

Article 37

[Notice of lack of conformity]

(1) The buyer loses the right to rely on a lack of conformity of the goods if he does not 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.

(2) In any event, the buyer loses the right to rely on a lack of conformity of the goods if he does not give the seller notice thereof at the latest within a period of two years from the date on which the goods were actually handed over to the buyer, unless such time-limit is inconsistent with a contractual period of guarantee.

PRIOR UNIFORM LAW

ULIS, article 39.

Prescription Convention, articles 8 and 10 (2).

Commentary

1. Article 37 states the consequences of the buyer's failure to give notice of non-conformity of the goods to the seller within a reasonable time. The consequences of the buyer's failure to give notice of third party rights or claims over the goods are dealt with in articles 39 (2) and 40 (3).

Obligation to give notice, paragraph (1)

2. Under paragraph (1) the buyer loses his right to rely on a lack of conformity of the goods if he does not give the seller notice thereof within a specified time. If notice is not given within that time, the buyer cannot claim damages under article 41 (1) (b), require the seller to cure

¹ Articles 29 (a) and 79 (1). See paras. 3 to 8 of the commentary to article 79 for a discussion of the rules which determine when risk passes if the contract of sale involves carriage of the goods.

² See paragraph 6 of the commentary to article 54 for a discussion of the buyer's obligation to pay the price prior to examination of the goods.

the lack of conformity under article 42, avoid the contract under article 45 or declare a reduction of the price under article 46.¹

3. The buyer must send the notice to the seller within a reasonable time after he has discovered the lack of conformity or ought to have discovered it. If the lack of conformity could have been revealed by the examination of the goods under article 36, the buyer ought to have discovered the lack of conformity at the time he examined them or ought to have examined them.² If the lack of conformity could not have been revealed by the examination, the buyer must give notice within a reasonable time after he discovered the non-conformity in fact or ought to have discovered it in the light of the ensuing events.

Example 37A: The non-conformity in the goods was not such that Buyer ought to have discovered it in the examination required by article 36. However, the non-conformity was such that it ought to have been discovered once Buyer began to use the goods. In this case Buyer must give notice of the non-conformity within a reasonable time after he "ought to have discovered" it by use.

4. The purpose of the notice is to inform the seller what he must do to remedy the lack of conformity, to give him the basis on which to conduct his own examination of the goods, and in general to gather evidence for use in any dispute with the buyer over the alleged lack of conformity. Therefore, the notice must not only be given to the seller within a reasonable time after the buyer has discovered the lack of conformity or ought to have discovered it, but it must specify the nature of the lack of conformity.

Termination of the right to rely on non-conformity, paragraph (2)

5. Even though it is important to protect the buyer's right to rely on latent defects which become evident only after a period of time has passed, it is also important to protect the seller against claims which arise long after the goods have been delivered. Claims made long after the goods have been delivered are often of doubtful validity and when the seller receives his first notice of such a contention at a late date, it would be difficult for him to obtain evidence as to the condition of the goods at the time of delivery, or to invoke the liability of a supplier from whom the seller may have obtained the goods or the materials for their manufacture.

6. Paragraph (2) recognizes this interest by requiring the buyer to give the seller notice of the non-conformity at the latest two years from the date the goods were actually handed over to him. In addition, under articles 8 and 10 of the Prescription Convention the buyer must commence judicial proceedings against the seller within four years of the date the goods were actually handed over. It should be noted that while the principles which lie behind paragraph (2) of this article and articles 8 and 10 of the Prescription Convention are the same and while the starting points for the running of the two or four year periods are the same, the obligation under paragraph (1) to give notice is a completely separate obligation from that to commence judicial proceedings under the Prescription Convention.

7. The overriding principle of the autonomy of the will of the parties recognized by article 5, would allow the parties to derogate from the general obligation to give the notice required by paragraph (2). However, in the absence of a special provision, it would not be clear whether the obligation to give notice within two years was affected by an express guarantee that the goods would retain specified qualities or characteristics for a specified period.³ Accordingly, paragraph (2) provides that this obligation to give notice within two years will not apply if "such time-limit is inconsistent with a contractual period of guarantee". Whether it is, or is not, inconsistent is a matter of interpretation of the guarantee.

¹ For a discussion of failure to give notice in relation to the passing of risk, see paragraph 3 of the commentary on article 82 and example 82B.

² For a discussion of the extent to which the buyer ought to have discovered a lack of conformity of the goods by the examination required by article 36, see paragraph 3 of the commentary on that article.

³ Article 34 (2) provides that the seller is liable for any lack of conformity of the goods which occurs after the delivery date if that lack of conformity is in breach of an express guarantee.

Example 37B: The contract for the sale of machine tools provides that the machine tools will produce a minimum of 100 units per day for at least three years. Because of the three-year guarantee, this clause is inconsistent with the two-year time-limit in paragraph (1). It would be a matter of interpretation of the guarantee clause in the contract whether the notice of failure to produce 100 units per day had to be given within three years to notify Seller that within the three-year period there was a breach of the guarantee.

Example 37C: The contract provides that the machine tools will produce a minimum of 100 units per day for one year. It would be unlikely that this contract calling for a specified performance for one year would be interpreted to affect the two-year time-limit in article 37 (2) within which notice must be given.

Example 37D: The contract provides that notice of a failure to produce at least 100 units per day must be given within 90 days of the date of delivery. Such an express clause would be inconsistent with the two-year time-limit in paragraph (2).