

*Article 43*

(1) 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.

(2) The seller is not entitled to rely on the provisions of the preceding paragraph if he knew of the right or claim of the third party and the nature of it.

## OVERVIEW

1. Article 43 (1) imposes on the buyer a notice requirement with respect to claims that the seller has breached articles 41 or 42.<sup>1</sup> In certain circumstances, article 43 (2) provides for a defence if a buyer has failed to give the notice required by article 43 (1). The provisions of article 43 parallel in many ways the notice requirement and defence thereto that articles 39 and 40 establish with respect to breaches of article 35.

## APPLICATION OF ARTICLE 43

2. A small number of cases have applied article 43. In one, the buyer gave oral notice, during a personal visit to the seller, that the goods (an automobile) had been confiscated by authorities seven days earlier as stolen property; the court indicated that this constituted notice of a third party's right or claim to the goods (which would be a breach of the seller's obligations under article 41 CISG), that the notice was given within a reasonable time after the buyer became aware or ought to have become aware of the right or claim, and thus that the notice satisfied article 43—although the court also suggested that the parties had excluded article 41 by agreement, and that the buyer's article 41 claim was barred by the applicable statute of limitations.<sup>2</sup>

3. In another decision, the seller and its parent company were engaged in an ongoing dispute with the licensor of patent rights relating to CDs manufactured by the parent and sold to the buyer by the seller; the buyer may have become aware as early as 18 October 2000 that the licensor had attempted to terminate its license contract with the parent, but the buyer did not become aware that the seller was withholding license payments to the licensor until around the beginning of December 2000. In a fax to the seller dated 3 December 2000 the buyer complained that it feared the licensor would seek to collect license fees directly from the buyer's customers. The seller brought an action to collect payments on the price of the goods that the buyer had withheld, and the buyer defended by claiming the seller had breached article 42 CISG. The court of first instance held that the buyer's notice to seller concerning the third party's intellectual property claim was timely under

article 43 (1) because the buyer had no obligation to investigate, even in the face of "suspicious circumstances," whether the license contract with the licensor remained valid; therefore the buyer need not have become aware of the third party's intellectual property right or claim earlier than it in fact did; in addition, the court of first instance held that, under article 43 (2), the seller could not rely on any alleged failure by buyer to give notice as required by article 43 (1) because the seller was aware of the third party's right or claim.<sup>3</sup> The intermediate appeals court affirmed the lower court's decision concerning article 43 notice on the basis of article 43 (2);<sup>4</sup> the final appeals court reversed the decision of the court of first instance on other grounds, without commenting on the article 43 notice issue.<sup>5</sup> Another decision addressing article 43 (2) declared that the provision applied (and thus would excuse a buyer's failure to give proper notice under article 43 (1)) only if there was "positive knowledge by [Seller] of the right or the claims of third parties at the time when the claim would have had to have been presented to him."<sup>6</sup>

4. A court has also held that the buyer's notice indicating the goods had been confiscated as stolen, given two months after the goods were seized, was untimely under article 43 (1): the court emphasized that the buyer should easily have recognized, without the need to secure legal advice, that such seizure was a significant event suggesting that the goods the seller delivered had been stolen; the court also found that the buyer had failed to substantiate its claim to have engaged in a complex and protracted legal evaluation of the seizure.<sup>7</sup> In addition, the court found that the buyer had failed to give the seller proper article 43 (1) notice that the insurer of the party from whom the goods were allegedly stolen had demanded that the buyer turn over the goods: even if information concerning such demand contained in the buyer's legal complaint against the seller could satisfy article 43 (1), the court held, the notice was too late because the complaint was filed almost seven months after the buyer received the insurance company's demand.<sup>8</sup> In the course of this decision, the court made a number of general observations concerning article 43 notice. The court indicated that the "reasonable time" for giving notice under article 43 (1) was to be determined by the circumstances of each particular case, and that a "rigid" interpretation of the buyer's period for giving notice would therefore be improper; that the buyer

was entitled to “a certain period of time within which it could get an approximate picture of the legal situation,” and the length of that period would be influenced by the type of legal defect involved.<sup>9</sup> Concerning the contents and purpose of the notice required by article 43 (1), the court stated that it was not sufficient to inform the seller generally that the goods were alleged to have been stolen because “[t]he notice of a third party claim is supposed to allow the seller to make contact with the third party and to

defend the claim against the buyer. The notice must therefore set forth the name of the third party and inform the seller of the steps taken by the third party.”<sup>10</sup>

5. Presumably those called upon to interpret article 43 (1) or 43 (2) may look for guidance from the numerous decisions that apply the parallel provisions of article 39 and 40, although the differences between those provisions and article 43 should certainly be kept in mind.

## Notes

<sup>1</sup> See CLOUT case No. 1235 [Oberlandesgericht Dresden, Germany, 21 March 2007 and 18 January 2007], English translation available on the Internet at [www.cisg.law.pace.edu](http://www.cisg.law.pace.edu) (holding that the buyer’s duty to notify under article 43 (1) applied only to the buyer’s claim that the goods seller delivered were subject to a right or claim of a third party in violation of article 41 CISG, and not to the buyer’s claim that the seller failed to transfer the property in the goods as required by article 30 CISG).

<sup>2</sup> CLOUT case No. 1235 [Oberlandesgericht Dresden, Germany, 21 March 2007 and 18 January 2007], English translation available on the Internet at [www.cisg.law.pace.edu](http://www.cisg.law.pace.edu).

<sup>3</sup> See CLOUT case No. 753 [Oberster Gerichtshof, Austria, 12 September 2006] (see full text of the decision) (containing a report of the decision of the court of first instance and of the intermediate appeals court).

<sup>4</sup> Ibid.

<sup>5</sup> Ibid. For another decision dealing with the application of article 43 to a buyer’s claim under article 42 CISG, see Landgericht Köln, Germany, 5 December 2006, English translation available on the Internet at [www.cisg.law.pace.edu](http://www.cisg.law.pace.edu) (dealing with a claim under article 42 CISG).

<sup>6</sup> Oberlandesgericht Hamm, Germany, 15 July 2004, decision described and affirmed (without specific comment on article 43 (2)) in CLOUT case No. 822 [Bundesgerichtshof, Germany, 11 January 2006] (see full text of the decision).

<sup>7</sup> CLOUT case No. 822 [Bundesgerichtshof, Germany, 11 January 2006] (see full text of the decision). For another decision holding that the buyer had lost its claim for failure to give timely article 43 (1) notice, see Landgericht Köln, Germany, 5 December 2006, English translation available on the Internet at [www.cisg.law.pace.edu](http://www.cisg.law.pace.edu) (dealing with a claim under article 42 CISG).

<sup>8</sup> CLOUT case No. 822 [Bundesgerichtshof, Germany, 11 January 2006] (see full text of the decision).

<sup>9</sup> Ibid.

<sup>10</sup> Ibid.