INTELLECTUAL PROPERTY RIGHTS & THE CISG ARTICLE 42

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1 INTRODUCTION

A current dispute, which will most likely have a sequel in a World Trade Organisation (WTO) dispute resolution panel, is of interest in light of the Convention on the International Sale of Goods (CISG). The facts are simple. An Indian company sold generic pharmaceutical goods to a Brazilian buyer. The goods did not breach any patent or other intellectual property rights in either India or Brazil. However, during transit in the Netherlands the goods were seized as they were in breach of intellectual property rights currently in force in the Netherlands.

As it stands, the Indian government is threatening to take the matter to the WTO. It is obvious that the buyer has no interest in waiting for the result of a potentially prolonged dispute resolution process considering the dispute has not even been lodged with the WTO yet. As far as the buyer is concerned, the seller breached the contract and hence remedies ought to flow from such a breach. It is recognised that the CISG would not apply to the dispute as neither India nor Brazil are contracting states. However, this hypothetical example is of value to analyse the problem of supplying goods that are subject to third party intellectual property rights and consider how the CISG could assist in providing a solution. This paper will investigate whether the CISG can resolve a breach of contract which is caused by a third party claiming breaches of intellectual property rights.

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As a preliminary issue, it ought to be considered whether the CISG can successfully govern matters that have traditionally been territory-based, namely breaches of intellectual property rights.\(^1\) Some authors, specifically Beline, suggest that the CISG ought to be excluded in favour of a selected domestic law when third party intellectual property rights are at issue.\(^2\) It is interesting to note that there is no counterpart of Art. 42, the pivotal article dealing with intellectual property rights, in either the UNIDROIT Principles or the Principles of European Contract Law. Furthermore, very few cases have been decided on the basis of Art. 42, which might have given rise to the suggestion that the CISG is not suited to govern issues of third party rights in the first place. Nonetheless, it is equally valid to argue that since only few cases have been raised on this basis before courts and tribunals, buyers and sellers generally take measures to inquire into potential third party claims and to minimise this risk.

The real issue that needs to be evaluated in the hypothetical case is what remedies the buyer can invoke, as in the buyer’s opinion the seller has breached the contract due to non-delivery. It is obvious that in this case the buyer is not interested in whether the Netherlands authorities rightfully detained the goods in transit or not. While the seller is interested in how this issue will be determined under WTO dispute resolution rules, the buyer is only interested in the effect of the non-delivery of the goods on its contractual rights and remedies. Three problems need to be considered: first the question of risk allocation, secondly the issue of encumbrances on the goods by third parties and how far the CISG governs such legal defects and lastly whether Art. 79, namely an impediment beyond the control of the seller, can be invoked.

This paper will argue that several avenues are open to an aggrieved party in relation to possible breaches of contract caused by legal defects. As noted, Arts. 42 – 44 are relevant in cases where intellectual property rights are the cause of action. Additionally, Art. 35 is applicable as it provides guidance on the standard of inquiry for legal defects. This is of special interest in this case as the goods are non-conforming due to a third party claim which triggered the interference of an unrelated third party. Furthermore, this paper will also argue that an impediment pursuant to Art. 79 is the best defence for the seller coupled with a claim that the risk of potential third party claims has been transferred to the buyer.

### 3 LEGISLATIVE HISTORY

In order to shed light on the intent of the drafters of the CISG, the travaux préparatoires are often consulted. At the onset it is argued that a reliance on extrinsic material such as travaux préparatoires should only be undertaken in limited cases. The text as contained in the ‘Four Corners’ of the CISG must be the starting point of

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2. Ibid.
interpretation, not the history of the legislation. As the CISG is the result of a conference of participants belonging to a different social, legal and economic systems the views, by definition, must be divergent. Of interest only is the compromise reached, which is the text itself. Nonetheless, by consulting the views of the delegates much can be gained, especially as it might disclose perceived problems with the text. However, it does not disclose the politics of closed doors and the deals done to obtain support for other points on the agenda. The most important problem is that the views as expressed in the travaux préparatoires are aspects frozen in time. Nonetheless the travaux préparatoires cannot be completely dismissed as they shed light on problems the drafters had to overcome. Notably in the drafting process it was acknowledged that the third party claims based on intellectual property are to be differentiated from other types of third party claims. This principle has not changed and is still relevant to the interpretation of the CISG. Furthermore, the understanding that the seller is obliged to deliver goods free from any rights or claims of third parties is embedded in both civil law and common law systems. However, the drafters of the CISG understood that this obligation has a limit. The seller should not be responsible for all infringements and is not expected to have complete knowledge of the status of international intellectual property rights in the same way the seller would be expected to have knowledge of such rights in its own country. It is for these reasons that the drafters included express limitations as to the seller’s liability in Art. 42. Of note is the remark that:

‘[...] for a variety of reasons it is possible for a third party to have rights or claims based on intellectual property even though there has been no publication. In such a situation, even if the goods infringe the third party's rights, article 42(1) provides that the seller is not liable to the buyer’

It follows that the drafters envisaged that if a seller is not aware or could not have been aware of any third party claims then the buyer must bear the loss. This is specifically so if the buyer either knew or could not have been unaware of the existence of third party claims at the time of the conclusion of the contract. In effect, in such cases the buyer is taken to have impliedly accepted the goods subject to third party rights or claims. In any case, a breach of contract rests on an application of Arts. 42 – 45, i.e. that the goods are not free of third party claims. However, arguably if a third party detained the goods the buyer, instead of relying on Arts. 42 – 45, can simply argue that a breach occurred due to non-delivery of the goods. This line of argument will not be pursued in this paper.

3 Ibid.
5 Ibid.
6 Ibid.
7 Ibid.
3 SELLERS OBLIGATIONS

The article most relevant to this discussion is Art. 42 CISG. It describes the protection of the buyer as well as the limitations of the seller’s liability in relation to purchasing goods where an existing legal defect could frustrate the performance of the contract. The resulting remedies for the buyer for breach of contract by the seller are provided in Art. 45(1). This article stipulates that “if the seller fails to perform any obligations under the contract” the buyer ‘may’ exercise the rights as provided in articles within the CISG. The choice of the word ‘may’ appears to be an optional requirement and unlike the obligatory ‘must’ contemplates variations in obligations. The word ‘may’ is well-chosen as it enables the buyer to select which if any of the available remedies to pursue. Article 45 merely suggests the common remedies a buyer may claim for the breach of the contract but does not provide and exhaustive list of remedies.

Article 42 is premised on the principle that all goods sold by a seller must be “free from any right or claim of a third party”8. This criterion is never easily met, as it is well-known that goods might have a third party claim in one country but not in others. However, reading this criterion in the context of Art. 41(1) leads to the conclusion that “the seller’s lack of knowledge of the defect in the goods or of the third-party claim is irrelevant”9. The mere fact that there are defects or third party claims automatically triggers a potential claim by the buyer. The question of course is how successful the claim might be taking into account the entire text contained in the four corners of the CISG. The CISG provides ‘excuses’ for both buyers and sellers. Article 42 notes that the seller must deliver goods free from third party claims but only in relation to claims where the “seller knew or could not have been unaware”10.

The burden of knowledge placed on the seller in Art. 42 is similar to the one in Art. 35. However given that such an extensive burden would be unreasonable, it is restricted to only a particular degree of knowledge and particular territories in Art. 42.11 This is especially so in relation to patent rights as in the hypothetical case.

First, in relation to the degree of knowledge, the CISG states that the seller must at the conclusion of the contract be aware or at least not unaware of such third party claims. This has been confirmed for example by the Court of Zwolle stating that “before

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9 Honnold, J.O., Uniform Law for International Sales under the 1980 United Nations Convention, 1999,
10 CISG Art. 42(1).
11 Ibid.
buyer’s claim can be sustained, buyer must prove that seller knew or could not have been unaware that the copyright existed at the time of the sale”\(^{12}\).

Secondly, the knowledge is restricted to the place where the goods are to be resold or otherwise used.\(^{13}\) However, since the seller may only be aware of where the goods are first handed over the carrier for transportation or released for the buyer’s disposal, this may at first glance seem like a heavy burden requiring complex analysis of risk passing. Such terminology may be found in Arts. 67 – 69 which describe the passing of risk in cases where the contract does not contain a clause to that effect such as an INCOTERM. However, in relation to third party claims the CISG overcomes the problem of requiring such extensive knowledge in Art. 42(1)(b) by narrowing the seller’s obligations. The seller must comply with the “law of the state where the buyer has his place of business” in cases where the seller does not know or could not reasonably have known the place where the goods are to be ultimately sold.

In any case for the purpose of this paper the argument in relation to passing of risk is not relevant. Third party claims as well as claims in relation to the delivery of defective goods must be distinguished from passing of risk, as the seller is always obliged to deliver goods which conform to the contract.

The key question in relation to the hypothetical case is whether the seller was aware of the existence of third party rights in the Netherlands. The Austrian Supreme Court has noted that the burden of proving the existence of third party rights and establishing “the lack of conformity is on [buyer] being the party relying on the breach”\(^{14}\). This is of importance in the hypothetical, as generic pharmaceutical goods cannot be sold in every country. Arguably, however, the buyer knew or at least could not have been unaware of this fact and hence consented to such a ‘defect’ of the goods.

The territorial limitation of the seller’s obligations has also been applied by the Austrian Supreme Court, which noted:

\begin{quote}
‘The seller merely has to guarantee a corresponding conformity in certain countries, but not on a worldwide level It is primarily liable for any conflict with property rights under the law of the State in which (not: "into which"!) it is being resold or in which it is supposed to be used, provided that the parties took this
\end{quote}


\(^{13}\) CISG Art. 42(1)(a).


(2011) 15(2) VJ 289 - 302
There is an argument that if “the parties took [a designated] State into consideration at the time of the conclusion of the sales contract”, Art. 43 has automatically been invoked, i.e. “the buyer has lost his right to rely on the provisions of Article 41 or Article 42”.  

Interestingly, the Austrian Supreme Court widened the application of Art. 42 by stating that if “a third party unfoundedly asserted an intellectual property right, the seller will nevertheless be liable”. The court based this reasoning on the assumption that it is part of the seller’s sphere of risk to deal with the third party in such cases. This was the court’s interpretation of Art. 41, which is connected to Art. 30 and together set out the obligations of the seller. The German Supreme court has noted:

‘[...] the duty to notify only applies in relation to Arts. 41 and 42 CISG but not in relation to Art. 30 CISG. The breaches of contract pursuant to Art. 30 and 41 CISG are independent of each other and have to be assessed separately’

Article 30 CISG is unlikely to apply in the hypothetical example as the seller has in good faith handed over the documents and transferred the property in the goods. However, Art. 30 sets out the very basic obligations of the seller ensuring efficient operation of the documentary credit system. Article 41 merely adds a new obligation to those specified in Art. 31, namely that the delivered goods must be ‘free from any rights or claims of a third party’.

Nonetheless, the CISG must be read within its four corners, Arts. 30, 41 and 42 must be interpreted together. Therefore the facts of the hypothetical example in relation to the detention of goods must be judged within the combined rulings of the above three articles.

One of the problems with Art. 42 is that it does not set out any special remedies if the goods are not free of a claim in relation to breaches of third party property rights. However, it is obvious that a breach of Art. 42 amounts to a breach of contract. As stated above, Art. 42 sets out the basic requirements in relation to a third party claim. The crucial criterion is that the goods must be free from any ‘right or claim’.

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15 Ibid.
16 Ibid.
17 Ibid.
18 Ibid.
It has been argued that a ‘right or claim’ as contained in Art. 42 is not only restricted to actual claims but also to whether a claim can be made at all.\textsuperscript{20} This ‘enlarged’ liability is certainly relevant when a particular branch of intellectual property rights such as trade marks are universally enforceable but it does not apply to patents which are generally only enforceable in countries where a patent has been lodged. It is obvious that ‘industrial property or other intellectual property’ is not defined by the CISG but rather by domestic laws and hence breaches of intellectual property are governed by domestic law. The purpose of the CISG has never been to define the existence and extent of third party rights but rather to govern what will happen if such rights have been infringed.

In summary, the seller has an obligation to deliver goods free from third party claims. However ‘knowledge’ ought not be interpreted narrowly or strictly. The extent of knowledge is described in Art. 42. The seller, at the time of concluding the contract, must have either known or could not have been unaware of third party claims. The question therefore is whether the seller has to have actual knowledge. Schlechtriem notes that the seller “must inform himself about the possible industrial or other intellectual property rights of a third person”\textsuperscript{21}, which arguably fulfils the requirement of not being unaware. Therefore actual knowledge in all cases is not required but the seller must make a reasonable attempt at inquiries to determine whether third party rights exist.

4 REQUIREMENT OF THE STANDARD OF INQUIRY

The starting point for the standard of inquiry is that that the buyer must be in a position to obtain title to the goods. It is also obvious that the goods must be fit for the particular purpose for which the goods would be used pursuant to Arts. 35(2)(a) and (b). A German Supreme Court decision, popularly referred to as the “Mussels’ case” provides a useful analogy regarding the expected standard of inquiry. It deals with a breach of regulations, which, as with intellectual property rights, require consideration of public law standards.

The problem in the hypothetical and in the Mussels case are identical, namely how much is the seller required to know of foreign regulations in order for the buyer to obtain good title to the goods. The facts in the Mussels’ case are simple. A Swiss seller delivered New Zealand mussels to a German buyer. Inspection showed that the cadmium level was exceeding recommended German health regulations which were not the same as the New Zealand or Swiss regulations. The question was whether the mussels conformed to the contract: The court noted:

\textsuperscript{20} Beline, \textit{supra}, fn 1.
'Decisive is that a foreign seller can simply not be required to know the not easily determinable public law provisions and/or administrative practices of the country to which he exports, and that the purchaser, therefore, cannot rationally rely upon such knowledge of the seller, but rather, the buyer can be expected to have such expert knowledge of the conditions in his own country or in the place of destination, as determined by him, and, therefore, he can be expected to inform the seller accordingly.'

Importantly, in our hypothetical it is assumed that the seller certainly did not know of the Netherlands public policy in relation to generic pharmaceuticals nor could the seller expect that goods could be confiscated in transit. Article 42(1)(a) only requires that the seller guarantees “conformity in certain countries, but not on a worldwide level”. It can therefore be argued that the seller’s obligation in relation to Art. 42 is restricted to the laws of the state where the goods will be sold or otherwise used, which can be extended to knowledge of being able to sell the goods at least in the buyer’s country. In other words the seller fulfilled its obligations. The seller is only obliged to guarantee that the goods are free of third party claims under the law of the State where the goods will be resold or otherwise used. The seller has discharged its obligations in that regard, as the goods were free from third party property claims under Brazilian law, where the buyer was located.

The drafters of the CISG also reinforced the fact that a worldwide level of obligation is not envisaged by using the singular form of ‘State’ and not ‘States’. Beline argues, however, that limiting Art. 42 to one State “could yield the unintended result of permitting the seller to choose which State to inquire into for the existence of any IIP rights that may exist in relation to the goods”. However, that view is not consistent with the text of Art. 42, which is not drafted to grant the seller a choice in setting the standard of inquiry. This is further supported by the reasoning in the mussels’ case. Hence, the knowledge of the seller covers the possible existence of third party property rights in the buyer’s country and generally extends to countries to which the buyer normally sells. However, the CISG makes it clear that there is no intention to further extend this obligation and make the seller responsible for the buyer’s decisions to on-sell to countries that were never in the contemplation of the parties at the formation of the contract.

Another point that needs to be taken into consideration is whether the seller knows or ought to know whether the buyer is a wholesaler or a manufacturer. Article 8 CISG can assist in this issue. In most cases, unless the parties had a long history of prior

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23 See, CD media case, supra fn 14.
24 CISG Art. 42(1)(a).
25 Beline, supra fn 1.
dealings, a seller would not actually be aware of the buyer’s business situation. Consequently, the buyer bears the burden of proof regarding the seller’s knowledge of the business situation of the buyer.

Nonetheless, cases have set the seller’s sphere of risk regarding third party claims rather high. The Austrian Supreme court makes it clear that:

‘[...] a seller would breach the contract at any rate if an industrial property right of a third person actually existed; under the additional requirements of Art. 42 CISG the seller is also liable if any industrial property right is being unrightfully claimed. It is part of the seller’s sphere of risk to deal with the third party in such cases’26

This statement is quite correct but it needs to be noted that it is not merely the breach of Art. 42 that makes the seller liable but also the breach of the contract namely to supply goods pursuant to the contract. As the buyer never received the goods, a breach of contract has occurred. However, since the goods were arguably unrightfully or at least unexpectedly seized, the seller can argue that Art. 79 applies, namely an impediment beyond its control. This article allows the buyer to avoid the contract but the seller is exempted from liability to pay damages. The ‘sphere of risk’ as indicated by the Austrian Supreme Court27 will determine the responsibility of each party in bearing the resulting loss. This is governed by the CISG under the Arts. 67 – 69.

5 ARTICLE 79 DEFENCES

In order to claim an impediment, the failure to deliver the goods must be due to an event beyond the seller’s control. The issue in the hypothetical case is that Art. 42 obliges the seller to supply goods free from any third party property rights subject to the above mentioned restrictions. It can be argued that a strict reading of Art. 42(1)(a) does not include knowledge of intellectual property rights in a transit country. This leads to the conclusion that the reason for non-delivery was confiscation in transit and not the existence of third party property rights affecting the goods in either their country of origin or destination. The issue in relation to intellectual property rights has shifted away from the buyer and now rests between the third party and the seller. As far as the buyer is concerned there has been a non-delivery and it is for the seller to prove that the cause of this was an impediment beyond its control, that is, the actions of the third party. Only events which the breaching party cannot anticipate or make an

26 See, CD media case, supra fn 14.
27 Ibid.
impact on can be claimed as being an ‘impediment beyond his control’. The key element here is that the impediment must be uncontrollable.\textsuperscript{28}

The Belgian Supreme Court notes that:

\begin{quote}
‘Changed circumstances ... that are unequivocally of a nature to increase the burden of performance of the contract in a disproportionate manner, can, under circumstances form an impediment in the sense of this provision of the treaty’\textsuperscript{29}
\end{quote}

For this hypothetical, the question simply is whether the defaulting party, the seller in this case, could have controlled the transit of the goods through the Netherlands but failed to do so. This problem is exacerbated by the fact that the legality of the confiscation by the Dutch authorities must be determined by the WTO/GATT. Hence the control factor is in part determined by public international law. The reasons for authorising transhipment through the Netherlands are crucial in determining whether Art. 79 can be invoked. However, in the end the matter boils down to a question of risk and whether, as indicated in the Austrian Supreme Court decision,\textsuperscript{30} it was part of the seller’s sphere or risk to deal with the third party, thereby negating an Art. 79 defence.

6\hspace{1em}BUYER’S OBLIGATIONS

Article 42(2) limits the seller’s obligation to cases where the buyer would not have been unaware of a third party right or claim. It can be argued that these cases are basically restricted to situations where the risk is better placed with the buyer. There are two situations in which this is applicable.

In the first instance Art. 42(2)(b) notes that the seller is not responsible if the buyer supplied specifications for the goods such as “technical drawings, designs, formulae or other such specifications”. A seller can rely on both this article and Art. 80 to be exempted from liability. Art. 80 states that a party cannot rely on the failure of the other party “when such failure was caused by the first party’s act or omission”. In this case it is the buyer who must make sure and is in the best position to check whether the specifications are not subject to third party property claims.

In the second instance, as noted in Art. 42(2)(a), the CISG protects the seller if the buyer knew or could not have been unaware of the existence of a right or claim at the

\begin{footnotes}
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time of contract conclusion. Two French court decisions did not allow the buyer to claim compensation because they reasoned that the buyer is the ‘professional’ and not the seller. The District Court of Versailles held that:

‘[…] it is evident that [Buyer One] made the orders in perfect knowledge of the identity of the creators of the purchased furniture. It was already demonstrated that this company and [Buyer Two] consult with professionals in the field of interior decoration and could not have been unaware that the furniture bought from the [Seller] was counterfeit "Le C" furniture. Because of this knowledge of the buying companies at the moment of the contract conclusion, their guarantee claim is rejected.’

This case demonstrates that where both the seller and the buyer understand that the goods were counterfeit, they are taken to have accepted the risk of having to defend a third party claim.

In the second French case the court noted that the seller had been informed that the goods were to be exclusively used in France. However the buyer exported the goods to another country. The court clearly stated that the buyer:

‘[…] could not, in a professional capacity, be unaware of this infringement, so that it acted with knowledge of the asserted intellectual property right, and that in accordance with Article 42(2)(a) of the Vienna Convention, Company K [Seller], is no longer bound to the obligation of delivering the merchandise free of all intellectual property rights.’

Arguably Art. 42 balances the obligations of the seller and the buyer specifically if it relates to third party claims governed under the law of the State where the buyer has his place of business. The CISG read within its four corners includes the general principle of passing of risk and Art. 42 is a good example where the risk falls to the person who is able to best control the risk. Indeed if the buyer pursuant to Art. 42(2)(b) supplies exact specifications, the seller should not be responsible for third party claims as the seller is merely conforming to contractual obligations supplied by the buyer.


Ibid.

The Israeli Supreme Court put the issue succinctly when comparing the two subsections of Art. 42:

‘By virtue of these sections, the first and main duty is the duty of the exporter (the seller) to transfer the right to the importer (the buyer) free of any third-party rights. The other duty is the duty of the importer, if he is aware of such a right, to act himself so that the transaction is not frustrated, or at least to inform the exporter of the difficulty that is likely to arise, so that the latter may act accordingly’.

Another French case came to the same conclusion as the Israeli court noting precisely that “the seller is not responsible to the buyer where the reclamation based on the intellectual property right of a third person resulted from the seller accommodating instructions issued by the buyer”.

7 Notification Procedures

Article 43 deals with issues of notification of the nature and rights of third parties. In line with Art. 42, the rights and obligations are equally shared by seller and buyer. Under Art. 43(1) the buyer must explain the nature of the claim in a timely fashion and under Art. 43(2) the seller cannot rely on any defects in the buyer’s notification if the seller actually knew “of the right or claim of the third party and the nature of it”. The leading Austrian case on these issues combined Art. 42 with the obligations under Art. 43 and stated:

‘Consequently, [Buyer]’s notice by letter dated 3 December 2000 was given in the time required by Art. 43(1) CISG. In any case, [Seller] had been aware of the patent or industrial property right of [Licensor], meaning that giving notice was not even necessary.’

Art. 43 deals with third party claims, which in essence is similar to supply of defective goods. The underlying issue in all three articles is the same, i.e. matters of timing and the nature of notification for breach of contract. Therefore, issues of form and exact timing of notification can be resolved by looking at the jurisprudence of Arts. 38 and 39. Arguably, the same time lines and form of notification ought to be observed. The German Appellate Court of Köln considering the application of Arts. 38 and 43,

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36 See, CD media case, supra fn 16.
noted that the buyer since he “had complied with the requirements of 38 and 43 CISG’ was ‘entitled to damages under Art. 74 CISG’”\(^{38}\).

Obviously the strict timeline of the “noble month”\(^{39}\) cannot be strictly adhered to and there undoubtedly courts and tribunals would be aware of the additional problems an interfering third party might pose on the time obligation pursuant to Art. 39. Furthermore, as Art. 43, unlike Art. 39, does not impose an express time limit it could be argued that this is a gap which needs to be filled by domestic statutes of limitations. On the other hand, it can be argued that time limits are governed by the text of the CISG and, according to the plain reading of Art. 7(2), the perceived gap in Art. 43 may be filled by the principles on which the CISG is based. Hence, as Art. 39 is comparable to the obligations of Art. 43, the aggrieved party “must give notice within a period of two years”\(^{40}\). Accordingly, recourse to domestic law is not necessary.

It has also been argued by some authors that Art. 43 does not actually “require the buyer to make inquiries into the States in which the buyer plans to use or resell the goods before it commences such use”\(^{41}\). This line of argument relies on the phrase ‘ought to have become aware of the right or claim’ of third parties. Article 43 deals with issues of notification for defects and obviously such notification must be provided in a timely manner. The clock starts running when the buyer has become aware of the defect. Arguably, ‘ought to become aware’ does not require the buyer to make any inquiries at all it merely suggests that the buyer cannot turn a blind eye on matters in a third country. However, reasonable businesses would make some inquiries before a sale is contemplated. After all, the location of delivery is within the buyer’s sphere of risk and the buyer cannot blame the seller for its own negligence. In essence, these provisions of the CISG protect both parties in cases where third party claims are the cause of a breach of contract. The buyer is protected by giving notice to the seller pursuant to Art. 43 but must do so in a way that allows the seller to commence, where appropriate, its own legal actions.

However, Article 43 only deals with the issue of notification once a third party claim has or will be commenced against the buyer. The German Automobile case illustrates this issue, finding:

“In view of the clear facts -- seizure of the car based on the suspicion of theft -- which even for a legal layman are recognizable as an especially important

\(^{38}\) It must be noted that there was no breach of a third part claim but only a breach by supplying goods that did not conform to the contract.


\(^{40}\) CISG Art 39(2).

\(^{41}\) Beline, *supra* fn 1.

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circumstance without further consideration or legal advice, notice would have to have been given within a month at the latest.\footnote{See, “Automobile Case”, Germany Supreme Court (11 January 2006), available at: <http://cisgw3.law.pace.edu/cases/060111g1.html>}

The question left unanswered in Art. 43 is what happens if the third party intellectual property claim is made against the seller rather than the buyer, as in our hypothetical case? The answer must be that there is no need to consider any parallel obligations of the seller to notify the buyer under Art. 43 or any other article for that matter. The mere fact that the seller did not perform its delivery obligation consists of a breach of contract. It is the buyer therefore who is in a position to decide the next step in the resolution of the contractual dispute.

**8 CONCLUSION**

This paper has shown that the CISG addresses issues of third party claims adequately by taking a ‘business like’ approach. It emphasises that the innocent contractual party is protected against third party property claims. Yet, the CISG equally balances the rights and obligations of both parties. This is achieved by imposing the same standard of knowledge, namely ‘knows or could not have been unaware of’ the third party claim on both the seller and buyer. In this way, the CISG places a burden on both parties to investigate whether possible third party claims exist. Further, this paper has shown that facts, such third party claims, cannot be viewed in isolation as the CISG contains purposefully inter-connected provisions which necessitates taking the ‘four corner’ approach to understand and devise solutions to contractual problems.

Most importantly, the CISG attempts to resolve disputes in a ‘pragmatic’ way, that is both buyers and sellers must contribute to the successful completion of contractual obligations. Hence, it is argued that the exclusion of the CISG in relation to third party intellectual property rights is not warranted.

Finally, returning to the hypothetical WTO dispute, it appears that buyer has the stronger argument. First, the goods were not delivered which is a fundamental duty of any seller and is independent of any other claims such as intellectual property rights. Secondly, the seller ought to have known that the existence of third party rights for generic goods are always a possibility. However, the seller can rely on Art. 79 and claim that an impediment beyond its control, namely, that the seizure of goods while in transit was the cause of the non-delivery.