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Introduction

The rules on conformity occupy a central place in sales law:

- They lie at the core of the seller’s obligations
- They help define the goods – the subject-matter of the contract
- They allocate risks between the parties
- One of the most litigated issues

The experience of Art 35 CISG can tell us much about the effectiveness of the Convention:

- Has time come for a new international sales law?
- Tentative reflections on whether there is room for improving or reforming the Convention’s structure and experience
Paragraph (3) of Article 35 provides that:

‘[t]he seller is not liable...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’.

This provision is expressly said to apply only to paragraph (2), containing default rules on conformity.

Does it extend to paragraph (1) of Article 35? **NO**
The buyer’s knowledge of a lack of conformity (2)

Federal Supreme Court, 22 December 2000 (Switzerland):

- The contract: ‘rapport equipment length ‘641 mm - 1018 mm’
- Before the contract, B inspected the machine
- The machine was 14 years old, not capable of operating at full rapport length
- Prior to the contract, S sent a fax: the machine was ‘complete and operating as viewed’
- After the contract, B sent a confirmation: the machine ‘complete and operating as viewed’
- B’s claim: the stencil holders for a rapport length of 1018 mm missing
- Claim dismissed: B ought to have known that the machine would not conform to the latest technical specifications
Does Article 35(2)(a) imply a certain level of quality?

Article 35(2)(a): The goods to be fit for ‘the purposes for which goods of the same description would ordinarily be used’

No reference to and no reliance on quality!

An inquiry into the notion of quality can supplement and facilitate the test of fitness for ordinary purposes, but it does not seem essential.
Different quality tests: the debate

Merchantable Q?
   The goods’ ability to be resold at the same price as that in the contract

Average Q?
   A ‘middle belt of Q’

Reasonable Q?

All can lead to different results: see Netherlands Arbitration Institute, Case No. 2319, 15 October 2002
Different quality tests: the debate (2)

Is the CISG a vehicle for promoting some benchmark of quality around the world?

See Appellate Court’s-Gravenhage, 99/474, 23 April 2003 (Netherlands)

If so, this points to the need to articulate an underlying Q standard.

Reasonable Q!

If there is ever a new sales law: THINK ABOUT THE NEED FOR an underlying Q standard!
Compliance with public law regulations

Supreme Court, 8 March 1995 (Germany) – *New Zealand Mussels:*

- Mussels delivered by Swiss S to German B did not comply with a recommendation of the German health authorities
- SC: S not liable for non-compliance
- UNLESS:
  1. regulations were the same in S’s country;
  2. B specifically drew S’s attention to regulations;
  3. S had a good reason to know about them (e.g., S had a branch in B’s country, long established business relationship with B, often previously exported the goods to or promoted them in that country).
Compliance with public law regulations (2)

New Zealand Mussels: Right balance between CERTAINTY and FLEXIBILITY

If there is a new international sales law:

- *New Zealand Mussels* needs to be built upon
- Should a provision dealing specifically with non-compliance with public law regulations be introduced?
Proof

Burden of proof:
increasingly recognised as governed by the CISG

Standard of proof:
Argument - uniformity is hardly achievable if the rights, established by the CISG, cannot be exercised in the same way due to different standards of proof in domestic legal systems
Proof (2)

Admissibility of evidence:

- Outside the CISG because it is a procedural law matter?
- BUT see Appellate Court, 24 April 2000 (Argentina): B’s evidence of non-conformity, based on testimony of an inspection company, inadmissible
- B did not follow a procedure in Art 476 of the Argentine Commercial Code: to contest Q of the goods B ought to appeal to expert arbitration

If admissibility of evidence can be a substantive law matter, could it be governed by the CISG, similar to a standard of proof? NO
Proof (3)

Best to leave admissibility of evidence to dom. law:

(1) Dom. rules on admissibility of evidence are based on various policies emanating from different spheres, beyond the reach of CISG:

The common law, e.g., includes rules against hearsay, on expert witnesses, against evidence of bad character, on protecting confidential communications between lawyer and client, against evidence injurious to public interest (the public interest immunity doctrine).
Each of these rules is based on its particular rationale.

(2) Efficiency, speed and practical convenience

If there is a new sales law: it’d be good to see clearer guidance on burden, standard, evaluation and admissibility of proof