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# A Comparative Study on the Conformity of Goods under the UN Convention on Contracts for the International Sale of Goods (CISG) and Ukrainian Sales Law<sup>3</sup>

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## Abstract

The conformity of goods is a central concept underpinning the CISG and is based, broadly speaking, on breach of contract. However, questions arise whether the concept of conformity under the CISG has found its place in Ukrainian sales law, especially due to the lack of comparative research on this topic. This article, therefore, seeks to answer key questions and close gaps in legal research. In particular, the article highlights the differences between the CISG and the Ukrainian sales law and indicates where the latter requires improvements.

**Keywords:** conformity of goods, CISG, quality of goods, comparative study, sales contract, Ukraine.

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# Studium porównawcze zgodności towarów z umową w świetle Konwencji Narodów Zjednoczonych o umowach międzynarodowej sprzedaży towarów (CISG) oraz w myśl ukraińskich przepisów dotyczących sprzedaży<sup>4</sup>

## Streszczenie

Zgodność towarów to centralna koncepcja leżąca u podstaw CISG, opierająca się na, ogólnie rzecz biorąc, naruszeniu umowy. Pojawiają się jednak pytania – zwłaszcza z powodu braku badań porównawczych na ten temat – o to, czy koncepcja zgodności w rozumieniu CISG znalazła swoje miejsce w ukraińskich przepisach dotyczących sprzedaży. Niniejszy artykuł stara się zatem odpowiedzieć na kluczowe pytania i wypełnić luki w badaniach dotyczących prawa. Artykuł w szczególności podkreśla różnice między CISG a ukraińskimi przepisami dotyczącymi sprzedaży i wskazuje, w którym miejscu te ostatnie wymagają poprawek.

**Słowa kluczowe:** zgodność towarów z umową, CISG, jakość towarów, studium porównawcze, umowa sprzedaży, Ukraina.

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<sup>4</sup> Niniejszy artykuł jest częścią badań prowadzonych w ramach projektu "Homo consumens, Homo ecologicus - test ekologicznej efektywności nowej dyrektywy w sprawie niektórych aspektów umów sprzedaży towarów" finansowanego przez Narodowe Centrum Nauki (NCN) w Krakowie pod numerem 2019/34/A/HS5/00124.

## Introduction

Over the last centuries, the sale contract has been a central institution for the private law unification at both the international level and the supranational. It contributes not only to the effectiveness of transnational commercial markets, but it also facilitates the improvement of national sales laws. Article 35 CISG on the requirements for the conformity of goods is a core concept in uniform sales law and is the most frequently commented provision. This concept of conformity has inspired numerous reforms of national and EU sales laws. A number of provisions of the modern Ukrainian Civil Code (CC)<sup>5</sup> have also been drafted under the influence of the CISG. While the comparative analyses of the CISG and the CC allows for discovering a correlation between their respective provisions, the relevant question in this study is whether the concept of the conformity of goods established by the CISG has found its place in Ukrainian sales law.

### Historical Background of the Concept of the Conformity of Goods

The concept of the conformity of goods was based on the fundamental work by Professor Ernst Rabel, *Das Recht des Warenkaufs*, a comparative analysis of national sales laws around the 1930s. The comparative study of different legal systems in the world allowed Rabel to conclude that some national approaches regulate the seller's liability based on the Roman law's *caveat emptor* principle, with the buyer bearing the risk of detecting the non-conformity of goods. In legal systems following the *caveat venditor* principle, the seller is liable for defects in the goods regarding goods quality. Finally, some national systems had no codified system for the conformity of goods. Eventually, the concept of lack of conformity, proposed by a scientist is not an independent legal category, but only a part of contract law.<sup>6</sup>

<sup>5</sup> Tsyvilnyi kodeks Ukrainy vid, 16.01.2003.

<sup>6</sup> E. Rabel, *Das Recht des Warenkaufs*, Berlin 1968, pp. 101–104, 132; R.F. Henschel, *Conformity of Goods in International Sales Governed by CISG Article 35: Caveat Venditor, Caveat Emptor and Contract Law as Background Law and as a Competing Set of Rules*, "Nordic Journal of Commercial Law" 2004, No. 1, p. 2.

Rabel's theoretical concept was laid down in the first unified international sales law – the 1964 Hague Sales Convention.<sup>7</sup> Its Article 33 established quantitative and qualitative (general and special) defects, *aliud*, lack of the qualities of a sample or model which the seller has handed over or sent to the buyer, or lack of a description in the contract as lack of conformity. The provisions of the 1964 Hague Convention were thus defined in the same way: *peius* and *aliud*. It was also defined that no difference in quantity, lack of part of the goods or the absence of any quality or characteristic shall be taken into consideration where it is not material (Article 33(2)). Determining the requirements of the non-conformity of goods, the 1964 Hague Convention focused on the side of the physical defect of the goods, and did not regulate the legal defect.

Due to the insignificant amount of ratifying states,<sup>8</sup> the 1964 Hague Sales Convention has not become universal and did not live up to the high expectations, but its practical significance should not be underestimated.<sup>9</sup> In view of the above, the project team established by UNCITRAL continued to work on the unification sales law, using the 1964 Hague Sales Convention as a basis. Finally, in 1980, the CISG was adopted.<sup>10</sup> The CISG “exceeded all expectations” as the most successful attempt to combine a large part of the various rules of international trade law<sup>11</sup> and an effective legal instrument for harmonizing economic transactions between

<sup>7</sup> Uniform Law on the International Sale of Goods 1964. For the 1964 Hague Conference, see: E. von Caemmerer, *Die Haager Konferenz über die internationale Vereinheitlichung des Kaufrechts vom 2. bis 25. April 1964*, „Rabels Zeitschrift für ausländisches und internationales Privatrecht“ 1965, Vol. 29/1, pp. 101–142.

<sup>8</sup> P. Lansing, *The Change in American Attitude to the International Unification of Sales Law Movement and UNCITRAL*, „American Business Law Journal“ 1980, No. 18(2), p. 274; P. Winship, *International Sales Contracts under the 1980 Vienna Convention*, „Uniform Commercial Code Law Journal“ 1984, No. 17, p. 58; R.G. Lee, *The UN Convention on Contracts for the International Sale of Goods: OK for the UK?*, „Journal of Business Law“ 1993, p. 131; K.C. Sutton, *The Draft Convention on International Sale of Goods (Part I)*, „Australian Business Law Review“ 1976, No. 4, p. 269; S. Eiselen, *Adoption of the Vienna Convention for the International Sale of Goods (the CISG) in South Africa*, „South African Law Journal“ 1999, No. 116(2), pp. 334–335.

<sup>9</sup> P. Schlechtriem, U. Magnus, *Internationale Rechtsprechung zu EKG und EAG: Eine Sammlung belgischer, deutscher, italienischer, israelischer und niederländischer Entscheidungen zu den Haager Einheitlichen Kaufgesetzen*, Baden-Baden 1987, p. 34–35; P. Schlechtriem, P. Butler, *UN Law on International Sales*, Berlin; Heidelberg 2009, p. 2.

<sup>10</sup> I. Schwenger, P. Hachem, *The CISG – Successes and Pitfalls*, „American Journal of Comparative Law“ 2009, No. 57, p. 460; B. Nicholas, *The Vienna Convention on International Sales Law*, „Law Quarterly Review“ 1989, No. 105, pp. 202–203; Explanatory Note by the UNCITRAL Secretariat on the United Nations Convention on Contracts for the International Sale of Goods; J.H. Dalhuisen, *Dalhuisen on International Commercial, Financial and Trade Law*, Oxford 2007, pp. 400–401.

<sup>11</sup> U. Magnus, *The Vienna Sales Convention (CISG) between Civil and Common Law – Best of All Worlds?*, „Journal of Civil Law Studies“ 2010, No. 3, p. 71; J.M. Lookofsky, *Loose Ends and Contorts in International Sales: Problems in the Harmonization of Private Law Rules*, „American Journal of Comparative Law“ 1991, No. 39, p. 403.

different countries<sup>12</sup> (it regulates three quarters of all international economic transactions),<sup>13</sup> a compromise in approaches to the regulation of sales contract in the civil law and common law systems.<sup>14</sup> The CISG does not even attempt to resolve all issues related to the international sales contract, but instead it establishes the fundamental principles of sales contract that determine the general spirit of the Convention.<sup>15</sup>

The success of CISG is also evidenced by its current application in 95 signatory states and it has an impact on the unified<sup>16</sup> and national sales law<sup>17</sup> – from Chinese contract law to reforms in Eastern and Central European countries with transition

<sup>12</sup> G.V. da C. Cerqueira, *Defective Performance in Contracts for International Sale of Goods: A Comparative Analysis Between the Brazilian Law and the 1980 United Nations Convention on Contracts for the International Sales of Goods*, [in:] *Review of the Convention on Contracts for the International Sale of Goods (CISG) 2005–2006*, *Pace International Law Review*, München 2007, p. 54.

<sup>13</sup> U. Magnus, *op. cit.*, p. 71.

<sup>14</sup> V.M. Kossak, *Vybrani tvory: zbirnyk naukovykh prats, Khmelnytskyi* 2015, p. 160; M.H. Rozenberh, *Mezhdunarodnaia kuplia-prodazha tovarov. Kommentariy k pravovomu rehulyrovaniyu v praktike razresheniya sporov*, Moskva 2006, p. 38; B. Krupa, *Istotne naruszenie umowy w Konwencji wiedeńskiej jako przesłanka odstąpienia od umowy*, „Problemy Prawa Prywatnego Międzynarodowego” 2013, No. 12, p. 86; J. Napierała, *Odpowiedzialność odszkodowawcza sprzedawcy w świetle postanowień konwencji wiedeńskiej*, „Ruch Prawniczy, Ekonomiczny i Socjologiczny” 1993, No. LV(4), p. 77; C.M. Bianca, M.J. Bonell, *Commentary on the International Sales Law*, Milan 1987, p. 75; F. Enderlein, D. Maskow, *International Sales Law*, New York 1992, p. 88; M. Pilich, *Prawo kupującego do wstrzymania się z zapłatą ceny w razie dostarczenia towarów niezgodnych z umową na tle art. 46 ust. 2 i 3 Konwencji wiedeńskiej o międzynarodowej sprzedaży towarów*, „Problemy Prawa Prywatnego Międzynarodowego” 2009, No. 4, p. 91; M. Pohl, *Sytuacja prawna dotycząca świadczenia aliud na tle Konwencji wiedeńskiej o umowach międzynarodowej sprzedaży towarów z 1980 r.: wybrane zagadnienie*, [in:] *Prawo prywatne wobec wyzwań współczesności. Księga pamiątkowa dedykowana Profesorowi Leszkowi Ogiegłemu*, eds. M. Frasz, P. Ślęzak, Warszawa 2017, p. 375.

<sup>15</sup> R. Hyland, *Conformity of Goods to the Contract under the United Nations Sales Convention and the Uniform Commercial Code*, [in:] *Einheitliches Kaufrecht und nationale Obligationenrecht*, ed. P. Schlechtriem, Baden-Baden 1987, p. 328; A.H. Aksenov, *Rehulyrovanye dohovora mezhdunarodnoi kuply-prodazhy tovarov mezhdru sub'ektamy predprynimatelskoi deiatelnosti stran SNH v ramkakh konventsiyy OOH «O dohovorakh mezhdunarodnoi kuply-prodazhy tovarov» 1980 h.*, „Vestnyk Nyzhehorodskoho unyversyteta ym. N.Y. Lobachevskoho” 2013, No. 3(2), p. 21; F. Ferrari, *Kommentar zu den Artikeln 1–7, 10, 89–101*, [in:] *Kommentar zum Einheitlichen UN-Kaufrecht*, eds. P. Schlechtriem, I. Schwenzer, München 2008, p. 55.

<sup>16</sup> M.J. Bonell, *The CISG, European Contract Law and the Development of a World Contract Law*, „American Journal of Comparative Law” 2008, No. 56(1), p. 16; O. Lando, *CISG and Its Followers: A Proposal to Adopt Some International Principles of Contract Law*, „American Journal of Comparative Law” 2005, No. 53(2), p. 381; U.G. Schroeter, *Das einheitliche Kaufrecht der afrikanischen OHADA-Staaten im Vergleich zum UN-Kaufrecht*, „Recht in Afrika” 2001, pp. 163, 166; I. Schwenzer, P. Hachem, *op. cit.*, pp. 461–462.

<sup>17</sup> See more about the impact of the CISG on national legal systems in: *The CISG and Its Impact on National Legal Systems*, ed. F. Ferrari, Munich 2008; P. Schlechtriem, *25 Years of the CISG: An International Lingua Franca for Drafting Uniform Laws, Legal Principles, Domestic Legislation and Transnational Contracts*, [in:] *Drafting Contracts Under the CISG*, eds. H.M. Flechtner, R.A. Brand, M.S. Walter, Oxford 2008, pp. 167, 174; P. Schlechtriem, *Basic Structures and General Concepts of the CISG as Models for a Harmonisation of the Law of Obligations*, „Juridica International” 2005, No. 10, p. 27; F. Zoll, *The Impact of the Vienna Convention on the International Sale of Goods on Polish Law, With Some References to Other Central and Eastern European Countries*, „Rabels Zeitschrift für ausländisches und internationales Privatrecht” 2007, Vol. 71, Iss. 1, pp. 81–98.

economies.<sup>18</sup> The reception provisions of the CISG on the strict liability of the seller under EU consumer law was fundamental for European private law, as it marked a series of civil law reforms in EU Member States. The concept of conformity under the CISG has found its application in Directive (EU) 1999/44/EC<sup>19</sup> and in new Directive (EU) 2019/771<sup>20</sup> and Directive (EU) 2019/770.<sup>21</sup> Comparativists note that the borrowing of this institution from the CISG is the largest *novum* in EU private law.<sup>22</sup>

Comparing with its predecessor, the CISG took a slightly different approach to regulating the conformity of goods. Article 35 CISG contains requirements for non-conformity, while the 1964 Hague Sales Convention's lack of conformity was determined through the prism of the seller's default on the delivery of goods. In addition to the pre-defined requirements, new ones concern the particular purpose of goods that the buyer relies on (Article 35(2)(b)) and packaging of goods (Article 35(2)(d)). Also, for the first time, the CISG unified the legal defect of the goods at the international level (Article 41).

The conception of conformity under the CISG is based on the seller's obligation to deliver goods which are required by the sale contract. The prerequisites for enshrining this provision are universal and due to the seller's influence on the goods, and all their features. It is presumed that the seller knew more about the goods than the buyer who had paid for them and had the right to receive his or her share under the contract (*quid pro quo*). The basis of this is the *caveat venditor* principle, which formed the general trend of sales law since the end of the 19th century.<sup>23</sup> The growing number of distance sales contracts, led to the transfer of emphasis from the Roman law *caveat emptor* principle<sup>24</sup> to that of *caveat venditor*, whereby the

<sup>18</sup> R. Schulze, *The New Shape of European Contract Law*, „Journal of European Consumer and Market Law” 2015, No. 4, pp. 139–140; C. Błaszczyk, *Wpływ Konwencji Narodów Zjednoczonych o umowach międzynarodowej sprzedaży towarów na prawo Unii Europejskiej w zakresie sprzedaży konsumenckiej*, „Studia Prawnicze” 2014, No. 3, pp. 30, 34.

<sup>19</sup> Directive 1999/44/EC of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees; S. Grundmann, *Consumer Law, Commercial Law, Private Law: How Can the Sales Directive and the Sales Convention Be So Similar?* „European Business Law Review” 2003, Vol. 14(3), p. 237; S.A. Krusinga, *What Do Consumer and Commercial Sales Law Have in Common? A Comparison of EC Directive on Consumer Sales Law and the UN Convention on Contracts for the International Sale of Goods*, „European Review of Private Law” 2001, Vol. 9(2/3), p. 177; L. Bertino, *Service Contracts and EU Directive 1999/44 on Consumer Sales*, „Journal of European Consumer and Market Law” 2018, No. 5, p. 213; C. Błaszczyk, *op. cit.*, p. 34.

<sup>20</sup> Directive (EU) 2019/771 of 20 May 2019 on certain aspects concerning contracts for the sale of goods.

<sup>21</sup> Directive (EU) 2019/771 of 20 May 2019 on certain aspects concerning contracts for the supply of digital content and digital services.

<sup>22</sup> S. Troiano, *The CISG's Impact on EU Legislation*, [in:] *The CISG and Its Impact on National Legal Systems*, F. Ferrari (ed.), München 2008, p. 357.

<sup>23</sup> U. Krüger, *Modifizierte Erfolgshaftung im UN-Kaufrecht*, Frankfurt/M., Berlin, Bern, New York, Paris, Wien 1999, p. 25.

<sup>24</sup> J.C. Reitz, *A History of Cutoff Rules as a Form of Caveat Emptor: Part I – The 1980 U.N. Convention on the International Sale of Goods*, „American Journal of Comparative Law” 1988, No. 36, pp. 437–440; J.C. Reitz,

buyer must rely more on the information about the goods defined in the contract and provided by the seller. As the goods were under the seller's influence before the transfer to the buyer, the seller is thus responsible for the accuracy of the information and conformity of goods. The seller must bear the risk of the conformity of goods and the buyer can reasonably expect to receive goods, conforming to the contract. In the context of this research, it is important to emphasize that the CISG has served as a source of inspiration for the civil codes of the newly independent Eastern European states, formed as a result of the collapse of the Soviet Union and the Baltic States.<sup>25</sup> As the codification of the Russian law of obligations, which was based on the norms of the CISG, had a strong impact on the Ukrainian CC, the CISG also affected the law of obligations of Ukraine.<sup>26</sup> During the development of the modern Civil Code, the tools fixed in the CISG were actively used in the part of the sales contract. In this regard, it can be stated that in general, the norms are set out in the spirit of its relevant provisions.<sup>27</sup> Despite this, the Ukrainian CC and CISG also have certain differences, including the conformity of goods to the contract. On the other hand, the CISG is a part of the Ukrainian law since February 1, 1991, as the successor state of the Ukrainian SSR. According to case law, the CISG is applied to the dispute as the law of the contracting party (Ukraine) (Article 1(1)(b) CISG). The Ukrainian law is subject to subsidiary application in matters not regulated by the CISG.<sup>28</sup>

## Lack of Conformity or Defects?

The CISG and Directive (EU) 1999/44/EC, Directive (EU) 2019/771, and Directive (EU) 2019/770 use the concept "conformity of goods" from a positive or negative perspective. Instead, the Ukrainian CC does not contain the notion of conformity or non-conformity but uses only the terms "defect" and "significant defect," "improper quality of goods." The question arises whether these concepts are identical, whether the lack of the conformity of goods is considered as the goods with defects; if such goods do not have a physical defect, just do not conform with the contractual consent.

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*A History of Cutoff Rules as a Form of Caveat Emptor: Part II – From Roman Law to the Modern Civil and Common Law*, "American Journal of Comparative Law" 1989, No. 37, pp. 248–257.

<sup>25</sup> I. Schwenzer, P. Hachem, *op. cit.*, pp. 462–463.

<sup>26</sup> F. Zoll, *op. cit.*, pp. 95–96.

<sup>27</sup> O. Kot, *Porivnialnyi analiz norm Konventsii Orhanizatsii Obiednanykh Natsii pro dohovory mizhnarodnoi kupivli-prodazhu tovariv i Tsyvilnoho kodeksu Ukrainy*, „Pravo Ukrainy” 2016, No. 5, p. 29.

<sup>28</sup> Rishennia MKAS pry TPP Ukrainy № 102 vid, 31.07.2014 p.

The concept “conformity of goods” under the CISG has a broad meaning and covers all cases of the improper performance of contract. The seller’s responsibility for the delivery of the non-conformity of goods is regulated in the CISG within the liability for breach of contract, taken from the common law and Scandinavian models.<sup>29</sup> It is based on the presumption of the contractual liability for each breach of obligations to the counterparty – regardless of the type and form of defects and faults.<sup>30</sup> The seller’s liability, according to the Ukrainian CC, is also not based on fault, but on the distribution of risk between the parties. The seller is liable for defects in the goods if the buyer proves that they arose before it transferring to him or for reasons that existed before (Article 679(1) CC). And if the seller guarantees the quality of the goods, he or she is liable for its defects, unless he or she proves that they arose after its transfer to the buyer due to the violation of the rules of use or storage of goods by the buyer, actions of third parties, by accident or *force majeure* (Article 679(2) CC).

Unlike the CISG concept “conformity of goods”, the Ukrainian CC uses the terms “quality,” “defect,” and “improper quality.” Article 673(1) CC indicates the seller’s obligation to deliver goods with quality required by the contract. Next, the legislator determines the legal consequences for delivery goods of improper quality (Article 678 CC). In the Law of Ukraine “On consumer rights protection,”<sup>31</sup> the proper quality of goods is defined as its features that meets the requirements established for this category of goods in legal acts and contractual terms (Article 1(1)(13)).

<sup>29</sup> M. Drózdź, *Podstawowe środki systemu ochrony prawnej w razie naruszenia zobowiązania na gruncie konwencji wiedeńskiej o międzynarodowej umowie sprzedaży*, „Przegląd Sądowy” 2014, No. 5, p. 98.

<sup>30</sup> R. Herber, B. Czerwenka, *Internationales Kaufrecht-Kommentar*, München 1991, p. 330; G. Reinhart, *UN-Kaufrecht*, Heidelberg 1991, p. 168; G. Tracz, *Odpowiedzialność sprzedawcy za wady rzeczy na gruncie prawa polskiego oraz Konwencji Wiedeńskiej o międzynarodowej sprzedaży towarów. Uwagi prawoporównawcze*, [in:] *Studia z prawa gospodarczego i handlowego. Księga pamiątkowa ku czci Profesora Stanisława Włodyki*, W. Pyziół (ed.), Kraków 1996, p. 474; C.M. Bianca, *Article 35*, [in:] *Commentary on the International Sales Law*, C.M. Bianca, M.J. Bonell (eds.), Milan 1987, pp. 270–271; J. Napierała, *Istotne naruszenie zobowiązania jako przesłanka odpowiedzialności w Konwencji wiedeńskiej*, „Ruch Prawniczy, Ekonomiczny i Socjologiczny” 1994, No. 1, pp. 1–2; J. Napierała, *Odpowiedzialność eksportera i importera za naruszenie umowy międzynarodowej sprzedaży towarów*, Warszawa 1998, p. 73; J. Klatka, *Odpowiedzialność z tytułu niewykonania lub nienależytego wykonania umowy w Konwencji wiedeńskiej o umowach międzynarodowej sprzedaży towarów*, „Rejent” 1997, No. 4, pp. 135–136; M. Pilich, *op. cit.*, p. 91.

<sup>31</sup> Zakon Ukrainy «Pro zakhyst prav spozhyvachiv» vid,12.05.1991 p.



In the Ukrainian doctrine<sup>32</sup> and case law,<sup>33</sup> the quality of the goods is determined by its characteristics, provided by the relevant standards and regulatory requirements relating to this type of goods. The “quality of the goods” is defined around the requirements set by the creators and producers, as well as authorized state bodies and institutions.<sup>34</sup> It is also claimed that the general criteria to distinguish proper quality from improper quality are safety, reliability, compliance with standards, manufacturability, possibility to use for its intended purpose, innovation, and aesthetics. All them are interconnected and complementary, and together they ensure the optimal level of the quality of goods.<sup>35</sup>

The main feature of the quality criterion is its compliance with standards, specifications, and rules of production<sup>36</sup>; equating the notion of the “conformity of goods” and the “quality of goods” is not acceptable. The goods might not require any quality standards but should be demanded by the buyer, which suits any particular purpose of the buyer, i.e., it is covered<sup>37</sup> by the concept of the conformity of goods.

It is appropriate to determine the meaning of the concept of the “conformity of goods” established in the CISG. In general, the legal doctrine defends the position of a broad interpretation of this concept<sup>37</sup> and coverage of both physical and legal defects.<sup>38</sup> However, there is an opinion that this concept does not include every “non-conformity” (a breach of the seller’s obligations, for instance, in delivery delays, quantitative defects, or only partial performance), but it is essentially synonymous

<sup>32</sup> *Naukovo-praktychnyi komentar Tsyvylnoho kodeksu Ukrainy*, eds. O.V. Dzery, N.S. Kuznietsovoi, V.V. Lutsia, Vol. II., Kyiv 2005, p. 219; L.M. Ivanenko, O.M. Yazvinska, *Zakhyst prav spozhyvachiv*, Kyiv 2014, p. 211; L.M. Ivanenko, O.M. Yazvinska, *Realizatsiia prav spozhyvachiv na prydbannia tovaru nalezhnoi yakosti*, „Pravo Ukrainy” 2003, No. 8, pp. 73–77; V.F. Yakovleva, *O roly norm sovetskoho hrazhdanskoho prava v borbe za kachestvo produktsiyi*, „Sovetskoe hosudarstvo y pravo” 1954, No. 3, p. 56; H. Yanovytska, *Pravo spozhyvacha na nalezhnu yakist produktsii*, „Visnyk Natsionalnoi akademii prokuratury Ukrainy” 2015, Nos. 3–4, p. 50; M.M. Kuzmina, *Vyznachennia poniattia «yakist produktsii» ta kryterii yii otsinky*, „Pidpriemnytstvo, gospodarstvo i pravo” 2007, No. 12, pp. 138–141; T. Blashchuk, *Poniattia yakosti v pravi Ukrainy*, „Pidpriemnytstvo, gospodarstvo i pravo” 2011, No. 3, p. 13.

<sup>33</sup> Rishennia Yevpatoriiskoho miskoho sudu AR Krym № 2-2804/2009 vid 6.11.2009 r.; Rishennia Kyivskoho raionnoho sudu m.Kharkova № 2-306/07/09 vid 21.09.2007 r.; Rishennia Hospodarskoho sudu m.Kyieva № 07/322-10-38/5229.03.11 vid 19.04.2011 r.; Rishennia Hospodarskoho sudu Kyivskoi oblasti № 911/1566/17 vid 24.07.2017 r.; Rishennia Hospodarskoho sudu Zakarpatskoi oblasti № 3/33 vid 16.09.2010 r.; Rishennia Podilskoho raionnoho sudu m.Kyieva № 758/15114/14-ts vid 3.07.2015 r.

<sup>34</sup> *Velykyi entsyklopedychnyi yurydychnyi slovnyk*, ed. Yu.S. Shemshuchenka, Kyiv 2012, p. 1017.

<sup>35</sup> Yu.V. Verkhola, *Prava spozhyvacha pry prydbanni tovaru nalezhnoi yakosti*, *Naukovyi visnyk Uzhhorodskoho natsionalnoho universytetu*, „Seria Pravo” 2016, Vol. 37(1), p. 111.

<sup>36</sup> *Naukovo-praktychnyi... op. cit.*, p. 219.

<sup>37</sup> S.A. Kruisinga, *(Non-)Conformity in the 1980 UN Convention on Contracts for the International Sale of Goods: A Uniform Concept?* Antwerp; New York 2004, pp. 27–28; E. Habryn-Motawska, *Niezgodność towaru konsumpcyjnego z umową sprzedaży konsumenckiej*, Warszawa 2010, p. 25.

<sup>38</sup> P. Schlechtriem, *Internationales UN-Kaufrecht. Ein Studien- und Erläuterungsbuch zum Übereinkommen der Vereinten Nationen über Verträge über den internationalen Warenkauf (CISG)*, Tübingen 2007, pp. 133–134.

with physical defects in the goods.<sup>39</sup> Defining the concept of a defect due to the “non-conformity of goods,” the legislator emphasizes that the defect is not a sign of the goods as such, but it is a negative consequence of assessing the relationship between performance and its content. In this sense, the defect is equated with the improper performance of the obligation.<sup>40</sup>

## Requirements for Conformity

The analysis of Article 35(1) CISG gives grounds to assert conformity on the basis of a “subjective” description of the goods in the contract, hence the enshrinement in the CISG of the subjective concept of the conformity of goods. The lack of goods’ features that the parties expected at the time of the conclusion of the contract are non-conformity. The interpretation of a separate sale contract allows for establishing the criteria of guaranteed features, and hence to identify the lack of conformity.<sup>41</sup> The priority of the contractual autonomy allows the parties to cover all physical properties of the goods and all factual, legal circumstances of the goods and the environment interconnection by the “conformity of goods.”<sup>42</sup> The parties may agree that the good has certain non-physical features, for instance, a ban on the manufacture of goods by minors or the goods are produced in environmentally-friendly processes,<sup>43</sup> without the use of biotechnology,<sup>44</sup> by or socially responsible producers,<sup>45</sup> etc. The limits of such agreed contractual provisions will be determined by the respective intentions of the parties and mandatory public law.<sup>46</sup>

The Ukrainian CC does not have a similar provision to Article 35(1) CISG. However, the analysis of Article 662(2) CC, according to which the seller is obliged to deliver the goods required by the sale contract, gives grounds to assert in the Ukrainian sales law the subjective concept of the conformity of goods. Nevertheless,

<sup>39</sup> A. Koch, *Wadliwość rzeczy sprzedanych w świetle Konwencji ONZ o międzynarodowej sprzedaży towarów*, „Przegląd Prawa Handlowego” 1998, No. 10, p. 11; G. Tracz, *op. cit.*, p. 475; M. Pilich, *op. cit.*, pp. 95–96.

<sup>40</sup> F. Zoll, *Rękojmia. Odpowiedzialność sprzedawcy*, Warszawa 2018, p. 101.

<sup>41</sup> R. Hyland, *op. cit.*, pp. 319–320.

<sup>42</sup> K. Maley, *The Limits to the Conformity of Goods in the United Nations Convention on Contracts for the International Sale of Goods (CISG)*, “International Trade and Business Law Review” 2009, No. 12, p. 104.

<sup>43</sup> M.L. Loureiro, J.J. McCluskey, R.C. Mittelhammer, *Will Consumers Pay a Premium for Eco-labeled Apples?* „Journal of Consumer Affairs” 2002, Vol. 36(2), pp. 203–219.

<sup>44</sup> See more in: *Appellationsgericht Basel-Stadt, Urteil vom 22 August 2003*, “Internationales Handelsrecht” 2005, No. 3, pp. 117–119.

<sup>45</sup> W. Moon, S.K. Balasubramanian, *Willingness to Pay for Non-biotech Foods in the U.S. and U.K.*, „Journal of Consumer Affairs” 2003, Vol. 23(2), pp. 317–339.

<sup>46</sup> R.F. Henschel, *Conformity of Goods in International Sales: An Analysis of Article 35 in the United Nations Convention on Contracts for the International Sale of Goods (CISG)*, Copenhagen 2005, p. 162.

the legislator provides for means of protection of the buyer's rights, i.e., to have the goods brought into conformity free of charge by repair or replacement, to have an appropriate reduction of price, the contract rescinded with regard to those goods which are of improper quality. The delivery of goods with quantitative or packaging defects are regulated in other articles. The legal consequences for the delivery of goods with packaging defects are the same as for the delivery of goods of improper quality. The situation differs vis-à-vis quantitative defects. If the seller delivered a smaller quantity of goods than required, the buyer has the right to demand the delivery of any missing part, to refuse the goods, or to get a refund (Article 670(1) CC). Thus, the legislator, allocating quantitative defects in a separate regulation, significantly reduced the protection of the buyer's rights. The comparison of this provision of the Ukrainian CC and of Article 51(2) CISG gives grounds to assert that the CISG aimed at keeping the sale contract in force. The buyer may avoid the contract because of the failure to make delivery or the delivery of non-conforming goods amounts to a fundamental breach of the contract. Instead, the Ukrainian CC allows the buyer to avoid the contract in cases of a non-fundamental breach. It seems like the CISG provides higher protection of both the seller's rights and contractual relations.

The Ukrainian CC in Article 670(2)(3) sets the buyer's rights if the seller delivered a bigger quantity of goods, and the buyer accepted it. The issue of the buyer's refusal to accept these goods remains unresolved.

The concept of the conformity of goods under the CISG is based on a general understanding of the breach of contract as its homogeneous formula. In general, all forms of breach of obligation thus result in the same sanctions. A uniform legal formula for breach of obligation covers all non-performance, minimizing the significance of certain forms of breach. In this sense, the non-conformity of goods with the contract is one of the cases that constitute a breach of obligation.<sup>47</sup>

The good's description of goods contained in the offer is binding on the seller, without the need to further guarantee the availability of certain features. If the offer contains an advertisement, which illustrates the good's quality, it is presumed that it includes its description.<sup>48</sup> An interesting point is where the goods purchased by the buyer correspond with the terms of the contract, but not with the features given in advertising. For instance, an advertisement of a trampoline indicated its maximum load at 150 kg, and in the contract the parties noted approximately 100 kg of maximum load. Is it possible to qualify such a trampoline as not conforming to

<sup>47</sup> M. Pecyna, *Naruszenie zobowiązania w świetle harmonizacji prawa zobowiązań. Studium prawnoporównawcze*, Warszawa 2009, p. 184; F. Zoll, *op. cit.*, p. 101.

<sup>48</sup> C.M. Bianca, Article 35..., *op. cit.*, p. 273; P. Schlechtriem, P. Butler, *op. cit.*, p. 114.

the contract? If the parties have not made a reference in their contract to the advertising terms, then such a trampoline should be recognized as being in conformity. However, it corresponds to the parties' will and the subjective concept of the conformity of goods to the contract. Taking into account the requirements of Article 35(1) CISG, it is also necessary to distinguish between the pre-contractual agreements reached by the parties and those that constitute the content of the contract.

The seller's obligation to deliver goods which are fit for the purposes of the goods' ordinary use (Article 35(2) CISG, Article 673(2) CC) associated with the principle of a guarantee of goods' quality, inherent in the common law system.<sup>49</sup> Using the criterion of the common use of goods, the CISG does not establish the certainty of the possibility of goods' resale.<sup>50</sup> It should be noted that there is no single approach to understanding the concept of the "ordinary use of goods." It is interpreted as a standard of average suitability,<sup>51</sup> average quality,<sup>52</sup> or reasonable quality.<sup>53</sup> The goods do not fit into their ordinary use if they do not have special properties or if they have defects that prevent their material use or significantly reduce their value as a commodity.<sup>54</sup> The category of the "ordinary use of goods" covers at least three standards: commodity, average quality, and reasonable quality. The first two depend on external factors, while the third concerns the expectations of the party.<sup>55</sup> None of the above understandings of the ordinary use of the goods is a general rule. This category does not have the character of an objective legal guarantee and acts as a rule for determining the contractual intention of the parties.<sup>56</sup> The use of valuation concepts "average quality", "reasonable quality" can cause significant difficulties in practice for the parties.<sup>57</sup>

<sup>49</sup> J.O. Honnold, *Uniform Law for International Sales under the 1980 United Nations Convention*, Hague 1999, p. 256.

<sup>50</sup> Landgericht Berlin, September 15, 1994.

<sup>51</sup> F. Enderlein, D. Maskow, *op. cit.*, p. 144.

<sup>52</sup> Landgericht Berlin, *op. cit.*

<sup>53</sup> Netherlands Arbitration Institute, October 15, 2002, No. 2319.

<sup>54</sup> C.M. Bianca, M. Bonell, *op. cit.*, p. 144; K. Maley, *op. cit.*, p.113.

<sup>55</sup> A.M. Giuliano, *Non-conformity in the Sale of Goods between the United States and China: The New Chinese Contract Law, the Uniform Commercial Code, and the Convention on Contracts for the International Sale of Goods*, "Florida Journal of International Law" 2006, No. 18, pp. 331–358.

<sup>56</sup> R.F. Henschel, *Conformity of Goods in International Sales: An Analysis...*, *op. cit.*, p. 199; R.F. Henschel, *Conformity of Goods in International Sales Governed...*, *op. cit.*, p. 18; K. Maley, *op. cit.*, p. 112.

<sup>57</sup> C.P. Gillette, F. Ferrari, *Warranties and "Lemons" under CISG Article 35(2)(a)*, „Internationales Handelsrecht" 2010, No. 1, p. 4.

Eventually, this may lead to the displacement of the sellers of high-quality goods from the market,<sup>58</sup> as that low- and high- quality goods are covered by the notion of “ordinary.” The interpretation of Article 35(2) CISG should expediently use Article 5.1.6 UNIDROIT Principles<sup>59</sup> and Article 6:108 PECL<sup>60</sup> regarding average quality.

Another objective requirement of conformity is that the goods should fit for the purpose explained to the seller while concluding the contract (Article 35(2)(b) CISG). The Ukrainian CC establishes a similar rule in Article 673(2)(2), which, in contrast to the CISG, does not contain “except where the circumstances show that the buyer did not rely, or that it was unreasonable for him or her to rely, on the seller’s skill and judgement.” Such a provision of the CISG is an important guarantee of the seller’s rights protection in contractual relations. Whereas the seller is not always the producer of goods, who has special knowledge about the good’s features and is competent to provide the buyer with recommendations on the fitness of the goods for any particular purpose specified by him, in Ukrainian doctrine it is claimed that if the seller was informed by the buyer about a particular purpose of the purchase of the goods at the time of contract conclusion, the seller must deliver proper goods. In some cases, lawn mowers can therefore be bought for their engines, which will later be used for other purposes, for instance, to create self-propelled vehicles, aircraft, pumps, etc. Therefore, the seller must point out the defects of power, design, weight, and other characteristics of such an engine, which may interfere with the implementation of the buyer’s ideas in reality.<sup>61</sup> Failure to notify the buyer of the proper quality of goods for its specific use is considered a violation of this rule and entails the consequences provided for by the Ukrainian CC. It is difficult to agree with such a categorical position, since it is quite often that the seller is deprived of such a special skill and judgement and is therefore not always competent to express views on the fitness of the goods for the particular purpose stated by the buyer. The establishment of such a rule in the Ukrainian CC would protect the rights of the seller, who is not a producer and has no special skill and judgement to assess the fitness of goods for the particular purpose made known by the buyer.

Both the CISG and the Ukrainian CC set a requirement for the buyer to inform the seller, at the time of the conclusion of contract, about the purpose of buying

<sup>58</sup> D. Saidov, *Article 35 of the CISG: Reflecting on the Present and Thinking About the Future*, “Villanova Law Review” 2013, No. 58, pp. 539–540; C.M. Bianca, M.J. Bonell, *op. cit.*, p. 279; C.P. Gillette, F. Ferrari, *op. cit.*, p. 4.

<sup>59</sup> UNIDROIT Principles of International Commercial Contracts 2016.

<sup>60</sup> Principles of European Contract Law 2002.

<sup>61</sup> *Naukovo-praktychnyi komentar Tsyvilnoho kodeksu Ukrainy...*, *op. cit.*, p. 220.

goods. Opinions on the obligatory indication of a particular purpose in the contract were divided. Some scholars believe that it is necessary for the seller to know about it.<sup>62</sup> Others argue that the particular purpose in the contract will have legal force.<sup>63</sup> The notification about the specific purpose may serve as evidence not only for the contract, but also pre-contractual relations, relevant statements, or behavior of the buyer.<sup>64</sup> In short, the seller should know at the stage of concluding the contract.<sup>65</sup> Otherwise, the seller is unable to respond, give advice, or refuse to conclude the contract. The prevailing view in the doctrine is that the provisions of the CISG cannot be interpreted in this respect so broadly as to require the express consent of the seller. It is rather the absence of objections.<sup>66</sup>

An interesting situation is that the good has all the features agreed upon by the parties in the contract but is not suitable for the purpose specified therein. Is its delivery a proper performance of the contract? Taking into account the subjective concept of the conformity of goods, it is necessary to set the purpose of the contract. The goods must be fit for the agreed purpose, and the features specified in the contract are a means leading to it. In this case, the good will be considered defective, despite the fact that it contains consistent features, but it is not suitable for its intended purpose.<sup>67</sup>

The objective requirements regarding the qualities of goods which the seller has held out to the buyer as a sample or model (Article 35(2)(c) CISG) and packaging (Article 35(2)(d) CISG) are the same in the Ukrainian CC (Article 673(3), Article 685).<sup>68</sup>

Thus, according to the subjective concept of the conformity of goods to the contract under the CISG, in assessing such conformity, the contractual intentions by the parties are of priority importance. The parties establish their own contractual obligations, guided by the principles of autonomy and freedom of contract. The five objective requirements of the conformity of goods under Article 35(2)

<sup>62</sup> F. Enderlein, *Rights and Obligations of the Seller under the UN Convention on Contracts for the International Sale of Goods*, [in:] *International Sale of Goods: Dubrovnik Lectures*, eds. P. Sarcevic, P. Volken, New York 1996, p. 157.

<sup>63</sup> *Naukovo-praktychnyi komentar Tsyvilnoho kodeksu Ukrainy...*, op. cit., p. 221.

<sup>64</sup> J. Lookofsky, *Understanding the CISG in Scandinavia*, Copenhagen 2002, p. 54; T. Neumann, *Features of Article 35 in the Vienna Convention; Equivalence, Burden of Proof and Awareness*, „Vindobona Journal of International Commercial Law and Arbitration” 2007, No. 11, pp. 81–97.

<sup>65</sup> Rishennia MKAS pry TPP Ukrainy № 63 vid 31.05.2011 r.

<sup>66</sup> U. Magnus, *The CISG's Impact on European Legislation*, [in:] *The 1980 Uniform Sales Law: Old Issues Revisited in the Light of Recent Experiences*, ed. F. Ferrari, Milano, München 2003, p. 137.

<sup>67</sup> F. Zoll, *Rękojmia...*, p. 110.

<sup>68</sup> See more about the impact of defective packaging on the non-conformity of goods in the Ukrainian case law: Rishennia MKAS pry TPP Ukrainy №1 vid 7.06.2006 r.

CISG play only a complementary role in relation to the contractual intentions of the parties.

## Conclusions

The CISG enshrines the subjective concept of the conformity of goods to the contract. Its content is to establish the criteria for the proper performance of the contractual obligation by the seller based primarily on the contract, and then the five objective requirements for assessing performance. Given that the subjective concept is grounded in the general system of breach of obligations, it therefore should also include legal defects. In Article 35 CISG, all lacks of a good's conformity are considered as a breach of contract. The CISG has managed to level the differences between national laws concerning conditions, warranties, *aliud pro alio*, defects, improper quality and replace them with the concept of the non-conformity of goods.

A comparative legal study of CISG and the Ukrainian CC regarding the conformity of goods to the contract allowed for finding similarities and differences. The seller's liability in both acts is not based on fault, but on the distribution of risk between the parties.

In general, the Ukrainian CC enshrines the subjective concept of the conformity of goods, but the means of protecting the buyer's rights only concern goods of improper quality. Other legal consequences established in the Ukrainian law for quantitative defects significantly reduced the protection of the buyer's rights in comparison with the CISG.

The comparison of legal consequences for the quantitative defects of goods under the CISG and the Ukrainian CC gives grounds to assert that the CISG aims more at keeping the sale contract in force and offers a higher level of protection of both the seller's rights and contractual relations.

Another guarantee of the seller's rights established in the CISG and absent in the Ukrainian CC is if the seller lacks the special skill and judgement to assess the conformity of goods for a particular purpose expressly or impliedly made known by the buyer at the time of the contract conclusion. In our opinion, the Ukrainian legislator should borrow the provisions of the CISG regarding a clearer settlement of this issue. It would protect the rights of the seller who is not a producer and has no special skill and judgement to assess the fitness of goods for the particular purpose made known by the buyer.

Unlike the CISG concept of the "conformity of goods," the Ukrainian legislator uses the terms "quality," "defect," and "improper quality." The concept of the "conformity of goods" under the CISG is based on the breach of obligation and is

broader than the quality concept under the Ukrainian CC, and it is not acceptable to equate these concepts. In the context of the re-codification of the Ukrainian CC, the Ukrainian legislator needs to adapt the notion of the conformity of goods to the contract with Article 35 CISG, which became the basis for this concept in the EU sales law and several civil codes of EU member states.

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