



International Distribution Institute

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

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*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
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- 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
 - ...

III. Contractual adaptations and their validity

- 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



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Thank you for your attention