

Article 36

(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 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 the preceding paragraph and which is due to a breach of any of his obligations, including a breach of any guarantee that for a period of time the goods will remain fit for their ordinary purpose or for some particular purpose or will retain specified qualities or characteristics.

OVERVIEW

1. Article 36 deals with the time at which a lack of conformity in the goods must have arisen in order for the seller to be liable for it.¹ Article 36 (1) states a general rule that the seller is liable for a lack of conformity that exists at the time risk of loss for the goods passes to the buyer.² Article 36 (2) extends the seller's responsibility in certain circumstances by providing that the seller is liable for a lack of conformity occurring even after risk has passed if the non-conformity is caused by a breach of the seller of its obligations, including a breach of a guarantee of the future performance or qualities of the goods.³ Several decisions illustrate the operation of the two paragraphs of article 36. A flower shop that purchased daisy plants refused to pay the price when the buyer's own customers complained that the plants did not bloom throughout the summer as expected: a court of appeals affirmed the seller's right to the price because (1) the buyer failed to prove, pursuant to article 36 (1), that the plants were defective when the risk passed to the buyer, and (2) the buyer failed to prove that the seller had guaranteed the future fitness of the goods under article 36 (2).⁴ Another court concluded that the seller was not liable under article 36 (1) for damage to pizza boxes that occurred while the boxes were being shipped by carrier because risk of loss had passed to the buyer when the goods were handed over to the first carrier; the result was not changed by article 36 (2) because the damage was not due to any breach by the seller.⁵ And where regulations restricting the buyer's ability to import pork were issued after the contract was formed, a court has held that the seller was responsible for such regulations only if the regulations existed when the risk passed (as provided in article 36 (1)) or if the seller had issued a specific guarantee as provided in article 36 (2).⁶

ARTICLE 36 (1) OVERVIEW

2. Article 36 (1) provides that 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." Tribunals have invoked article 36 (1) to establish the time and place at which to determine whether the goods lacked conformity under

article 35 CISG.⁷ The principle of seller responsibility for defects existing before risk passes is reinforced by the final clause of article 36 (1), which confirms the seller's liability "even though the lack of conformity becomes apparent only after [the time risk passes to the buyer]." Thus it is the time that the lack of conformity comes into existence, not the time it is discovered (or should have been discovered), that is critical for the rule in article 36 (1).⁸ One court decision involving the sale of cocoa beans from Ghana illustrates the general operation of article 36 (1).⁹ The contract provided that risk would shift to the buyer when the goods were handed over to the first carrier. It also required the seller to supply, before the goods were shipped, a certificate from an independent testing agency confirming that the beans met certain quality specifications. The independent agency tested the goods some three weeks before they were packed for shipment, and issued the required certificate. When the goods arrived, however, the buyer's own testing revealed that the cocoa beans were below contract-quality. The court stated that the seller would be liable for the lack of conformity in three situations: (1) if the pre-shipment certificate of quality from the independent agency were simply mistaken and the goods thus lacked conformity at the time they were inspected; (2) if the deterioration in the quality of the goods occurred in the three week gap between inspection and shipment; or (3) if the defects otherwise existed when the goods were shipped but the defects would only become apparent after they were delivered to the buyer.

SELLER'S LIABILITY FOR DEFECTS EXISTING WHEN RISK PASSED

3. The basic principle of article 36 (1), that the seller is liable for a lack of conformity that exists at the time risk passes to the buyer, has been affirmed in several decisions.¹⁰ Conversely, the principle that the seller is not normally liable for a lack of conformity arising after risk has passed has also been invoked in several decisions. For example, where a contract for the sale of dried mushrooms included a "C & F" ("cost, freight") clause, and the mushrooms deteriorated during shipment, one court found that the lack of conformity arose after risk of loss had passed and the seller was therefore not responsible for it under article 36 (1).¹¹

DEFECTS NOT APPARENT UNTIL AFTER RISK PASSED

4. Article 36 (1) states that a seller is liable for a lack of conformity existing when risk passed to the buyer “even though the lack of conformity becomes apparent only after that time.” This principle has been applied in several cases. Thus where a refrigeration unit that had been sold installed on a truck trailer failed within 15 days of delivery, the court found that a lack of conformity had existed at the time risk passed even though the non-conformity did not become apparent until the unit had been put into use.¹² Where, after pork was delivered, regulations were issued that prevented the buyer from reselling the goods because of suspicion of dioxin contamination (although such contamination was never actually detected), a court found that the goods were non-conforming at the time risk passed, although the lack of conformity only became apparent later.¹³ On the other hand, a buyer of a painting said to be by a specific artist sued the seller when the party to whom the buyer resold the painting determined that it could not be attributed to that artist.¹⁴ The court stated that the seller was not liable because, under article 36 (1), the seller was only responsible for non-conformities existing at the time risk of loss passed to the buyer, and there was no indication at that time that the artist indicated was not the painter.¹⁵

BURDEN OF PROOF REGARDING THE TIME A DEFECT AROSE

5. Under article 36 (1), the parties’ rights often hinge on whether a lack of conformity existed at the time the risk of loss passed to the buyer. For this reason, the question of which party bears the burden of proof on this issue is a critical one.¹⁶ A court has noted that some CISG scholars suggest the question should be settled by reference to domestic law applicable under the rules of private international law, whereas other scholars argue that CISG itself contains a general principle (controlling under CISG article 7 (2)) that the party asserting the non-conformity (i.e., the buyer) bears the burden;¹⁷ in the particular case the court did not have to resolve this disagreement because both approaches placed the burden on the buyer.¹⁸ In another case, a lower court had dismissed a buyer’s claim because it was not clear whether the goods’ lack of conformity arose before or after risk passed to the buyer; the buyer appealed, arguing that article 36, in conjunction with article 7 (2), allocates to the seller the burden of proving that the goods were conforming when risk passed;¹⁹ the appeals court, however, held that the lower

court decision had not reversed the burden of proof and dismissed the appeal.²⁰ Other courts appear to have taken a factual approach to the question. Thus, it has been asserted that a buyer who accepts goods upon delivery without promptly objecting to their quality bears the burden of proving that they did not conform to the contract.²¹ On the other hand, where a refrigeration unit broke down shortly after it was delivered, the court presumed the defect existed when the goods were shipped, and the seller bore the burden of proving it was not responsible for the lack of conformity.²²

ARTICLE 36 (2)

6. Article 36 (2) provides that a seller is liable for a lack of conformity arising after the time that risk passed to the buyer, but only if the lack of conformity is due to a breach by the seller.²³ An arbitral tribunal has invoked this provision in finding a seller liable for the lack of conformity of canned fruit that deteriorated during shipment because of inadequate packaging, even though the buyer bore transit risk under the FOB term in the contract.²⁴ And a court has held that, although the buyer bore the risk when goods (wine bottles) were damaged or contaminated in transit, the seller was responsible because the damage was due to seller’s breach of its article 35 (2) (d) obligation to package the goods in manner adequate for truck transport.²⁵ On the other hand, a court has found that the seller was not responsible for damage to pizza boxes occurring after risk of loss passed to the buyer because the buyer did not demonstrate that the damage was due to any breach by the seller.²⁶ Where a buyer signed an acknowledgment of delivery that indicated the goods conformed to the contract, but the goods later suffered breakdowns, a court stated that the buyer bore the burden of proving that the breakdowns resulted from a breach by the seller that was not apparent at the time the goods were received.²⁷ Article 36 (2) specifically mentions that the seller will be responsible for post-risk non-conformities if they result from “breach of any guarantee that for a period of time²⁸ the goods will remain fit for their ordinary purpose²⁹ or for some particular purpose³⁰ or will retain specified qualities or characteristics.” Another court has placed the burden of proving the existence of an express guarantee of future performance on the buyer, and concluded that a seller of plants was not liable under article 36 (2) for the failure of the plants to bloom throughout the summer because the buyer did not prove that the seller had guaranteed future performance of the plants.³¹ And a court placed the burden on the buyer to prove that the goods had breached a five-year guarantee given by the seller.³²

Notes

¹ Where there is no lack of conformity for which the seller could be liable, it has been stated that article 36 is irrelevant. *Chambre Arbitrale de Paris, France, 2007*, available at www.cisg.law.pace.edu. See also *Inalta Curte de Casatie si Justitie, Romania, 6 June 2003*, English translation available on the Internet at www.cisg.law.pace.edu.

² Rules on risk of loss, including rules on when risk shifts from the seller to the buyer, are given in articles 66-70 of the Convention.

³ The substance of the two paragraphs of article 36 constitutes a mirror image of article 66, which provides: “Loss of or damage to the goods after the risk has passed to the buyer does not discharge him from his obligation to pay the price, unless the loss or damage is due to an act or omission of the seller.”

⁴ CLOUT case No. 107 [Oberlandesgericht Innsbruck, Austria, 1 July 1994].

⁵ CLOUT case No. 360 [Amtsgericht Duisburg, Germany, 13 April 2000] (see full text of the decision).

⁶ Rechtbank van Koophandel Ieper, Belgium, 18 February 2002, Unilex.

⁷ U.S. District Court, Colorado, United States, 6 July 2010 (Alpha Prime Development Corp. v. Holland Loader), available on the Internet at www.cisg.law.pace.edu; CLOUT case No. 1037 [Audiencia Provincial de Barcelona, Spain, 24 March 2009], English translation available on the Internet at www.cisg.law.pace.edu; Oberlandesgericht Linz, Austria, 23 January 2006, English translation available on the Internet at www.cisg.law.pace.edu, modified on other grounds in Oberster Gerichtshof, Austria, 4 July 2007, Unilex; High People's Court of Shandong Province, People's Republic of China, 27 June 2005 (Norway Royal Supreme Seafoods v. China Rizhao Jixiang Ocean Food Co. and China Rizhao Shanfu Food Co.), English translation available on the Internet at www.cisg.law.pace.edu; Appellationshof Bern, Switzerland, 11 February 2004, English translation available on the Internet at www.cisg.law.pace.edu; Rechtbank van Koophandel Ieper, Belgium, 18 February 2002, Unilex.

⁸ Under article 39 (1), in contrast, the time of discovery of a lack of conformity is critical: that article provides that a buyer loses its right to rely on a lack of conformity if it fails to "give notice to the seller specifying the nature of the lack of conformity within a reasonable time after he has discovered it or ought to have discovered it."

⁹ CLOUT case No. 253, Switzerland, 1998 (see full text of the decision).

¹⁰ CLOUT case No. 774 [Bundesgerichtshof, Germany, 2 March 2005]; Cour d'appel de Paris, France, 25 February 2005, English translation available on the Internet at www.cisg.law.pace.edu; CLOUT case No. 575 [U.S. Court of Appeals (5th Circuit), United States, 11 June 2003] (see full text of the decision); CLOUT case No. 204 [Cour d'appel, Grenoble, France, 15 May 1996], reversed on other grounds by CLOUT case No. 241 [Cour de cassation, France, 5 January 1999]; CLOUT case No. 253 [Cantone del Ticino Tribunale d'appello, Switzerland, 15 January 1998] (see full text of the decision).

¹¹ CLOUT case No. 191 [Cámara Nacional de Apelaciones en lo Comercial, Argentina, 31 October 1995]. To similar effect, see U.S. District Court, Colorado, United States, 6 July 2010 (Alpha Prime Development Corp. v. Holland Loader), available on the Internet at www.cisg.law.pace.edu; CLOUT case No. 1037 [Audiencia Provincial de Barcelona, Spain, 24 March 2009], English translation available on the Internet at www.cisg.law.pace.edu; Oberlandesgericht Linz, Austria, 23 January 2006, English translation available on the Internet at www.cisg.law.pace.edu, modified on other grounds in Oberster Gerichtshof, Austria, 4 July 2007, Unilex; High People's Court of Shandong Province, People's Republic of China, 27 June 2005 (Norway Royal Supreme Seafoods v. China Rizhao Jixiang Ocean Food Co. and China Rizhao Shanfu Food Co.), English translation available on the Internet at www.cisg.law.pace.edu; Inalta Curte de Casatie si Justitie, Romania, 6 June 2003, English translation available on the Internet at www.cisg.law.pace.edu; Tribunal de commerce Namur, Belgium, 15 January 2002 (SA P. v. AWS), English translation available on the Internet at www.cisg.law.pace.edu; CLOUT case No. 107 [Oberlandesgericht Innsbruck, Austria, 1 July 1994] (see full text of the decision); CLOUT case No. 360 [Amtsgericht Duisburg, Germany, 13 April 2000].

¹² CLOUT case No. 204 [Cour d'appel, Grenoble, France 15 May 1996], reversed on other grounds by CLOUT case No. 241 [Cour de cassation, France, 5 January 1999]. See also CLOUT case No. 253 [Cantone del Ticino Tribunale d'appello, Switzerland, 15 January 1998] (see full text of the decision); CLOUT case No. 1193 [Comisión para la Protección del Comercio Exterior de Mexico (Compromex), Mexico, 29 April 1996] (Conservas La Costeña S.A. de C.V. v. Lanín San Luis S.A. & Agroindustrial Santa Adela S.A.).

¹³ CLOUT case no. 774 [Bundesgerichtshof, Germany, 2 March 2005] (see full text of the decision. Contrast Rechtbank van Koophandel Ieper, Belgium, 18 February 2002, Unilex (holding that the seller was responsible under article 36 (1) for regulations restricting the import of pork only if the regulations existed at the time risk passed). For other decisions addressing, under article 36 (1), defects that become apparent only after risk passed, see Cour d'appel de Paris, France, 25 February 2005, English translation available on the Internet at www.cisg.law.pace.edu; CLOUT case No. 575 [U.S. Court of Appeals (5th Circuit), United States, 11 June 2003] (see full text of the decision).

¹⁴ Arrondissementsrechtbank Arnhem, the Netherlands, 17 July 1997, Unilex. On appeal, the court found that CISG was inapplicable but affirmed the result on the basis of domestic law. Gerechtshof Arnhem, the Netherlands, 9 February 1999, Unilex.

¹⁵ This statement was an alternative holding. The court also reasoned that the seller was not liable because any claim against the buyer by its own buyer was time-barred.

¹⁶ This question is closely related to the general question of which party bears the burden of proof when the buyer claims the goods do not conform to the contract under article 35. See the Digest for article 35, paragraph 17.

¹⁷ For a decision allocating to buyer the burden of proving that goods were non-conforming at the time risk passed, based (apparently) on a burden of proof rule derived from the Convention itself (although the court invokes an analogy to domestic law burden of proof rules), see U.S. Court of Appeals (7th Circuit), United States, 23 May 2005 (Chicago Prime Packers, Inc. v. Northam Food Trading Co.), available on the Internet at www.cisg.law.pace.edu. Compare Polimeles Protodikio Athinon, Greece, 2009 (docket no. 4505/2009), English editorial remarks available on the Internet at www.cisg.law.pace.edu (stating that the buyer bears the burden of proving that the goods were non-conforming at the time risk passed). See also CLOUT case No. 1037 [Audiencia Provincial de Barcelona, Spain, 24 March 2009], English translation available on the Internet at www.cisg.law.pace.edu (apparently allocating to buyer the burden of proving that goods were non-conforming at time risk passed); High People's Court of Shandong Province, People's Republic of China, 27 June 2005 (Norway Royal Supreme Seafoods v. China Rizhao Jixiang Ocean Food Co. and China Rizhao Shanfu Food Co.), English translation available on the Internet at www.cisg.law.pace.edu (same).

¹⁸ CLOUT case No. 253 [Cantone del Ticino Tribunale d'appello, Switzerland, 15 January 1998].

¹⁹ Compare Appellationshof Bern, Switzerland, 11 February 2004, English translation available on the Internet at www.cisg.law.pace.edu (stating that the burden of proof rests on the seller only until the time that risk passes).

²⁰ CLOUT case No. 494 [Cour de cassation, France, 24 September 2003], on appeal from CLOUT case No. 481 [Cour d'appel Paris, France, 14 June 2001].

²¹ Hovioikeus/hovrätt Helsinki, Finland, 31 May 2004 (Crudex Chemicals Oy v. Landmark Chemicals S.A.), English editorial analysis available on the Internet at www.cisg.law.pace.edu; Tribunal de commerce Namur, Belgium, 15 January 2002 (SA P. v. AWS), English translation available on the Internet at www.cisg.law.pace.edu; CLOUT case No. 377 [Landgericht Flensburg, Germany, 24 March 1999].

²² CLOUT case No. 204 [Cour d'appel, Grenoble, France, 15 May 1996], reversed on other grounds by CLOUT case No. 241 [Cour de cassation, France, 5 January 1999].

²³For general discussion of the operation of article 36 (2), see U.S. District Court, Southern District of New York, United States, 23 August 2006 (*TeeVee Toons, Inc. v. Gerhard Schubert GmbH*), available on the Internet at www.cisg.law.pace.edu.

²⁴CLOUT case No. 1193 [Comisión para la Protección del Comercio Exterior de Mexico (Compromex), Mexico, 29 April 1996] (*Conservas La Costeña S.A. de C.V. v. Lanín San Luis S.A. & Agroindustrial Santa Adela S.A.*).

²⁵CLOUT case No. 724 [Oberlandesgericht Koblenz, Germany, 14 December 2006].

²⁶CLOUT case No. 360 [Amtsgericht Duisburg, Germany, 13 April 2000].

²⁷Tribunal de commerce Namur, Belgium, 15 January 2002 (*SA P. v. AWS*), English translation available on the Internet at www.cisg.law.pace.edu.

²⁸For general discussion of guarantees of future performance under article 36 (2) see CLOUT case No. 800 [Tribunal Supremo, Spain, 16 May 2007]; *Rechtbank van Koophandel Ieper*, Belgium, 18 February 2002, *Unilex*.

²⁹Article 35 (2) (a) of CISG provides that, unless otherwise agreed, goods do not conform to the contract unless they “are fit for the purposes for which goods of the same description would ordinarily be used.” This provision does not, however, expressly require that goods be fit for ordinary purposes for any specified “period of time.” For a decision holding that a breach of article 35 (2) (a) implicates article 36 (2), see *Hof van Beroep Gent*, Belgium, 10 May 2004 (*N.V. Maes Roger v. N.V. Kapa Reynolds*), English translation available on the Internet at www.cisg.law.pace.edu.

³⁰Article 35 (2) (b) of the Convention provides that, unless otherwise agreed, goods do not conform to the contract unless they “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.” This provision does not, however, expressly require that goods be fit for particular purposes for any specified “period of time”.

³¹CLOUT case No. 107 [Oberlandesgericht Innsbruck, Austria, 1 July 1994].

³²CLOUT case No. 800 [Tribunal Supremo, Spain, 16 May 2007].