
Article 35 of Cisg

The concept of Article 35 of CISG is the conformity of the goods under the contract, which describes the criteria for determining whether goods delivered by the seller meet the requirements of the contract in terms of quality, quantity, and packaging.

Article 35 CISG states that the seller is obliged to deliver the goods as mentioned in the contract. delivering of non-conformity goods referred to as "defective delivery", and the buyer is not required to take the delivery of the goods.

These criteria define the seller's obligations in relation to these important aspects of contract performance. The integrated concept of compatibility defined in Article 35 dismisses the concepts of "guarantee" contained in some domestic laws and, according to the CISG, the delivery of different kinds of goods which are against the contract, is found the delivery of lack compatibility with the goods. It is also stated that the CISG offers a unique solution for non-compliance in commodities, and thus not only violates the internal law of contracts, but also domestic laws that make the contract based on the mistake concerning the quality of the goods.

In general, the seller's failure to deliver the goods in accordance with the requirements of Article 35 is a violation of the vendor's commitment, although it is alleged that the failure of the goods to comply with the contract is not a violation, goods are compatible with value and are suitable tools for adaptation to the goods. The delivery of false documents relating to the origin of goods has been a violation of Article 35. It has been stated: "Although the seller is required to provide a product that conforms to the quantity, quality, and specifications of the contract in accordance with business practices, the difference in the amount and terms of the contract can only be regarded as unauthorized goods under Article 35 of the CISG, If defects reach a certain level of severity. Violations of the seller's obligations under Article 35 may, in appropriate circumstances, increase to the level of the essential contravention of the contract, as defined in Article 25 of the Convention, thereby preventing the buyer from contracting under article 49 (1).

This research paper mainly deals with the question, Is Article 35(2)(a) CISG applicable if public law restricts selling the goods in the country of the purchaser.

In order to answer the question, first chapter will give the understanding of Article 35(1) of CISG on seller's obligation towards conformity of the contract in terms of description, quality, quantity and packaging, second chapter will state on Article 35(2) (a,b,c,d,) CISG which focuses on non-conformity of the goods between the parties, distrust on seller, quality and packaging manner of the goods third chapter will focus on Article 35(3) CISG which will explain the conditions of the

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seller's non-liability in case of non-conforming delivery. The fourth chapter provides a case study and court decisions under Article 35(2) (a). The concluding chapter provides a short overview of the case study and answers the original research question.

Article 35 (1) CISG

Article 35 (1) CISG expresses the conformity regulations which the seller to provide goods in accordance with the specifications of the contract in terms of description, quality, quantity, and packaging. It has also been found that the carriage of goods contains less than the amount specified in the contract violated Article 35 (1) CISG, since this law explicitly states that the lack of "conformity" includes the lack of quality in the delivered goods and lack of quantity, however, minor delivery is not breached of Article 35 (1) CISG in which the contract was allowed and the buyer had accepted them without a complaint. However, compliance obligations are not limited to what the contract is reporting directly. The seller must also comply with certain contractual requirements. (Law2) Indicated requirements may upraise, for instance, from created practices among the parties to the contract or trade use, and are widely known in the business industry. Even if the contract is off, the seller has the duty to meet these implied requirements to meet the compliance obligations. The compulsory implied conformity obligations of the seller should be clear when the statements are made during the initial negotiations between the parties. Under Article 35 (1) CISG, conformity obligations are only reached from what is provided within the contract. Whatever is left outside of the contract which means, has not been agreed between the parties has no legal aspect. (conformity of the goods) To define the purpose of Article 35 (1) CISG, if there is a specific requirement of quality, quantity or description or requires a specific manner for packaging, it must be referred to the general regulations for the setting the content of the parties agreement. (law2) Under Article 35 (1) CISG, seller liability arises if there is a failure to provide goods in respect of the following four criteria: quantity, quality, description, and packaging.

Contractual Quantity

The delivery of goods which is less in quantity than agreed in the contract is a violation of the conformity of obligations. The implementation of the general rule becomes enforced overseller and the seller is obliged to deliver the exact quantity of the goods based on the contract agreement. Any kind of difference in the number of delivered goods by the seller, allows the buyer to appeal the solutions for non-conformity delivery.

The contractual quantity under Article 35 (1) CISG does not define less or more than the contracted amount of the goods, in both situations a violation rises to the conformity obligations. However, there is some right reserved to the buyer. If the delivery is less than what has been agreed in the contract, in this case, Article 51 CISG is implemented. Under this article the buyer

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has the right to fix an additional time period for delivery of the missing parts and accept the non-conformity delivery with less price, the buyer also could declare the contract partially avoid because of the missing part or avoid the entire contract, if the missing part violate the fundamental parts of the contract. In any case, the seller is responsible for the damages.

If the delivery quantity is greater than that provided for in the contract, then Article 52 CISG is applied and in this case, the buyer has the right to accept the excess quantity of the goods or to refuse. If the buyer accepts the excess delivery of the goods then he must pay for the excess quantity on the rate of the contract. If the buyer is not able to reject the extra goods then the buyer could avoid the whole contract (conformity of the goods)

Contractual Quality

The seller must deliver the goods of quality provided in the contract. Any differences in quality of delivered goods are considered a lack of conformity regardless of the consequences on the usability or value of the goods. Physical conditions are not the only attributes to be evaluated. It is necessary to pay attention to other legal conditions between the parties. Given the outstanding role played by the party's independence, there is no limit to these conditions, because parties can agree without any non-physical attributes. Indeed the contract may be provided to arise from a specific location in order to produce a product that is of a special ethical nature or to respect certain production standards in the production process.

Article 35 (1) CISG does not diverge between deliveries of better quality or worse quality than agreed in the contract and there is no specific limitation to the remedies available to the buyer when goods are of non-conforming quality. (conformity of the goods)

Contractual Description

The third position referred to Article 35 (1) CISG is relating to the delivery of goods, which does not conform to the contract description. As with defective quality, these requirements cover a wide range of events, in the sense that the concept of description is widely defined as "The usual way that the parties determine the content of their obligations".

When drafting the agreement, there is no limit to how the goods are described. In fact, parties may decide to express the goods through contractual provisions or, conversely, implicitly by referring to an external document that shows the goods and their quality. The conformity obligations are fulfilled when the seller delivers the goods as described in the contract. Handing over goods that is completely different from what has been agreed on is not a non-conformity goods delivery but is a failure to deliver goods. (conformity of the goods)

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Packaging

Packaging is an important issue as it affects directly the quality, usability, and tradability of the contracted goods. Given the value to correct packaging, Article 35 of the CISG raises this issue both conformance statements and regulations. The vendor must always fulfill a specific package of rules when packaging goods. (conformity of the goods) 3. Article 35 (2) CISG Article 35 (2) CISG defines standards for product quality, performance and packaging, while not compulsory, they are supposed to be part of the sales contract. In other words, these standards are the terms that the vendor attaches to it, even without its positive agreement. If the parties do not want to apply these standards to their contract, they could agree otherwise. The parties will be bound under Article 35 (2) CISG if they use these standards to contract out. In case the parties agree to exclude the seller obligations under Article 35 (2) CISG, then is governed by the Convention's rules on interpretation. It was found that an agreement on the general quality of the goods does not deviate from Article 35 (2) if the agreement contains only positive conditions for the quality of the goods and no negative conditions relieving the seller of his obligations, however, other decisions indicate that an express agreement in article 35 (1) on the quality of goods excludes the inherent quality obligations imposed under article 35 (2), even if the parties do not state otherwise that the obligations under article 35 (2) are not applicable. Some decisions have applied national law in order to determine the validity of agreements in order to exclude a seller's obligations under Article 35 (2). (law2) Article 35 (2) consists of four parts. Two of the subsections (Articles 35 (2) (a) and 35 (2) (d)) apply to all contracts unless the parties have agreed otherwise. The other two subsections (Articles 35 (2) (b) and 35 (2) (c)) are only triggered if certain substantive predicates exist.

Article 35 (2) (a) CISG

Article 35 (2) (a) CISG obliges the seller to deliver goods, which should be suitable for the purposes for which goods of the same description would normally and ordinarily be used. This commitment is equivalent to the specific obligations imposed on sellers under domestic law. Article 35 (2) (a) assigns risks between buyers and sellers regarding the performance of a good. It would be a breach of Article 35 (2) (a) when the seller delivered a refrigeration unit which broke down shortly after the first start-up. It would be also a breach of Article 35 (2) (a) if the seller delivers wine diluted with 9 percent water, which causes the national authorities to grab and destroy the wine. It was also found to be violated if the seller replaced another component in a machine without informing the buyer and without giving the buyer adequate instructions for installation, which will be caused machine failed after a short time using and will disappoint the buyer. (law2) It is clear that the car should be drivable, food should be eatable, clothes should be wearable and so on. In order to avoid overly specific contracts and reduce the risk that sellers will take the advantages of the contractual "silence" to deliver inferior quality goods, the authors of the CISG have introduced a standard rule that reflects the parties' agreements, if only over

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the term had negotiated. It results that, even if there is no specification for use, the seller must guarantee that the goods are at least suitable for their normal and ordinary uses.

Article 35 (2) (a) CISG is regarding two conditions legally compulsory, the first condition is the absence of a contradictory contract term and the second condition is the absence of a specific purpose under Article 35(2)(b) CISG. If the seller has been informed of a specific purpose for which the goods should be used, he has priority over ordinary purposes. (conformity of the goo)

However, the standard of Article 35 (2) (a) only requires that the goods should be suitable for the purposes for which they are normal and ordinary users. It is not necessary that the goods should be perfect or flawless unless the goods are perfect for the fulfillment of their ordinary purpose and used. One court found that heavy oil could be used in the buyer's business, even though there were problems due to the particular type of pumps that the buyer used and the seller was unaware of. The court further ruled that the seller had no pre-contractual obligation to inquire about the specific purposes of the buyer. To simplify more, Article 35 (2) (a) CISG stated that the goods requiring should be "average" quality, "marketable" quality, or "reasonable" quality. It has been also described that traceability of the goods is an aspect of their fitness for ordinary purposes and use under article 35 (2) (a), that at least food intended for human consumption must not be harmful to health, because harmful food caused injurious to health, therefore it may lead to a breach of Article 35 (2) (a). (law2)

Article 35 (2) (b) CISG

Article 35 (2) (b) CISG expresses that the goods should be fit for any specific purpose, which the seller is explicitly or implicitly notified at the time of contract approval. this is the same obligation as domestic law imposes on the seller. The obligation under Article 35 (2) (b) arises only if specific purposes have been notified to the seller at the time of the conclusion of the contract. It could be the breach of Article 35 (2) (b) if the delivered goods do not meet the specific purposes intended by the buyer at the time of contract approval. In that case, the seller is found violated Article 35 (2) (b) because once the special purpose has been negotiated, the seller is obliged to deliver goods that have these characteristics that make them suitable for specific use. (law2) For instance, the buyer orders a series of drills designed to drill a carbon steel plate, if the seller delivers ordinary drills, These would break when drilling the durable carbon steel. Therefore, the buyer could be unable to use them for the intended purpose. In such case the seller breach Article 35 (2) (b) CISG and the buyer is protected and Article 35 (2) (b) CISG is applied to the seller and is obliged to deliver the goods fit for the specific purpose, which explicitly or implicitly communicated at the time the contract was concluded. (conformity of the goo)

The requirements of Article 35 (2) (b) CISG do not apply, if the circumstances show, that the

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buyer did not reasonably rely on the skills and judgment of the seller and he was himself an experienced importer of the goods. A court has stated that the buyer should not expect the seller to have knowledge about his country public law requirements or administrative practices relating to the goods unless the buyer is responsible to point such requirements out to the seller. (law2)

The main difference between Article 35 (2) (a) CISG and Article 35 (2) (b) CISG is: ordinary purposes goods and specific purposes goods, which means, If the seller has been informed of a specific purpose for which the goods should be used, he has priority over ordinary purposes.

Article 35 (2) (c) CISG

Article 35 (2) (c) CISG describes that, in order to comply with the contract, goods must contain the characteristics of goods which the seller has provided to the buyer as a model or sample. This provision is also applicable even if the buyer provides a sample or model and the parties agree that the goods should conform to the sample or model. (law2) There will be problems arise if the buyer is received a sample or model but is ordered the goods without any reference to them. It is always necessary for the buyer to give reference based on the provided sample or model from the seller. It has been also confirmed that goods of a particular sample or model do not have to comply if the parties have not agreed on. (conformity of the goo) Comparable to Article 35 (2) (b) CISG, This provision does not automatically arise when the contract is concluded, but only comes into effect if the seller has provided samples or samples of the contracted goods and It would breach Article 35 (2) (c), if the delivered goods do not conform with the sample or model provided by the seller.

Article 35 (2) (d) CISG

Article 35 (2) (d) CISG states that the goods should be contained or packaged in the manner required by the contractor if there is no such manner, then it should be packaged in an appropriate manner to preserve and protect the goods. If the parties have not specified packaging requirements in their contract, in this case, the standard packaging method is considered by the seller country.

The seller would be considered liable and violated Article 35 (2) (d) CISG, if any damaged happen to the delivered goods in buyer jurisdiction caused by inadequate packaging, because Packaging is an important issue as it affects directly the quality, usability, and tradability of the contracted goods. For instance, the seller of canned fruit would breach Article 35 (2) (d) CISG if the containers are insufficient to prevent the contents from deteriorating after shipping or if marble panels are damaged during transport because of inappropriate packaging. (law2)

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Article 35 (3) CISG

Article 35 (3) CISG exempts the seller from the responsibility for any lack of conformity under "Article 35 (2) sub-paragraphs (a) to (d)" if the buyer "knew or knowledge" of the non-conformity of the goods at the time of the conclusion of the contract. Article 35 (3) relieves the seller only from responsibility for non-compliance in accordance with Article 35 (2) sub-paragraphs (a) to (d). The non-conformity under Article 35 (1) "the goods should be delivered in terms of description, quality and quantity required by the contract", does not deal with Article 35 (3). (law2)

The buyer would be responsible of damages if he accepts the delivery of non-conformity goods and without immediately notifying the seller of defects, because, after the conclusion of the contract, the obligation of the seller to deliver conforming goods will not be affected. Regarding two cases the seller is liable even if the buyer knew or could not have known of the lack of conformity. The first situation concern these two cases is where the purchaser persisted on flawless and perfect goods. Even if the purchaser has known about the non-conformity at the conclusion of the contract, the seller is obliged to rectify the defect if the buyer has expressly demanded perfect condition. The second one is when the seller intentionally masked the defect of the goods. The seller would be responsible for the lack of conformity because the buyer is only unaware because of his negligence and he looks like to be protected than a seller who purposely tries to deceive the buyer. (conformity of the goo) 5. Case Study and Court Decisions under Article 35 (2) (a) CISG This case are related to the sale of New Zealand mussels by a Swiss company to a German buyer in January 1992. After the delivery of the goods, the German Health Authority found that a certain level of cadmium content is high in the mussels and violated German food regulations and is unacceptable for sale under German public law. However, the level of cadmium content was acceptable under Swiss Law. It was declared by the buyer that the contract is avoided because of the lack of conformity of the goods while the seller asked for the sales price. The Bundesgerichtshof found that the seller has not violated Article 35 (2) (a) CISG and the goods were in conformity with the contract since the mussels were still eatable and the mussels were not of inferior quality even if their cadmium content level is high and were fit for ordinary use. In addition, the court has stated that Article 35 (2) (a) does not oblige the seller to deliver goods that, comply with public law of buyer country, unless the same provisions exist also in the seller country, or the buyer informed the seller about the stricter regulations of his country, or the seller was aware of the provisions due to special circumstances. According to the court, public law regulations in the buyer country are only important when they correspond to those of the seller country, or when the buyer refers the seller to them. The court has explained that the delivered mussels by Swiss seller to German buyer which contained a high level of cadmium content, contrary to basic food, are generally not consumed in large quantities within a short time, and thus even "contamination peaks" are not detrimental to health. Therefore, it is no longer relevant whether the public law provisions of

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those countries in which an export was possible at the time of conclusion of the contract, do not affect the conformity of the goods with the contract according to CISG Article 35 (2) (a).

Recapitulating, it is fair to say that due some special circumstances, it would be possible to apply Article 35(2)(a) CISG when public law restricts selling the goods in the country of the purchaser, when the buyer has already informed the seller about the stricter regulations of his country, or the seller has already a business branch in the country of purchase, or if the seller already promoted his products in the country of purchase. it would be also possible to apply this article when the seller has knowledge of the restricted provisions of the buyer's country due to some special situations, or when there are ongoing business connections with the buyer, or if the seller often exports goods to the buyer's country. Regarding above case study about mussels which contained high level of cadmium content, it was not a breach of Article 35(2)(a) CISG since, A foreign seller cannot be obliged to know the not easily determinable public law provisions of the buyer's country, but rather, the buyer is expected to have knowledge and know about his country provisions and conditions and he is expected to inform the seller accordingly. It would be a breach of Article 35(2)(a) CISG if the same regulations are available in both (seller and buyer) countries.

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