those articles.

*Example 82A:* The contract was the same as in example 81 A. Buyer was to take delivery of 100 cartons of transistors at Seller's warehouse during the month of July. On 1 July Seller marked 100 cartons with Buyer's name and placed them in the portion of the warehouse reserved for goods ready for pick-up or shipment. On 20 July Buyer took delivery of the 100 cartons at which time he paid the price. Therefore, under article 81 (1) the risk of loss passed to Buyer on 20 July.

On 21 July, before Buyer could make the examination required under article 36, 50 of the cartons were destroyed in a fire. When Buyer examined the contents of the remaining 50 cartons, the transistors were found not to conform to the contract to such a degree that the lack of conformity constituted a fundamental breach of the contract.

In spite of Buyer's inability to return all 100 cartons because of the fire which had occurred after the passage of the risk of loss, Buyer could avoid the contract and recover the price he had paid.

*Example 82B:* The facts are the same as in example 82A except that Buyer did not examine the remaining 50 cartons of transistors for six months after he received them. In such a case he could probably not avoid the contract because it would probably be held under article 37

(1) that he had not given notice of the lack of conformity "within a reasonable time after he . . . ought to have discovered it" and under article 45 (2) (b) that he had not declared the contract avoided "within a reasonable time . . . after he . . . ought to have known of such breach".

*Example 82C:* In partial fulfilment of his obligations under the contract in example 82A on 1 July Seller identified to the contract 50 cartons of transistors rather than the 100 cartons called for in the contract.

On 5 August, before Buyer took delivery of the goods, the 50 cartons were destroyed in a fire in Seller's warehouse. Even though the risk of loss in respect of the 50 cartons had passed to Buyer at the close of business on 31 July,<sup>1</sup> if identifying to the contract only 50 cartons instead of 100 cartons constituted a fundamental breach of contract, Buyer could still declare the contract avoided by reason of article 82. However, he must do so "within a reasonable time . . . after he knew or ought to have known" of the shortage or he will lose the right to declare the contract avoided by virtue of article 45 (2) (b).

*Example 82D:* Although Seller in the contract described in example 82A should have had the 100 cartons ready for Buyer to take delivery at any time during the month of July, no cartons were marked with Buyer's name or otherwise identified to the contract until 15 September. Buyer took delivery on 20 September. As was stated in example 81C, the risk of loss passed to the Buyer on 20 September, the time when Buyer took delivery of the goods.

On 23 September the goods were damaged through no fault of Buyer. If Seller's delay in putting the goods at Buyer's disposal amounted to a fundamental breach, article 82 provides that the damage to the goods after the passage of the risk of loss would not prohibit Buyer from declaring the contract avoided. However, under article 45 (2) (a), it is likely that it would be held that once Buyer had taken delivery of the goods by picking them up at Seller's warehouse, he had lost the right to declare the contract avoided for not having "done so within a reasonable time . . . after he [became] aware that delivery has been made".

*Example 82E:* The contract was similar to that in example 82A except that Seller was to ship the goods on FOB terms during the month of July. The goods were shipped late on 15 September. Under article 79 (1) the risk of loss passed on 15 September.

On 17 September the goods were damaged while in transit. On 19 September both the fact that the goods had been shipped on 15 September and that they were damaged on 17 September were communicated to Buyer. Under these facts, if the late delivery constituted a fundamental breach, Buyer could avoid the contract if he did so "within a reasonable time . . . after he has become aware that delivery has been made",<sup>2</sup> a time which would undoubtedly be very short under the circumstances.

<sup>1</sup> See example 81 B.

<sup>2</sup> Article 45 (2) (a).