

# Research on the Warranty for the Seller's Intellectual Property Rights in CISG

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## Abstract

United Nations Convention On Contracts For The International Sale Of Goods (hereinafter referred to as CISG) came into effect in 1988. The warranty for the seller's intellectual property Rights is one of his most important obligations in CISG, which is stipulated in Article 42. The article firstly clarified the applicable conditions of the warranty for the seller's intellectual property rights, then compared Contract Law of the People's Republic of China with CISG, looking for the reason why there are no relevant provisions in China's contract law. The conclusion focus on the significance of seller's warranty for intellectual property provisions in the CISG to China's legislation.

## Keywords

CISG; Intellectual Property Rights; Warranty for the Seller's Intellectual Property Rights; Duty Exemption.

## 1. Introduction

In the rapid growth in international trade, the seller's warranty of the good's rights are very important for a system. Rights warranty system, refers to the guarantee on the sale of the goods, the seller should have legal rights. In other words, it requires the seller warrants that the delivered goods were not "legally defective" or "legal barriers", free from any interference by third parties. Under the provisions of CISG, there are two aspects: one is the warranty of real right, the second is warranty of intellectual property rights. This article is only for the latter to study. Its main provisions are reflected in article 42. 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

## 2. Overview of Article 42 in CISG

### 2.1. Background of Article 42 in CISG

Since the 1930s, the international community has begun to work on formulating a convention on contracts for the international sale of goods that can be accepted by the international community as a whole. The Uniform Law on the International Sale of Goods (ULIS), and the Uniform Law on the Formation of Contract for International Sale of Goods (ULF) were drafted successively by International Institute for the Unification of Private Laws (UNIDROIT). Due to the limitations and shortcomings of these two conventions, they have not been recognized by the international community. UNCITRAL began to formulate CISG on the basis of these two conventions.

There is no clause in ULIS and ULF on the warranty for the seller's intellectual property rights. Article 52 of the ULIS states that the goods submitted by the seller shall not be subject to third party title or security interest, which is consistent with Article 41 of CISG. Taking into account the particularity of intellectual property rights, UNCITRAL explicitly denied the warranty for the seller's intellectual property rights in the Convention in 1976. But at a later stage, UNCITRAL realized the importance and necessity of international protection of intellectual property rights.

To this end, UNCITRAL set up a special working group to list the seller's intellectual property guarantee obligations in a separate article, which is Article 42 of CISG.

## **2.2. Geographical Scope of the Warranty for the Seller's Intellectual Property Rights**

(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.

It can be seen from the above clauses that the seller's intellectual property guarantee obligations are limited to two types of areas: the State where the buyer has his place of business and, the State where the goods will be resold or otherwise used. The former is basically undisputed, and the latter is mainly to define contract recognition. Since the CISG recognizes any form of contract, such as oral contracts, the foreknowledge here can be in writing or oral. Then the buyer has to bear the burden of proof for the foreknowledge of the contract when making a claim against the seller. If the buyer has more than one place of business, the convention stipulates that the place of business that is most closely related to this contract shall prevail. Of course, if there are multiple transactions between buyers and sellers, then based on reliance interests, the seller has reason to believe that the previous buyer's place of business is also the buyer's place of business in this contract for the sale of goods.

Why the warranty for the seller's intellectual property rights are Geographically Restricted? As we all know, intellectual property right is territorial, and it is impossible for any right holder to obtain intellectual property rights all over the world. For example, I am the seller of a contract for the sale of thermos cups, and I only have the patent for thermos in China and the United States, so I can only guarantee that this product will not infringe the patent rights of others in China and the United States. otherwise, it's unfair and burdensome for the seller.

## **2.3. Time Limit on the Warranty for the Seller's Intellectual Property Rights**

Paragraph 1 of Article 42 stipulates as follows: 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. It can be seen that time limit of the warranty for the seller's intellectual property rights is time of the conclusion of the contract. It is unfair and burdensome for the seller if there is no time limit on the warranty for the seller's intellectual property rights. Even if the seller has signed the sales contract with due prudence, it still has to bear the risks brought by the change of circumstances, which seriously undermines the principle of good faith.

Many scholars have proposed that the time limit on the warranty for the seller's intellectual property rights should be set as the time of delivery of the goods. But the Convention does not adopt this view.

## **2.4. Duty Exemption of the Warranty for the Seller's Intellectual Property Rights**

(a) at the time of the conclusion of the contract the buyer knew or could not have been unaware of the right or claim. What is impossible not to know? No undue obligation can be imposed on the buyer at this point. It should be understood from a normal person's perspective, rather than requiring additional investigation to know. For example, I sign a contract on a French leather factory, buying 100 LV handbags. The price of each bag is 100 RMB. As we all know, LV handbag is very expensive, which price is over 10000 RMB. In this case, we can infer that the buyer knew

that the bag was an infringing product. Then the seller is exempted from the intellectual property guarantee obligation.

(b) the right or claim results from the seller's compliance with technical drawings, designs, formulae or other such specifications furnished by the buyer. I'll give an example to illustrate. An American buyer signs a contract for vases with a kiln factory in Jingdezhen. The buyer also provides the design of a peacock vase. If one day, a third party claims that the peacock vase infringes its own intellectual property rights, then the seller in Jingdezhen can be exempted from the intellectual property guarantee obligation accordingly.

## **2.5. Buyer's Obligation to Notify Promptly**

The buyer loses the right to rely on the provisions of article 41 or article 42 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 has become aware or ought to have become aware of the right or claim. Why does the buyer have this obligation? What can the seller do after receiving this notification? According to the provisions of the Convention, regardless of the right or claim of the third party, that is to say, regardless of whether the buyer wins or loses the lawsuit against the third party, he can claim the losses from the seller. Obviously, the amount of loss in the two cases is very different. How to improve the buyer's winning rate? Evidence is everything. This evidence is in the hands of the seller. Therefore, after the seller receives this notice, it will promptly and fully provide the buyer with evidence of relevant intellectual property rights. On the contrary, if the buyer fails to notify the seller in time, but responds passively to a lawsuit with a third party, the seller shall not be liable for the loss caused thereby.

How to understand in a reasonable time? Since the purpose of notifying the seller is to allow the seller to provide evidence about its intellectual property rights to assist in the litigation. Then, a reasonable time should be defined as the period before the expiry of the first-instance trial period. Otherwise, the notification will be meaningless.

## **3. Comparison Contract Law of the People's Republic of China with CISG**

### **3.1. Lower Level of Warranty of Real Right in Contract Law of the People's Republic of China**

The seller's first obligation is the title guarantee. In this regard, the level of guarantee stipulated by the Chinese Contract Law is lower than that of the CISG. Article 132 and 150 of the Contract Law of the People's Republic of China has the following provision: The seller shall have title to, or the power to dispose of, the subject matter for sale. The seller is obligated to warrant that the buyer will be free from any third party claim against it in respect of the subject matter delivered, except otherwise provided by law. In other words, if a third party sues the buyer, only if the third party wins the case, it shows that the seller has not fulfilled the obligation of title guarantee, and the seller does not need to bear the liability for breach of contract. According to CISG Article 41, the seller must deliver goods which are free from any right or claim of a third party, unless the buyer agreed to take the goods subject to that right or claim. That is to say, regardless of whether the buyer wins or loses the lawsuit against the third party, he can claim the losses from the seller. Obviously, the seller's title guarantee obligation under Chinese contract law is lower than that of CISG.

Are the relevant provisions of China's contract law reasonable and in line with international law? I think this is unreasonable. If a Chinese seller signs a cup sale contract with an American buyer and a Chinese buyer at the same time. According to the provisions of the Convention, the cups provided by the Chinese seller to the American buyer which are free from any right or claim of a third party; while according to the provisions of the Chinese Contract Law, the cup provided by the Chinese seller to the Chinese buyer only requires that the third party cannot

claim the right. According to the principle of national treatment, Chinese buyers are in an unequal position with American buyers. Perhaps when China's contract law was enacted in 1999, lawmakers were concerned that too high a level of title security would impose too heavy an obligation on sellers. But the third person in legal language is a rational person and will not sue for no reason. Therefore, there will be no abuse.

### **3.2. No Clause of Warranty for the Seller's Intellectual Property Rights. in Contract Law of the People's Republic of China**

There is no clause of warranty for the seller's intellectual property rights. in Contract Law of the People's Republic of China. Is this reasonable? Let's first analyze why the warranty for the seller's intellectual property rights exists. Or why the seller needs to undertake intellectual property guarantee obligations. In the international sale of goods, because the buyer and seller are located in different countries, they do not know each other, let alone the intellectual property status of the seller. Therefore, only the seller knows in which countries it owns the relevant intellectual property. On the contrary, in domestic trade in goods, buyers and sellers are relatively well acquainted, and it is relatively easy to conduct intellectual property inquiries and verifications within a country. Then, the buyer also has the obligation to investigate the relevant intellectual property rights holders before signing the contract. then there is no need for the law to impose an intellectual property security obligation on the seller.

Some scholars claim that the third party claim warranty in Article 150 of the Chinese Contract Law includes the guarantee of intellectual property rights, but I disagree. The rights here should not be interpreted in an expanded manner, because other provisions of contract law have no connection with intellectual property rights.

## **4. Conclusion**

The obligation to guarantee rights is the basic obligation of the seller. Through the analysis of this paper, the following amendments should be made to Chinese contract law. (a) Increase the level of seller's title security. Article 150 of the Contract Law is amended as follows: The seller must deliver goods which are free from any right or claim of a third party, unless the buyer agreed to take the goods subject to that right or claim. The buyer loses the right to rely on the provisions of article 150 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 has become aware or ought to have become aware of the right or claim (b) Whether to increase the seller's intellectual property guarantee obligation clause? I don't think it's necessary. Of course, the contract field follows the principle of autonomy of will, and the buyer and the seller can agree on the seller's intellectual property guarantee obligations in the contract. In addition, in international trade in goods, Chinese enterprises are mainly sellers. Therefore, when signing a contract, it is necessary to carefully investigate the intellectual property status of the relevant area, and at the same time, the buyer's instructions should be written to avoid disputes.

There is one more question that deserves further thought and research. If the goods delivered by the seller do infringe the intellectual property rights of a third party, and the buyer has evidence to prove the seller's feelings. But there is no third party to put forward right or claim, at this time, can the buyer claim the seller's liability for breach of contract? The answer is yes. Even if the buyer's rights and interests have not been infringed, but the goods are in an uncertain state, which will affect the buyer's disposal of the goods.

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