

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

PETR ŽÍDEK

Právnická fakulta Masarykovy univerzity, Katedra mezinárodního a evropského práva

Abstrakt

Příspěvek se zabývá otázkou, který z různých vnitrostátních souborů veřejnoprávních předpisů (např. předpisů o bezpečnosti výrobků, hygienických a zdravotních norem nebo technických norem) se použije na zboží vyvážené v souladu s mezinárodní kupní smlouvou z jedné země do druhé. Problém je analyzován především na základě publikovaných soudních rozhodnutí, s několika odkazy na odbornou literaturu. V závěru autor činí poznámky k používání pravidel formulovaných v rozhodovací praxi a uvádí doporučené řešení.

Klíčová slova

Mezinárodní koupě zboží, Vídeňská úmluva, porušení smlouvy, vady zboží, veřejnoprávní předpisy.

Abstract

The paper addresses the issue which of the different national sets of public law standards (e.g., product safety regulations, sanitation and health standards or technical norms) apply to the goods exported under a cross-border sales contract from one country to another. This problem is analysed mainly on the basis of published court rulings, with some references to the literature. In the conclusion the author makes some remarks concerning the application of the rules formulated in the case law and recommends preferred solution.

Key words

International sale of goods, CISG, breach of contract, non-conforming goods, public law standards.

Introduction

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.¹ 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”) does not provide definite solution. The quality of the goods is governed primarily by Art. 35(1) CISG providing that the seller must deliver goods “*which are of the quantity, quality and description required by the contract*”. Where the parties have not agreed on certain quality of the goods, the second paragraph of the Art. 35 CISG comes into play, especially letters (a) and (b) according to which the goods must fit for any particular purpose known to the seller, or, in the absence of such known intent, for the purposes for which goods of the same description would ordinarily be used. One could assume that the “fit for particular use” rule comprises also requirement to supply goods complying with the public law standards of *destination country* as, if the binding regulations are not observed, the goods are not capable of being used there (the consumer goods would not be approved for retail sale, the buyer would not be allowed to operate the purchased machine etc.). On the other hand, it can be argued that such solution is too burdensome for the seller who would be required to know the often very detailed public law standards effective in all of the countries where he exports to. Regard must be had also to the second part of Art. 35(2)(b) CISG excluding the claim to deliver goods being fit for particular purpose “*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*”. In the present paper, we will try to find solution to the above problem on the basis of case

¹ The term “public law standards” is used by Schwenger, I. In Schlechtriem, P., Schwenger, I.: *Commentary on the UN Convention on International Sale of Goods (CISG)*. 2nd (English) edition. Oxford: Oxford University Press, 2005, 1149 p., ISBN 0199275181, p. 419.

law, as required by the principle of uniform application of the CISG set down in Art. 7(1) thereof.²

Case law analysis

It follows from the above mentioned provision of Art. 35(1) CISG (as well as from the general rule of precedence of the parties' will set forth in Art. 6 CISG) 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. Should the contract determine the public law standards of the *destination country* to be respected, no room remains for seller's argumentation that the goods conform to the contract because he observed all the regulations effective in *his country*. For instance, a German court dismissed the claim of a Spanish seller for payment for a consignment of paprika which a German buyer declined to pay because the spices contained an amount of ethylene oxide exceeding the limit permitted under the German Food Safety Law. The court held that the parties were in general agreement that the ordered goods had to be fit to be sold under the German Food Safety Laws and the seller therefore could not assert his ignorance of those Laws. The court concluded that the seller by delivery of contaminated spices committed fundamental breach of contract since the buyer was substantially deprived of what he was entitled to expect. Consequently, the buyer was entitled to avoid the contract with respect to the consignment in question.³ Similar decision was rendered by a court in the Chinese province of Shandong which heard a dispute between a Chinese exporter of frozen shrimps and a buyer with the place of business in the U.S.A. The parties agreed that the quality of the goods should meet U.S. sanitation and health standards. If the goods were refused admission to the United States by the U.S. Food and Drug Administration, seller shall be obligated to return the price paid and compensate the cost of freight to ship the goods back to China and other relevant costs. When the U.S. authorities indeed found that the shrimp had decayed and denied their entry to customs, the court had no

² Art. 7(1) CISG highlights, inter alia, "the need to promote uniformity in application of the Convention". The meaning and practical implications of this principle (as well as the other two interpretative principles laid down in Art. 7(1) CISG) are dealt with in Žídek, P. Úmluva o smlouvách o mezinárodní koupi zboží. Specifika výkladu mezinárodně unifikovaného právního předpisu. Právní fórum, 2008, No. 3, pp. 83 – 84.

³ Judgment of Landgericht Ellwangen (Germany) dated 21 August 1995.

doubt about the breach of the contractual obligations of the seller and the right of the buyer to use the remedies as specified in the contract.⁴

Which public law standards should apply, however, when the parties themselves have not addressed this issue in the sales contract? This question was first dealt with by the German Supreme Court in so called „mussels case“. A Swiss seller delivered to a German buyer New Zealand edible mussels which contained a concentration of cadmium exceeding the limit recommended by the German health authority. The buyer declared the contract avoided, but the court held that the goods conformed to the contract. The court did not find any agreement of the parties on preference of the German health standards. In the opinion of the court, the German standards were in such a situation not relevant. The court referred to an extensive list of literature⁵ 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). Nevertheless, none of these conditions was proved in the case at hand. The Supreme Court summarized his reasoning in the following statement: „*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*

⁴ Judgment of Rizhao Intermediate People's Court (China) dated 17 December 1999, Hang Tat v. Rizhao (all judgments quoted in this paper all accessible at www.cisg.law.pace.edu). However, the buyer had to bear part of the loss of the value of the returned shrimp because he failed to take measures to preserve them.

⁵ Cf. Bianca, C. M. In Bonell, M. J., Bianca, C. M.: *Commentary on the International Sales Law – 1980 Vienna Sales Convention*. Milano: Giuffrè, 1987, accessible at www.cisg.law.pace.edu, pp. 274, 282 – 283 („*The fitness of goods for ordinary use must be ascertained according to the standards of the seller's place of business. Indeed, the seller is not supposed to know about specific requirements or limitations in force in other countries (unless that may reasonably be expected from the buyer according to the circumstances [...]).*“); Enderlein, F., Maskow, D.: *International Sales Law: United Nations Convention on Contracts for the International Sale of Goods; Convention on the Limitation Period in the International Sale of Goods*, Oceana, 1992, accessible at www.cisg.law.pace.edu, p. 144 (“*The CISG stipulates nothing with respect to qualitative prerequisites which may be mandatory in the buyer's country or in the country of destination. An obligation of the seller to fulfil those requirements would have to be expressly agreed in the contract [...]*“).

*destination, as determined by him, and, therefore, he can be expected to inform the seller accordingly.*⁶

Several other courts later arrived at similar conclusion as in the “mussels case”. A Dutch court ruled against a German buyer of mobile room units who refused payment alleging, inter alia, lack of conformity of the mobile units with the industrial standards applicable in the buyer’s country. The court found that the buyer had never requested application of the industrial standards to the mobile units. The warning addressed to the seller that governments of German states had issued requirements with respect to mobile units was insufficient to deduce such a request. The possible expectation of the buyer that the seller would abide by the respective norms was, pursuant to the court’s opinion, unjustified, if those norms were not explicitly discussed. The court concluded: *“The fact that [the seller] knew that the mobile units would be exported to Germany does not alter this analysis given that it was up to the client to point out which governmental requirements were to be observed in the place of destination of the mobile units.”*⁷

The Austrian Supreme Court heard a dispute between a German seller of four used machines and an Austrian buyer who refused to pay the rest of the purchase price on the grounds that the goods lacked the European Community "CE" mark, indicating that the product conformed to applicable European Community directives. The court held that the seller cannot be expected to know all special rules of the buyer's country or the country of usage. It cannot be derived from the information on the country of destination that the seller is bound to observe the public law provisions of this country. It is rather for the buyer to observe his country's public law provisions and specify these requirements in the sales contract. The requirements of the buyer's country should only be taken into account if they also apply in the seller's country, if they are agreed on, or if they are submitted to the seller at the time of the formation of the contract. Therefore, the Supreme Court remanded the case back to the lower courts and directed them to determine which security provisions and standards had to be applied and whether the machines complied with such provisions.⁸

The “mussels case” was explicitly referred to in the judgment of the U.S. District Court for the Eastern District of Louisiana whereby the court upheld an arbitral award issued in favour of an American importer of Italian medical equipment (mammography units). The arbitrators awarded damages to the buyer because the Italian seller of the equipment delivered

⁶ Judgment of Bundesgerichtshof (Germany) dated 8 March 1995.

⁷ Judgment of Hof Arnhem (the Netherlands) dated 27 April 1999.

⁸ Judgment of Oberster Gerichtshof (Austria) dated 13 April 2000.

units which failed to comply with U.S. safety standards. The seller challenged the award on the grounds that the arbitrators allegedly did not follow the rule formulated in the “mussels case” that under Art. 35 CISG, a seller is generally not obligated to supply goods that conform to public laws and regulations enforced at the buyer's place of business unless certain exceptional circumstances occur (see above). The court, however, confirmed the view of the arbitrators that the case fit one of the exceptions articulated in the “mussels case” rather than the basic rule, specifically because the seller knew or should have known about the U.S. safety standards due to “special circumstances” (unfortunately, the exact nature of these “special circumstances” is in the case presentation not described). Violation of the safety regulations by the seller therefore amounted to a breach of contract which was fundamental and the buyer was therefore entitled to declare the contract avoided.⁹

On the other hand, there have been also decisions which applied the regulations of the buyer's state as a matter of course. For instance, a French court found against an Italian seller who supplied ordered parmesan cheese in sachets not conforming to the requirements of local law (the composition and expiry date were not stated on the packaging). Pursuant to the opinion of the court, the seller undisputedly knew that the cheese would be marketed in France and this knowledge imposed a duty on him to deliver the goods wrapped in the manner required by French law (composition and expiry date printed on the packaging). Omitting to place appropriate labels on the sachets resulted in delivery of non-conforming goods.¹⁰

For the time being, the latest decision concerning the issue of public law standards was rendered in 2005, again by the German Supreme Court. A Belgian seller entered into a contract with a German buyer for the sale of frozen pork meat. It was agreed that the meat should be delivered directly to the buyer's customer and from there redispached to the final destination, a company in Bosnia-Herzegovina. Shortly after the delivery of the goods a suspicion arose in both Germany and Belgium that the meat produced in Belgium is contaminated by dioxin. This prompted first Germany, then the EU and afterwards also Belgium to enact a regulation on the subject, requiring for pork meat a certificate stating the absence of dioxin. The sold meat was confiscated by the Bosnian customs. As the seller failed to deliver the requested certificate, the buyer refused to pay the outstanding price. The court, with reference to the “mussels case” and others, reiterated that the seller could not be generally expected to know the relevant provisions in the buyer's country or in the country of

⁹ Judgment of U.S. District Court, Eastern District of Louisiana (U.S.A.) dated 17 May 1999, *Medical Marketing v. Internazionale Medico Scientifica*.

¹⁰ Judgment of Cour d'appel Grenoble (France) dated 13 September 1995, *Caito Roger v. Société française de factoring*.

the ultimate consumer. Because there were no special circumstances, the provisions issued in Bosnia-Herzegovina were not applicable. Neither could the meat be found defective on the basis of the regulation effective in Belgium (the seller's country) since this was enacted only after the date of delivery. 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 existed at the time when the goods were delivered to the buyer, even though the lack of conformity became apparent only after that time (see Art. 36(1) CISG). According to the court, the suspicion alone, which became apparent later and which was not invalidated by the seller, had a bearing on the resaleability and tradability. Put differently, the Supreme Court formally adhered to the rule formulated in the "mussels case", but avoided its strict application (which would exclude finding of any non-conformity of the goods) on the basis of (hidden) inability of the goods to be resold. Contrary to the "mussels case" and other above mentioned rulings, 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.¹¹

Conclusion

Two different approaches can be identified in the case law. Prevailing part of judgments 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 majority approach is criticised also in part of literature¹² and a different solution is proposed based on Art. 35(2)(b) CISG, that is, the seller who knows where the goods are

¹¹ Judgment of Bundesgerichtshof (Germany) dated 2 March 2005.

¹² For example, Schlechtriem points out certain objectionable consequences of the rule developed in the "mussels case". On the one hand, the buyer must take the goods which violate the standards enforced in his (or destination) country and are therefore non-merchantable only because the same standards do not apply in the seller's place of business (although this place may have no actual connection with the delivery). On the other hand, the seller is not allowed to supply goods non-conforming with the regulations effective in his place to another country even if the level of administrative protection in such importing country is lower. Schlechtriem, P.: *Compliance with local law; seller's obligations and liability. Annotation to German Supreme Court decision of 2 March 2005*. In Review of the Convention on Contracts for the International Sale of Goods (CISG) 2005-2006. München: Sellier, 2007, 260 p., ISBN 3866530161, pp. 201-202. For the criticism of "mussels case" approach see also Schwenger, *ibid.*, p. 420.

intended to be used should be usually expected to have taken all factors that influence the possibility of their use in that country into consideration, including the local public law standards (except when the exporter, especially a smaller enterprise, could not know all such standards).¹³ We believe, however, 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.¹⁴ 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.

Literatura:

- [1] Bonell, M. J., Bianca, C. M.: *Commentary on the International Sales Law – 1980 Vienna Sales Convention*. Milano: Giuffrè, 1987, accessible at www.cisg.law.pace.edu.
- [2] Enderlein, F., Maskow, D.: *International Sales Law: United Nations Convention on Contracts for the International Sale of Goods; Convention on the Limitation Period in the International Sale of Goods*, Oceana, 1992, accessible at www.cisg.law.pace.edu.
- [3] Schlechtriem, P.: *Uniform Sales Law in the Decisions of the Bundesgerichtshof*. Translated into English by Todd J. Fox, accessible at www.cisg.law.pace.edu.
- [4] Schlechtriem, P., Schwenger, I.: *Commentary on the UN Convention on International Sale of Goods (CISG)*. 2nd (English) edition. Oxford: Oxford University Press, 2005, 1149 p., ISBN 0199275181.

¹³ Schlechtriem, P.: *Uniform Sales Law in the Decisions of the Bundesgerichtshof*. Translated into English by Todd J. Fox, accessible at www.cisg.law.pace.edu, part IV.1.

¹⁴ Schlechtriem, *ibid.*, gives example of export of foodstuffs containing pork or beef to countries in which the consumption or resale for consumption of pork or beef is prohibited due to religious reasons.

- [5] Schlechtriem, P.: *Compliance with local law; seller's obligations and liability. Annotation to German Supreme Court decision of 2 March 2005*. In Review of the Convention on Contracts for the International Sale of Goods (CISG) 2005-2006. München: Sellier, 2007, 260 p., ISBN 3866530161.
- [6] Židek, P. *Úmluva o smlouvách o mezinárodní koupi zboží. Specifika výkladu mezinárodně unifikovaného právního předpisu*. Právní fórum, 2008, No. 3, pp. 83 – 84.

Kontaktní údaje na autora – email:

pzidek@centrum.cz