



General Assembly

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Article 42

(1) The seller must deliver goods which are free from any right or claim of a third party based on industrial property or other intellectual property, of which at the time of the conclusion of the contract the seller knew or could not have been unaware, provided that the right or claim is based on industrial property or other intellectual property:

(a) Under the law of the State where the goods will be resold or otherwise used, if it was contemplated by the parties at the time of the conclusion of the contract that the goods would be resold or otherwise used in that State; or

(b) In any other case, under the law of the State where the buyer has his place of business.

(2) The obligation of the seller under the preceding paragraph does not extend to cases where:

(a) At the time of the conclusion of the contract the buyer knew or could not have been unaware of the right or claim; or

* The present digest was prepared using the full text of the decisions cited in the Case Law on UNCITRAL Texts (CLOUT) abstracts and other citations listed in the footnotes. The abstracts are intended to serve only as summaries of the underlying decisions and may not reflect all the points made in the digest. Readers are advised to consult the full texts of the listed court and arbitral decisions rather than relying solely on the CLOUT abstracts.

(b) The right or claim results from the seller's compliance with technical drawings, designs, formulae or other such specifications furnished by the buyer.

In general

1. Article 42 states the seller's duty to deliver goods that are free of intellectual property rights or claims of third parties. A seller breaches if it delivers goods in violation of article 42, but the seller's obligation to deliver goods free of third party rights or claims based on intellectual property is subject to three significant limitations. First, the seller is only liable under article 42 if the third party's right or claim is one "of which at the time of the conclusion of the contract the seller knew or could not have been unaware".¹ Second, the seller is only liable if the third party's right or claim is based on the law of the State designated by articles 41 (1) (a) or (b), whichever alternative is applicable. The third limitation on the seller's obligations under article 42 is stated in article 42 (2), and appears to be based on assumption of risk principles: the seller is not liable if the third party's right or claim is one of which the buyer "knew or could not have been unaware"² when the contract was concluded, or if the right or claim arose from the seller's compliance with technical requirements ("technical drawings, designs, formulae or other such specifications") that the buyer itself supplied to the seller.

Application of article 42

2. Article 42 has been the subject of few decisions. In one piece of litigation, both the lower court and the appeals court emphasized that the buyer bears the burden of proving that, at the time the contract was concluded, the seller knew or could not have been unaware of the third party's intellectual property right or claim that the buyer alleges produced a violation of article 42.³ In another decision, although the transaction was governed by the 1964 Hague Convention on the Uniform Law for International Sales ("ULIS") the court invoked CISG article 42 (2) in deciding that, although the seller delivered goods with a symbol that infringed a third party's well-known trademark, the seller was not liable to the buyer because the buyer could not have been unaware of the infringement, and the buyer had itself specified attachment of the symbol in the designs that the buyer supplied the seller.⁴

¹ The phrase "knew or could not have been unaware" as a standard for a party's responsibility for awareness of facts is also used in articles 8 (1), 35 (3), 40 and 42 (2) (a).

² The phrase "knew or could not have been unaware" as was just noted, is also used in article 42 (1). It also appears in articles 8 (1), 35 (3), and 40.

³ Hof Arnhem, the Netherlands, 21 May 1996, Unilex; Rechtbank Zwolle, the Netherlands, 1 March 1995 (final decision) and 16 March 1994 (interim decision), Unilex.

⁴ Supreme Court of Israel, 22 August 1993, Unilex.