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# On the Need of Specifying a Particular Purpose of the Goods in a Contract for Sale of Goods<sup>2</sup>

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## Abstract

Non-conformity of goods is the crucial matter in many cases on sale of goods. Usually, it is not difficult to determine conformity in the legal sense, when the parties have made express statements on that issue in the contract. Factual conformity, by contrast, depends on the actual properties of the delivered goods. For the commercial buyer who typically plans to resell the goods, the actual conformity is a matter of practical importance. Conformity in a legal sense is more important in cases when the buyer wants to use the goods himself for an intended purpose.

The main objective of this article is to draw attention to the importance of specifying accurately the purpose for which the goods are being bought; the grade of quality or relevant standard as a pre-emptive measure for limiting the risk of receiving non-conforming goods in legal terms. The second purpose of this article is to compare the rules on conformity to see how they tackle the issue of allocating the risk for lack of non-conformity, and what the buyer can do to minimize his risks. The article will start with an overview of English sales law, which has long served as the *de facto* international sales law for sales transactions. It then scrutinises the rules on conformity under the Convention on Contracts for International Sales of Goods (CISG). Finally, it compares all the relevant rules with Polish law.

**Keywords:** non-conformity of goods, correspondence with description, satisfactory quality, fitness for a particular purpose, fitness for a general purpose, implied terms, physical defect, hidden defect, mistake about quality, duty of acceptance of goods, rejection right, breach of contract, fundamental breach.

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## O potrzebie określenia konkretnego przeznaczenia towarów w umowie o sprzedaży towarów<sup>3</sup>

### Streszczenie

Niezgodność towarów to kluczowa kwestia w wielu sprawach dotyczących sprzedaży towarów. Zazwyczaj określenie zgodności w sensie prawnym nie jest trudne, kiedy obie strony wprost dokonały oświadczenia dotyczącego tej kwestii w umowie. W przeciwieństwie do tego zgodność faktyczna zależy od rzeczywistych właściwości dostarczonych towarów. Dla klienta biznesowego, który zwykle planuje odsprzedaż towarów, zgodność faktyczna jest sprawą istotną z praktycznego punktu widzenia. Zgodność w sensie prawnym jest ważniejsza wtedy, gdy osoba kupująca chce sama korzystać z towarów zgodnie z ich przyjętym przeznaczeniem.

Głównym założeniem niniejszego artykułu jest zwrócenie uwagi na to, jak ważne jest to, by dokładnie określić cel, dla którego kupuje się towary; poziom jakości lub odpowiedni standard jako środek zapobiegawczy, który ogranicza ryzyko otrzymania towarów niezgodnych z perspektywy prawa. Drugim celem jest porównanie przepisów dotyczących zgodności po to, by sprawdzić, jak rozwiązują one kwestię rozłożenia ryzyka braku niezgodności i tego, co może zrobić osoba kupująca, by zminimalizować ryzyko. Artykuł zaczyna się od ogólnego opisu angielskich przepisów dotyczących sprzedaży, które już od dawna służą za *de facto* międzynarodowe przepisy mające zastosowanie przy transakcjach sprzedażowych. Później następuje analiza przepisów o zgodności towarów w myśl Konwencji Narodów Zjednoczonych o umowach międzynarodowej sprzedaży towarów (CISG). Na końcu autorka porównuje odpowiednie przepisy z prawem obowiązującym w Polsce.

**Słowa kluczowe:** zgodność towarów, zgodność z opisem, satysfakcjonująca jakość, przydatność do konkretnego celu, przydatność do ogólnego celu, warunki dorozumiane, wada fizyczna, wada ukryta, błędne określenie jakości, poleganie osoby kupującej na umiejętnościach i osądzie osoby sprzedającej, obowiązek zaakceptowania towarów, prawo do odmowy.

<sup>3</sup> Badania wykorzystane w artykule nie zostały sfinansowane przez żadną instytucję.

## Introduction

For a commercial buyer who plans to resell the goods for a profit, the actual conformity of the goods is a matter of practical importance. However, for the buyer who wants to use the goods himself or herself, for a particular purpose, conformity in a legal sense becomes vital. When the parties have made express statements on conformity of the goods in the contract, usually it is not difficult to determine it in a legal sense. Factual conformity of the goods depends on the actual properties of the delivered goods.

The central thesis of this article is an assertion that identical terms of the contract and facts can lead to different results under Polish law, English law, the CISG. The main objective of this article is to highlight the importance of specifying accurately the purpose for which the goods are being bought, including the grade of quality or a suitable standard. The second objective of this article is to compare the rules on conformity to show how they tackle the issue of allocating the risk of inaccurate terms on conformity.

This article was written by applying the functional comparative analyses to the rules on conformity under English law, the CISG and Polish law. The article will start with an overview of English sales law, which has long served as the *de facto* international sales law for sales transactions. It then scrutinizes the rules on conformity under the Convention on Contracts for International Sales of Goods (CISG). Finally, it compares all the relevant rules with Polish law.

## The Importance of Expressing a Particular Purpose for the Goods under English Law

### The Express and Implied Terms under English Law

The basic principle under English law is that the goods must conform with express terms under the contract, and if applicable, with implied statutory terms and implied terms annexed by trade usage. The terms may be also implied by facts.<sup>4</sup> The express terms of the contract are classified as: the conditions, the warranties,

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<sup>4</sup> E. Peel, *Treitel on the Law of Contract*, Sweet & Maxwell 2015, pp. 222–229.

and the intermediate terms for the purpose of the remedial system.<sup>5</sup> The express terms on description, quality and fitness of the goods are more common in complex goods and in high value sales.<sup>6</sup> The most recent approach of the English courts concerning express terms on conformity is that they should be treated as absolute requirement.<sup>7</sup>

The seller is bound by the implied terms to deliver goods in correspondence with description (Section 13 SGA 1979), fit for a purpose, and if he or she sells in 'the course of business', the goods must be of satisfactory quality (Section 14 SGA 1979). The three primary implied terms laid down in Sections 13, 14(2) and 14(3) and their combined force offers to a buyer a substantial degree of protection against the risk of the goods proving to be defective or unfit for the purpose.<sup>8</sup> The implied terms under the Sales of Good Act 1979 have been classified as conditions and warranties.<sup>9</sup> The terms as to quality and fitness are all conditions in English law. The requirement of compliance with descriptive words is not a condition, but a warranty or innominate term. However, dividing line between description and statements on quality cannot always easily be drawn.<sup>10</sup>

### Implied terms that the goods must correspond with their description

Under the Sale of Goods Act 1979, the sale of goods falls into two categories: (1) sales by description and (2) sale by sample and model. Such a classification of the sales contract was introduced by the Sale of Goods Act in 1893.<sup>11</sup> The sales by description can be defined as 'all cases of sale where the buyer has not seen the goods, but is relying on the description alone.'<sup>12</sup> The implied term of correspondence with description under Section 13 SGA 1979, requires a seller to deliver the goods in conformity with the description in terms of form and identity, but not as a sum of every descriptive attribute. The description identifies not the article which, in fact, is selected by the parties but the essential characteristics which the article must possess if the seller is to fulfil his or her fundamental obligation.<sup>13</sup>

For the buyer to be able to bring an action for a breach of Section 13, all important aspects of the goods must be identified by the words of the contract and the

<sup>5</sup> Hong Kong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha [1962] 2QB 26.

<sup>6</sup> Ch. Twigg-Flesner, R. Canavan, *Atiyah and Adams' Sale of Goods*, Pearson 2021, p. 116.

<sup>7</sup> Hazelwood Grocery Ltd v Lion Foods Ltd [2007] EWHC 1887 (QB).

<sup>8</sup> Ch. Twigg-Flesner, R. Canavan, op. cit., pp. 114–115.

<sup>9</sup> R. Goode, E. McKendrick, *Goode and McKendrick on Commercial Law*, Penguin 2017, p. 307.

<sup>10</sup> M. Bridge (ed.), *Benjamin's Sales of Goods*, Sweet & Maxwell, 2017, pp. 537–542.

<sup>11</sup> R. Goode, *Commercial Law*, Penguin Books 1996, p. 293.

<sup>12</sup> Varley v Whipp [1900] 1QP 513, 516.

<sup>13</sup> R. Goode, E. McKendrick, op. cit., p. 321.

buyer must prove reliance on description.<sup>14</sup> For a description as an implied term to offer greater protection to the buyer, it must be a detailed one.<sup>15</sup> However, Section 13 of the SGA 1979 does not provide much help as to the content of description.<sup>16</sup> Therefore, the courts usually arrive at whatever decision seems appropriate in the given circumstances.<sup>17</sup> Whenever the buyer has a chance to examine the goods before the purchase, the application of Section 13 SGA 1979 is likely to be excluded. Because the law assumes that the buyer accepts the goods despite a wrong description. In such circumstances, the seller is unlikely to be liable for breach of Section 13 the SGA 1979.<sup>18</sup>

In sale by sample, the bulk must correspond with a sample and must be free from any defect which would not be apparent on reasonable inspection of the sample.<sup>19</sup> Thus, the use of a sample does not protect the seller from liability for hidden defects.<sup>20</sup>

### The scope of the protection offered by the implied term of satisfactory quality

The definition of satisfactory quality is provided by Section 14(2B) SGA 1979, which states that:

*For the purpose of this Act, the quality of the goods includes their state and condition, and the following (among other things) are in appropriate cases are aspects of the quality of the goods:*

- (a) fitness for all purposes for which goods of the kind in question are commonly supplied,*
- (b) appearance and finish,*
- (c) freedom from minor defects,*
- (d) safety, and*
- (e) durability.*

The implied term of satisfactory quality serves as an assurance of the inherent quality of the goods and does not depend on whether the buyer had relied on the seller's skills and judgment. The price of the goods may be relevant in deciding if the goods are of satisfactory quality in the given case. A satisfactory quality is a default rule, therefore if a particular grade of quality has been specified, the seller must comply. For the goods to be considered to be of satisfactory quality, they must also

<sup>14</sup> M. Bridge (ed.), *Benjamin's Sales of Goods...*, pp. 542–543.

<sup>15</sup> Ch. Twigg-Flesner, R. Canavan, *Atiyah and Adams'...*, p. 180.

<sup>16</sup> H. MacQueen Ch. Twigg-Flesner, R. Canavan, *Atiyah and Adams' Sale of Goods*, Pearson 2016, p. 125; M. Bridge (ed.), *Benjamin's Sales of Goods...*, p. 559.

<sup>17</sup> Ch. Twigg-Flesner, R. Canavan, *Atiyah and Adams'...*, p. 123.

<sup>18</sup> See *Harlington and Leinster Ltd v Christopher Hull Fine Art Ltd* [1991]1QB 564.

<sup>19</sup> Section 15(1) and (2) SGA 1979.

<sup>20</sup> See Section 14(2C) SGA 1979.

be in compliance with technological standards such as: HDML, USB, SD for data transmission and storage.<sup>21</sup> In addition, for the goods to be considered to be of satisfactory quality they must meet the standard that a reasonable person would consider satisfactory; taking account of the description of the goods, the price (if relevant) and all other relevant circumstances.<sup>22</sup>

It is important to note that the implied term of satisfactory quality offers protection to the buyer who orders the goods from the seller who sells 'in the course of business'. Thus, it does not protect the buyer who buys from private sellers, such a buyer would be protected by Section 13 SGA 1979, which requires the seller to deliver goods in conformity with the description.<sup>23</sup> Also, if the buyer wants to get goods of a higher-than-average quality, or goods that must be fit for a particular purpose, the buyer must make the seller known about that fact. Section 14(2) SGA 1979 extends to the packaging or containers, in which the goods were sold, even if the containers were still the property of the seller.<sup>24</sup>

The seller might be excused for the lack of satisfactory quality if the unsatisfactory features of the goods were drawn to the buyer's attention or if the buyer examines the goods before the contract is made and such examination should reveal the defects. Also, if the goods are to be made to the buyer's design and specifications, the seller's liability is limited to using all reasonable skill and care in selecting materials and making the goods. The legal reasoning behind such a rule is that in circumstances when the buyer gets precisely what he asked for under the contract, it would be difficult for him to complain that the goods are of 'unsatisfactory quality'. The seller's liability for lack of satisfactory quality in such a case would be *excluded* by 'implication' under Section 14(2) SGA 1979.<sup>25</sup>

### Fitness for a particular purpose

Section 14(3) SGA 1979, which deals with the implied term of a fitness for a particular purpose, states:

*where the seller sells goods in the course of business and the buyer, expressly or by implication, makes known to the seller [...] any particular purpose for which the goods are being bought, there is an implied term that the goods supplied under the contract are reasonably fit for that purpose, whether or not such goods are commonly supplied, except where the circumstances show that the buyer does not rely, or that it was unreasonable for him to rely on the skills on the seller [...].*

<sup>21</sup> *Lowe v Machell Joiner* [2011] EWCA Civ 794.

<sup>22</sup> Section 14(2A) SGA 1979.

<sup>23</sup> *Stevenson v Roger* [1999] QB 1028.

<sup>24</sup> *Gedding v Marsh* [1920] 1KB.

<sup>25</sup> See Ch. Twigg-Flesner, R. Canavan, Atiyah and Adams'..., p. 122.

Section 14(3) SGA 1979 applies in circumstances when the buyer informed the seller about a particular purpose, or when the circumstances of the case clearly imply a particular purpose. In application of section 14(3) SGA 1979 two principal issues must be taken into consideration: (1) the seller's knowledge of the particular purpose and (2) the buyer's reliance on seller's judgment and skills. The onus of proof is on the buyer, to prove that on the balance of probabilities the seller's product is not fit for its purpose.<sup>26</sup> However, if the seller can prove that it would be unreasonable to rely on his judgment or skills then the risk of non-conformity for a particular purpose is entirely on the buyer.

How the courts apply the rule on reliance is well explained in the case *Grant v Australian Knitting Mills Ltd*. Lord Wright pinpointed the essence of this rule in the following statement:

*The reliance will seldom be expressed: it will usually arise by implication from the circumstances: thus, to take a case like that in question, of a purchase from a retailer the reliance will be in general inferred from the fact that a buyer goes to the shop in the confidence that the tradesman has selected his stock with skill and judgment.*<sup>27</sup>

Reliance might also be the result of a trade custom or established practice. For instance, in a case which involved the supply of coal for a ship, the wrong type of coal was delivered by the coal merchant.<sup>28</sup> The court had pointed out that merchants knew well enough that ships differ in their types and requirements. Thus, they used to require different types of coal. Additionally, if a merchant undertook to supply the coal for a particular ship, he or she was under a continuous obligation to supply the right type of coal. In that case, the courts have shown, a readiness to look at the facts of the case pragmatically. Although reliance is a matter of fact, the very question whether reliance was unreasonable involves an element of evaluation.<sup>29</sup> For instance, if both the buyer and the seller are members of the same commodity market, it does not of itself demonstrate that the buyer did not rely on the seller's skills and judgement.<sup>30</sup> However, if the seller is more experienced in a given trade than the buyer this fact could imply that the buyer relied on the seller's judgment. The seller who sells for export from the UK, is not expected to know the applicable standards in the buyer's country.<sup>31</sup> For the seller to be liable, the contract must stipulate that the goods are to be fit for export to the given country.

<sup>26</sup> See *Leicester Circus Ltd v Coates Brothers plc* [2003] EWCA Civ 290, 333.

<sup>27</sup> [1936] AC 85, 99.

<sup>28</sup> *Manchester Liners Ltd v Rea* [1922] AC 74.

<sup>29</sup> See *Jewson Ltd v Boyhan* [2003] EWCA Civ 809.

<sup>30</sup> *Kendall v Lillico* [1969] 2 AC 31, 124.

<sup>31</sup> Ch. Twigg-Flesner, R. Canavan, *Atiyah and Adams'...*, p. 45.

### Fitness for all the purposes for which the goods of the kind are commonly bought

Under the implied term of *fitness for all purposes* under Section 14(2) SGA 1979, the seller assures that the goods purchased under the contract will be suitable for *all the purposes* for which the goods of the kind are commonly bought. However, the rule might cause a problem in circumstances when the goods are fit for some purposes, but unfit for others. According to the Law Commission Report, the obligation of the seller under Section 14(2) SGA is to inform the buyer about any unsuitability for one of the common purposes. The word *common* is difficult to apply because everything depends on the standard of comparison. For instance, *in vintage* or *for parts* car markets, the sale of the old, not roadworthy cars is considered to be a common use. Therefore, if the cars are impliedly sold for parts, they are deemed to be fit for that purpose and to be of satisfactory quality. The Law Commission took the view that the goods should always be fit for all their common purposes, but if they are not, the buyer should fall back on Section 14(3) SGA, provided that he or she expressly or impliedly let the seller know about the purpose for which the goods were being bought.<sup>32</sup> In one case, a plaintiff bought a 'hot water bottle' for his wife and after only few uses, the bottle burst and the hot water scalded her. The question arose during the case whether a particular purpose was within the ordinary use of the item? The court held that the hot water bottle was for hot water as the description implied, thus being suitable for that purpose was a crucial condition within the ordinary use.<sup>33</sup>

The issue of specifying a particular purpose arose in *Ashington Piggeries* case. The subject matter of the dispute was the purchase of *herring meal* for farmed animals. The feed turned out to be contaminated, but particularly toxic to minks. As a result, the buyer endured a big financial loss. The buyer, however, did not inform the seller about the particular purpose. But the very fact that the contaminants were also harmful to other animals meant that the herring meal was held not fit for all purposes, neither fit for common uses nor a particular purpose.<sup>34</sup> However, had the feed been fit for the general use, the buyer would have been obliged to accept it. A different judgment was reached in *Griffiths v Peter Conway Ltd*. The case involves a purchase of a coat. A husband bought a coat for his wife, but he failed to inform the seller that the wife had a rare skin condition. After having worn the coat, she developed dermatitis (an inflammation of the skin). The seller argued that he was unaware of the predicament. The court pointed out that

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<sup>32</sup> *Ibidem*, p. 169.

<sup>33</sup> *Priest v Last* [1903] 2K 148.

<sup>34</sup> *Ashington Piggeries* [1922] 2 AC 74.



the plaintiff had an unusual sensitive skin, which was the real source of the health problems having resulted from wearing the coat.

### Safety, durability, and hidden defects

For goods to be considered of satisfactory quality they must be safe, durable and without minor defect. This default standard also applies to goods fit for a particular purpose. Some minor hidden defects can be dangerous just because they are hidden. In such circumstances, the goods could be deemed unsafe. For instance, failure to give a standard warning would amount to negligence on the part of pharmacist.<sup>35</sup> However, the fact that an electric heater lacked an additional safety mechanism, did not make it unsafe and thus unsatisfactory.<sup>36</sup> However, a hidden defect in the form of a sealed ventilator in an animal-food hopper, was considered to be unfit for the purpose.<sup>37</sup> In similar cases, the courts apply a reasonable person test under Section 14(2A) SGA 1979. The question asked is: Would a reasonable person with full knowledge of the facts have bought those goods? The result of the dispute would depend on the individual facts of the case.<sup>38</sup>

As for durability, the general rule has been that the goods must remain of satisfactory quality for a reasonable time.<sup>39</sup> What is a reasonable time is a matter of fact and depends on the nature of the goods, the circumstances of the case and the price paid. And if the goods break down within a brief period of time from the delivery, this implies that they were defective at the time of sale.<sup>40</sup>

### Mistake as to Particular Purpose

The problem of a mistake is not dealt with under the Sale of Good Act 1979, but under general contract law, and it is an issue of validity rather than conformity.<sup>41</sup> For the contract to be held void due to a mistake as to a particular purpose, a knowledge of the mistake on the part of the seller is necessary.<sup>42</sup> The buyer may decide to void a contract due to a mistake in order to evade the normal limitation periods or a bad bargain.<sup>43</sup>

<sup>35</sup> John Richardson Computers v Flanders and Chemtech [1994] FSR 144.

<sup>36</sup> Medivance Instruments Ltd v Gaslane Pipework Services Ltd [2002] EWCA Civ 854.

<sup>37</sup> Parsons (Livestock) Ltd v Uttley, Ingham & Co [1978] QB 791.

<sup>38</sup> Eagen v Motor Services Ltd [2007] EWCA Civ 1002.

<sup>39</sup> See Mash and Murrell v Joseph I Emanuel [1962]1 All ER 77.

<sup>40</sup> Crowther v Shanon Motor Co [1975] 1WLR 30, 33.

<sup>41</sup> Raffles v Wichelhaus [1864] 2H & C 906.

<sup>42</sup> Smith v Hughes [1971] LR 6QB 597, 607.

<sup>43</sup> See Section 32 of Limitation Act 1980. And in Peco Art Inc v Hazlitt Galleries [1983] 3ALL ER 193.

The traditional case on a mistake is *Smith v Hughes*, where the buyer agreed to buy a specified quantity of oats, after having seen a sample. The buyer thought that he would get old oats, but instead he got the new ones. However, it was held that a contract between Mr Smith and Mr Hughes was not void. The court applied an objective test which revealed that a reasonable person would expect the sale of decent quality oats in a similar contract. And since there was no express discussion of old oats, the sample gave the buyer an opportunity to inspect the oats, and the sample consisted of new oats. This was an example of a *caveat emptor* case (buyer beware). At present, the approach of the courts would be different to such cases. The court would have asked if the seller was contracted to deliver old oats or a specific parcel of oats in question, old or not.<sup>44</sup> However, it is believed that a mutual mistake as to quality would make the contract void, however, there is no modern case to demonstrate such a rule.<sup>45</sup>

In extreme circumstances, the courts may also offer protection to a seller by invoking mistake doctrine. For instance, when the *excess fitness* of the goods in relation to the paid price would be make it excessively unjust to hold the seller to the bargain.<sup>46</sup>

### Buyer's Remedy for Lack of Conformity

The buyer's main remedy for a breach of express or implied term of fitness for a particular purpose is a rejection right. The right to reject the goods does not mean that the contract will come to an end. Because the seller, if time allows, may tender a conforming good. The remedy of repudiation is only available to a buyer, if the breach goes to the root of the contract.<sup>47</sup> The rejection right must be exercised in a brief period of time, otherwise it might be lost; even though the seller may be guilty of a breach of condition. The rejection right might also be lost by acceptance, affirmation, waiver, and estoppel.<sup>48</sup> Thus, if the buyer acts in a way inconsistent with rejection, he or she may lose the right to reject. However, the buyer may still have a rejection right for hidden defects when they become known long after delivery. But if it turns out that he or she had no right to do so, he or she would be in breach

<sup>44</sup> Ch. Twigg-Flesner, R. Canavan, *Atiyah and Adams'....*, pp. 183–185.

<sup>45</sup> *Ibidem*.

<sup>46</sup> *Sherwood v Walker* 33 NW919 (1887).

<sup>47</sup> See *Kwei Tek Chao v British Traders & Shipping* [1966] CIJ. And *Johnson v Agnew* [1980] AC 367.

<sup>48</sup> *Vargas Pena Apezteguia y Cia Saic v Peter Cremer GmbH* [1987] 1Lloyd's Rep 394.

of the contract himself.<sup>49</sup> The seller would have an action for damages for non-acceptance.<sup>50</sup>

## Non-conformity under the CISG

### The Uniform Notion of Non-conformity under the CISG

The main provision which deals with the issue of non-conformity of goods is Article 35 CISG. It sets out the rules on how to measure conformity of the goods delivered under the contract. It is based on a uniform concept of *lack of conformity* which functionally corresponds to the concept of *physical defect* under Polish law and *breach of condition or warranty* under English law.<sup>51</sup>

*Article 35 CISG goes as follows:*

- (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 any particular purpose expressly or impliedly 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;*

<sup>49</sup> Section 50 of the SGA 1979 provides: '(1) Where the buyer wrongfully neglects or refuses to accept and pay for the goods, the seller may maintain an action against him for damages for nonacceptance. (2) The measure of damages is the estimated loss directly and naturally resulting, in the ordinary course of events, from the buyer's breach of contract. (3) Where there is an available market for the goods in question the measure of damages is prima facie to be ascertained by the difference between the contract price and the market or current price at the time when the goods ought to have been accepted or (if no time was fixed for acceptance) at the time of the refusal to accept.'

<sup>50</sup> Section 37 of the SGA 1979 provides: '(1) When the seller is ready and willing to deliver the goods, and requests the buyer to take delivery, and the buyer does not within a reasonable time after such request take delivery of the goods, he is liable to the seller for any loss occasioned by his neglect or refusal to take delivery, and also for a reasonable charge or the care and custody of the goods. (2) Nothing in this section affects the rights of the seller where the neglect or refusal of the buyer to take delivery amounts to a repudiation of the contract.'

<sup>51</sup> See I. Schwenzer, Ch. Foutoulkakis, M. Dimsey, *International Sales Law, A Guide to the CISG*, Oxford 2019, pp. 271–274.

- (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 subparagraphs (a) to (d) of the preceding paragraph for any lack of conformity of the goods if at the time of the conclusion of the contract the buyer knew or could not have been unaware of such lack of conformity.

Under the CISG any failings in terms of identity of the goods, quantity, fitness for purpose or packaging has been treated as one general category of breach of conformity.<sup>52</sup> The rule on conformity does not make a distinction between *peius* and *aliud*, however, there is a dividing line between ordinary purpose and a particular purpose, which can be found in Article 35(2)(a) and Article 35(2)(b) CISG.

### Fitness for any particular purpose

Article 35(2)(b) CISG requires the seller to deliver goods suitable for ‘any particular purpose’, expressly or impliedly known to him at the time of the conclusion of the contract. For the goods to be considered fit for a particular purpose, they must also be in compliance with the standards implied by the facts of the case.<sup>53</sup> The Sales of Good Act 1979 has a comparable provision – section 14(3)(a) SGA, which make the obligation conditional on the seller’s knowledge acquired either *expressly or by implication*. These two rules do not cause difficulty in application, except for circumstances when the seller’s knowledge as to the particular purpose is implied by the facts of the case. The buyer would have to provide evidence that, for instance, he or she mentioned about the purpose at the time of the negotiations.<sup>54</sup> For instance, in one case which involved the purchase of meat, the contract asked for a certificate of fitness for consumption. At that time, the EU issued an ordinance requiring the certificate of fitness for consumption which would confirm that the goods were dioxin-free. Despite the contractual obligation for a such a certificate, the seller has failed to produce one. Consequently, the authority destroyed the goods, and the question arose: Who should assume the loss? The court held that the goods, except for the last delivery for which the seller had already obtained the certificate of

<sup>52</sup> See the overview of the notion of conformity under various legal systems in R. Goode, *Goode and McKendrick on Commercial Law*, Penguin Books 1995, p. 293.

<sup>53</sup> For instance, the majority of top 500 companies in the UK have adopted some kind of code of conduct available at [www.ilo.org/global/standards/introduction-to-international-labour-standards/international-labourstandards-use/lang-en/index.htm](http://www.ilo.org/global/standards/introduction-to-international-labour-standards/international-labourstandards-use/lang-en/index.htm) (access: 20.03.2022).

<sup>54</sup> See Article 8(3) CISG, under this article the oral evidence is permitted, in fact the courts are allowed to give due consideration to all the relevant circumstances of the case including the negotiations. The rule under Article 35(2)(b) is similar to the one of Section 14(3)(a) SGA 1979. See Discussion in *Schmitz-Werke GmbH & Co, Plaintiff-Appellants v Rockland Industries, Inc, Rockland International FSC, Inc, Defendants – Appellants*, US Ct App (4th Cir), 21 June 2002, CISG-online 625.

fitness were unfit for the purpose for which goods of the same description would ordinarily be used.<sup>55</sup> Thus, the buyer was under no obligation to pay for the meat, except for the last delivery for which the seller had produced the certificate of fitness for consumption. Although the above-mentioned case was decided on Article 35(2)(a) CISG, the same result would have been reached under Article 35(2)(b), provided that the specific purpose would have involved human consumption. In international wholesaler trade, the important part of being fit for a purpose under Article 35(2)(a) is the condition of *tradability*.<sup>56</sup>

The application of Article 35(2)(b) CISG is well-explained in a case which involved the purchase of the *inflatable triumph arches*.<sup>57</sup> The seller in this case was explicitly aware of the particular purpose, which was to provide an advertising platform, during a car race. However, the arches were unstable due to faulty design. During the preliminary race, one of the arches lost air and it 'drifted away' towards the already started training race. The race managers ordered the arches to be removed due to safety concerns. And the buyer complained about the defects to the seller. The seller offered to fix the arches, but at considerable cost. The buyer declined that offer, because at this point, he lost trust in the seller's ability to fix the problem. The buyer asserted lack of conformity and took the seller to court. The court held that the purpose for which the goods were ordered was perfectly known to the buyer. On the facts of the case, the court found that the buyer failed to deliver goods fit for the purpose explicitly expressed by the seller. Therefore, the seller was liable under to Article 35(2)(b) CISG.<sup>58</sup> A similar result was achieved in a case which concerned a large number of *rotating video screens*, all of which were to be used as advertisement devices in various car showrooms.<sup>59</sup> The goods were held to be unfit for the purpose expressed by the buyer, due to the fact that the seller used cheap motors for the devices. The price of the goods and the high costs of delivery implied that the operational life of rotating devices should not be shorter than three years on average, while the devices lasted no more than two years.<sup>60</sup>

<sup>55</sup> Bundesgerichtshof (Germany), 2 March 2005, CISG-online 999.

<sup>56</sup> See Król, L. Mistelis, P. Viscallias, *UN Convention on the Contract for the International Sales of Goods (CISG): A Commentary*, München 2018, p. 559. Compare UNCITRAL Digest of Case Law on the United Nations Convention on Contracts for the International Sale of Goods, Digest of Article 35 case law, New York 2012, p. 144. <https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/cisg-digest-2012-e.pdf>.

<sup>57</sup> See Handelsgericht Aargau (Switzerland), 5 November 2002, CISG-on-line 715.

<sup>58</sup> Article 36 CISG deals with the time when a lack of conformity must have existed for the seller to be held responsible. Functionally Article 36 CISG corresponds to Section 14(2)(d) and (e) under SGA 1979.

<sup>59</sup> Handelsgericht Aargau (Switzerland), 5 November 2002, CISG-online 715.

<sup>60</sup> Landgericht München (Germany), 2 February 2002, CISG-online 654.

The seller's liability can be excluded for lack of conformity if the condition of Article 35(3) CISG is met: 'the buyer at the time of the conclusion of the contract knew or could not have been unaware of such lack of conformity.'<sup>61</sup> For instance, in a case which involved the sale of a second-hand 'textile machine', the buyer's claim was dismissed on the ground that the buyer should have not expected the old machine, which he had a chance to inspect, to be in the condition of a new one. Also, the fact that the contract had a limitation of liability clause, which stated that 'the goods for sale are taken over by the buyer in the present conditions, any guarantee and right to remedy are waived, meant that the buyer was buying as *caveat emptor*.<sup>62</sup> In other words, it was not reasonable for the buyer to rely on the seller's opinion because he had enough experience to assess conformity of the goods by himself.

### Fitness for any general purpose under Article 35(2)(a) CISG

If a buyer does not expressly or impliedly make the seller aware of a particular purpose for which the goods are to be purchased, the default general purpose applies. According to this rule under Article 35(2)(a) CISG, a seller is obliged to deliver goods 'fit for any purposes for which goods of the same description would ordinarily be used.' The crucial word within the Article 35(2)(a) is *any*, which implies that the CISG does not expect the seller to deliver goods fit for all the general purposes but at least one of the general purposes. And the goods do not need to be fit for all theoretically imaginable uses. They must be fit for the purposes within the material and technical specifications and the market expectation for the given description.<sup>63</sup> For instance, food stuff for human consumption must be at least not harmful to health.<sup>64</sup> The quality of ceramic for baking dishes must be such as to resist heat, the quality of perishable foods must have a certain shelf life in accordance with certain relevant usage.<sup>65</sup> However, if the buyer wants the goods to be 'organic', he or she must expressly or impliedly inform the seller about it.<sup>66</sup> When it comes to appearance, finish, safety, durability, all these matters, if undecided by the buyer, would be within the sphere of influence of the seller,<sup>67</sup> who bears the risk for the wrong choice of components, design, or packaging etc. In *Rijn Blend* – a case which

<sup>61</sup> Article 35(3) CISG.

<sup>62</sup> Bundesgericht (Switzerland), 22 December 2000, CISG-online 628. Compare with the English law approach expressed in the Law Commissions' Report, First Report on Exemption Clauses in Contracts (1969) Law Com No. 24.

<sup>63</sup> See Bundesgerichtshof (Germany) 26 September 2012, CISG-online 2348.s

<sup>64</sup> See UNICITRAL Digest of case law on Article 35 CISG..., pp. 144–145.

<sup>65</sup> I. Schwenzer, [in:] *Schlechtriem & Schwenzer: Commentary...*, pp. 601–602.

<sup>66</sup> See Organic Barley Beer Case, Oberlandesgericht München (Germany), 13 November 2002, CISG-online 786.

<sup>67</sup> *Ibidem*.

involved several crude oil deliveries, the issue arose as to whether the buyer was obliged to accept a higher-than-expected level of mercury in the oil in some deliveries. The court held that the contractual description 'mix of condensate, or cure oil' and 'Rijn Blend' were not the term on quality. Therefore, the court applied a test of *reasonable quality* as a default rule on quality. The arbitral tribunal asked the question whether the increased level of mercury would have made the goods of reasonable quality. However, that seller failed to prove that the goods were of reasonable quality. Therefore, he was held to be in breach of Article 35(2)(a) CISG. According to court's reasoning, the buyer was entitled to constant quality of condensate of oil under the contract, because of the higher price and long-term nature of the sale relationship.<sup>68</sup>

Since it is not always easy to know with which standards and industry codes of practice the seller should comply with under Article 35(2)(a), the CISG Advisory Council has offered some guidance as to what facts should be taken into consideration before deciding, if a standard is applicable. In general, the following event should be taken into account: '(a) the parties' statements and conduct before and after the conclusion of the contract; (b) whether the buyer has drawn the seller's attention to the standard; (c) any prior dealings between the parties; (e) the extent of the buyer's involvement in designing the goods and advising the seller as to the manufacturing or production process.'<sup>69</sup> The tests applied by the courts or arbitral tribunals under Article 35(2)(a) are very fact-sensitive and need to be evaluated with a knowledge of the background of the contractual transaction, and determined on a case-by-case basis.<sup>70</sup>

### The Mistake About Quality or Fitness for a Particular Purpose

The goods may not be fit for a particular purpose due to a mutual mistake of the parties or the mistake of either party. The CISG does not have a rule on mistakes. However, if a buyer was mistaken about the quality of the goods, he bought then Articles 35 and 38–44 of CISG pre-empts domestic law on mistake.<sup>71</sup> This matter is

<sup>68</sup> Netherlands Arbitral Institute, Case No. 2319, 15 October 2002, CISG-online 740.

<sup>69</sup> CISG-AC Opinion No. 19, Standards and Conformity of the Goods under Article 35 CISG, Rapporteur: Prof. D. Saidov, King's College London, United Kingdom. Adopted by the CISG Advisory Council following its 25th meeting, in Aalborg Denmark, on 25 November 2018, pp. 5–6.

<sup>70</sup> Ibidem.

<sup>71</sup> I. Schwenzer, P. Hachem, Ch. Kee, *Global Sales and Contract Law*, Oxford University Press 2012, paras 10.5–10.16. V. Hirsiger-Meier, L. Innerebner, Switzerland, New Landmark Decision on the Applicability of the CISG and Its Interaction with Swiss Law in Case of Fundamental Errors. *Global Litigation News*, 4 December 2019, <https://globallitigationnews.bakermckenzie.com/2019/12/04> (access: 15.03.2022). The

treated as an internal gap of the Convention and it should be resolved by reference to the general principles on which the Convention is based.<sup>72</sup> This issue is resolved by referring to the principle of reasonableness and the principle of avoiding economic waste. The arbitral tribunals may resolve to external sources like, for instance, the PECL, as an interpretative source.<sup>73</sup> In either case, only a mistake caused by the seller and a serious one, would allow for avoidance. The issue of a possibility of resale would be relevant. However, the seller would have to compensate all the losses to the buyer.

### Buyer's Remedy for Lack of Conformity

When the goods do not conform to the contract, the buyer may be entitled to the remedy of (1) price reduction, (2) repair of the goods, (3) a substitute delivery (4), and finally, he or she might have a right to avoid the contract.<sup>74</sup> The CISG imposes very stringent conditions for the availability of a termination right, including cases of non-conformity of the goods for a particular purpose. For instance, a breach of Section 14(3) SGA 1979 would usually entitle a buyer to a rejection right.<sup>75</sup> Under the CISG, the buyer can only avoid a contract if lack of conformity of the goods amounts to a fundamental breach. In circumstance when, a buyer is in a re-sell business and can re-sell goods without much effort, a fundamental breach would not usually be assumed.<sup>76</sup> The reason for such approach is that the drafters of the Convention wanted to avoid the economic waste associated with the cost of transportation and storage in circumstances when the goods could be sold at a reduced price.<sup>77</sup> The buyer, however, can claim damages for the breach of contract.<sup>78</sup>

If the contract itself does not make clear what amounts to a fundamental breach, one of the central questions is: For what purpose are the goods bought? The decisive factor is whether the buyer is able to make use of the goods or to process them

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question is whether, and to what extent, the Convention 'expressly provides otherwise'; thereby preventing domestic rules on mistake from being applied.

<sup>72</sup> See Article 7(2) CISG.

<sup>73</sup> See Article 7(2) CISG and Article 4:103 PECL, which applies both to mistakes regarding the fact or the law, avoidance is only allowed when the mistake was caused by the other party or was known or ought to be known to him. The test under the PECL is as to whether a mistake is serious.

<sup>74</sup> See Article 46 and Article 50 CISG.

<sup>75</sup> See Section 15(A) SGA 1979.

<sup>76</sup> Supreme Court of Poland, 11 May 2007, CISG-online, 1790.

<sup>77</sup> CISG Advisory Council Opinion No. 19 Standards and Conformity of the Goods under Article 35 CISG. Firstly, the terms of the contract are to be given regard, but whether or not a contractual agreement is of the essence is a matter of interpretation under Article 8 CISG.

<sup>78</sup> For the calculation of damages and the type of factors considered see Opie E., [in:] Felemegas J. (ed.), *An International Approach to the Interpretation of the United Nation Convention on Contracts for the International Sale of Goods (1980) as Uniform Sale Law*, Cambridge 2007, pp. 228–230.



differently without unreasonable expenditure? The fact that the buyer himself or herself is in the resale business becomes relevant, as it would be easier for him or her to sell the goods. If he or she did not buy them with a purpose to resell them, then a relevant question is whether the goods could be resold even at a discount price. By contrast, the fact that the defect of the goods does not hinder their ability to be resold does not exclude a termination right. The question then is whether resale can reasonably be expected from the individual buyer in the normal course of business. Thus, a wholesaler with broader access to markets in the business concerned has more opportunities to resell the goods than a retailer. A retailer cannot always be expected to resell the goods at a discount price as this could in some cases damage his own reputation. In all these cases, regard should be had for the possibilities of the seller himself to dispose of the goods. A fundamental breach has been assumed in cases where very precise measurements or quality requirements for the goods were provided for in the contract. In other cases, a fundamental breach was also found when the goods did not comply with national health regulations, because the seller was notified in which country the buyer intended to resell the goods.<sup>79</sup>

## Overview of Polish Law on Conformity of Goods

### Notion of Non-conformity under Polish Law

Non-conformity of the goods, under Polish sale law, is called a physical defect (*wada fizyczna*). The notion of a physical defect is defined in Article 556<sup>1</sup> kc which sets out rules on conformity.<sup>80</sup> Article 556<sup>1</sup> kc applies both to transactions between commercial buyers and in consumer sales alike,<sup>81</sup> and it goes as follows:

*A physical defect is the non-conformity of the sold goods with the contract. In particular, a sold good is not in compliance with the terms of contract if it:*

- (1) *does not have the characteristics which such an item should have because of the purpose expressed in the contract or resulting from the circumstances, or a general purpose of such goods,*
- (2) *does not have the characteristics of which the seller has assured the buyer, including by presenting a sample or model,*

<sup>79</sup> Supreme Court of Poland, 11 May 2007, CISG-online 1790. The non-conformity of goods is a breach of contract, however, mere non-conformity does not entitle to substitute goods, because only non-conformity amounting to fundamental breach entitles to substitute delivery.

<sup>80</sup> Article 556<sup>1</sup> kc.

<sup>81</sup> See Article 354 kc, Article 535 kc and an old Article 556 kc.

- (3) *is not suitable for the purpose of which the buyer informed the seller at the conclusion of the contract and the seller has not objected to such a purpose,*
  - 4) *has been delivered to the buyer in an incomplete state.*
2. [...]
3. *The sold good also has a physical defect if it was incorrectly installed by the seller, or a third party for which the seller is responsible, or by the buyer who followed the instructions, received from the seller.*

In 2014, Polish law on warranty (*rękojmia*) was redrafted to implement the EU Directive 2011/83/EU on consumer protection. As a result, the old Article 556 kc was replaced by Article 556<sup>1</sup> kc and Article 556<sup>3</sup> kc.<sup>82</sup> The changes, however, do not appear to be profound. The new rules on conformity of goods are still based on an old civil-law principle called *equivalence of benefits* (*ekwiwalentność świadczeń*); which means that the buyer is entitled to receive the goods corresponding to contractual terms and also matching the contractual price. The very fact that Polish courts refer to old cases in the process of interpretation of the new Article 556<sup>1</sup> kc, fully supports such an opinion.<sup>83</sup> The old Article 556 kc had defined a physical defect as ‘a depreciation in value or functionality of the item, given the purpose of the contract [...]’.<sup>84</sup>

### Fitness for an express purpose

The main criterion for determining whether goods have a physical defect is the functionality of the goods, measured against the contractual terms and applicable public law standards.<sup>85</sup> Firstly, the suitability or utility of the goods are measure, against a particular purpose specified by the buyer in the contract or implied by the circumstances of the case.<sup>86</sup> For instance, it is not enough for the goods to be in

<sup>82</sup> EU Directive 1999/44/EC of the European Parliament of 25.05.1999 on certain aspects of the sale of consumer goods and associated guarantees. (OJEU L 171/12).

<sup>83</sup> Compare J. Rajski, *Prawo zobowiązań – część szczegółowa. System prawa prywatnego. Tom 7*, Warszawa 2018, Legalis.

<sup>84</sup> The old Article 556(1) kc. ‘A seller is liable towards the buyer if a thing sold has a defect reducing its value or usefulness given the aim specified in the contract or arising from circumstances or from the purpose of the thing if the thing does not have the properties of which the seller has assured the buyer or if the thing was handed over to the buyer in an incomplete condition (implied warranty for physical defects). (2) The seller is liable towards the buyer if the thing sold is owned by a third party or if it is encumbered with a third party right; in the event of the sale of rights, the seller is also liable for the existence of the rights (implied warranty for legal defects).’

<sup>85</sup> For instance, Regulation (EC) No 1223/2009 defines what is understood by cosmetics, and obligatory standards are applicable to the products, in terms of manufacturing standards, quality of chemical components, composition, durability, function, animal testing, packaging, instruction.

<sup>86</sup> See G. Tracz, *Studia z prawa gospodarczego i handlowego. Księga pamiątkowa ku czci Profesora Stanisława Włodyki*, Kraków 1996, p. 475; E. Łętowska, *Prawo umów konsumenckich*, Warszawa 1999, p. 395.

compliance with only technical norms, they must also be fit for the particular purpose as specified by the buyer.<sup>87</sup> According to that rule, even high-quality goods may be considered defective, if they are not suitable for the purpose explicitly expressed by the buyer under the contract, or during exchange of information at the time of contracting. Secondly, a particular purpose might be uncovered during the process of a contract interpretation. The case law regarding interpretation rules under Article 65 kc clarifies that ‘the terms of the contract are to be construed in such way as to uncover ‘the economic goal of the contract’.<sup>88</sup> Thus, indirectly also the suitability of the goods for that purpose. A particular purpose might also be communicated by the buyer at the time of contracting, by seeking expressed assurances from the seller.<sup>89</sup> The particular purpose might be implied by the trade usage annexed to the contract.<sup>90</sup> The terms of the contract may require that the goods comply with Good Manufacturing Practices (GMP). There are many GMPs set up by the EU, for instance, the Pharmaceutical Inspection Convention and Pharmaceutical Cooperation Scheme.<sup>91</sup> Where the transaction is connected with a particular trade, the custom and usage of this trade must be considered to be part of the circumstances of the case.<sup>92</sup>

### Fitness for a general purpose (*the default rule*)

In circumstances when *a particular purpose* cannot be ascertained neither from the terms of the contract, nor from the facts of the case, the seller must deliver good suitable for a general purpose.<sup>93</sup> Often, the notion of fitness for a particular or general purpose is often interlined with the notion of quality. For the buyer to assure that he receives goods of the highest standard, he has to specify it under the contract. Otherwise, the seller is obliged to deliver goods which are reasonably suitable for a particular purpose and of an *average decent quality*.<sup>94</sup>

<sup>87</sup> This issue is for the parties to express clearly in the contract, otherwise it is a matter of interpretation.

<sup>88</sup> For more information on contract interpretation, see: SN: 10.2.2016 r., I CSK 1/15, Legalis; 7.4.2016, III CSK 249/15, Legalis. 2.6.2016, I CSK 506/15, Legalis; 7.10.2016, I CSK 748/15, Legalis; 18.11.2016, I CSK 802/15, Legalis. K. Osajda (ed.), *Kodeks cywilny, zobowiązania – część szczególna. Tom III*, Warszawa 2017, pp. 39–40.

<sup>89</sup> Compare Article Section 14(3)(b) SGA 1979 and Article 35(2)(b) CISG.

<sup>90</sup> See T. Wiśniewski, [in:] J. Gudowski (ed.), *Kodeks cywilny. Komentarz. Tom III, Zobowiązania – część ogólna*, Warszawa 2018, pp. 47–48; K. Osajda (ed.), *Kodeks cywilny, zobowiązania – część szczególna. Tom III*, Warszawa 2017, pp. 45–46.

<sup>91</sup> See The Pharmaceutical Inspection Co-operation Scheme, <https://picschm.org> (access: 15.02.2022).

<sup>92</sup> Article 354 kc. Compare Strugała R., *Wykładnia umów. Standardowe klauzule umowne*, Warszawa 2018, pp. 80–83.

<sup>93</sup> Article 556<sup>1</sup>(1) kc.

<sup>94</sup> I. Schwenzer, [in:] *Schlechtriem & Schwenzer: Commentary...*, p. 601. This rule is a rule of general contract law and it is expressed in Art 357 kc. If a debtor is obliged to provide fungibles, and the quality of the things is not indicated by relevant regulations or by the legal act and does not follow from the circumstances, the debtor should provide things of average quality. The average decent quality corresponds

The application of Article 556<sup>1</sup>(a) kc might prove difficult with regard to multi-purpose goods.<sup>95</sup> The range of common uses of the given goods are usually implied by circumstances of the case or are determined by the standard of a reasonable man. From the wording of Article 556<sup>1</sup>(1) kc it is not clear whether the goods must be suitable for one of the main purposes rather than *all* of them. The doctrine and case law do not examine that issue. It would appear that the seller's liability is limited to delivery of the goods suitable for at least a purpose, which would meet a test of a hypothetical, rational participant in the given trade or industry with average knowledge of the subject matter.<sup>96</sup> How this rule is applied in practice can be seen in the dispute *on conformity of 'galvanised copper sheets'*.<sup>97</sup> The buyer in the given case did not stipulate the purpose of the goods. The 'the galvanised copper sheets' can, however, be used for various purposes, for instance for roof making, or for shop interiors. The main problem with the conformity of the goods was that the protective copper coating of the sheets got damaged due to a traditional cutting technique, and the goods became useless from the point of view of the buyer. The buyer informed the seller about the damage. The seller agreed to reduce the price of the goods to the price of the scrap.<sup>98</sup> However, upon some consideration the seller changed his mind, and he started a court proceeding contesting the buyer's claim that the goods were defective. The Court of First Instance ordered the seller to pay the previously agreed reimbursement, but the seller appealed against this judgement. The seller argued that the contract neither specified a purpose for which the goods are to be used, nor it required any particular grade of quality. He produced certificates that the used steel was in conformity with the applicable technical standards. The Court of Appeal held that the fact that the contract was silent on the issue of quality of steel or copper was irrelevant in that case. It was held that the seller failed to deliver goods fit for a purpose. The Court of Appeal explained that certification of quality is only an assurance of the properties shown in the certificate. However, it is of no value if the goods have a defect that disqualifies their utility resulting from the normal purpose of the item.

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closely to reasonable quality under the CISG and average quality under the PECL, and satisfactory quality under the SGA.

<sup>95</sup> Compare Section 14(2B) SGA and Article 35(2)(a) CISG. The problem is that Polish rules on physical defects do not clarify whether the goods must be fit for 'all the purposes for' which goods of that kind are commonly bought or just 'any' of the purposes.

<sup>96</sup> Resolution of SN (PSIC) 30.12.1988., III CZP 48/88, OSN 1989, No. 3, item 36.

<sup>97</sup> SN 9.03.2006., ICSK 147/05, Legalis. That case is still relevant despite the changes made to Article 556 kc.

<sup>98</sup> Judgment of the Court of Appeal in Krakow from 21.10.2014. I Aca 3/14, Legalis.

### Buyer's reliance on seller's judgment and skills

Paragraph 3 of Article 556<sup>1</sup> kc deals with an issue of additional assurances offered by the seller, as a response to buyer's queries regarding suitability or utility of the goods. The general rule under Paragraph 3 is that a buyer can seek direct assurances from the seller at the time of contracting. The seller should act accordingly, by confirming or denying that the goods would be suitable for a particular purpose. Such a legal construction pre-empts a dispute as to the seller's awareness of the purpose or reasonableness of the buyer's reliance on seller's judgement and skills. Paragraph 3 of Article 556<sup>1</sup> kc does not require, like section 14(3) SGA 1979 to evaluate the seller's skills and experience versus the buyer's experience in the given trade. Thereby, the construction of Paragraph 3 limits uncertainty as to the implied knowledge of a particular purpose; its function is to discourage dishonest sellers from selling non-conforming goods to maximize profit by avoiding straightforward answers.

### Mistake as to Fitness for a Particular Purpose

The goods might be *unsuitable for a particular purpose*, in real terms due to mistake caused by a buyer or a seller. For the buyer to be able to void a contract due to a mistake, he or she would have to satisfy three conditions of Article 84 kc. Firstly, he or she would have to prove that it was the seller who caused that mistake. Secondly, that if not for a mistake, he would not have bought the goods.<sup>99</sup> Thirdly, that due to a mistake, the goods would be completely unsuitable for the particular purpose.<sup>100</sup> The question arises as to the relation of Article 560(1) kc to Article 84 kc and Article 88 kc.<sup>101</sup> Article 560(1) kc deals with the issue of remedies for non-conformity of the goods. Additionally, Article 88 kc offers a remedy for a mistake. It is generally

<sup>99</sup> Article 84(1) kc. 'In case of an error in the substance of a legal act, the legal effects of this declaration of intent may be avoided. If, however, the declaration of intent is made to another person, its legal effects may be avoided only if the mistake was caused by that person, even if it was not his fault, or if that person was aware of the mistake or could easily have noticed it; this restriction does not apply to a free-of-charge legal act. A mistake can only be relied on if it justifies the supposition that, if the person making the declaration of intent had not acted under the influence of the mistake and had judged the case reasonably, he would not have made such a declaration (material mistake).' (translated by Anna Świążkowska).

<sup>100</sup> For instance, a buyer may ask for copper wires and a seller may mistakenly recommend aluminium ones. Since both types of wires have different applications, the buyer would be entitled to terminate a contract if he or she can prove that if not for the mistake of the seller, he or she would not have bought the correct good. At the same time, he or she would have to prove that that mistake was a serious one.

<sup>101</sup> Article 88(1) kc. 'The legal effects of a declaration of intent made to another person under the influence of an error or threat are avoided by a declaration being made to that person in writing. (2) The avoidance right expires in case of an error one year after its discovery, and in the case of a threat, one year after the state of fear ceases.'

considered that it is for the buyer to make a choice whether to terminate the contract due to a mistake or a physical defect.<sup>102</sup>

### Buyer's Remedies for the Goods Unfit for a Particular Purpose

The remedies for physical defects are set out in Articles 560–561 kc. According to these rules a buyer can: (1) request substitute goods free from physical defects or (2) request to get the goods repaired, or (3) ask for a price reduction, or (4) finally, he or she can terminate the contract.<sup>103</sup> However, in circumstances when the buyer fails to specify a particular purpose, the seller's obligation is to deliver goods reasonably suitable for a normal usage, in compliance with technical norms and statutory regulations. If the goods meet the criteria of goods fit for the general purpose, then the buyer would have to accept them and pay the price.

### Conclusion

The fact that the sales laws cover such a wide range of transactions means that a single standard of general functionality cannot resolve a question of conformity of the goods with the contract. The sale laws resolve this issue by assessing conformity of the goods either against a particular purpose or a general one. A basic rule under the examined sales laws is the same, that whenever a buyer wants to buy goods for a particular purpose, he or she must specify the intended use in the contract. Thus, the sales law reaffirms the freedom of contract principle, which says that the party agreement takes primacy over the default provisions. The logic behind this rule is that the buyer is the best judge of what he or she wants. However, if the buyer does not inform the seller about a particular purpose effectively, the seller's obligation is altered to the delivery of goods fit for a general purpose. Provided that the goods are fit for such a general purpose, the buyer must accept them.

To limit the risk of delivery of goods unsuitable in legal terms or future dispute, the contractual terms on conformity should be 'watertight', which means that all terms on conformity will pass the test of a reasonable person in the given trade. Standard quality in legal terms means average, satisfactory, merchantable goods. Anything above that, in terms of more features, performance, safety and durability must be stipulated in the contract. If a buyer is very keen on getting goods perfectly

<sup>102</sup> F. Zoll, *Rękojmia. Odpowiedzialność sprzedawcy*, Warszawa 2018, p. 215.

<sup>103</sup> See Article 560(1) and (4) kc, the termination right is conditional upon the lack of effective cure on the part of seller, and subject to a condition that the psychological defect is not trivial. In some trades, the buyers would not be entitled to reject goods but instead get a discount on a price.

fit for a particular purpose, he or she must also inform the seller about that fact. Otherwise, the seller would be obliged to deliver goods reasonably fit for a particular purpose.

From the comparative point of view, the wording of the examined rules on particular purpose are remarkably similar. In practice, however, the interpretation and application of the rules vary. For instance, Section 14(3) SGA 1979 has to be interpreted autonomously because a breach of each implied term is to be assessed separately. By contrast, Article 35(2)(b) and Article 556<sup>1</sup>(1) kc are part of the broader notion of non-conformity of the goods which has been measured against all contractual terms. There is also a slight difference with regard to a general use. Under the CISG and Polish law, the ordinary use would be examined from the perspective of the buyer, and under English law, from the perspective of the seller. Thus, identical facts and terms of contract might lead to different results under the Polish law, the English law, and the CISG. The biggest difference appears to be in the area of remedies. The CISG and the Polish law focus on performance remedies, while the English law favours the termination right and a monetary remedy.

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