

## LIABILITY OF THE SELLER FROM THE CONTRACTUAL RELATIONSHIP REGARDING CERTAIN DEFICIENCIES WITHIN THE SAMPLE AND MODEL SALES CONTRACT

**ABSTRACT:** The seller's responsibilities for particular contractual defects, as a distinct, separate and very complex institute, are regulated by the Law of Contract. The authorized subject of the Law of Contract is free to decide on entering the contractual obligation. The goal of the subjects, in the context of concluding a contractual relationship, is its realization. However, in addition to the stated common interest of the contracting parties, in practice, there is very often a situation when one of the contracting parties does not perform the contract in full, or performs it, but the subject of the contractual relationship is not consistent with the contract. The sales contract, together with its modalities, are regulated by the Law of Contract legal provisions regulating the institute of seller's liability in the context of defects in the contractual relationship within the sample and model sales contract are not precisely and clearly regulated. The necessity and obligation to define the institute of seller's responsibility for defects of items from the contractual relationship within the sample and model sales contract, is reflected in a precise and linguistically clear definition of seller's liability for eviction and material defects. The proposed

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solutions in the paper could be a great contribution to legal science, but legal practice too.

**Keywords:** *the seller's responsibility for certain defects according to the contractual relationship, the sample and model sales contract, the Law of Contract, the deadline for filing complaints for non-conformity of goods.*

## 1. Introduction

With the technical and technological development of trade, especially online trade, the institute of seller's responsibility for the shortcomings of goods has experienced its greatest prosperity. Through the research of this interesting issue, it is concluded that the question of the seller's responsibility for the shortcomings of goods has been growing since the slave-owning society. Namely, the slaves who had certain deficiencies, such as a weaker vision, a disability that is reflected in the limited ability of physical work, pointed this out on the board they wore around their necks. In this way, the seller of the goods/slaves was protected from possible return of the goods in case they did not correspond to the intended purpose.

The Law on Obligations regulates the seller's responsibilities regarding the lack of items both within the sales contract and the provisions governing the modalities of the sales contract, such as the sample and model sales contract. The modalities of the contract of sale that exist in legal transactions, but are not named, are subject to the general provisions within the provisions governing the contract of sale. The complexity of the obligatory relationship that arises from the conclusion of the contract is reflected in its termination (Kovačević, 2012, p. 72).

As the contract of sale is the most widespread contract today and as almost every individual concludes it at least once a day, especially by implied actions, it is the subject of work analysis important both from a theoretical and practical aspect.

Section 2 of the Law on Obligations regulates the seller's liability for material and legal defects of the thing, ie when the thing has a material or legal defect of the thing, deadlines for raising objections, hidden defects of the thing, etc.

Authorized subjects enter into numerous legal relations (Jakovljević, 2019, p. 85). The conclusion of any contract creates rights and obligations on both sides, which are regulated by law. The seller's obligations are to deliver the goods in the manner and within the agreed time, and to provide

protection to the buyer from defects, and the buyer's obligations are to receive the goods according to the agreed place and manner, pay the price and notify the seller of the lack of goods. In order for the sales contract to be valid, it is necessary that it contains essential elements, ie essential ingredients. The Law on Obligations stipulates that the essential elements of the contract of sale are goods, ie the right and the price.

In the civil law sense, a good is a commodity (Radulović, 2020, p. 13). In the legal sense, a good is a bodily object, a spatially limited material part of nature, which can be perceived by the senses, which can be subjected to human authority, which serves people to meet their needs, and exists in the present or there are realistic assumptions that it will occur in the future (Stanković & Orlić, 1982, p. 7). The price is the monetary equivalent for the good that the seller sells to the buyer and must be expressed in money (Marković, 1997, p. 419). The price is determined when it is stated in the contract in one total amount or per unit of measure, and can be determined when relevant data are agreed according to which the price will be determined later (eg average market price at a quantum market in a certain city on the 90th day contract, as the day of payment) (Ognjanović, 2010, p. 32). The contract is concluded when the contracting parties agree on the essential elements of the contract (Article 26 of the Law on Obligations).

## **2. Sales contract by sample and model (in general)**

Sample and model sales is a modality of the sales contract that is named. The Law on Obligations did not define the concept of this modality of the contract of sale, but it prescribed the case of the seller's liability for material defects or for non-performance of the contractual obligation.

Sale by sample and model deviates from the basic type of sales contract (see Article 454 et seq.) In that the buyer here determines the subject of the contract and its properties according to the sample (pattern) or model that should be used exclusively to create or compare with the purchased item and its properties (Perović & Stojanović, 1980, p. 184).

A model is a three-dimensional creation of an item (eg brick, car, boots, stove, etc.) in its original size or in a relatively reduced form, which accurately reflects the properties of the item, and the sample is a smaller quantity of items to which it will deliver the quantity of all sold items (Babić & Petrović, 2004, p. 37).

Therefore, the sale by sample and model can be defined as a modality of the sales contract by which the creditor undertakes to make or only hand

over goods according to the cause or model shown to the buyer, and the buyer undertakes to pay the seller a certain amount of money.

Selling by pattern or model is a very common modality of sales contract in everyday life. It is often used when going to a tailor to cut a piece of clothing, or when buying a car, bathroom tiles, kitchen or yard, buying furniture, etc.

It is about selling things according to a sample or model, where the buyer gets an insight into the final look of the product, after which it is finally decided whether he wants to conclude a contract with the seller or not.

If the buyer decides to buy items according to a sample or model, the contracting parties usually determine the delivery time or the deadline within which the product should be produced. If the buyer chooses tiles for the yard and the seller has a sufficient quantity for the buyer in the warehouse, then there is no need to set a deadline. However, if the seller has yet to produce or import the goods, then the delivery time becomes an essential element, as the buyer or seller himself, or both parties, make it so.

With this modality, as with the contract of sale, the buyer acquires ownership by handing over the goods. In case of damage to the goods, the seller bears the risk until the goods are handed over to the buyer, as defined by law.

### **3. Responsibility of the seller with regard to defects in the sales contract according to the sample and model**

Section 3, Article 538, paragraph 1, of the Law on Obligations prescribes the liability of the seller in case of sale of goods that do not comply with the sample or model. Liability in that case is regulated by the rules of liability of the seller for material defects, and in other cases by the regulations on liability for failure to fulfill obligations. Article 478 of the Law on Obligations prescribes the responsibility of the seller in the case when the goods contains some of the legally prescribed defects of the thing. Namely, according to the mentioned article, the seller is responsible for material defects of goods that she had at the time of transfer of risk to the buyer, regardless of whether he was aware of it, and for those material defects that occur after the transfer of risk to the buyer if are a consequence of a pre-existing cause. Article 508, paragraph 1 of the Law regulates the liability of the seller in case of eviction, where it is prescribed that the seller is liable if there is a third party right on the sold item that excludes, reduces or limits the buyer's right, and the buyer is not informed or agreed to take the thing encumbered with that right.

Interesting is Article 538, paragraph 2, Law on Obligations, which regulates the seller's liability in the contract of sale by sample and model where it stipulates that the seller is not responsible for lack of conformity if the sample or model submitted to the buyer only for information and approximate determination of property, without promise compliance.

Here, the legislator protects the seller from liability due to a small deviation of the goods in relation to the sample or model, if the buyer is given the item for inspection only for information and without promising that the item will be identical.

We are of the opinion that this legal provision does not apply when any deviation is in question, but only in the event that objectively two or more identical copies of the product cannot be produced.

The legislator justifiably allows deviations in the context of the conformity of things to a sample or model and in some way mitigates the responsibility of the seller when there really is a basis.

For example, if the buyer intends to buy natural stone tiles with a design such as that natural stone has in itself, in black and white combination, where black dominates, the seller is allowed to deviate in a specific situation.

The buyer would not have the right to invoke the provisions of the seller's liability due to the non-conformity of the item to the pattern or model because it is dominated by more white color, because the material is natural and difficult to change. If it were to be changed, then it is no longer a question of that pattern or model, and in such situations a minor deviation is justified.

Minor deviations are allowed by law when it comes to smaller samples that are given as an example for making larger items, such as when choosing a fabric for a set that the customer decides to make. If, at the time of collection, the color differed in a slight shade or pattern, it would be considered permissible.

It should be noted that the law did not explicitly prescribe the allowed deviation, but stated it as a situation when the seller did not promise compliance or when he submitted the sample or model to the buyer only as a notice. Therefore, the creditor is obliged to inform the buyer about the same before he decides to buy the item. Subsequent notification is meaningless.

If the deviation is greater, the seller will be liable without deviation and the buyer will not be obliged to pay the amount to the seller, unless he allows a subsequent deadline for production. In any case, he will be entitled to compensation if he has suffered it.

General customs for trade in goods defined the quality according to the sample of goods in Article 141, where it is stated that the authentic is the sample that is sealed and on which the label is signed by the parties, or a sample

submitted by one party under its seal. This solution should also be adopted by the Law on Obligations, because in this way the parties gain security in legal transactions so that what is agreed is recorded in writing, and in case of non-fulfillment of the contract can be easy to prove the inconsistency of things in court proceedings.

The general customs for the trade of goods stipulate that if the quality of the goods is determined according to the sample, the delivered goods must correspond to the sample in everything. We are of the opinion that the Law on Obligations should adopt this legal provision as well. Prescribing the seller's liability for defects in items in the contract of sale by sample and model through only one provision is not precise enough.

The responsibility of the seller in fact depends on his sincere statement to the buyer whether he can produce or deliver the item in accordance with the sample or not. If the seller sincerely acts and announces that the item would have a minor deviation during production, and the buyer agrees to such delivery, ie delivery of items, the buyer would not have the right to point out the non-conformity of items to the model or sample.

Otherwise, if the buyer is conscientious and the seller is unscrupulous, the buyer will have the right to hold the seller liable for non-conformity of the model or sample.

The parties to the contract should conclude a written contract where they would specify the specification, ie the characteristics of the model they want to make, together with the seller's statement on the possibility of realization of the requested. In that sense, the mentioned proposal of the solution should be adopted by the Law on Obligations in order to have a binding character. A contract that would not contain the seller's statement on the realization of the requested, should not be considered a validly concluded contract of sale by sample and model.

#### Annex 1

Judgment of the Higher Commercial Court, Pž. 427/2009 of 16 April 2009 years

Law on Obligations, Art. 480 and 481

Manner of submitting notifications, sentences:

In the notification of the defect of the item, the buyer is obliged to describe the defect in more detail and invite the seller to inspect the item. If the notice of defect sent by the buyer in a timely manner to the seller by registered letter, telegram or other reliable means is late or does not reach the seller at all, he considers that the buyer has fulfilled his obligation. The buyer

is obliged to notify the seller of the defects by giving written notice within a specified period. The notice should be forwarded to the seller by registered letter, telegram or in some other reliable way, so that, among other things, he can, in case of a dispute, prove the timely complaint and its content.

From the explanation: „The first instance court correctly concluded that the complaint, which the defendant submitted to the plaintiff on 18.12.2006. year, which was submitted to him by a third party SZTR Commission S. from P, was made by a third party, probably the defendant's distributor, and it was not signed by the litigants. From the contents of the minutes, it cannot be concluded with certainty that the subject of the complaint is the first goods that the plaintiff delivered to the defendant according to the defendant's invoices, especially having in mind that the complaint was made on December 18, 2006. years, more than a year from the receipt of goods on the disputed invoices.

The position of the first instance court is correct that a closer identification of the goods is necessary for a complaint about the quality of the goods, ie characteristics that prove that they are the goods that were delivered. The first-instance court correctly concluded that there is no relevant evidence that the complaint of the goods from 18.12.2006. submitted to the prosecutor. The defendant also did not prove that it was a sale of goods according to a sample or model or that the goods were delivered to the defendant for information and approximate determination of the quality of things, without promising compliance in terms of Article 538 paragraph 2 of the Law on Obligations.

The first instance court correctly concluded that even if it were accepted that it was a sale according to a sample or model, from Article 538, paragraph 1 of the Law on Obligations, the plaintiff would not be responsible for the quality of goods, since the defendant did not act in accordance with the said legal provision. If the item handed over to the buyer by the seller does not comply with the sample or model, the seller is liable under the regulations of the seller's liability for material defects of the item.

The provision of Article 480 of the Law on Obligations Art. 1 and 2 stipulates that the seller is not responsible for defects, when the item does not have the necessary properties for its regular use or for trade, if the item does not have the required properties for special use, for which the buyer procures it, and which was known to the seller, or it must have been known to him, if at the time of concluding the contract they were known to the buyer or could not remain unknown to him. It is considered that the buyer could not remain unaware of the shortcomings that a caring person with average knowledge and experience of a person of the same profession and profession as the customer could easily notice during the usual inspection of things.

The provision of Article 481, paragraph 1 of the Law on Obligations stipulates that the buyer is obliged to inspect the received item in the usual manner, or to inspect it as soon as possible according to the regular course of things, and to notify the seller of visible defects within eight days, and in the case of contracts in the economy without delay, otherwise he loses the right that belongs to him on that basis.

On the disputed fact whether the goods were advertised in accordance with the law, the first instance court concluded by applying the rule on the burden of proof on the basis of Art. 220 and 223 of the Law on Civil Procedure. The defendant stated that the received goods contained indications that it was not first class, but second and third class, he did not state that he inspected the goods, and from his allegations as well as from the complaint it can be determined that the delivered tires were old and damaged, which represents shortcomings that could not remain unknown to the defendant. Defendant did not provide evidence that he informed the seller in a timely manner of the deficiencies he was referring to, nor did he provide evidence to establish whether he informed the plaintiff of the deficiencies at all, or whether he did so within the time limit. the court correctly decided when it adopted the claim, and in that sense the appellate allegations of the defendant are unfounded.

The provision of Article 484 of the Law on Obligations stipulates that in the notification on the lack of items, the buyer is obliged to describe the defect in more detail and invite the seller to inspect the item. If the notice of defect sent by the buyer in a timely manner to the seller by registered letter, telegram or other reliable means is late or does not reach the seller at all, he considers that the buyer has fulfilled his obligation to notify the seller.

The first-instance court correctly concluded that the defendant did not provide evidence that he informed the plaintiff within a certain period of time about the deficiencies through a written notice, which he could send to the defendant by registered letter, telegram or other reliable means. The first-instance court correctly determined that the defendant returned a certain amount of goods, but this does not constitute evidence that the same return relates to the defendant's claim, bearing in mind that the defendant did not provide evidence of payment, and in that sense .

As the defendant did not prove that he settled the debt, nor that he made a timely complaint about the goods, ie that he filed a timely complaint about the quality, the first instance court correctly concluded that the defendant also loses the right under Article 488, paragraph 1 of the Law to request a price reduction... because he did not timely and properly inform the seller



about the defect. By correctly applying Article 262, paragraph 1, Article 277, paragraph 1, Article 324, paragraph 1 and Article 454, paragraph 1 of the Law on Obligations, the first instance court correctly applied the substantive law to the established factual situation, when it adopted the claim regarding principal debt and default interest on the maturity of the defendant's account."

#### **4. Concluding remarks**

The contract on sales according to the sample and model is among the most frequently concluded modalities of the contract on sale, and by specifying unclear legal solutions, legal protection is provided to subjects in legal transactions, which reduces the scope of work of courts. The law of the Republic of Serbia can boast of rules that do not deviate much from international ones, especially when it comes to the sales contract, as well as its modalities.

However, the above does not mean that we should stagnate in terms of adopting new, current solutions, although these are agreements whose domain covers not only the borders of the state, but also beyond.

As contract and model contract is a common contract, determining and defining the seller's responsibility for defects is an important issue that should be clearly defined. Having in mind the previous critical review of certain legal provisions, in this part of the paper, we are of the opinion that one potential modality of the sales contract should be added as a proposal, which modalities of the sales contract would facilitate legal transactions and specify the seller's responsibility for defects. It is a modality of the sales contract called "sales contract according to a sample and model with specification".

Namely, although it seems that the sales contract with the specification is very similar to the sales contract by sample and model, they differ in that the sales contract by sample or model shows the buyer a model or sample of things, and the buyer specifically, for the time of concluding the contract knows the shape, size, color and other characteristics of the thing he is buying, that is, he knows its final appearance. The sales contract with the specification determines the type and quantity, as well as the subject, but the specifics subsequently. Example: if the customer wants to make a handbag, he determines that it will be one piece, its dimensions, probably also the material, e.g. skin. Within the set deadline, the buyer undertakes to perform the specification, in the sense that he will determine the skin color, quality, some additional designed details, etc.

Thus, it can be seen that there is a difference between these two modalities of the sales contract. We are of the opinion that it is very possible for one complex contract to emerge from these two contracts. This would be when the buyer would buy things according to a sample or model and demand from the seller a deadline within which he will state certain additional details of the item.

This modality of the sales contract and its legal regulation leaves the possibility for the seller to determine the specifics of the item within the deadline with a subsequent agreement with the buyer, which would allow the seller to inform the buyer about possible and minor changes he would encounter. Also, in that case, the buyer would have the opportunity to withdraw from the contract within the agreed period, if the buyer is not able to deliver the requested items to the buyer. It could be interpreted that this loosens the contract according to the sample and model, since the seller is uncertain whether the contract will be realized at all, however, we are of the opinion that such an attitude would be neglected over time because concluding such a complex contract, seller and buyer, approached with some certainty. Another point should be added here, and that is that the costs that the seller would have in collecting information of importance to the buyer in making the desired item should be specified. Otherwise, the buyer would always be at a profit and would have nothing to risk, which could make his negotiations “more daring”. If the position was added that the buyer would be obliged to pay the actual costs, if the main contract is not realized, the buyer would approach a more careful and precise explanation of the requested items.

In accordance with all the above, it is concluded that the contract of sale according to the sample and the model is a frequent contract and that the clarification of unclear and linguistically imprecise legal provisions should be approached very seriously. The proposed solutions in the paper should be considered in more detail, and maybe some should be adopted, especially having in mind the scarce professional literature on this issue.

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## **ODGOVORNOSTI PRODAVCA IZ UGOVORNOG ODNOSA U POGLEDU NEDOSTATAKA STVARI KOD UGOVORA O PRODAJI PO UZORKU I MODELU**

**REZIME:** Odgovornosti prodavca za nedostatke stvari, kao zaseban, izdvojen i vrlo kompleksan institut, regulisane su obligacionim pravom. Ovlašćeni subjekt obligacionog prava je slobodan pri odlučivanju o stupanju u obligacioni odnos. Cilj subjekata u kontekstu zaključenja ugovornog odnosa, jeste njegova realizacija. Međutim, pored navedenog zajedničkog interesa ugovornih strana, vrlo često se u praksi događaju situacije da jedna od ugovornih strana ne izvrši ugovor u celosti ili ga pak izvrši, ali predmet ugovornog odnosa nije saobrazan ugovorenom. Ugovor o prodaji, zajedno sa svojim modalitetima, regulisani su Zakonom o obligacionim odnosima. Zakonske odredbe koje regulišu institut odgovornosti prodavca u kontekstu nedostataka stvari iz ugovornog odnosa kod ugovora o prodaji po uzorku i modelu nisu dovoljno precizno i jasno regulisane. Neophodnost i obaveznost definisanja instituta odgovornosti prodavca za nedostatke stvari iz ugovornog odnosa kod ugovora o prodaji po uzorku i modelu, ogleda se u preciznom i jezički jasnom definisanju odgovornosti prodavca za materijalne nedostatke stvari. Postavljeni predlozi rešenja u radu bi mogli predstavljati veliki doprinos za pravnu nauku, ali i praksu.

**Ključne reči:** odgovornost prodavca iz ugovornog odnosa u pogledu nedostataka stvari, ugovor o prodaji po uzorku i modelu, Zakon o obligacionim odnosima, rok za podnošenje prigovora za nesaobraznost robe.

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