

# The Legal Basis and Application Approach of Article 42 of the United Nations Convention on Contracts for the International Sale of Goods

Huang Yuan<sup>1\*</sup>

<sup>1</sup>School of Law, Xingzhi College, Zhejiang Normal University

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\*Corresponding author: Huang Yuan

School of Law, Xingzhi College, Zhejiang Normal University

## Abstract

The United Nations Convention on Contracts for the International Sale of Goods (CISG) is a crucial treaty in the realm of international trade, significantly influencing the global exchange of goods. However, due to the complexities of international trade, diverse legal customs and interests across countries, and the obscure wording of the convention, various ambiguities arise in the interpretation and application of certain provisions, particularly Article 42. This paper aims to dissect the legal basis of this article, elucidate its true meaning, and ultimately establish a correct understanding and application approach.

**Keywords:** Warranty of title, Reasonable foreseeability, Territoriality.

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## INTRODUCTION

Article 42 of the CISG stipulates<sup>1</sup>:

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

- (a) The State where the goods will be resold or otherwise used, if the parties contemplated such use at the time of the contract; or
- (b) In any other case, the State where the buyer has its place of business."

This article appears to comprehensively allocate the intellectual property warranty responsibilities between the seller and buyer in international trade. However, due to the expression and translation into Chinese, significant ambiguities arise in its understanding and application in China. This paper will analyze the legal basis inherent in this provision, restate the legislative intent, and ultimately indicate the correct understanding and application approach.

## I. Legal Basis

An understanding of CISG provisions reveals a dual mandate: on one hand, it explicitly stipulates the seller's obligation to provide an intellectual property warranty; on the other, it sets two limitations on this obligation: (1) the seller's obligation to provide an intellectual property warranty is contingent upon the seller knowing or being unable to be unaware of the defect at the time of the contract; (2) the seller's intellectual property warranty obligation is confined to specific jurisdictions.

In theory, the essence of a sales transaction is that the buyer obtains the desired goods free from any third-party claims. However, due to the territoriality and temporality of intellectual property rights, it is unrealistic and excessively burdensome to require the seller to provide a global warranty for the entire duration of the contract. To balance the interests of both parties, the above stipulations were summarized into two legal principles.

### A. Principle of Reasonable Foreseeability

The principle of reasonable foreseeability mandates that the scope of losses should not exceed what the breaching party could have reasonably foreseen at the

<sup>1</sup> The United Nations Convention on Contracts for the International Sale of Goods (CISG) was developed under the auspices of the United Nations Commission on

International Trade Law and was adopted at a diplomatic conference held in Vienna in 1980. The convention officially came into effect on January 1, 1988.

time of the contract. This principle is an essential limitation on liability for breach of contract, recognized across various legal systems. In the context of international sales, the seller's failure to fulfill the warranty of title constitutes a breach of contract, and the liability for such a breach is naturally subject to the principle of reasonable foreseeability. Hence, phrases like "of which the seller knew or could not have been unaware at the time of the contract" and "if the parties contemplated such use at the time of the contract" are included in Article 42(a) and the preamble.

### ***B. Principle of Territoriality***

It is widely acknowledged that industrial property and other intellectual property rights are territorially bound. The protection granted by one country is independent of another. For example, a product might be protected by industrial property rights in Country A but not in Country B if the product has not been registered there. Due to the complexity of such situations in international trade, legislation on the seller's warranty obligations must consider the territorial implications. CISG Article intellectual property rights, thereby ensuring that the seller's obligations are foreseeable and balanced with fairness and reasonableness.

## **II. Application Approach**

Chinese scholars have explored various aspects of Article 42 of the CISG and its two underlying legal principles. For instance, some scholars have analyzed the specific meaning of "knew or could not have been unaware" to define the scope and extent of the "reasonable foreseeability" principle<sup>2</sup>. Others have investigated whether the standards for determining the seller's and buyer's knowledge differ<sup>3</sup>. However, the focus has largely been on whether the seller's intellectual property warranty obligations can be waived and the specific grounds for such waivers.

### ***A. Interpretation of "Knew or Could Not Have Been Unaware"***

A critical aspect of applying Article 42 is understanding what constitutes the seller's knowledge of intellectual property claims. The phrase "knew or could not have been unaware" suggests a need for objective criteria to determine whether the seller should have been aware of potential intellectual property issues. This

interpretation aligns with the principle of reasonable foreseeability, ensuring that sellers are only held liable for intellectual property claims that they reasonably could have anticipated at the time of contract formation.

### ***B. Territorial Limitations of Warranty Obligations***

The principle of territoriality requires that the seller's obligations be confined to jurisdictions where intellectual property rights are enforceable. This limitation is crucial for preventing undue burdens on sellers who cannot reasonably be expected to ensure compliance with intellectual property laws globally. By tying the seller's obligations to the legal frameworks of specific countries, the CISG provides a balanced approach that protects buyers' interests without imposing excessive risks on sellers.

The author believes that to correctly understand and apply this provision, the following macro-level approach can serve as a reference:

First, Article 42 of the CISG requires that the seller's warranty obligation regarding the goods is not an absolute obligation; it is necessary to distinguish different situations to determine whether the obligation should be borne. Second, if the seller could foresee the basis of the third party's claim and the law protects that right, then the seller must bear this obligation. However, if the law does not protect that right, the seller is not required to bear the obligation. Lastly, if the seller could not foresee the basis of the third party's claim, then regardless of whether the law protects that right or not, the seller is not required to bear the warranty obligation regarding the goods.

## **III. CONCLUSION**

To correctly interpret and apply Article 42 of the CISG, it is essential to consider its legal foundations: the principles of reasonable foreseeability and territoriality. These principles provide a framework that balances the interests of both buyers and sellers in international trade. For practitioners and scholars in China, a thorough understanding of these principles is necessary to navigate the complexities of international sales contracts effectively. By adhering to these principles, stakeholders can ensure fair and predictable outcomes in disputes related to intellectual property claims in international trade.

<sup>2</sup>Li Wei, "Commentary on the United Nations Convention on Contracts for the International Sale of Goods," Law Press, 2009, p. 204.

<sup>3</sup>Wang Jiade, "The Issue of the Seller's Intellectual Property Warranty Obligations in International Trade:

An Analysis of Article 42 of the CISG," Journal of Jiaozuo University, 2013, No. 1.