

Conformity of the goods

Prof. Dr. Ingeborg Schwenzer,
LL.M.

Basel/Switzerland

General

- Art. 35 CISG: conformity of the goods
- Most important provisions of CISG
- CISG key concept: quality, quantity, aliud packaging treated alike

Art. 35(1) CISG

(1) The seller must deliver goods which are of the quantity, quality and description required by the contract and which are contained or packaged in the manner required by the contract.

Domestic Approaches

- warranties/conditions/intermediate terms (SGA)
- express/IMPLIED warranties (UCC)
- vices apparents/vices cachés (CC)
- peius/aliud (CC, Germanic systems)
- partial non-delivery
- ancillary duties

Non-conformity – Party Agreement

- Art. 35(1) CISG: primarily party agreement
- Quantity: trade usages
- Quality: features of goods, origin, manufacturing practices (cGMP), ethical standards

Non-conformity – Party Agreement

- Dcrepancies in nature: aliud
- Packaging
- Additional duties: services, non-competition

Art. 35(2) CISG – Fitness for Ordinary Purpose

(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.

Non-conformity – Ordinary Purpose

- Art. 35(2) CISG: objective criteria to determine conformity
- Art. 35(2)(a) CISG: fitness for ordinary purpose
- Commercial purposes, resalability, average quality?
- Public law requirements, regional v. global players

Non-conformity – Fitness for Particular Purpose

.....

(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 judgement.

Non-conformity – Fitness for Particular Purpose

- Art. 35(2)(b) CISG: fitness for particular purpose
- Purpose made known to seller
- Buyer reasonably relying on seller's skill and judgement

Non-conformity – Other Cases

- Art. 35(2)(c) CISG: sample or model
- Art. 35(2)(d) CISG: adequate packaging
- Art. 35(3) CISG: buyer's knowledge

Time for Conformity – Art. 36(1) CISG

(1) The seller is liable in accordance with the contract and this Convention for any lack of conformity which exists at the time when the risk passes to the buyer, even though the lack of conformity becomes apparent only after that time.

Time for conformity

- Art. 36 CISG: determinative time for conformity
- Art. 36(1) CISG: passing of risk
- Burden of proof

Time for Conformity – Art. 36(2) CISG

(2) The seller is also liable for any lack of conformity which occurs after the time indicated in the preceding paragraph and which is due to a breach of any of his obligations, including a breach of any guarantee that for a period of time the goods will remain fit for their ordinary purpose or for some particular purpose or will retain specified qualities or characteristics.

Time for Conformity

- Art. 36(2) CISG: after risk has passed: breach of obligation, guarantee
- Durability in general

Seller's Right to Cure

- Art. 37 CISG: seller's right to cure non-conformity
- Distinguish: seller's right to cure under Art. 48 CISG

Concluding Remarks

- Conformity of goods = most complicated area of sales law especially in civil law countries based on Roman law
- Facilitation by CISG – broad conception
- Flexibility
- Independent concept embodies advantages of different legal systems while avoiding their disadvantages

Muchas gracias por su
atención!