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CASE PRACTICES ON ACCEPTANCE AND REJECTION OF GOODS UNDER THE CISG AT A GLANCE

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Abstract

Issues on acceptance and rejection of goods with respect to the CISG have considerably absorbed both academic and practical debates on a global scale let alone Vietnam. This paper shall revisit the case law practices and notable issues related to acceptance and rejection of goods settled under the umbrella of CISG to provide a glimpse anticipation for similar cases to be occurred in the future.

Keywords: CISG, Goods Acceptance, Goods Rejection

I. Introduction

1. United Nations Convention on Contracts for the International Sale of Goods (*CISG* or *Convention*) has become increasingly popular in the role of an umbrella governing the international goods trading on a global scale. Vietnam, as the 84th member of the CISG⁵, is not the exception to the foregoing. Nonetheless, case law involving the interpretation

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³ Kien Thuc Phap Ly is a legal knowledge center with free open access <www.kienthucphaply.com>

⁴ The citation is made under OSCOLLA reference format.

⁵ CISG was acceded by Vietnam on 18 December 2015 and came into binding effect as of 1 January 2017. See more: WTO Center, <<https://trungtamwto.vn/chuyen-de/8401-viet-nam-chinh-thuc-tro-thanh-thanh-vien-thu-84-cua-cisg>> (21 January 2016) accessed on 15 October 2020.

and applicability of CISG in Vietnam is still limited in number. Henceforth, it is worth revisiting the theoretical and practical approach of the preceding case practices in other jurisdictions so as to provide a glimpse indication and anticipation for similar cases that may be occurred in the future. For ease of reference, this article comprises of two parts, in which both parts shall be illustrated on text analysis and case law practices. In particular, Part 1 shall refer to the issues on acceptance while Part 2 shall discuss the rejection of goods under the CISG.

II. Acceptance of goods under the CISG

2. One of the most important factors regarding the acceptance of goods is the required examination. Put differently, examination or test is the condition precedent for either acceptance or rejection of goods. CISG explicitly provides that the burden of examination lies significantly with the buyer in the contract⁶. With the purpose of harmonizing the sale law in multiple jurisdictions, the literature of CISG suggests that its creators purported to set out only the core principles governing the sale law rather than provide comprehensive parameters and substances to identify the same. To clarify, CISG neither specifies the manner in which goods are tested nor the precise juncture at which the examination should take place.

A. Method of examination

3. Recent practices suggest that the method of examination substantially relies upon contractual arrangement, trade usages, or practices⁷. In the absence of the foregoing, the manner of examination shall be determined by the judges or arbitrators based on the mere notion of “reasonableness”, subject to the unique nature of each good in question. In 1997, a dispute arose between a German seller delivering the surface-protective film to an Austrian buyer⁸. In reliance on the long-standing business relationship between the parties, neither agreement nor conduct was reached or taken for the examination of the goods. Subsequently, the buyer acknowledged of the default of the goods and claimed for the reimbursement. The appellate court of Karlsruhe arrived at two notable conclusions, (1) “the extent and intensity of examination being dependent upon the type of goods, packaging and testing possibilities”⁹ and (2) “spot-checks and test treatments were

⁶ CISG, art. 38.1.

⁷ UNCITRAL, *UNCITRAL Digest of Case Law on the United Nations Convention on Contracts for the International Sale of Goods* (UNCITRAL 2016) 115.

⁸ UNCITRAL, *Case Law on UNCITRAL Texts (CLOUT) [A/CN.9/SER.C/ABSTRACTS/20]*, 22 February 1999, 5.

⁹ *Ibid.*

required where the lack of conformity would have only become evident only upon use”¹⁰. The latter conclusion implies that it is reasonable for spot-checks and test treatment to be carried out upon the delivery of these particular goods, which was referred to by the Court as “durable ones”. Another case happened in 1995¹¹ when a German buyer rejected paying the price for wine sold by an Italian seller since it alleged that the quality of wine is not in line with the merchantable standard, in which water accounts for 9% component of the wine. The key issue in this case is that the buyer has failed to discover a non-conformity during the period of examination required by article 38.1 of the CISG. However, this failure does not exempt the buyer from its right to rely on the non-conformity of the goods given the fact that the dilution test is not practically required by the buyer. The line of reasonings of the adjudicators indicates that the seller must bear its liabilities for the particular default which is known or should have been known by them in accordance with article 40 of the CISG, irrespective of whether the buyer conceives of the same or not. In other words, the method of examination seems to create no considerable impact on the liabilities of the seller in consideration of those defaults in nature.

B. Time period

4. Technically, CISG provides for two different time periods, one of which is the period for examination during which the buyer must complete its obligation to examine and the other is the period for notifying the non-conformity commencing upon so discovery¹². Both periods are determined by the notion of “reasonableness”¹³. The determination of those periods seems to be controversial, especially in consideration of latent defect. Plainly, latent defect is not a concept referred to by the CISG in its literature but it would be reckless to assume that CISG does not govern the same. Practical case laws view that there may be hidden defects that are unable to be practically discovered right after the delivery but can only be revealed upon the test carried out by specialists or upon actual use. Indeed, the approach from the tribunal in such regard is diverted into two routes. Whilst some tribunal opines that the latent defect should not be isolated from the umbrella of article 38, others view that issues thereof are not the subject of such a provision¹⁴.

¹⁰ *Ibid.*

¹¹ UNCITRAL, *Case Law on UNCITRAL Texts (CLOUT) [A/CN.9/SER.C/ABSTRACTS/12]*, 26 May 1997, 7.

¹² CISG, art. 38.1 and art. 39.1.

¹³ *Ibid.*

¹⁴ UNCITRAL (n 7) 116.

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5. The former believes there is a line to be drawn between the commencement of the period for examination in respect of the obvious defect with that of the latent defect. In 1999¹⁵, a court proceeding was initiated by a German buyer against a sub-seller in relation to a defect in grinding equipment being used in the paper industry. The buyer did not discover such a defect when taking the delivery but only upon the examination report submitted by an expert did the buyer so acknowledge¹⁶. The Supreme Court concluded that “period for examination to discover latent defects in grinding device did not begin until the device broke down approximately three weeks after delivery”¹⁷. Such a conclusion implies that article 38 of CISG is designed in a flexible manner which allows the commencement of examination to occur at different juncture subject to the particular type of defect / non-conformity.
6. The latter view indicated in Section 4 herein appears to adopt a restrictive approach following the black texts of CISG, whereby CISG does not give effort to separate the hidden defect and the obvious one by virtue of article 38.1, the hidden defect is something falling outside the scope of such an article¹⁸. In a claim settled by Oberlandesgericht¹⁹, the Court opined that examination under article 38 must be fulfilled in a timely manner upon the delivery of goods regardless of the defects in question being obvious or hidden ones. Should the defect may only be revealed by experts, its omission from the buyer’s end is irrelevant. The conclusion left the issues open but to a certain extent, it can be inferred that the adjudicators in that case brought the matter of latent defect out of article 38.

III. Rejection of goods under the CISG

7. As opposed to the acceptance of goods, rejection of goods cause a bigger problem for both seller and buyers from a commercial sense. There is not a single consolidated clause provided by the CISG where all circumstances under which a rejection may occur can be founded. Indeed, causes of rejection are fragmented throughout the Convention but in general may be listed under five circumstances²⁰, (1) buyer exercising right to avoid the

¹⁵ UNCITRAL, *Case Law on UNCITRAL Texts (CLOUT) [A/CN.9/SER.C/ABSTRACTS/30]*, 24 May 2000, 5

¹⁶ *Ibid.*

¹⁷ UNCITRAL (n 7) 115.

¹⁸ UNCITRAL (n 7) 116.

¹⁹ UNCITRAL, *Case Law on UNCITRAL Texts (CLOUT) [A/CN.9/SER.C/ABSTRACTS/26]* 3 Dec 1999, 11.

²⁰ Sarah Howard Jenkins, “Rejection, Revocation of Acceptance, and Avoidance: A Comparative Assessment of UCC and CISG Goods Oriented Remedies” (2013) 22 Minn J Int’l 152, 167; See more: Nguyen Thi Thu Thao and Le Tran Quoc Cong, “Goods Acceptance and Rejection

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contract by virtue of material breach committed by the seller²¹; (2) buyer exercising the right to request for substitute goods by virtue of non-conformity of goods being treated as material breach²²; (3) Early delivery subject to the refusal of the same from the buyer²³; (4) exceeded delivery subject to the refusal of the same from the buyer²⁴; and (5) suspension of performance²⁵.

8. For instance, in consideration of early delivery indicated above, this provision initially originated from the 1893 United Kingdom Sale Act, which is later adopted by the 1964 La Haye Convention (ULIS)²⁶. It is worth mentioning that the rejection rendered to the buyer under this article is not in its absolute discretion but subject to certain limitations created by the nebulous notion of “good-faith”²⁷. The same approach seems to be applied to the delivery of goods in excess of quantity. Notably, if there is an agreement on the deviation of quantity of goods, the goods delivered which still fall under such a deviation shall not be treated as the exceeded quantity of goods²⁸.
9. One commentator has arrived at the conclusion that rejection can only be made under the CISG if the goods have been under the custody of the buyer at the contract destination with the only exception of the case of installment contract²⁹. Exercising the right to reject entail the subsequent obligation of the buyer to preserve the goods which have been rejected³⁰ unless the so doing involves unreasonable expense³¹. Unlike the Uniform Commercial Code (*UCC*) which permits the buyer to sell the goods for securing not only

Obligation Under United Nation Convention on Contracts for International Sale of Goods” (2017) 110 Legal Science Journal 42, 43.

²¹ CISG, art. 49.

²² CISG, art. 46.2.

²³ CISG, art. 52.1.

²⁴ CISG, art. 52.2.

²⁵ CISG, art. 77.

²⁶ Pace Law School Institute of International Commercial Law, <<https://www.cisg.law.pace.edu/cisg/biblio/will-bb52.html>> (Micheal Will, 1 February 2005) accessed on 11 October 2020

²⁷ Article 7.1 of the CISG mandates:

“(1) In the interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity in its application and the observance of **good faith** in international trade.” (*emphasis added*)

²⁸ Thao (n 20) 45.

²⁹ Jenkins (n 20) 168

³⁰ CISG, art. 86(1).

³¹ CISG, art. 86(2).

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its expenses but also the payments made in relation to the goods³², CISG only takes into account the reasonable expenses incurred by the buyer for such preservation³³.

10. In addition to the foregoing, the sale of rejected goods by the buyer can either be implemented in form of a *right* conferred upon them or a required *obligation*. The former may be facilitated if there has been unreasonable delay by the seller in substituting or taking back the goods or fulfilling the payment of preservation expenses whilst the latter requires the buyer to sell the goods if there is a rapid deterioration or the expenses regarding such preservation become unreasonable³⁴. In a case settled by Rizhao Intermediate People's Court in 1998³⁵ involving the sale and purchase of frozen shrimp between a Chinese seller and American buyer. The buyer activated its right to reject the imported shrimp due to the non-conformity of shrimp and it retained the shrimp in storage but allowing them to become perishable without reselling as required by article 88.2. The court then upheld that the buyer failed to adhere to its obligation provided thereunder and therefore, subject to the set-off of loss in value of the shrimp due to such a breach³⁶.
11. Compared to the UCC, the obligation imposed by the Convention by virtue of article 88 on the buyer may be less a burden as the duty for reselling provided under the UCC as it does not include the purpose of avoiding loss in value due to adverse changes in the market as so prescribed by the UCC³⁷.

IV. Conclusion

12. It can be observed that "reasonableness" is the central pillar of the matters related to acceptance and rejection of goods. Put it simply, decoding "reasonableness" in a proper manner would provide almost every answer to the uncertainties implied in the CISG. That said, it is far from easy to do so as "reasonableness" can be stretched differently under different jurisdictions based on its unique common practice.
13. As an international treaty, CISG must be read in line with the United Nations Convention on the Law of Treaties (*UNCLT*) which specifically requires that a treaty must be construed

³² UCC, Sec. 2-603(1).

³³ CISG, art. 86(1); *See more*: UNCITRAL (n 5) 406.

³⁴ CISG, art. 88.

³⁵ Pace Law School Institute of International Commercial Law, <https://cisgw3.law.pace.edu/cases/991217c1.html> (11 May 2010) accessed on 11 October 2020

³⁶ *Ibid.*

³⁷ UCC (n 32); *See more*: Jenkins (n 20) 173.

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on the observance of good faith and in light of its purpose and objectives³⁸. As such, CISG should be read following international practices rather than local ones and it is absolutely necessary to revisit the case law practices in other jurisdictions under the umbrella of CISG instead of relying completely on self-interpretation, particularly to those being adjudicators in question.

Bibliography

United Nations Convention on Contracts for the International Sale of Goods

UNCITRAL, *UNCITRAL Digest of Case Law on the United Nations Convention on Contracts for the International Sale of Goods* (UNCITRAL 2016)

UNCITRAL, *Case Law on UNCITRAL Texts (CLOUT) [A/CN.9/SER.C/ABSTRACTS/12]*, 26 May 1997

UNCITRAL, *Case Law on UNCITRAL Texts (CLOUT) [A/CN.9/SER.C/ABSTRACTS/30]*, 24 May 2000

UNCITRAL, *Case Law on UNCITRAL Texts (CLOUT) [A/CN.9/SER.C/ABSTRACTS/26]*, 3 Dec 1999

UNCITRAL, *Case Law on UNCITRAL Texts (CLOUT) [A/CN.9/SER.C/ABSTRACTS/12]*, 26 May 1997

Sarah Howard Jenkins, “Rejection, Revocation of Acceptance, and Avoidance: A Comparative Assessment of UCC and CISG Goods Oriented Remedies” (2013) 22 Minn J Int’l 152

Nguyen Thi Thu Thao and Le Tran Quoc Cong, “Goods Acceptance and Rejection Obligation Under United Nation Convention on Contracts for International Sale of Goods” (2017) 110 Legal Science Journal 42

Pace Law School Institute of International Commercial Law,
<<https://www.cisg.law.pace.edu/cisg/biblio/will-bb52.html>> (Micheal Will, 1 February 2005)

³⁸ See more: UNCLT, art. 31.



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Pace Law School Institute of International Commercial Law,
<<https://cisgw3.law.pace.edu/cases/991217c1.html>> (11 May 2010)