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THE CONFORMITY OF GOODS UNDER THE CISG

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Abstract
Aim. To analyse CISG Article 35 which regulates conformity of goods.
Methodology. The method of analysis, empirical research method were used
Results. In international sales law, the buyer is entitled to receive what was bargained between both parties and the seller has an obligation to send the goods in accordance with the contract of sale. Naturally, the goods must be suitable as agreed in the contract of sale. Therefore, the conformity of goods is the duty of the seller. Article 35 CISG is only provision which regulates the conformity of goods.
Research iimplications. Conformity of goods is a very significant part of the contract of sale in international sales law and non-conformity of goods may amount to the fundamental breach of the contract of sale. Conformity of goods is shaped by the expectations of the buyer and is the duty of the seller. Pursuant to Article 35 CISG, conformity of goods is categorized in two different groups; the express conformity of goods and the implied conformity of goods. The express conformity of goods criteria are contractual quality, contractual quantity, contractual description and packaging in CISG Article 35(1). The implied conformity of goods criteria are fitness for the ordinary purpose, fitness for the particular purpose, sample goods and packaging in CISG Article 35(2). Packaging is the common criterion for both criteria.

Keywords*:* Conformity of Goods, CISG Article 35, international sales law

СООТВЕТСТВИЕ ТОВАРОВ ДОГОВОРАМ МЕЖДУНАРОДНОЙ КУПЛИ-ПРОДАЖИ

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Аннотация
Цель. Анализ ст. 35 Договора международной купли-продажи товаров, регулирующей соответствие товаров.
Процедура и методы. В работе использованы методы анализа и эмпирический.
Результаты. В соответствии с международным правом купли-продажи покупатель имеет право получить то, что было заключено между обеими сторонами, и продавец обязан отправить товар в соответствии с договором купли-продажи. Естественно, товар должен быть подходящим, как оговорено в договоре купли-продажи. Поэтому соответствие товара является обязанностью продавца. Ст. 35 CISG является лишь положением, регулирующим соответствие товара.
Теоретическая и/или практическая значимость. Соответствие товара является весьма значительной частью договора купли-продажи в международном праве купли-продажи, и несоответствие товара может представлять собой существенное нарушение договора купли-продажи. Соответствие товара определяется ожиданиями покупателя и является обязанностью продавца. Согласно ст. 35 CISG соответствие товаров подразделяется на 2 группы: явное соответствие товаров и подразумеваемое соответствие товаров. Критериями явного соответствия товаров являются договорные качество, количество, описание и упаковка, описанные в ст. 35 (1)

CISG. Подразумеваемыми критериями соответствия товаров являются пригодность для обычной цели, пригодность для конкретной цели, образцы товаров и упаковка, описанные в ст. 35 (2). Упаковка является общим критерием для обеих групп.

Ключевые слова: соответствие товаров, статья 35 CISG, международное право купли-продажи

Introduction

In Post II World War Era, the international trade escalated dramatically and triggered the globalization. The globalization of trade become the reason of the regional and global unification of sales law[1]. Since the law of the destination of goods is the applicable law in international sales contracts between the buyer and the seller, the seller is not familiar to the applicable law unlike the buyer. This situation causes legal uncertainty for the seller because national contract law provisions are insufficient to regulate the international sales transactions between the buyer and the seller. Therefore, the UNCITRAL («the United Nations Commission on International Trade Law») prepared the draft of CISG (United Nations Convention on Contracts for the International Sale of Goods) in 1980 to promote uniformity of sales law and to eliminate legal uncertainty at global level in international sales law. It offers standard rules in international sales law[2].

Non-conformity of goods means that the quality and quantity of the goods do not fulfil conditions of the quality and quantity as agreed by the contractual terms between them[3]. After the contract of sale is concluded, the seller has obligation to send goods as required by the contract. The goods must conform as required by the contract. Article 35 of CISG is only provision which regulates the conformity of goods[4]. Article 35(1) is the basic rule of the determination of conformity of goods. It embodies one basic principle of contract law, i.e. freedom of contract. Therefore, the buyer is entitled to receive exactly what was bargained by the parties pursuant to Article 35(1). These criteria are known as the express conformity obligations. They are contractual quantity, contractual quality, contractual description and package respectively. Article 35(2) includes four subparts which regulates the situation that the parties have not agreed otherwise on their contractual conditions. It is applied where there are no relevant provisions which regulating conformity of goods[5]. They are known as the implied conformity obligations. They are fitness for the ordinary purpose, fitness for the particular purpose, sample or model and package respectively. As a result, the goods must be conformed to

1 Ruangvichathorn J. The Harmonization of ASEAN Sales Law: A Comparative Study with Thai Sales Law and CISG. In: *Thammasat Business Law Journal*, 2020, vol. 49, no.1, p. 133.

2 Oktavïandra S. Indonesia and Its Reluctance to Ratify the United Nations Convention on Contracts For the International Sale of Goods(CISG). In: *Indonesia Law Review*, 2018, vol:8, no. 3, p. 244.

3 Mai Nan Kham. Exclusion and Limitation of Liability for Non-conformity of Goods: A Comparative Study on CISG, UCC and UK Law: PhD Thesis, Nigata University, 2017, p. 12.

4 CISG Article 35: (1) The seller must deliver goods that are of the quantity, quality and description required by the contract and which are contained or packaged in the manner required by the contract.
(2) Except where the parties have agreed otherwise, the goods do not conform with the contract unless they:
(a) are fit for the purposes for which goods of the same description would ordinarily be used,
(b) are fit for any particular purpose expressly or impliedly made known to the seller at the time of the conclusion of the contract, except where the circumstances show that the buyer did not rely, or that it was unreasonable for him to rely, on the seller's skill and judgment;
(c) possess the qualities of goods, which the seller has held out to the buyer as a sample or model,
(d) are contained or packaged in the manner usual for such goods or, where there is no such manner, in a manner adequate to preserve and protect the goods.
(3) The seller is not liable under subparagraphs (a) to (d) of the preceding paragraph for any lack of conformity of the goods if at the time of the conclusion of the contract the buyer knew or could not have been unaware of such lack of conformity.

5 Williams J. Analysis of CISG Article 35 – Conformity of the Goods in the Changing Power Dynamics of Corporate Social Responsibility. In: *Comparative Law Journal of the Pacific*, 2015, vol. XIX, pp. 304-305.

the express terms of the contract of sale and implied terms which do not appear in express terms of the contract of sale. Their quality has an obligation to comply with the standard stipulated in the law[1].

The Express Conformity Obligations

1. Contractual Quantity

The seller must deliver the exact quantity of goods the buyer as agreed in the contract. A failure of the delivery of more or less amount of goods constitutes breach of contract. However, it should be emphasized that variations in quantity is considered normal within certain limits[2]. For example, Pursuant to UCP 600 Rules Article 30(a), various tolerances in credit amount, weight and value of goods are allowed as follows[3]:

a) the words «about» or «approximately», used in connection with the amount of the credit or the quantity or the unit price stated in the credit, are to be construed as allowing a tolerance not to exceed 10% more or 10% less than the amount or the quantity or the unit price to which they refer;

b) a tolerance not to exceed 5% more or 5% less than the quantity of goods is allowed, provided the credit does not state the quantity in terms of a stipulated number of packing units or individual items and the total amount of the drawings does not exceed the amount of credit;

c) even when partial shipments are not allowed, a tolerance not to exceed 5% less than the amount of the credit is allowed, provided that the quantity of the goods, if stated in the credit, is shipped in full and a unit price, if stated in the credit, is not reduced or that sub-Art 30(b) is not applicable. This tolerance does not apply when the credit stipulates a specific tolerance or uses the expressions referred in sub-Art30(a).

In English law, the national courts disallow the buyer to take the advantage of a merely «*de minimis*» variation which is «*not capable of influencing the mind of the buyer*»[4]. Gravity, nature of goods may affect the quantity of total goods[5]. However, it should be at «*de minimis level*».

Quantity of the goods may be delivered less or more than the agreed quantity in contract of sale. Both situations violate the conformity of goods obligations. If the seller delivers less quantity of goods which has been agreed by the parties, the buyer may fix an additional time for the delivery of the missing goods, price reduction or partial avoidance of contract of sale for the missing parts. If the partial delivery of goods amounts to fundamental breach of contract of sale, there is the avoidance of the contract of sale as a legal remedy[6]. This article became the subject matter of many civil cases. On 28 December 2008, the Shangai First Instance Court held that there is the fundamental breach of the contract of sale in case the seller had delivered only minor parts of the liquors requested by the buyer and -additionally- none of the brands listed in the contract of sale. Other courts delivered similar judgments in cases where the major part of the goods was either non-confirming or considerably affected by the non-confirming goods. An American court ruled that a fundamental breach of the contract of sale is considered that 93% of delivered goods performing below the standard cooling capacity for air conditions. In a French case, it was held that 380 of 445 non-confirming motherboards amount to the fundamental breach. A German court ruled that 420 kg out of 22 tons non-confirming goods constitute the fundamental breach. In an Italian case, the value of more than 90% of the non-confirming goods more than 90% constitute fundamental breach[7]. However, it

1 Maï Nan Kham, p. 12.

2 Huber P., Mullïs A. The CISG A New Textbook for Students and Practitioners. In: *European Law Publishers*, 2007, p. 131.

3 Carr I. International Trade Law. In: *Routledge*, 2009, p. 480.

4 Huber / Mullis, p. 480.

5 Ekşi N., Milletlerarası T. H., Beta Yayıncılık. Bası, İstanbul, Mart 2010, p. 11.

6 De Luca V. The Conformity of the Goods to the Contract in International Sales. In: *Pace International Law Review*, 2015, iss. 1, vol. 27, article 4, p. 188.

7 Chen M. M., Pair L. M. Chapter 35: Avoidance for non-Conformity of Goods under Art. 49(1)(A)

should be noted that excess delivery of goods does not constitute fundamental breach as a rule[1]. If the seller delivers excessive quantity of goods, the buyer has two options, accepting the excess goods or refusing the excess quantity. It is accepted that if the buyer cannot reject the «extra» goods, it may amount to the fundamental breach of contract of sale and the contract of sale may be totally avoided. The CISG Official Records exemplifies this situation as follows:

«*If it is not feasible for the buyer to reject only the excess amount, as where the seller tenders a single bill of lading covering the total shipment in exchange for payment for the entire shipment, the buyer may avoid the contract if the delivery of such an excess quantity constitutes a fundamental breach*»[2].

2. Contractual Quality

The second condition of CISG Article 35(1) is the delivery of goods of the quality provided in the contract of sale. CISG Article 35(1) does not specify criterion as to the allowed divergence from the agreed standard; any variation, therefore, is assessed non-conformity regardless of the consequences on the value or usability of the goods. Given the broad significance attributed to «quality», It is commonly accepted that the term is broadly interpreted in order to comprise both the lack of physical conditions and «all factual and legal circumstances concerning the relationship of the goods to their surroundings.» For example, the French Court of Cassation ruled that the seller «*had not honoured its contractual obligation to supply a wine confirming to the contract and of fair merchantable quality*» since he delivered chaptalized wine that had transformed into vinegar[3].

It is common practice that the buyer must inform the seller regarding the public law regulation in the country of the destination of the goods. The «*New Zealand Mussels*» case, which was heard by the German Court in 1995 is one of the most popular cases related to CISG Article 35(1)[4]. The German buyer requested 1.750 kg of New Zealand Mussels from the Swiss seller and the seller delivered the goods on time to the place agreed by the seller and the buyer. Upon the seller's payment request, the buyer notified that the level of cadmium concentration is higher than the rate set by the German public authorities. The German court held that the foreign seller is unable to know the administrative criteria and public law regulations; therefore, the buyer cannot rely upon the knowledge of the foreign seller; it can be expected that the buyer has such information in the place of destination of goods or in his own country. The buyer has an obligation to share relevant information to the seller in detail. Therefore, the German court approved the seller's payment request to the buyer[5]. In this respect, the German courts set three exceptions as follows:

– The countries of the seller and the buyer has the same or very similar standards.

– The information was given to the seller regarding the standards of goods by the buyer.

– Relevant factors (such as: the relationship between the existence of the headquarter or branch of the seller in the country of the buyer, the buyer and the seller in pre-shipment of goods, the fact that the seller sells the goods to the country of the buyer for a long while or other reasonable or similar conditions) showing that the seller knows the public law regulations or criteria in the country of the buyer party[6].

CISG, Liber Amicorum Eric Bergsten International Arbitration and Commercial Law: Synergy, Convergence and Evolution, Edited by Stefan Kröll, L. A. Mistelis, P. Perales Viscasillas & V. Rogers, Kluwer Law International, 2011, p. 669.

1 Chen / Pair, p. 669.

2 De Luca V. The Conformity of the Goods to the Contract in International Sales. In: *Pace International Law Review*, 2015, iss. 1, vol. 27, article 4, pp. 189–190.

3 De Luca, pp. 189–190.

4 CISG Article 35(2)(a) «fit for the purpose for which they would ordinarily be used".

5 Atamer Y. M. Uluslararası Satım Sözleşmelerine İlişkin Birleşmiş Milletler Antlaşması(CISG) Uyarınca Satıcının Yükümlülükleri ve Sözleşmeye Aykırılığın Sonuçları, 1. Bası, Beta Yayınları, İstanbul, 2005, p. 202.

6 Can Hacı, Tuna Ekin, Sınıraşan Sözleşmelere İlişkin Meseleler Gümrükten Geçmeyen Mallardan Kaynaklanan Hukuki Sorumluluğa İlişkin Bir Vaka İncelemesi, Dokuz Eylül Üniversitesi Hukuk Fakültesi Dergisi, vol. 19, iss. 2, 2019, p. 2186. See also AY Yunus Emre, The Fundamental Breach of Contract of Sale

a. Trade Usage

The contractual quality is also related to the trade usages because trade usage is a source of law and can be applied to solve commercial dispute[1]. It is a part of *lex mercatoria*[2]. It may call for certain ethical rules and standards in commercial life. Pursuant to CISG Article 9, the parties are bound by any usage to which they have agreed and by any practices which they have established between themselves. The parties are considered, unless otherwise agreed, to have impliedly made applicable to their contract or its formation a usage of which the parties knew or ought to have known and which in international trade is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade concerned[3]. For instance, private initiatives have to fulfil minimum ethical standards such as setting a maximum number of working hours, the prohibition of child labour, and prescribing human treatment in many trade sectors[4]. If the buyer and the seller are located in different countries in the European Union, relevant European regulations or directives can be considered trade usage that sets criteria for the quality of goods as gap-filling rule between parties.

A prominent trade usage example is the Kimberley Process Certification Scheme that is an international certification scheme for rough diamonds as a trade usage. Participants of this scheme must ensure that any diamond cannot be obtained from the country which does not finance a rebel group(so-called blood diamonds). Every diamond is imported (from) or exported (to) by a Kimberley process certificate. Therefore, the Kimberley Process Certification became the trade usage[5].

Above-mentioned trade usages are not created by the buyer and the seller. A trade usage cannot be created by way of concluding of the mere contract. Repeated transactions are necessary to establish trade usage between the parties[6]. The buyer and the seller may create a trade usage between them if they have long-lasting relationship. If the seller exports the certain quality goods to the buyer in many times for certain long period, there may be considered trade usage between them. Especially, a revolving letter of credit may be evidence to prove trade usage between the parties in such situations.

3. Contractual Description

The seller has an obligation to deliver the goods which were agreed in contract of sale. Pursuant to CISG Article 35(1), any deviation from the contractual description of the goods is considered a breach of contract of sale. For example, parties decide to trade beef between them. The buyer from Muslim country ordered beef from the seller to sell them butcher in his country but the seller delivers pork. There is a breach of contract of sale. In this situation, the issuing bank reject payment based on the strict compliance principle if there is letter of credit relationship because there is violation of contractual description criterion.

Within the context of contractual description, there has been debates amongst scholars is whether the delivery of goods of a different kind(known as «*aliud*») may be regarded as delivery of non-confirming goods or failure to deliver. The first view that regards «*aliud*» as failure to deliver rejects distinction between defective delivery and failure to deliver goods. The second view that regards «*aliud*» as non-confirming goods is more accepted in the doctrine[7]. It makes drawing the distinction between delivery of wholly different goods and merely defective goods

under the CISG, Facta Universitatis, Series: Law and Politics, 2022, vol. 20, iss. 1, p. 30.

1 Arbitration Rules of the Arbitration Center of Iran Chamber of Commerce Art. 42(D): «*The Arbitrator is obliged to decide in accordance with provisions of the contract and shall take into account the relevant trade usage*."

2 Pamboukis Ch. The Concept and Function of Usages in the United Nations Convention on the International Sale of Goods. In: *Journal of Law and Commerce*, 2005, vol. 25, iss. 1, p. 107.

3 Pamboukí states that CISG Article 9 grants normative value to trade usage. See Pamboukis, p. 108.

4 Schwenzer I. Ethical Standards in CISG Contracts. In: *Uniform Law Review*, 2017, pp. 124–125.

5 Schwenzer, Ethical Standards in CISG Contracts, p. 125.

6 Graffi L. Remarks on Trade Usages and Business Practices in International Sales Law. In: *Journal of Law and Commerce*, 2011, vol. 29, no. 2, pp. 278–279.

7 De Luca, pp. 192–193.

unnecessary. Furthermore, it is unreasonable situation to put the buyer obligation to give notice of delivery of completely different goods and to notify avoidance of contract[1]. Supposing that the buyer and the seller agreed on the documentary letter of credit as the payment method. Letter of credit relationship is a triparty relationship. The three parties are the buyer (known as the applicant), the buyer's bank(known as the issuing bank) and the seller (known as the beneficiary). There is an underlying contract(the contract of sale) between the buyer and the seller. This contract may contain a letter of credit clause as the payment method. The letter of credit is independent relationship from the underlying contract. The issuing bank has obligation to make payment to the seller upon the proper presentation of the documents stipulated in the documentary letter of credit proving the seller's performance of the underlying contract, which generally include a bill of lading, proforma invoice and insurance policy[2]. In this relationship, these three documents contain the information regarding the contractual description in the contract of sale between the buyer and the seller. If these three documents prove that the seller delivers the goods against contractual description and there is «aliud», the issuing bank does not make payment to the seller[3].

The Implied Conformity Obligations

1. Fitness for the Ordinary Purpose

Unless the parties specify the purpose of the ordered goods, the goods must be «fit for the purpose for which goods of the same description would ordinarily be used» pursuant to CISG Article 35/2. Although goods are purchased for a purpose of the buyer, the purpose of purchasing goods may not be discussed in pre-contractual negotiatons[4]. In this respect, the term «ordinary use» gained importance. It is not defined in any international commercial convention but if it is defined, it is necessary to abstain from absolute rules or definitions[5]. «Ordinary use» can be defined as «the function of goods that comes in mind at first under normal conditions» in the legal doctrine. In the light of this definition, if the buyer orders the goods from the seller only with general description without the need to further communication, for example, cars must be suitable for drivable, fruit must be suitable for consumption and so on[6]. If the buyer orders the same type of goods for the same purpose for a long time, the last order is considered that it is like previous purposes unless its purpose is specified.

HENSCHEL is of the opinion that «*The rule in Article 35(2)(a) on the fitness of the goods for their ordinary purposes is not an objective legal standard, but a rule about the presumed intention of the parties which should be interpreted on the basis of all the relevant circumstances of the case, cf. Article 8 and Article 9*»[7]. As a departure point, the determination of ordinary use of goods is interpreted in accordance with the «objective view of a person in the trade sector concerned». The determination of ordinary use of goods depends on consuming or using purpose of the buyer in market expectations. It is related to various factors such as culture, traditions, legal regulations(especially public law provisions) and economic requirements[8]. For example, steering wheel is located on the left side of the front of car in continental Europe. In the UK, steering wheel is located on the right side of the front of car. It is a good example of the relationship between

1 Huber / Mullĭ, p. 133.

2 Gao Xiang, The Fraud Rule in Law of Letters of Credit in the P.R.C., The International Lawyer, 2007, vol. 41, p. 1069.

3 Graffı L. Remarks on Trade Usages and Business Practices in International Sales Law, p. 288.

4 Yarar A. İ., Conformity of Goods in International Sales Under CISG and English Law. In: *LLM Thesis*, Amsterdam, 2016, p. 17.

5 Henschel R. F., Conformity of Goods in International Sales Governed by CISG Article 35: Caveat Venditor, Caveat Emptor and Contract Law As Background Law and As a Competing Set of Rules. In: *Nordic Journal of Commercial Law*, 2004, iss. 1, p. 7.

6 De Luca, p. 197.

7 Henschel R. F. Conformity of Goods in International Sales Governed by CISG Article 35: Caveat Venditor, Caveat Emptor and Contract Law As Background Law and As a Competing Set of Rules. In: *Nordic Journal of Commercial Law*, 2004, iss. 1, p. 7.

8 Schlechtriem P. /Butler P., UN Law on International Sales, Springer, 2009, p. 116.

public law provisions, culture and fitness for the ordinary purpose. Therefore, the ordinary use may be defined by the criteria set by the country or region in which the buyer enjoys the goods[1]. As the seller always does not know this information, supporters of this view emphasize that the buyer should inform to the seller where the goods will be received[2]. Therefore, the above-mentioned *New Zealand Mussels* case is a very good example of this situation.

Pursuant to Article 35(2)(a) CISG, there is no stipulation regarding the average quality to be fit for average purpose which is required by many domestic legal systems[3]. This problem was discussed in a Dutch Arbitral Award in 2002. This dispute is related to contract of sale of a condensate derived from the exploration of gas reservoirs after they separate from the gas stream. The condensate was sold through series of contract of sale and is subject to refining on behalf of the buyer as part of mixture which consists of condensate and crude oil known as «Rijn Blend». The buyer and sellers had entered into numerous contracts of sale for several years to sell Rijn Blend. In 1998, however, the buyer claimed that it would not accept any more Rijn Blend due to the high level of mercury in condensate. The sellers resold the Rijn Blend at lower prices than contract price and requested the coverage of damages from the buyer before the arbitral tribunal. The Arbitral Tribunal discussed the term of fitness for the ordinary purpose in Article 35(2)(a) CISG under three different terms to solve the dispute. There are reasonable standard, average quality standard, and merchantability standard[4].

Merchantability standard derived from the common law systems. The arbitral tribunal states that «*a reasonable buyer would have concluded contracts for Rijn Blend at similar prices if such a buyer had been aware of the mercury concentrations*». Relying on the seller's resale of condensate at lower prices after the buyer's non-acceptance, the arbitral tribunal ruled that if this standard were practiced, there would be breach by the seller since «*other buyers in the market for Rijn Blend were <…>. unwilling to pay the price [sellers] had agreed with [buyer]*»[5]. Average quality standard derived from civil law systems. The arbitral tribunal ruled that the buyer had failed to meet its onus of proof as regards the issue of «whether there [was] a common understanding in the refining industry what average quality for blended condensates (such as Rijn Blend) should have been and what levels of mercury [were] tolerable.» Therefore, the buyer could not be responsible if that test were practiced[6]. Ultimately, both of these standards were dismissed in favour of a «reasonable quality standard» for the interpretation of Article 35(2)(a) by the Arbitral Tribunal[7]. The Arbitral Tribunal emphasized that the standard of reasonable quality is more compatible with the Convention's international character and is more available to the promotion of uniformity. It was ruled that the seller breached the reasonable quality standard for two reasons. First, the arbitral tribunal stated that the contract price could not have been agreed from selling Rijn Blend in all likelihood if other buyers knew about the levels of mercury. The Rijn Blend with lower mercury level was clearly valued more highly than that with higher level mercury. Second, the buyer and the seller have had a long-term business relationship and it is an important factor to shape the expectations of the buyer. Therefore, the buyer «*was entitled under the contracts to a constant quality level of the Rijn Blend corresponding to the quality levels that had been obtained during the <…> initial period of the Contracts and on which [buyer] and its customers could reasonably rely*»[8].

1 See Schlechtriem, supra note 106, at 6 ff. quoted in: De Luca, p. 204.

2 See Schlechtriem & Butler, supra note 5, at 119. quoted in: De Luca, p. 204.

3 Schlechtriem / Butler, p. 116.

4 Gillette C. P., Ferrari F. Warranties and «Lemons" under CISG Article 35 (2) (a), *Internationales Handesrecht(IHR)*, 2010, vol. 1, p. 8.

5 Saĭdov D. Article 35 of the CISG: Reflecting on the Present and Thinking About the Future. In: *Villanova Law Review*, 2014, vol. 58, iss. 4, p. 535.

6 Saidov, pp. 535, 536.

7 Gillette / Ferrari, p. 9.

8 Saidov, p. 536.

2. Fitness for the Particular Purpose

The particular purpose criterion has priority over the ordinary purpose criterion. The goods that do not have the particular purpose criterion do not conform to the contract of sale even if they are fit for ordinary purposes in CISG Article 35(a) because they do not conform to the purpose for which they were produced or made[1]. Under Article 35(2)(b) CISG, the seller is responsible for the fitness of the goods for a particular purpose other than the fitness of the good for the ordinary purpose, if such a purpose has been informed to him expressly or impliedly or known by the seller[2]. The buyer may rely on the seller's skill and judgment reasonably. For example, the buyer's particular purpose could be the use of the goods in a specific way of processing or certain region having special standards related to religion. There is no problem when the seller is clearly informed to the buyer with the particular purpose of the goods. If such a purpose is impliedly informed to the seller, «*an objective test*» shall be applied. In both situations, the seller shall be made aware of the particular purpose of use of the buyer. Therefore, it is ruled by the *Cour d'Appel de Grenoble* in France that: «*because the seller deliver some metallic elements which could not be used for the reassembling of the second hand hanger as agreed upon by the parties, there was a lack of conformity as the seller knew at the time of contracting that such metallic elements had to be used for that particular purpose and were not fit for it*»[3].

A particular purpose rule is the result of the fact that the buyer has intention to enjoy the goods in a certain country or economic area. Good manufacturing practice(GMP) plays an important role for the interpretation of «fitness for the particular purpose» since it means that well-known regulation which ensures the appropriate production process on the impact of the quality of the goods[4]. For example, If the goods are imported into the European Union, they must have the CE Mark(«European Conformity») on the surface of their packages or goods. This is clearly required in European Union directives. The importers of the products have to confirm that the producers outside the EU have taken the necessary steps and the documentation is presented upon request. Distributors must present the documents to national authorities that they have acted with due care and must have submit affirmation from the importer or/and manufacturer that the necessary measures have been taken. If the seller sells medical devices to the United States, the seller must be aware of the fact that the goods are in accordance with the good manufacturing practices set by the Food and Drug Administration. The merchants must be aware of this situation[5].

Another emerging field is the awareness of consumers for the production of goods sustainably and ethically. The same is true for foods that must undertake the process in a certain way to fulfill religious standards such as halal or kosher food. Although there is no difference in the physical features of the goods in such situations, consumers are generally ready to pay a higher price for the goods compared to goods that are not traded or produced in such way. Therefore, there is a

[1] Andrushchenko S. Non-conformity of goods under Article 35 of the United Nations Convention on Contracts for International Sale of Goods, Knowledge Transfer in the Global Academic Environment, Volume I: Book of Research Papers, TESOL – Ukraine Research Academy, Lviv, 2020, p. 20.

[2] Shabanı F., Non-conformity of Goods in Light of the United Nations Convention on Contracts for the International Sale of Goods and the Law on Obligations of the Republic of Macedonia as Part of South-Eastern European Law. In: *Academic Journal of Interdisciplinary Studies*, MCSER Publishing, 2015, vol. 4, no. 2, p. 87.

[3] Decision No RG 93/4879, dated 26.04.1995.; DAWWAS Amin, Non-Confirmity of Goods in Light of CISG, Unidroit Principles and the Palestinian Commercial Law Draft. In: *Journal of Sharia & Law*, 2012, iss. 52, p. 40.

[4] Roland D. Sales and Conformity of Goods: A Legal Discourse, Banking and Finance, Editors: HARON Razali, HUSIN Maizaitulaidawait Md, MURG Micheal, 2020, p. 9.

[5] Schwenzer I. Conformity of the Goods – Physical Features on the Wane? Conference in Honour of Peter Schlectriem 1933–2007: the 3rd Annual MAA Schlectriem CISG Conference, The Hague, 2012, pp. 104–108.

special market with higher prices for relevant consumers[1].

3. Sample or Model

In a contract of sale, the purpose of the sample or model goods is to describe the consideration. Instead of using words to describe the goods and their characteristic, the performance of task is carried out by the sample or model[2]. In Article 35(2)(c) CISG, it is accepted that the goods conform to the contract of sale, if they have features which the seller has presented to the buyer as a sample or model. This situation can be deduced from two similar situations: the first, where the buyer and the seller have clearly agreed on strict compliance in performance(as in fitness for the particular purpose of the goods); and the second, where the applicable law assumes the qualities of sample good to be treated as a contractually promised quality in the sense of rule that can be found in some domestic legislations Section 2-313(1)(c) UCC, Section 15 of the English Sale of Goods Act(1893)[3].

In the *Packaging Machine* case, the buyer proved that the seller had promised producing a machine of 180 vials per minute while the actual performance of the machine was 52 vials per minute as a sample good although a maximum velocity of the machine was 115 vials per minute was possible. The seller claimed that maximum production capacity of the machine was impossible and had not ever been agreed by parties. The buyer declared the avoidance of the contract of sale and requested the coverage of damages from the seller. The court considered the qualities of the machines the fundamental breach of contract of sale. The court held that the actual production capacity – 52 vials per minute – caused 71% production loss over the 180 vials per minute and caused 40% production loss over the 115 vials per minute[4]. This situation is considered a fundamental breach of the contract of sale.

A small deviance is acceptable in the standard of the sample or model than that of the delivered goods. It is deduced from a decision delivered by a Belgium Commercial Court in 2006. The buyer ordered doors known as «Tulipwood» after they were sent to the buyer as sample or model goods. When the buyer received the doors, the buyer claimed that they are non-conforming in CISG Art. 35 (2)(c) due to the different colours of the door. In this case, the knowledge and experience of the buyer must be considered for the interpretation of CISG Art. 35(2). Regarding the particular case, «Tulipwood» that is the type of wood is known to have differences in colour, and therefore the buyer should have known that the goods do not correspond to the sample completely[5].

4. Packaging

Packaging is the common criterion of express and implied conformity obligations. As a rule, the seller is responsible for packaging in international sales law. In light of features of international trade between long distances, packaging is a very important issue[6]. In Article 35(2)(d) CISG, adequate packaging is necessary for the particular kind of goods. Packaging must be suitable for the nature of goods. Different factors such as the time, climate conditions, and the kind of transport are taken into account[7]. If the parties make a

[1] Schwenzer, Conformity of the Goods – Physical Features on the Wane? p. 105.

[2] Huber / Mullĭ, p. 139.

[3] Section 2-3138(1)(c) Uniform Commercial Code:
(1) Express warranties by the seller are created as follows:
(a) ….
(b) ….
(c) Any sample or model which is made part of the basis of the bargain creates an express warranty that the whole of the goods shall conform to the sample or model. Al-Hajaj, pp. 194–195.

[4] Al-Hajaj A. The Concept of Fundamental Breach and Avoidance under CISG: PhD Thesis, 2015, pp. 197–198.

[5] Krıstensen K. Q., The Conformity Assessment for International Sale of Goods Contracts, Master Thesis, Aalborg University, 2021, pp. 51–52.

[6] Shabanı F. Non-conformity of Goods in Light of the United Nations Convention on Contracts for the International Sale of Goods and the Law on Obligations of the Republic of Macedonia as Part of South-Eastern European Law. In: *Academic Journal of Interdisciplinary Studies*, vol. 4, no. 2, 2015, p. 86.

[7] Schwenzer in Schlechtriem / Schwenzer, Commentary, Article para 29, 31. quoted in Schlechtrıem / Butler, p. 120.

contract of sale regarding packaging and the goods are not be packaged in accordance with the contract of sale, there is an infringement of contract of sale[1]. If the parties make no contract regarding packaging, the goods must be packaged in the usual manner for the goods of the same description or, where there is no such manner, in a style to preserve the goods. If incorrect packaging causes the consequence that it is impossible to resell in the buyer's place of business, there is fundamental breach. Insufficient packaging gives rise to the passing of risk rules with the result that the seller is held liable although the risk passed from the seller to the buyer. In *Conservas La Soctena v Lanin* case, the Mexican arbitral tribunal ruled that the seller was held responsible for failing to supervise the delivery of the goods shipped by the Chilean supplier which reached the port of discharge in a damaged condition due to improper packaging[2]. Moreover, this situation is compatible with international transportation rules. For example, In Hague Visby Rules (1968) Article IV, the sea carrier is not responsible for loss or damage resulting from insufficient packaging because packaging is under the responsibility of the seller.

Exclusion of Liability for Lack of Conformity of Goods

In CISG Article 35(3), the seller is not responsible in cases where the buyer knew or could not have been unaware of the particular lack of the conformity of goods at the time of the conclusion of contract of sale. If the buyer has the knowledge of the lack of conformity at the time of delivery of goods or after the inspection of goods, the seller is responsible for the lack of conformity of goods[3]. Lack of conformity is not claimed that the buyer has the knowledge of the lack of the goods or accepting the goods in that state. For the interpreting the term of «could not have been unaware» within the context of the buyer, there should be a criterion that there is an average buyer. Although the CISG does not lay down the burden of proof rule in this situation, it is common approach that the seller has the burden of proof that the buyer knew or could not have been unaware of the lack of the goods in the legal doctrine. If the seller proves that the reasonable buyer could have the knowledge of the lack of conformity, he cannot be held responsible for the lack of conformity of goods[4]. In one case, the buyer and the seller have decided to trade the second-hand bulldozer. The buyer had examined the second-hand bulldozer and did not mention any defects before both parties made the contract of sale. As the seller managed to prove this examination, the court ruled that the seller is not responsible for defects claimed by the buyer[5].

A more complex case was related to the sale of a textile machine(rotary printing). The contract has the detail that there is the rapport equipment length 641–1018 mm. Prior to the formation of the contract of sale, the buyer, a trader in textile machinery, had an inspection opportunity to the machine, which was not a new model (being 14 years old) and had no capacity to operate at a full rapport length. Before the contract of sale was made, the seller sent a fax message to the buyer referring to the same rapport length as that is included in the contract of sale, emphasizing that the machine was «*complete and operating as viewed*». After the formation of the contract of sale, the buyer also sent a purchase confirmation that it would take over the machine «complete and operating as viewed». The buyer claimed that the reason of the breach of the contract

[1] Doğan H. Viyana Satım Sözleşmesi ve Türk Borçlar Kanunu Kapsamında Satıcının Ayıptan Doğan Sorumluluğu ve Özellikle Viyana Satım Sözleşmesine Göre Alıcının Tazminat Talep Etme Hakkı, Master Thesis, Özyeğin University Faculty of Law, Supervisor: Tevfik Fikret Eren, İstanbul, 2017, p. 31.

[2] Al-Hajaj A., The Concept of Fundamental Breach and Avoidance under CISG: PhD Thesis, 2015, p. 202.

[3] CISG Article 38(1): «The buyer must examine the goods, or cause them to be examined, within as short a period as is practicable in the circumstances».
Note: International inspection companies may inspect the standard of goods on the behalf of the buyer if the parties agree. It may be a good examination option for the buyer.

[4] Galego Dĩa A. C. The Concept of Lack of Conformity: From the CISG to the Proposal on Online Sale of Goods: Master Thesis, Universidade Nova de Lisboa, 2017, p. 66–67.

[5] Krıstensen, p. 60.

is that the stencil holders for a rapport length of 1018 mm were missing was refused on the ground that the buyer had an obligation that the machine does not conform to the latest technical features. Furthermore, the seller «*was entitled to expect that the buyer had concluded the contract in full knowledge of the technical possibilities of machinery and its equipment*». The Swiss First Instance Court ruled that «*rapport equipment was meant as technical information in respect to the possible rapport length, which could be printed if the necessary equipment was used*»[1].

In *Chicago Prime Packers, Inc v. Northam Food Trading Co*. case, the buyer and the seller agreed dealing with frozen ribs. The buyer decided to hire a third-party trucking company to collect the ribs. While accepting shipment, the trucking company signed a bill of lading describing the goods as «*in apparent good order*». The bill of lading also stated that the «*contents and condition of contents of packages [were] unknown*». Several days later, after the buyer's customer had received the ribs, the customer inspected the ribs and found them to be in an «off condition». Finally, the customer rejected the ribs. The district court ruled that the buyer underwent the burden of proving non-conformity of goods at the time of the delivery of goods and had the failure of the discharging the burden of proof. In confirming the district court's decision, the appellate court stated that «*the buyer had offered no credited evidence showing that the ribs were spoiled at the time of transfer or excluding the possibility that the ribs became spoiled after the transfer*». Additionally, as emphasized by the court, the buyer could not submit evidence that the seller «*stored the ribs in unacceptable conditions that could have caused them to become spoiled before the transfer*». Finally, the court emphasized the detail that the buyer's customer «*did not present a witness … to respond to the evidence suggesting that the ribs examined … were not those sold to [the buyer by the seller]*»[2].

In the Chinese *Heliotropin* case before CIETAC(the China International Economic&Trade Arbitration Commission), the arbitral tribunal imposes the burden of proof on the seller regarding the conformity of goods after the buyer's inspection report claiming non-conformity of goods. The arbitral tribunal found that the seller's export inspection certificate could not reflect the quality completely and was not an official document. Additionally, the arbitral tribunal ruled that the buyer submitted the inspection report to the seller, and the seller did not object to it within a reasonable time, the seller accepted the buyer's inspection report[3].

Conclusion

Conformity of goods is a very crucial part of the contract of sale in international sales law and the violation of conformity of goods may amount to the fundamental breach of the contract of sale. It is one of the duties of the seller. In Art. 35 CISG, conformity of goods is classified in two different groups; the express conformity of goods and the implied conformity of goods. The express conformity of goods criteria are contractual quality, contractual quantity, contractual description and packaging. The implied conformity of goods criteria are fitness for the ordinary purpose, fitness for the particular purpose, sample goods and packaging. Packaging is the common criterion for both criteria. Comparing to above-mentioned situations, the nature of the express conformity obligations has more objective character and the nature of the implied conformity obligations has more subjective character. If the seller does not perform his obligation to send conforming goods to the buyer, he becomes the responsible for non-conforming goods and it may amount to the fundamental breach of contract of sale and cause avoidance of contract.

The seller cannot be held responsible in situations where the buyer knew or could

[1] Saidov, pp. 532–533.

[2] Linne A. L., Burden of Proof under Article 35 CISG, Pace International Law Review, 2008, vol. 20, iss. 1, p. 36.

[3] CIETAC (the China International Economic & Trade Arbitration Commission), 10 July 1993(P.R.C.), LINNE, pp. 42–43.

not have been unaware of the particular lack of the conformity of goods at the time of the conclusion of contract of sale. If the buyer has the knowledge of the non-conformity of goods at the time of delivery of goods or after the inspection of goods, the seller is held responsible for the non-conformity of goods.

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