

The International Sales Law
aka
THE 1980 VIENNA SALES
CONVENTION

A brief exposé on the international law in general and on Section II of the CISG and the issue of conformity of goods with examples from Italian case law by Paolo Paracchini for IT & IL Practice Group, Eurojuris International Practice Group Days, Dublin, Ireland, 10-13 May 2012

Introduction

- In 1964 The Hague Convention gave birth to two international laws concerned with the sale of goods (ULIS & ULFC);

- The Uniform Law of International Sales (ULIS);
- The Uniform Law on the Formation of Contracts (for the international sale of goods).

- The partial success of the Hague Conventions encouraged the UN to call a conference on Contracts for the International Sale of Goods.
- Held in Vienna from 10 March to 11 April 1980 by representatives of 62 States and 8 international organizations!
- The Vienna Conference gave birth to the International Sales Law or UN Vienna Convention on the International Sale of Goods (CISG).
- Like the Uniform Sales Law(s), the International Sales Law of Vienna does not regulate all incidents of an international sales transaction. It does not regulate (i) the special trade terms for the delivery of goods and the fixing of the price and (ii) the passing of property in the goods, which is why an express reference to Incoterms and, where possible, a domestic law to supplement ULIS or CISG is highly recommended;

- As of 24 February 2012, UNCITRAL reports that 78 States (from Albania to Zambia) have adopted the CISG, including the world's major trading nations, with the noticeable exception of the UK and Ireland
- These last two countries adhered to ULIS and ULFC and incorporated both uniform laws into their legal systems by acts of parliament. In the case of the UK, the two uniform laws are given effect by the Uniform Laws on International Sales Act of 1967.

- The list of States that have adopted the International Sales Law is available from online sources as are copies of the Sales Law in the Official Language Texts, which includes English, French and Spanish (Italian and German translations are also available).
- See The UN Treaty Collection Website <http://treaties.un.org/Home.aspx?lang=en>

Section II

Conformity of the goods and third party claims

Claims based on a lack of conformity of the goods by Buyers

- Articles 35 to 44 of the CISG

- Art. 35 - Deals with the delivery of goods by Seller as contracted (in line with what generally provided for by the domestic laws of most common law and civil law jurisdictions).
 - (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.
 - 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;
 - (b) are fit for the particular purpose whether express or implied and 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;
 - (c) possess the qualities of goods which the Seller has held out to the Buyer as a sample or model;
 - (d) are 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.
 - (3) The Seller is not liable under sub-para. (a) to (d) of the above, for any lack of conformity of the goods, if at the time the contract was perfected (closed) the Buyer knew or could not have been unaware of such lack of conformity.

Meaning of Article 35

- Seller must deliver goods conforming to the contract (conformity principle) and lays down the conformity criteria. It is directly rooted in similar provisions contained in ULIS and in the national laws of the world's major legal systems, including the principal common and civil law jurisdictions.
- One innovation in respect of ULIS (but not in respect of the UCC) is the provision regarding the seller's duty to deliver goods contained or packaged in the usual manner or, where no such manner exists, in a manner adequate to preserve and protect the goods.
- Unlike with ULIS under the CISG seller will have met his delivery obligation if he delivers goods which meet the general description of the contract even though such goods do not conform in respect of quantity or quality (naturally, without limiting in any way the buyer's rights and remedies for their non-conformity).

- Non-performance (i.e., non delivery, or not handing over, of goods to buyer) and defective performance are better distinguished and strengthened under the CISG than under the ULIS.
- Furthermore, the unifying notion of defective performance is a noteworthy innovation even in respect of rules present in the domestic laws of the contracting states.
- Hence in article 35, all cases of non-conformity of the goods are treated as defective performances of the delivery obligation (goods are delivered but not in conformity to what provided in the contract).
- Thus, the Convention avoids the various distinctions still found in domestic laws between conditions and warranties or the very difficult to define, distinguish and prove delivery of goods of a different kind (*aliud pro alio*) and defects or lack of qualities.
- Article 35 replaces these distinctions with the unique notion of breach of contract, with the major distinction being between fundamental and non-fundamental breaches.

Questions not dealt with by Article 35

- Does the seller have a duty under the CISG to deliver goods that at least meet the standard of average quality (i.e., merchantability)?
- Does the seller have a duty under the CISG to deliver goods meeting the mandatory conditions required by the domestic law of the place where the goods are to be sent or used?

A look at a few examples from Italian case law demonstrates how Italian courts interpret, enforce and apply the rules set forth in the CISG and helps one better understand how the CISG may actually work in a civil law jurisdiction like Italy.

- A look at Italian case law may better explain how Italian courts may decide a suit brought by a foreign buyer claiming lack of conformity in the goods delivered to them by an Italian seller.

The International Sales Law is Italian Law

- and the CISG is the (“Italian”) law applied by Italian courts in solving disputes arising in connection with an international sale, when: (a) the provisions of article 1(1) apply or (b) when the parties choose the domestic law of a Contracting State, which automatically includes the CISG, unless expressly excluded by the parties or (c) when the parties expressly choose the CISG;
- In the case of sales with parties from States that have not adhered to the Vienna Convention such the UK or Ireland, freedom of choice should allow parties from most Vienna Convention States, in addition to expressly choosing the CISG under (c) above, the alternative of expressly choosing ULIS alone or as supplemented by local law, as the governing law of the underlying (international) sales agreement with their English or Irish counter-parts.

- January 31, 1996. In a case before the **court of first instance of Cuneo**, the court held that a notice of non-conformity of clothing given 23 days after delivery could not be considered to have been “timely” given within the meaning of the Convention. In that case, an **Italian buyer** claimed a lack of conformity in a shipment of sport clothes bought from a French manufacturer delivered in French sizes instead of Italian sizes, as had been previously agreed. It is not clear whether buyer had timely examined the goods in accordance with art. 38 CISG or not. The court, however, assumed the buyer had not, ruling the defect immediately detectable upon any timely examination of the goods by the buyer.

- July 12, 2000. An interesting case was decided by **the court of first instance of Vigevano**. The suit involved a series of sales. *An Italian seller delivered vulcanized rubber to a German buyer for the production of shoe soles.* The soles purchased by the **buyer** were **sold to an Austrian manufacturer** who manufactured a certain number of shoes, distributing them in Russia. Upon receiving complaints from its Russian customer, the Austrian manufacturer turned to the German buyer who commenced legal action against the Italian seller claiming lack of conformity of the raw material. **The court held that a notice given four months after delivery could not be considered to have been “timely” given within the meaning of the Convention.** Indeed, even supposing that the defects could not have been discovered upon delivery, the buyer should have discovered them at the latest upon processing the goods and given notice immediately thereafter, while it waited until it received complaints from its customers in the field.

- December 13, 2001. **The court of first instance of Busto Arsizio ruled** that malfunctioning of an industrial plant claimed since its installation by an **Ecuadorian buyer**, even when made to the Italian seller's local commercial agent, followed by subsequent various other claims, amounted to a proper notice of lack of conformity under art. 39. As for the specification requirement, the court affirmed the principle that while it is the buyer's duty to lodge a “timely” claim, the claimant need not precisely identify the nature of the lack of conformity.

- November 26, 2002. **Here, the court of first instance of Rimini ruled** that a notice of conformity sent by the **Italian buyer** of French porcelain tableware, six months after delivery was clearly not “timely” within the meaning of the Convention. In vain the Italian buyer claimed to have orally **informed the seller's commercial agent thereof soon after delivery but** failed to give evidence of any such communication. Interestingly, the Rimini court underlined that, in accordance with general principles of law, it is up to the buyer to give sufficient evidence that any notice given to the seller was in fact timely given within the meaning of the Convention.

- December 11, 2008 In a case before the **court of first instance of Forlì** involving a supply of shoes by an Italian manufacturer to a **Slovenian buyer**, which examined the goods immediately upon delivery and sent its notice of non conformity a week later. The court held the notice to have been “timely” given within the meaning of the Convention under arts 38 and 39. However, this was not, the real issue at stake, inasmuch as the seller admitted non conformity. Actually, the seller refused to return the money and in stead offered to replace the defective goods. Replacement of the defective goods was not considered admissible by the court, because arts. 45 and 49 gave the buyer the right to void the contract in such cases *and claim a full return of the money paid, under art. 81*

- Art. 36 - (1) Seller's responsibilities (under the contract and the Convention) for any lack of conformity of the goods existing at the time risk passes to Buyer whether apparent or not. (2) Also in case of lack of conformity occurring after risk has passed to Buyer when due to breach of contract (including any breach of express [or implied] warranty /guaranty).
- Art. 37 - If delivery of goods by Seller takes place before the contract date provided therefore, Seller may deliver any missing part(s) or deficient quantities in the goods delivered, or remedy any lack of conformity, provided doing so does not cause the Buyer unreasonable inconvenience or expense. However, Buyer retains any right to claim damages as provided for in this Convention.

- Art. 38 - (1) Buyer must examine goods or cause them to be examined, within as short a period as is practicable in the circumstances. (2) If the contract involves carriage of the goods, examination may be deferred until after the goods have arrived at their destination. (3) If goods are redirected in transit or re-dispatched 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 re-dispatch, examination may be deferred until after the goods have arrived at the new destination.

- Art. 39 - (1) The Buyer loses the right to rely on a lack of conformity of the goods if he does not give notice to the Seller specifying the nature of the lack of conformity within a reasonable time after he has discovered it or ought to have discovered it. (2) In any event, the Buyer loses the right to rely on a lack of conformity of the goods if he does not give the Seller notice thereof at the latest within a period of two years from the date on which the goods were actually handed over to the Buyer, unless this time-limit is inconsistent with a contractual period of guarantee.
- Art. 40 - The Seller may not rely on articles 38 & 39 when the lack of conformity relates to facts which the Seller knew or could not but have known and which the Seller knowingly kept from the Buyer.

- Art. 41 - Seller must deliver goods free and clear of any third party right or claim, unless the Buyer agreed to the goods subject to that right or claim. However, if such right or claim is based on industrial property or other intellectual property, the Seller's obligation is governed by article 42.
- Art. 42 - (1) The Seller must deliver goods free and clear of any third party right or claim based on industrial property or other intellectual property, of which at the time of the conclusion of the contract the Seller knew or could not have been unaware, provided that the right or claim is based on industrial property or other intellectual property:
 - (a) under the law of the State where the goods will be resold or otherwise used, if it was so contemplated by the parties at the time of the conclusion of the contract; or (b) in any other case, under the law of the State where the Buyer has his place of business.
- (2) The obligation of the Seller under the above para. does not extend to cases where: (a) at the time of the conclusion of the contract the Buyer knew or ought to have known of the right or claim, or (b) the right or claim results from the Seller's compliance with technical drawings, designs, formulae or other such specifications furnished by the Buyer.

- Art. 43 - (1) The Buyer loses the right to rely on the provisions of article 41 or article 42, if he does not give notice to the Seller specifying the nature of the right or claim of the third party within a reasonable time after he has become aware or ought to have become aware of the right or claim. (2) The Seller is not entitled to rely on the provisions of the preceding paragraph if he knew of the right or claim of the third party and the nature of it.
- Art. 44 - Notwithstanding the provisions of para. (1) of article 39 and para. (1) of article 43, the Buyer may reduce the price in accordance with article 50 or claim damages, except for loss of profit, if he has a reasonable excuse for his failure to give the required notice.