SELLER'S LIABILITY FOR COMPLIANCE OF THE GOODS WITH PUBLIC LAW STANDARDS – IN THE LIGHT OF CISG CASE LAW

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Probably any kind of goods which may be supplied under a sales contract is subject to some standard imposed by public law. These "public law standards" include, for example, product safety regulations, sanitation and health standards applicable to foodstuffs, rules of packaging and technical norms. In the area of cross-border trade an important question arises which of the different national sets of public law standards apply to the goods exported from one country to another. Does the seller have to comply with the requirements to be observed in the buyer's place of business or in the place where the goods are eventually exported? Or is his obligation to deliver conforming goods fulfilled when the merchandise is perfect according to the rules effective in the seller's own country? The wording of the UN Convention on Contracts for the International Sale of Goods (hereinafter the "CISG"), more specifically Art. 35 CISG, does not provide definite solution. The present paper, therefore, addresses the above problem from the point of view of case law, as required by the principle of uniform application of the CISG set down in Art. 7(1) thereof.

Firstly, the case law confirms that the best way how to avoid disputes over quality of the goods is to stipulate all their characteristics, including applicable standards, directly in the sales contract. For instance, a German court held that a consignment of paprika which contained an amount of ethylene oxide exceeding the limit permitted under the German Food Safety Law did not conform with the contract because the parties were in general agreement

that the ordered goods had to be fit to be sold under the said Laws. Similar decision was rendered by a court in the Chinese province of Shandong.

The question, which public law standards apply when there is no agreement, was first dealt with by the German Supreme Court in so called „mussels case“. The court referred to an extensive list of literature alleging that the compliance with specialized public law provisions of the buyer's country or the country of use of the goods cannot be expected. Certain standards in the buyer's country can only be taken into account *(i)* if they exist in the seller's country as well, *(ii)* the buyer has pointed them out to the seller, or *(iii)* if the relevant provisions in the anticipated export country are known or should be known to the seller due to the particular circumstances of the case (because, for instance, the seller has a branch in that country, he has already had a business connection with the buyer for some time, he often exports into the buyer's country or because he has promoted his products in that country). Several other courts later arrived at similar conclusion as in the “mussels case”. A Dutch court found unjustified the buyer’s expectation that the seller would abide by industrial standards applicable in the buyer’s country (as those standards were not explicitly discussed). The Austrian Supreme Court held that the seller cannot be expected to know all special rules of the buyer's country or the country of usage. It is rather for the buyer to observe his country's public law provisions and specify these requirements in the sales contract. The “mussels case” was explicitly referred to in a judgment of a U.S. federal court. The court ruled that the case fit one of the exceptions articulated in the “mussels case” (see letters *(i)* to *(iii)* above) rather than the basic rule, specifically because the seller knew or should have known about the safety standards of the importing country (which he violated) due to “special circumstances”.

On the other hand, there have been also decisions which applied the regulations of the buyer’s state as a matter of course. According to the opinion of a French court, the knowledge of the seller that the ordered cheese would be marketed in France imposed a duty on him to deliver the goods wrapped in the manner required by French law. Also the latest decision concerning the issue of public law standards seems to point this way. In the case of delivery of frozen pork meat suspect of contamination by dioxin and consequently seized by authorities the German Supreme Court first reiterated that the seller could not be generally expected to know the relevant provisions in the buyer's country or in the country of the ultimate consumer. Despite this, the court held that the goods did not conform to the contract on the grounds that the suspicion of dioxin contamination constituted a hidden defect which had a bearing on the resaleability and tradability of the goods. Put differently, the court

considered actual merchantability of the goods to be important for the conformity of the goods with the contract rather than the fact whether the public law standards were observed.

To sum up, two different approaches can be identified in the case law. Prevailing part of decisions apply the rule that the public law standards effective in the *seller's country* control the quality of the goods. The regulations in force in the buyer's place of business or in the country where the goods are eventually consumed or utilized are to be respected only in exceptional circumstances when the seller's knowledge of such regulations can be presumed. However, other rulings prefer the "merchantability" approach which results in considering the infringement of the public law standards of the *destination country* as a breach of contract. The above majority opinion is criticised also in part of literature. We believe that one universally applicable formula does not exist. The right solution, in our opinion, lies in an ad hoc approach taking into account the particular circumstances of each case. Thus, the liability for compliance of the goods with detailed (e.g., technical or health) standards in the destination place should not be transferred to the seller when the buyer failed to specify respective qualities of the goods in his purchase order or during negotiation. On the other hand, the seller should not be allowed to rely on his country's rules when it should be clear to him, on the basis of his professional experience or plain common sense, that the regulations in the buyer's country, or in the place where the goods are exported, are different (e.g., export of foodstuffs containing pork or beef to countries in which consumption of such meat is prohibited due to religious reasons). We would therefore recommend (also in view of the principle of uniform application of the CISG) to follow the rules formulated in the "mussels case", provided that the exceptions set down in this case are construed in a sufficiently extensive way. Still, the most secure way for the parties how to avoid potential disputes is to specify the qualities of the goods and applicable public law standards directly in the contract.

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