ГОСПОДАРСЬКЕ ПРАВО ТА ПРОЦЕС

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LEGAL COMPARISON OF TRANSFER OF THE RISK OF DAMAGE TO THE GOODS IN THE CONTRACT OF SALE IN BUSINESS

I. Introduction.

The article deals about the liability for defects of fulfillment in the contract of sale in business. In view of the size of this contribution, the author focused on the relevant legal institutes, regarding legal liability as a result of defective fulfillment, specifically after transfer of the risk of damage to the goods.

In this publication was used the methods of scientific analysis and synthesis and legal comparison, which are standard tools in the sphere of state and legal science.

II. Transfer of the risk of damage to the goods.

The basic structure of this article is the interpretation of the provisions of the Commercial Code [1], valid in the Slovak Republic (Member State of the European Union), and its interrelatedness by the spatial legal comparison of the relevant legal institutes [2]. Under the legal regulation on liability for defects of fulfillment, is in the provisions of Sections from 455 to 461 specifying the transfer of the risk of damage to the goods.

In contrast to the legal regulation of the transfer of ownership of goods under the provisions of Sections from 443 to 446 of the Commercial Code, there are differences as to the consequences at one point in time. The transfer of the risk of damage to the goods from the seller to the buyer, against the gain of ownership of the goods by the

buyer, happens independently. Under this we may considered above the eventuality, that even if the buyer is not the owner of the goods, he bears the risk of damage to the goods.

III. Formation the defects of goods after the transfer of the risk of damage to the goods.

In the context of the contract of sale, the seller is responsible for the creation of defects of the goods, only if he have caused them by own unlawful activity. This is the case from the moment of transferring the risk of damage to the goods to the buyer. It is not relevant, when the formation of defects of goods was occurred or how these defects were caused.

Under the provision of Section 461 (1) of the Commercial Code, damage to the goods, which occurred after the passing of the risk to the buyer, does not affect the buyer's obligation to pay the selling price, unless the damage occurred due to a breach of an obligation by the seller. This provision will be applied if the damage to the goods occurs during its transport and at the same time the buyer bears the risk of damage to the goods.

However, if damage has occurred after transferring the risk of damage to the buyer, due to a breach of obligations by sellers, for example by defective packaging, this fact impacts its obligation to pay the purchase price. He may apply, similarly as in the case of defects of goods, the right to a discount on the purchase price based on to the provision of Section 439 (2) of the Commercial Code.

According to German law, relating to the transferring of risk in the contract of sale, should be noted, that the Handelsgesetzbuch [3] does not contain such special regulation in its provisions. This affair is dealt by a provision under Section 446 (1) Bürgerliches Gesetzbuch [4], by which the handing over of the sold item (piece) causes the legal consequence of transfer the risk of accidental damage and the accidental destruction of the goods on the buyer's side. Separately, the divergent legal regulation is included in the provision under Section 446 (2) of the BGB, which relates to the purchase of a land (estate) or a ship (at building a ship is registered in a corresponding register), when the legal effects of the transfer of the

risk occur first time by registering it in the relevant official documentation (on the file) [5].

In the case of package business is the transfer of the risk of accidental damage and the accidental destruction of the goods regulated in the provision of Section 447 (1) BGB where, at the request of the buyer, the seller send the item (piece) to another place, as it is the place of fulfillment, to the buyer is transferred the risk, once have been the goods handed over from seller, either to the forwarder (shipper), the carrier, alternatively to another person or institution, which is intended for the delivery of the consignment.

In international trade law by the Convention CISG [6], is the detection of the moment of transfer of the risk of damage to the goods relevant to the legal position of the contracting parties. Due to the load of goods the risk of damage, is in application practice almost always covered by insurance [7]. It will be estimate possible to determine, whether a contracting party (in a particular case) will use coverage through the above-mentioned legal institute.

In American literature, it is possible meet up a generally applicable rule under the Convention CISG, where the risk on the side of buyer, became before the goods is taken over. Or it will happen at a time, when he break the contract of sale in business taken´t over the goods, that have been given it to disposition. Is need to be mentioned, that institute about decompose of the risk of damage to the goods by the UCC [8], which requires to be clear, who is at risk of losing, destroying or damaging to the goods, which was not caused by any of the parties – the seller or the buyer – irrespective of the real possibility of disposition with the goods.

The risk of damage to the goods corresponding with the ownership, because with it is transferring the risk, even though the goods is physically in disposition to the contracting party, which carries the risk. In eventum of a breach of the contract of sale in business, the contracting party bear the risk, if create it. If the other party have (in disposition) the goods, it bears the risk in the extent of its insurance. If the contract of sale in business is not violated, the (contracting) parties may agree, who and in what

proportion it carries the risk, while in the absence of a contractual negotiate, the risk of damage to the goods is «on the shoulders» contracting party, having the greater opportunity to dispose with the goods.

IV. Conclusion.

Research the responsible relationships (not only) in the field of private law is still actual theme, we could say, that it is a timeless (interdisciplinary) topic, having the attention of legal theorists (recodifiers) [9]. From the point of view of legal positivism, we could watching to this legal phenomenon through law order, namely through a hierarchically structured system of valid (effective) legal norms [10].

However, it should be noted, that a frequent phenomenon within the – national – legislation is (unrealized) a requirement for the effective publication of legislation, allowing proper orientation in the postmodern multilingual legal order; or even the guidance in interoperable legal systems. The challenge for access to law is the postmodern complex structure of law, characterized by multicentrism of law-making, hypertrophy of legal regulation, exceptionally high rate of change of legal norms and complicated interconnection of legal norms, and their considerable refinement by the juridical decision making [11].

These negative aspects can be observed in many sectors of law. The unacceptable phenomenon is, that they are brake on the development of business activities and the negative impact we can also seen in the efficiency and progressive growth of the national economy [12].

Some suggestions presented in this article are to be understood only in terms of academic opinions and de lege ferenda proposals.

References:

1. Act № 513/1991 Coll. – Commercial Code, as amended and supplemented.

2. To the relationship between lawmaking and the interpretation of law see for example: ŠKOP, M.: Některé techniky jazykové metody interpretace práva. Právník. Praha: AV ČR, Ústav státu a práva. Roč. 156, č. 9, 2017, str. 770 a nasl., ISSN 0231-6625.

3. The German Handelsgesetzbuch (HGB, Commercial Code) was adopted in 1897 with effect from 1. January 1900. The essence of this legal norm is that, it is a

lex specialis to the legal regulation contained in the BGB. It regulates the legal relationships, arise between particular business entities – traders (so-called Kaufmannsrecht). Compare: HOPT, K. J. – MERKT, H. – BAUMBACH, A.: Handelsgesetzbuch. Verlag C. H. Beck, München, 2205 s., 2008, ISBN 9783406565649.

4. The German Bürgerliches Gesetzbuch (BGB, Civil Code) is the first general (fundamental) codification of German private law. It was created in 1896 with effect from 1. January 1900. The BGB, as adaptation by German law, can be applied to legal relationships between traders under the legal principle lex generalis, since the HGB regulates only a specific part of legal relations. Compare: von STAUDINGER, J.: Kommentar zum Bürgerliches Gesetzbuch. Buch 2: Recht der Schuldverhältnisse §§ 433-480 (Kaufrecht). 16. Auflage. Gebunden Sellier – de Gruyter, München, 2012, 832 s., ISBN 978-3-8059-1126-9.

5. FESSL, V. st.: Kupní smlouva a smlouva o dílo podle německého práva. KONZULEX – MROPOR, Krnov, 1993, str. 27, ISBN 80-85299-10-0.

6. United Nations Convention on Contracts for the International Sale of Goods (Convention CISG). It was adopted on 11. April 1980 and take into force on 1. January 1988. It provides mainly to the businesses (entrepreneurs) a substantial degree of legal certainty, when they want to signing an international commercial contract, which is a contract of sale in business (goods for resale). Compare: DYNYS, H.: Transformation of modern international rights in the context of fundamental issues of jurisprudence. In: SAVCHYN M. V. – MENDZHUL M. V. (eds.): Fundamentálne problémy jurisprudencie. Zborník vedeckých prác. Užhorodská Národná Univerzita v Užhorode. Vydavateľstvo Olexandra Harkuša, Užhorod, str. 12 a nasl., 2016, 260 s., ISBN 978-617-531-154-7.

7. GABRIEL, H. D.: Contracts for the sale of goods. A comparison of U. S. and International Law. Second Edition. Oxford University Press, New York, 2009, str. 204, ISBN 978-0-19-533349-7.

8. American Uniform Commercial Code (UCC) was first published in 1952 as a requirement to harmonize business law in the United States of America, in particular regards sales, as well as other business transactions. Compare: FRIEDLAND, J. A.: Understanding international business and financial transactions. Lexis Nexis Group, New York, 2002, ISBN 0-8205-5698-X (softbound).

9. Compare: LUKÁČKA, P.: Teoretické východiská pojmu zodpovednosť v slovenskom právnom poriadku. In: LUKÁČKA, P. – DUFALOVÁ, L. – LENHARTOVÁ, K.: Zodpovednosť za vady diela. Wolters Kluwer s. r. o., Bratislava, str. 60, 2016, 187 s., ISBN 978-80-8168-416-6.

10. In wider context see: MAREK, K.: Relative property rights (Part 3). In: Justičná revue. Ministerstvo spravodlivosti Slovenskej republiky. Roč. 70, č. 5, 2018, str. 642 a nasl., ISSN 1335-6461.

11. KUKLIŠ, P. – HODÁS, M.: O súčasnej situácii v slovenskej právnej normotvorbe. Právny obzor. Roč. 99, č. 6, 2016, str. 486, ISSN 0032-6984.

12. LAZUR, Y. V. – FEŤKO, Y. I.: Formation of a system of cross-border cooperation according to european standards. In: SAVCHYN, M. V. – MENDZHUL, M. V. (eds.): Fundamentálne problémy jurisprudencie. Zborník vedeckých prác. Užhorodská Národná Univerzita v Užhorode. Vydavateľstvo Olexandra Harkuša, Užhorod, str. 5, 2016, 260 s., ISBN 978-617-531-154-7.