THE SELLER'S OBLIGATION TO DELIVER THE GOODS ACCORDING TO CISG

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Abstract

This article aims to analyze the seller's obligations under the Convention on International Sale of Goods (CISG) and in particular the obligation to deliver the goods showing the main issues that arise in an international sale.
We also wish to point the major innovations or improvements brought by the CISG in comparison to the European civil codes regulation and to conclude if the CSIG managed to revolutionize the tradition view on this issue.

Keywords: *sales contract, obligation to deliver, seller, buyer, CSIG*

1. Introduction

According to the art. 1603 of the French Civil Code, the seller has two distinct obligations: that of *delivering* and that of *warranting* the thing which he sales [*... deux obligations principales, celle de délivrer et celle de garantir la chose qu'il vend*].

Delivery was defined by the art.1604 as the transferring the thing sold into "the power and possession of the purchaser" [*la délivrance est le transport de la chose vendue en la puissance et possession de l'acheteur*] meanwhile the warranty took into account "the peaceable possession of the thing sold" and the absence of defects [*la garantie que le vendeur doit à l'acquéreur a deux objets : le premier est la possession paisible de la chose vendue ; le second, les défauts cachés de cette chose ou les vices rédhibitoires*][1].

The definition and the key words of the Napoleonic Code were followed by some European civil codes of the XIXth century as the Spanish, Italian or the Romanian one (e.g. the art. 1461 of the *codigo civil* stated that "el vendedor *está obligado a la entrega y saneamiento* de la cosa objeto de la venta" while the art.1462 stated that "se entenderá entregada la cosa vendida cuando se ponga *en poder y posesión* del comprador").

An obvious difference seemed to be the regulation provided by the Austrian Civil Code of 1812 [*Allgemeines Bürgerliches Gesetzbuch* or ABGB].

These rules which are placed in different sections of the code retain more importance for the delivery – the material action determines the ownership transfer – but don't make a obvious distinction between the two purposes of the "warranty".

Therefore, according to the § 1047 "Tauschende sind vermöge des Vertrages verpflichtet, die vertauschten Sachen der Verabredung gemäß mit ihren Bestandteilen und mit allem Zugehör zu rechter Zeit, am gehörigen Ort und in eben dem Zustande, in welchem sie sich bei Schließung des Vertrages befunden haben, zum freien Besitze zu übergeben und zu übernehmen".

The article §922 states that "Wer einem anderen eine Sache gegen Entgelt überlässt, leistet Gewähr, dass sie dem Vertrag entspricht. Er haftet also dafür, dass die Sache die bedungenen oder gewöhnlich vorausgesetzten Eigenschaften hat, dass sie seiner Beschreibung, einer Probe oder einem Muster entspricht und dass sie der Natur des Geschäftes oder der getroffenen Verabredung gemäß verwendet werden kann" while §923 that "Wer also der Sache Eigenschaften beylegt, die sie nicht hat, und die ausdrücklich oder vermöge der Natur des Geschäftes stillschweigend bedungen worden sind; wer ungewöhnliche Mängel, oder Lasten derselben verschweigt; wer eine nicht mehr vorhandene, oder eine fremde Sache als die seinige veräußert; wer fälschlich vorgibt, daß die Sache zu einem bestimmten Gebrauche tauglich; oder daß sie auch von den gewöhnlichen Mängeln und Lasten frey sey; der hat, wenn das Widerspiel hervorkommt, dafür zu haften".

The new German Civil Code [*Bürgerliches Gesetzbuch* or *BGB*] retained also the importance of the *traditio* but did not consider the "warranty" as a typical obligation in the frame of § 433 (1) (Vertragstypische Pflichten beim Kaufvertrag): "Durch den Kaufvertrag wird der Verkäufer einer Sache verpflichtet, dem Käufer die Sache zu übergeben und das Eigentum an der Sache zu verschaffen. Der Verkäufer hat dem Käufer die Sache frei von Sach – und Rechtsmängeln zu verschaffen".

In the other way, beyond providing the general definition, the *codice civile* of 1942 states that "le obbligazioni principali del venditore sono:

1) quella di consegnare la cosa al compratore;

.....

3) quella di *garantire* il compratore dall'evizione e dai vizi della cosa (art. 1476)".

In other words, the obligation of "warranty" seemed to play a complementary role to the delivery, supposed to be fulfilled immediately after the conclusion of the contract as a general rule.

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[1] See art. 1625.

Obviously, the mechanism of the sale contract, as it was proposed by most European Civil Codes, was obsolete (or at least not proper) in regulating an international sales contract.

As we know, most of the international sales are referring to goods that will be acquired or produced by the seller.

Both cases suppose that the buyer is not able to consider or inspect the goods.

The absence of the goods when the parties are negotiating doesn't mean that the buyer has no control over the quality of the goods he wants to acquire. If the seller is the manufacturer the buyer can inspect the goods that are made in order to honor the previous requests or use a sample in order to set up the quality of the goods.

Thus, changing the traditional view which dealt the sale contract as an agreement concluded by the parties in the presence of the goods became a challenge for the authors of the CISG.

Therefore, this case, as a general rule, had to be change in accordance with the necessities of international trade.

2. The new regulation of CSIG

2.1. A new vision seems to emerge from the content of the articles 30 to 44 of CSIG.

First of all, article 30 outlines the seller's major duties: The seller must deliver the goods, hand over any documents relating to them and transfer the property in the goods, as required by the contract and this Convention.

On one hand, it must be mentioned that the sale agreement has priority in relation with the regulation of the CSIG. That's why the provisions of the convention will have only a supplementary task, to offer rules when the parties forgot to provide and to help to solve problems[2].

On the other hand, as we can see, this article seems to impose more duties to the seller as the Napoleonic Code does[3].

Of course, the seller's primary obligation is to deliver the goods[4] but additionally he must deliver also any kind of documents needed by the commercial partners.

For example, if the parties concluded a sale on CIF Incoterms 2000, the seller has to deliver to the buyer an insurance policy or other evidence of insurance cover[5], the usual transport document[6] and obviously an invoice[7].

All these documents are usually necessary in order to make the payments by documentary credits.

If the seller doesn't hand over the above mentioned documents the buyer cannot fulfill his obligation to pay the goods.

In fact, the CSIG expressly states that the seller can consider the tender of these documents as a condition of obtaining payment when it provides that the seller may make such payment a condition for handing over the goods or documents[8].

Therefore, as the records prove, the article 30 of CSIG considers the handing over the documents as a secondary obligation of the seller[9].

More, to these two obligations it must be added the last duty stated by the above mentioned articles: transferring the property in the goods, as required by the contract and CSIG.

This obligation constitutes a major advance in regulating the sale contract.

The rules for the transfer of the ownership greatly differ from country to country; in many states the property in specific goods is transferred at the moment of the conclusion of the contract but there are also domestic laws that state the transfer at the moment of the delivery.

Even the CSIG regulation is not concerned with the effect which the contract may have on the property in the goods sold[10] but at least it recognize that sale contract supposes also the transferring the property not only the possession of the good, and more it placed that distinct obligation obviously on the seller.

Of course, having no international regulation regarding the way that the property will be transferred every case will be regulated by the law applicable pursuant the private international law of the forum[11].

2.2. According to the article 33 of CSIG, because the contractual arrangements have priority, the seller must deliver the goods on the specific date if a date is fixed by or determinable from the contract.

If the parties agreed a period of time in order to deliver the goods and that period is fixed by or determinable from the contract, the seller will have to deliver at any time within that period unless circumstances indicate that the buyer is to choose a date.

When the parties have not established the time to deliver the seller will have to deliver within a reasonable time after the conclusion of the contract.

[2] Enderlein and Maskow, 127; Honnold, 48.
[3] See again art.1603.
[4] *Secretariat Commmentary*, Art. 29 para 1. See Schlechtriem and Butler, 106
[5] See clause A 3 (b). See also Huber and Mullis, 126.
[6] See clause A 8.
[7] See clause A 1.
[8] Art. 58 para 1. See also Huber and Mullis, 126.
[9] *Secretariat Commmentary*, Art. 32 para 34.
[10] Art. 4 lit. b).
[11] See Huber and Mullis, 129.

This rule will be taken into account and will be applied even when the parties have agreed to deliver the goods as soon as possible[12].

2.3. Regarding the place of delivery, the main rules are contained in the article 31 of CSIG[13].

It is important to know where is the place of delivery not only to check if the seller has fulfilled his obligation but also to know where and when the risk is transferred to the buyer because article 67 of CSIG states that if the seller is bound to hand the goods over to a carrier at a particular place, the risk does not pass to the buyer until the goods are handed over to the carrier at that place.

On the other hand, if the contract of sale involves carriage of the goods and the seller is not bound to hand them over at a particular place, the risk passes to the buyer when the goods are handed over to the first carrier for transmission to the buyer in accordance with the contract of sale.

Nevertheless, the risk does not pass to the buyer until the goods are clearly identified to the contract, whether by markings on the goods, by shipping documents, by notice given to the buyer or otherwise.

We must mention that there is an essential difference between the place of delivery, which is the place where the duty of the seller finally ends and the place of destination where the goods are transported to.

In fact, the place of destination is a concept which will be used in relation with the examination of the goods.

According to the article 38 par. 1 of CSIG the buyer must examine the goods, or cause them to be examined, within as short a period as is practicable in the circumstances.

When the sales contract involves carriage of goods, examination may be deferred until after the goods have arrived at their destination.

If the goods are redirected in transit or redispatched by the buyer without a reasonable opportunity for examination by him and at the time of the conclusion of the contract the seller knew or ought to have known of the possibility of such redirection or redispatch, examination may be deferred until after the goods have arrived at the new direction.

On the other hand, article 31 of CSIG states that if the seller is not bound to deliver the goods at any other particular place there are three options available in order to fulfill his obligation.

Of course, the parties can agree on the place of delivery and often they do by referring to customary delivery clauses as Incoterms (the 2000 or 2010 version).

All these terms determines the place of delivery which can be at the seller's factory (Ex works), in a named port of shipment (FOB), in a named port of destination (CIF, DES, DEQ), or in a named point of destination, often in the buyer's country.

As we mention above, if there is no place agreed by the parties, the seller's obligation to deliver consists mainly in handing the goods over to the first carrier for transmission to the buyer if the contract involves carriage of goods.

Being characteristic for an international sale this case has become the first hypothesis to take into account.

Of course, as an exception, if the contract relates to specific goods or unidentified goods to be drawn from a specific stock or to be manufactured or produced, and at the time of the conclusion of the contract the parties knew where the goods were at, or were to be manufactured or produced at a particular place, the seller's obligation to deliver fulfills by placing the goods at the buyer's disposal at that place.

In any other cases, the seller will place the goods at the buyer's disposal at the place where the seller had his place of business at the time of the conclusion of the contract.

2.4. As we know in international trade the buyer is not able often to consider or inspect the goods.

What will happen if the seller placed goods that failed to conform to the requirements of the agreement?

Shall we consider that the seller have not fulfilled the obligation to hand over the goods?

It seems that the regulation of the CSIG was not influenced by the distinction acknowledged in several national laws between delivery of goods of different kind or aliud pro alio and defects or lack of qualities.

In fact, as one commentator emphasizes the supplier has delivered the goods if he has handed over or placed at the purchaser's disposal goods which meet the general description of the contract even those goods do not conform in respect of quantity or quality[14].

In jurisprudence, one court concluded that the delivery of goods different than the ones agreed upon (i.e. unprepared instead of prepared planks) is not a case of non-performance (non delivery) but has to be considered as a lack of conformity[15].

2.5. Finally, article 35 par. 1 of CSIG describes the seller's liability as having to conform with the contract: 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.

But if the parties haven't agreed on a way to establish the quality how can we know if there is breach of contract in the case of aliud pro alio or when the buyer pretends that there are lack of qualities?

In this specific case, the regulation of the CSIG seems to be another major improvement.

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[12] Enderlein and Maskow, 137.
[13] See Schlechtriem and Butler, 108.
[14] Bianca, Conformity of the Goods and Third Party Claims, *Commentary on the International Sales Law*, 269.
[15] Oberster Gerichtshof (Austria), 29.06.1999, http://www.unilex.info/case.cfm?id=419.

The second paragraph of the article 35 contains four determinative standards to be used when the parties have not agreed otherwise.

According to the first one, the goods are conform to the contract if they are fit for the purposes for which goods of the same description would ordinarily be used.

If that rule cannot be applied the seller must deliver goods which 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.

According to the third criterion the goods are conform to the contract if they possess the qualities of goods which the seller has held out to the buyer as a sample or model.

Finally, according to the last criterion the goods must be 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.

Of course, similarly to many European civil codes regulation we must retain that the seller will not be liable under the second paragraph of the article 35 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.

As we can see, there is no mention of any kind of warranty as a complementary obligation to duty to deliver the goods.

Notwithstanding, that does not mean, in our opinion, that the CSIG regulate the obligation of delivery as an unique obligation, that of deliver goods which are conform with the contract.

On the contrary, article 35 par. 1 of CSIG seems to be the legal ground for the potential buyer's allegations if there is a breach of contract[16] while the article 30 will be the ground only when the seller have failed to deliver the goods to the buyer[17].

3.Conclusions

The Convention on International Sale of Goods has replaced successfully the regulation of the civil or commercial continental codes.

The uniform rules provided by the Convention are more adequate to the international commercial relations as compared to domestic laws.

They are more flexible and regulate more specific cases as civil continental codes generally do.

Notwithstanding, the Convention has failed in regulating the delivery of the goods which conform to the contract as an unique obligation of the seller.

Therefore, if the delivered goods do not conform to the contract and that hypothesis constitutes a fundamental breach, **the legal basis for the buyer's allegations will be the article 35 par. 1 CSIG and not the article 30**.

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[16] See Audiencia Provincial de Palencia (Spain), 26.09.2005, http://www.unilex.info/case.cfm?id=1109.
[17] See Bundesgericht (Switzerland), 17.12.2009, http://www.unilex.info/case.cfm?id=1578.