The Supplier’s Liability for Non-conformity/Defects in His Quality as Seller

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Prof. M. Fontaine
The Supplier’s Liability
for Non-conformity/Defects
in His Quality as Seller

• Liability as a Seller – not as a Producer
• Very broad subject
  – Large variety of possible remedies ...
  – ... in each of a large variety of legal systems
  – Additional elements of complexity :
    • intervention of intermediaries ...
    • ... generally part of an international network
Plan

• I. Variety of remedies in seller-buyer relationship, dependent on the applicable law
• II. Additional complexity due to the intervention of intermediaries
• III. Contractual adaptations and their validity
I. Variety of claims and remedies

• Variety of claims and remedies in seller-buyer relationship, dependent on the applicable law
• A few important and/or typical examples
I. Variety of claims and remedies

• The European Directive (B2C)
• National systems
  – Belgium and France
  – Germany
  – England and Wales
• The Vienna Convention (CISG)
I. Variety of claims and remedies – The European Directive

• Sales to the consumer (B2C)
• Seller liable for lack of conformity
  – Broad definition of conformity
• Remedies:
  – repair
  – replacement
  – reduction of the price
  – rescission of the contract
• ...

I. Variety of claims and remedies — The European Directive

- ... 
- Time limit: 2 years
- Rules are mandatory
- No prejudice to other consumer rights under national rules
- Member States may adopt more stringent provisions
I. Variety of claims and remedies – Belgium

• Two main grounds
  – Hidden defects
  – Non-conformity
• Under some situations, also substantial mistake
• B2C contracts : application of the Directive
I. Variety of claims and remedies — Belgium

- Hidden defects
  - “Vice de la chose”: notion
  - Remedies:
    - Termination of the sale
    - or reduction of the price
    - Damages if seller in bad faith
      - Professional seller presumed in bad faith
        » Rebuttable presumption
  - Buyer must act within a short time
I. Variety of claims and remedies — Belgium

- Non-conformity
  - Notion
  - Must be apparent on delivery
    - Acceptance of the goods → waiver of claim
  - Remedies
    - Claim for specific performance
    - Damages
    - Termination of contract if substantial breach
I. Variety of claims and remedies – Belgium

• Substantial mistake
  – Notion
  – Remedies
    • Avoidance of contract
    • Possibly damages
I. Variety of claims and remedies — Belgium

• B2C Contracts: the European directive
  – Implementation through addition of a new section in the Civil Code
  – Mandatory rules
I. Variety of claims and remedies — Belgium

• Critical evaluation
  – Lack of clarity of traditional system
    • Three possible grounds for claims
      – not coordinated (borderline disputes)
      – different conditions
      – different remedies
  – Still another regime for consumer contracts
I. Variety of claims and remedies — France

— Similar to Belgian law (based on same Civil Code)
  • Hidden defects, non-conformity, mistake
  • Similar criticisms in French doctrine

— An important difference in case of hidden defects:
  • the professional’s presumption of bad faith is non-rebuttable in French law

• ...
I. Variety of claims and remedies — France

— …

• EU Directive:
  • transposed through new provisions in the Code de la consommation
    • Criticisms for a lost opportunity

— As in Belgium, multiplicity of regimes
I. Variety of claims and remedies – Germany

• Before *Schuldrecht* reform of 2002:
  – Similar system as in France and Belgium
    • Hidden defects
    • Non-conformity
  – Reform of 2002
    • Implementation of the EU Directive
      – not as an additional set of rules for B2C contracts
      – but as the basis of a new regime for sales
        common to B2B and B2C,
        with only a few specific rules for B2C
I. Variety of claims and remedies – Germany

- German law certainly more coherent
- Number and variety of remedies has increased with the reform, but
  - all based on the single concept of non-conformity
  - along the lines of the Directive
  - applicable to B2B as well as to B2C
    - but for a few special rules for B2C
I. Variety of claims and remedies – England

• No Civil Code in England, ...
  ... but a written statute on our subject
• Sales of Goods Act 1979
  – as amended in 2002 (implementation of the EU Directive)
    • regime applicable to all contracts
    • special rules for consumer contracts
I. Variety of claims and remedies — England

• Regime applicable to all contracts
  – Usual common law remedies:
    • damages primary remedy
    • specific performance only if damages would be no adequate remedy
    • right to reject the goods
    • termination of contract ("repudiation") if breach of "condition"
I. Variety of claims and remedies – England

• Regime applicable to B2C contracts
  – New section inserted in Sales Act
    • Additional remedies qualified as “revolutionary”
      – Repair, replacement, price reduction
    • Mandatory character
    • Consumer may also exercise remedies generally available
I. Variety of claims and remedies — England

• Conclusion
  – If B2B, characteristic common law remedies
    • Damages primary remedy
  – If B2C, remedies of the directive
    • + remedies generally available
  – No attempt to unify the law of sales
    • Comp. France-Belgium vs. Germany
I. Variety of claims and remedies — Vienna Convention on International Sales

- Wide success of the Convention
- Seller’s obligation of conformity
  - Notion of conformity
  - Buyer’s obligations
    - Examine the goods
    - Give notice of non-conformity
      - Time limit 2 years
- ...

I. Variety of claims and remedies — Vienna Convention on International Sales

• …

• Remedies
  • Specific performance (art. 46 - but see art. 28 !)
    • Delivery of substitute goods
    • Repair
    • Own remedying
  • “Avoidance” of the contract
  • …
I. Variety of claims and remedies — Vienna Convention on International Sales

- Remedies
  - ...
- Damages
  - Calculation
  - Can be claimed in addition to other remedies
  - Buyer’s obligation to mitigate the loss
I. Variety of claims and remedies — Conclusions

• Great variety among legal systems
  • Different categorizations and conceptualizations of breaches
    • Trend towards a uniform concept of “non-conformity”
  • Long list of remedies
    • Different according to the applicable law
• B2B and B2C
• Mandatory and non-mandatory rules
Plan

• I. Variety of claims in seller-buyer relationship, dependent on the applicable law
• II. Additional complexity due to the intervention of intermediaries
• III. Contractual adaptations and their validity
II. Intervention of intermediaries

• Additional complexity when sale through intermediaries
  – Two main situations
    • “Mere” intermediary
      – Sale itself from supplier to customer
    • Intermediary
      – purchases the goods
      – and resells them to the customer
II. Intervention of intermediaries

- “Mere” intermediary (agents, …)
  - Only finds customers
  - Or sells the goods on behalf of supplier
  - In either case, intermediary not concerned if problems of defects or non-conformity
II. Intervention of intermediaries

- Intermediary buys and resells the goods (wholesale distributors, exclusive dealers, franchisees, ...)
  - Two consecutive sales
  - Intermediary successively buyer and seller
  - Issues of non-conformity and defects at each level
  - ...

II. Intervention of intermediaries

• Intermediary buys and resells the goods
  – If intermediary detects problems when receiving the goods, it may exercise available remedies against supplier
  – If the goods have been resold and client detects problems
    • Client exercises remedies against intermediary
    • Intermediary may then exercise its own remedies against supplier, provided conditions still met
      – Applicable law may be different
  – ...

II. Intervention of intermediaries

– If the goods have been resold and client detects problems
  
  • Client exercises remedies against intermediary
    – Intermediary may then exercise its own remedies against supplier, provided conditions still met
  
  • Direct claim client ---> supplier ?
    – Available under some legal systems
      (e.g. France, Belgium)
II. Intervention of intermediaries

– Complexity of legal problems related to non-conform or defective goods in international sales

– Intervention of intermediaries: additional issues

– Still another factor of complexity: existence of a network of intermediaries

  • Several different legal regimes can be applicable within the network.
  • Is some harmonization possible?
Plan

• I. Variety of claims in seller-buyer relationship, dependent on the applicable law
• II. Additional complexity due to the intervention of intermediaries
• III. Contractual adaptations and their validity
III. Contractual adaptations and their validity

- Freedom of contracts a basic principle
- But there are mandatory rules, especially for B2C contracts
III. Contractual adaptations and their validity

• What can the seller do to improve its legal situation?
  – Modify the legal regime of non-conformity/defects claims (a)
  – Act on its legal relationships with its distributors
    • With each distributor (b)
    • At the level of the network of distributors (c)
III. Contractual adaptations and their validity

- a) Modify the legal regime of non-conformity/defects claims
  - First consider the choice of a more favorable law
  - Two main types of contractual adaptations
    - On the definition of the “hypothesis”
      - e.g. modify the legal definition of “non-conformity”
    - On the “regime”
      - e.g. modify the legal remedies
III. Contractual adaptations and their validity

• a) Modify the legal regime of non-conformity/defects claims

  – Modify the remedies – examples:
    • Replacement instead of repair and/or price reduction
    • Limit the amount of possible damages through a liquidated damages clause
    • Organize a strict procedure for calling on the warranty
    • ...
III. Contractual adaptations and their validity

• a) Modify the legal regime of non-conformity/defects claims
  – All of it, subject to validity under the applicable law
    • Some regulations generally mandatory
      – Cf. B2C regimes
    • But also issues of validity concerning specific clauses
      – e.g. penalty clauses, exemption clauses
      – general rules on abusive clauses
III. Contractual adaptations and their validity

– b) Act on its legal relationship with each distributor

  – The two successive sales may be subject to different legal regimes
  – How can discrepancies in claims and remedies be avoided?
III. Contractual adaptations and their validity

• How can discrepancies in claims and remedies be avoided?
  • Distributor required to use identical conditions in its relationship with buyer
  • Claims from distributor against seller excluded, but seller assists distributor in defending against customer’s claims
  • Seller offers direct warranty to customer
    – Implementation through distributor’s intervention
    – Keep in mind mandatory character of B2C rules
III. Contractual adaptations and their validity

• c) Actions addressing the network of distributors

  – Contractual arrangements with distributors in a network may be subject to different laws
  – ...

c) Actions addressing the network of distributors

- ... 
- Harmonization can be attempted by imposing standard conditions of sales to all network members 
- But the validity of some conditions may differ according to the applicable law
- ...
III. Contractual adaptations and their validity

- c) Actions addressing the network of distributors

- ...

- Possible solutions and their limits
  - Impose same choice of law to all distributors
  - Attempt to draft conditions of guarantee valid in all jurisdictions concerned
  - Specific conditions for important markets
Conclusions

• Have tried to introduce a very broad subject
  – by attempting to list, characterize and classify the main issues and some possible solutions

• Cannot dissimulate that very complex
  – Issues of validity always present, especially in B2C

• The following presentations will shed more light on some specific aspects
Thank you for your attention