

MANDATORY RULES AND SELLERS OBLIGATION TO DELIVER GOODS ACCORDING TO UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS

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Abstrakt v rodném jazyce

Obsahem tohoto příspěvku je na základě judikatury soudů vysvětlit vztah kogentních norem veřejného práva na povinnost prodávajícího dodat zboží dle článku 35 Vídeňské úmluvy o smlouvách o mezinárodní koupi zboží. Hlavní otázkou je, zda prodávající při dodání zboží musí respektovat kogentní normy veřejného práva své vývozní země nebo kogentní normy země kupujícího nebo země konečné dodávky zboží.

Klíčová slova v rodném jazyce

Kogentní normy, dodání zboží, povinnost prodávajícího, normy veřejného práva, Úmluva OSN o smlouvách o mezinárodní koupi zboží

Abstract

Aim of this paper is on a case law explain how mandatory rules affect delivery of goods according to Art. 35 CISG. The main question is whether the seller in order to meet his obligation to deliver goods according to the contract has to comply with the public law requirements of his seller's country or the public law of the buyer's country. On the presented cases is possible to study a changing view on this question.

Key words

Mandatory rules, delivery of goods, seller's obligation, public law requirements, the UN Convention on Contracts for the International Sale of Goods

1. INTRODUCTION

In transborder commerce is a very important question whether the seller in order to meet the obligation to deliver goods in conformity with the contract under Article 35 of the United Nations Convention on Contracts for the International Sale of Goods (hereinafter cited as CISG) has to comply with the local public law requirements for the use of certain goods. Do this public law requirements have to be observed in the export country or in the buyer's import country or are those requirements valid in the third country to which the goods are destined to be delivered. These standards are different in each country. Health, safety, environmental provisions affect fitness of purpose¹. The problem of conformity of goods to the public law requirements was overlooked at the creation of the CISG².

¹ Editorial remarks on the Medical Marketing v. Internazionale Medico Scientifica Case. Excerpt from DiMatteo, L., A. et al. The Interpretive Turn in International Sales Law: An Analysis of Fifteen Years of CISG Jurisprudence. 34 Northwestern Journal of International Law & Business, 2004, s. 299-440. Available on <http://cisgw3.law.pace.edu/cases/990517u1.html>.

² Schlechtriem, P. Commentary on 2 March 2005 Decision of Federal Supreme Court (Bundesgerichtshof) of Germany, VIII ZR 67/04 (June 2005). Compliance with local law: sellers obligation and liability. Available at <http://www.cisg.law.pace.edu/cisg/biblio/slechtriem7.html>.

The CISG contains conformity of the goods in Art. 35. The treatment of conformity within its meaning is based on the subjective understanding of a defect³. Art. 35 (1) CISG refers to the agreement of the parties and Art. 35 (2) contains provisions when the parties rules are incomplete.

Aim of this paper is to present a summary of case law on the relationship between public law requirements and seller's obligation to deliver goods. It will as well show a changing view on this question.

2. CONTRACT

The ideal situation is when parties fix the quality required for the goods in the contract⁴ as well as the risk associated with the observance of public law requirements.

As example of concludent agreement of the conformity of goods can serve case when Spanish seller and German buyer concluded an installment contract for the sale of paprika⁵. After delivery of the second installment, the buyer was officially informed by a German association of spice traders that paprika imported from Spain could contain traces of ethylen-oxyd in a quantity greater than the levels admitted by German law. The seller accepted to take back the goods admitting that they were non-conforming to German law on food and to deliver substitute goods within the period of time fixed by the buyer. Two weeks after the expiration of such a period, the buyer declared the contract avoided and did not pay the price. The Court found that the buyer was not bound to pay the price. In the Court's opinion the parties, also in the light of their previous commercial relationships, had impliedly agreed that the goods should comply with the standards provided by the German law on food.

But in many cases parties do not regulate the conformity with public law requirements in their contract and the arised problem is to be solved in the court room. Below are presented three very important cases on this topic. In addition it si possible to see a slightly changing view on this question.

3. THE NEW ZEALAND MUSSELS CASE

The first case dealing with the question whether the conformity of goods is governed by public law requirements of the seller's or buyer's country was very famous New zealand

See also legislative history to teh CISG Art. (35). Available at <http://www.cisg.law.pace.edu/cisg/text/roadmap/RoadmapL-35.html>.

³ Schlechtriem, P. Uniform Sales Law in the Decisions of the Bundesgerichtshof, in: 50 Years of the Bundesgerichtshof. A Celebration Anthology from the Academic Community. Available at <http://www.cisg.law.pace.edu/cisg/biblio/slechtriem3.html>.

⁴ According to Art. 6 CISG the main principle governing the contractual process is autonomy of will of the contracting parties. See Honnold, J., O. Uniform Law for International Sales under the 1980 United Nations Convention, 3rd ed., 1999, Article 6, The contract and the convention, s. 77-87. Available at <http://www.cisg.law.pace.edu/cisg/biblio/ho6.html>.

⁵ Germany 21 August 1995 District Court Ellwangen (Spanish paprika case). Available at <http://cisgw3.law.pace.edu/cases/950821g2.html>.

Mussels case⁶. The German Supreme Court ruled, that laws of the country of the seller prevail. At the same time he stated three exemptions to this rule

3.1 CASE

Swiss sellers delivered to German buyer New Zealand Mussels containing a cadmium concentration that exceeded the limits recommended by German health authority. The concentration was nevertheless allowed by Swiss public law requirements. The buyer declared the contract avoided due to lack of conformity of the goods, the seller sued for the sales price.

The Court found that the goods conformed to the contract. The violance of German food regulation was defect in quality not a defect in title⁷. The Court stated a principle that the public law regulations of the seller's place of business govern the conformity of goods according to Art. 35 (2). The Court decided on a huge list of legal authorities. According to the Court ruling „especially smaller enterprises cannot know all such regulations for the use of goods in the intended country. The buyer can also not trust that the seller has a kneweledge of the pulic law requirements and that he will respect them.“

As said above, the Court identified three exceptions to the rule. The public standadr of the buyer's country will prevail if: 1. the public laws of the buyer's country correspond to those in seller's country, 2.the buyer informed the seller about these regulations and 3. the seller knew or should have known about the regulations due to special circumstances (e.g. the seller has a branch in the buyer's country, he delivers goods for some time there, he is in a long-term relationship in the buyers country).

3.2 CRITICISM OF THE DECISION

Although this decision became a guide to to the question which public law requiremnts govern the conformity of goods according to Art. 35 (2)⁸, some arbitration tribunals and other courts have decided otherwise and applied the regulations of the buyers country⁹.

The decision was also criticised because it stated a very rigid rule that hadn't taken into consideration situation in other countries, that it goes well beyond what is necessary to decide the dispute¹⁰. According to Flechtner „the opinion implies that the uniformity principle

⁶ Germany 8 March 1995 Supreme Court (New Zealand mussels case). Available at <http://cisgw3.law.pace.edu/cases/950308g3.html>.

⁷ The Court also stated that the violation of public law must not necessarily represent a defect in quality because the relevant commercial sphere can perhaps disregard such governmental regulations and still readily consume and trade goods that violate a prohibition.

⁸ Schlechtriem, P. Uniform Sales Law in the Decisions of the Bundesgerichtshof, in: 50 Years of the Bundesgerichtshof. A Celebration Anthology from the Academic Community. Available at <http://www.cisg.law.pace.edu/cisg/biblio/slechtriem3.html>

⁹ See the next cited case.

¹⁰ Flechtner, H. M. Conformity of Goods, Third Party Claims, and Buyer's Notice of Breach under the United Nations Sales Convention ("CISG"), with Comments on the "Mussels Case," the "Stolen Automobile Case," and the "Ugandan Used Shoes Case", University of Pittsburgh School of Law Working Paper Series. Working Paper 64, 2007. Available at <http://law.bepress.com/pittlwps/papers/art64/>.

requires a single global standard of merchantability for mussels and all other goods under Art. (35) (2) (a). The Court misread the Art. 7 (1) and its uniformity principle¹¹.

4. THE MEDICAL MARKETING VS. INTERNAZIONALE MEDICO SCIENTIFICA¹²

4.1 CASE

Italian producer of medical equipment entered into contract with a trading company from Louisiana, USA. Italian producer delivered machines which was seized by U.S. Food and Drug Administration, because it did not conform to relevant U.S. safety standards, but it did comply with the Italian safety standards. The Court decided the goods as not being in conformity with the contract, thus constituting fundamental breach of contract by the Italian seller. It is opposite to the above cited decision of *Mussels Case*, because here were relevant public law requirements in the buyer's state. The Court based its decision on the third exemption of the *Mussels Case*.

According to Schlechtriem¹³ this case is important for three other reasons. A fundamental breach of contract according to Art. 25 CISG was assumed without further discussion, justifying an avoidance of contract according to Art. 49 CISG. The Court also treated the decision of German Federal Court as precedent and CISG as kind of international common law. It refused so called homeward trend¹⁴.

5. THE FROZEN PORK CASE¹⁵

5.1 CASE

This is a different type of case, because in the seller's country at the time of passing risk¹⁶ a public law requirement did not yet exist, it was issued later. It supports the critical views on the *Mussels Case*. This decision goes well beyond the sphere of the general rule of the *Mussels Case*. Strict application of the ruling in the *Mussels Case* would have concluded that the goods were in conformity with the contract.

¹¹ Flechtner, H. M. The Several Texts of the CISG in a Decentralized System: Observations on Translation, Reservations and Other Challenges to the Uniformity Principle in Article 7(1), 17 *Journal of Law and Commerce*, 1998, s. 187-217. Available at <http://www.cisg.law.pace.edu/cisg/biblio/flecht1.html>.

¹² United States 17 May 1999 Federal District Court Louisiana (*Medical Marketing v. Internazionale Medico Scientifica*). Available at <http://cisgw3.law.pace.edu/cases/990517u1.html>.

¹³ Schlechtriem, P. Case Commentary of *Medical Marketing International, Inc. V. Internazionale Medico Scientifica, S.r.l.* U.S. District Court, Eastern District of Louisiana, 17 May 1999. Conformity of the goods and standards established by public law. Treatment of foreign court decision as precedent. Available at <http://cisgw3.law.pace.edu/cases/990517u1.html>.

¹⁴ To so-called homeward trend and delivery of goods see Flechtner, H. 2007. Article 79 of the United Nations Convention on Contracts for the International Sale of Goods (CISG) as Rorschach Test: The Homeward Trend and Exemption for Delivering Non-Conforming Goods. 19 *Pace International Law Review*, 2007. Available at <http://www.cisg.law.pace.edu/cisg/biblio/flechtner7.html>.

¹⁵ Germany 2 March 2005 Federal Supreme Court (*Frozen pork case*). Available at <http://cisgw3.law.pace.edu/cases/050302g1.html>.

¹⁶ It is decisive for conformity or non-conformity under Art. 36 (1) CISG.

Belgian seller entered into contract with German buyer for the sale of pork meat. It was agreed that the meat should be delivered directly to the buyer's customer and from there to its final destination in Bosnia – Herzegovina. The pork meat was delivered in three installments, each delivery contained a certificate of suitability to consumption. During the term between delivery from Germany to Bosnia-Herzegovina a suspicion arose in Germany and Belgium, that the meat produced in Belgium could be contaminated by dioxin. Germany, EU and Belgium enacted a regulation on the subject that the pork meat produced in Belgium within a certain period requires a certificate stating the absence of dioxin. The sold meat was confiscated by the Bosnian Custom.

The Court held that two of three deliveries were non-conforming according to Art. 35 (2)(a) CISG. The suspicion of contamination affected the resale of meat, which is to be considered the „ordinary use“ in trade. It was not necessary to ascertain that the meat was really contaminated by dioxin. This suspicion was sufficient to designate the meat unsealable and non-conforming. The Court stated that the non-conformity not yet discovered existed at the time of passing risk according to Art. 36 (1) and 67 CISG. It is interesting and important that according to the Court the non-merchantability was caused by the suspicion. The consequent public law requirements just confirmed this suspicion. According to the Court „even if Belgium had never enacted the respective regulation, the suspicion and the hindrance of resale in Europe caused the non-conformity of Art. 35 (2) and fundamental breach of contract“.

5.2 CRITICISM OF THE MUSSELS CASE

According to Schlechtriem¹⁷ this case should be a starting point of reconsidering of the ruling in the Mussels Case. He propounds an interesting question. The meat was contaminated by dioxin, not fit for human consumption and not merchantable not only in the seller's country, but also in buyer's country and in country of final destination. If the Belgian (seller's) legislator did not enact any requirement in order to protect the national exporters, would the meat be considered as in conformity with the contract? According to the Mussels case the answer is clear. Schlechtriem especially exposes the re-sealability/merchantability as decisive for conformity. In his opinion it shows a turning view. For re-sealability are crucial the circumstances in buyer's country or in the third country of the final destination.

6. SUMMARY

The case law shows that it is important to consider every case separately. The rule stated in the Mussels Case even with the exemptions is not sustainable. As the Frozen Pork Case showed, the decisive moment should be the circumstances and public law requirements in the buyer's country. The rule from Mussels case should be decisive in case if the suspicion and public law restriction were enacted only in the seller's state without influence on use and resale in the buyer's country¹⁸. It will be interesting to observe another case law on this question.

¹⁷ Schlechtriem, P. Commentary on 2 March 2005 Decision of Federal Supreme Court (Bundesgerichtshof) of Germany, VIII ZR 67/04 (June 2005). Compliance with local law: seller's obligation and liability. Available at <http://www.cisg.law.pace.edu/cisg/biblio/slechtriem7.html>.

¹⁸ See Schlechtriem, supra note 17.

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