

Article 39

[Third party claims in general]

(1) The seller must deliver goods which are free from any right or claim of a third party, other than one based on industrial or intellectual property, unless the buyer agreed to take the goods subject to that right or claim.

(2) The buyer does not have the right to rely on the provisions of this article if he does not give notice to the seller specifying the nature of the right or claim of the third party within a reasonable time after he became aware or ought to have become aware of the right or claim.

PRIOR UNIFORM LAW

ULIS, article 52.

Commentary

Claims of third parties, paragraph (1)

1. Article 39 states the obligation of the seller to deliver goods which are free from the right or claim of any third party other than a right or claim based on industrial or intellectual property.

2. In contrast to article 33 (2) in respect of the lack of conformity of the goods and article 40 (2) (a) in respect of third-party claims based on industrial or intellectual property, article 39 holds the seller liable to the buyer even if the buyer knew or could not have been unaware of the third-party right or claim, unless the buyer agreed to take the goods

subject to that right or claim. Such an agreement will often be expressed, but it may also be implied from the facts of the case.

3. The seller has breached his obligation not only if the third party's claim is valid, i.e., if the third party has a *right* in or to the goods; the seller has also breached his obligation if a third party makes a *claim* in respect of the goods. The reason for this rule is that once a third party has made a claim in respect of the goods, until the claim is resolved the buyer will face the possibility of litigation with and potential liability to the third party. This is true even though the seller can assert that the third-party claim is not valid or a good faith purchaser can assert that, under the appropriate law applicable to his purchase, he buys free of valid third-party claims, i.e., that *possession vaut titre*. In either case the third party may commence litigation that will be time-consuming and expensive for the buyer and which may have the consequence of delaying the buyer's use or resale of the goods. It is the seller's responsibility to remove this burden from the buyer.

4. This article does not mean that the seller is liable for breach of his contract with the buyer every time a third person makes a frivolous claim in respect of the goods. However, it is the seller who must carry the burden of demonstrating to the satisfaction of the buyer that the claim is frivolous.¹ If the buyer is not satisfied that the third-party claim is frivolous, the seller must take appropriate action to free the goods from the claim² or the buyer can exercise his rights as set out in article 41.

5. Third-party rights and claims to which article 39 is addressed include only rights and claims which relate to property in the goods themselves by way of ownership, security interests in the goods, or the like. Article 39 does not refer to claims by the public authorities that the goods violate health or safety regulations and may not, therefore, be used or distributed.³

Notice, paragraph (2)

6. Paragraph (2) requires the buyer to give the seller a notice similar to the notice required by article 37 (1) in respect of goods which do not conform to the contract. If this notice is not given within a reasonable time after the buyer became aware or ought to have become aware of the third-party right or claim, the buyer does not have the right to rely on the provisions of paragraph (1).

Relationship to lack of conformity of the goods

7. In some legal systems the seller's obligation to deliver goods free from the right or claim of any third party is part of the obligation to deliver goods which conform to the contract. However, in this Convention the two obligations are independent of each other.

8. As a consequence, those provisions in this Convention which apply to the seller's obligation to deliver goods which conform to the contract do not apply to the seller's obligation to deliver goods free from the right or claim of any third party under article 39. Those provisions are:

- article 33, Conformity of the goods
- article 34, Seller's liability for lack of conformity
- article 35, Cure of lack of conformity prior to date for delivery
- article 37, Notice of lack of conformity
- article 38, Seller's knowledge of lack of conformity
- article 42 (2), Buyer's right to require performance (paragraph (2) deals with delivery of substitute goods)

¹ Cf. article 62 on the right of a party suspend his performance when he has reasonable grounds to believe that the other party will not perform a substantial part of his obligation.

² Although the seller may ultimately free the goods from the third person's claim by successful litigation, this could seldom be accomplished within a reasonable time from the buyer's point of view. When it cannot, the seller must either replace the goods, induce the third person to release the claim as to the goods or provide the buyer with indemnity adequate to secure him against any potential loss arising out of the claim.

³ If the goods delivered are subject to such restrictions, there may be a breach of the sellers's obligations under article 33 (1) (a) or (b).

- article 46, Reduction of the price
- article 47, Partial non-performance.