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## The Conformity of the Goods to the Contract in International Sales

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# THE CONFORMITY OF THE GOODS TO THE CONTRACT IN INTERNATIONAL SALES<sup>+</sup>

Villy de Luca<sup>\*</sup>

## ABSTRACT

The present article aims to provide a general overview on the issue of conformity of the goods to the contract as regulated by Article 35 of the Convention on Contracts for the International Sales of Goods (“CISG”).

The analysis will focus on Article 35 CISG and, after having retraced the history that led to the current formulation of the provision, will concentrate on the implications following the adoption of a “unitary” notion of conformity. The evaluation will proceed focusing on the single express and implied conformity obligations covered, respectively, in the first and second paragraphs of Article 35 CISG.

The discussion will then delve into the cases of exclusion of liability. After having considered the exemptions falling under Article 35(3) CISG, the two cases of failure to give notice provided by Article 39 CISG will be addressed.

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## 1. INTRODUCTION

The issue of conformity of the goods to the contract has always played a central role in both national and international sales transactions as it goes to the very essence of the contractual relationship. Indeed, the underlying reason pushing any buyer to conclude a sales contract is the will to receive a specific product in return for a given price; the contract is nothing more than the means of regulating all the aspects of this transaction. Given the importance of guaranteeing the correspondence between the characteristics described in the contract and the final product, legal systems worldwide have always laid down provisions establishing when goods are deemed to be in conformity to the contract. Notwithstanding this widespread diffusion, the issue of conformity has not received a uniform regulation as the different national legislators have adopted their own approach to the concept. What followed is that when parties concluded an international sales transaction, the rules regulating the conformity of the goods to the contract necessarily differed according to the chosen applicable law.

The need to achieve uniformity in the field of conformity became pressing with the development of a global market economy. The process of globalization, a phenomenon which pushes toward the creation of a single common world market, boosted to a great extent international transactions and, inevitably, forced national regulators to re-think and re-arrange the basic categories underlying the contract. A globalized economy in which parties to the contract come from different legal backgrounds called for a uniform and easily accessible law specifically designed to address the peculiarities of such transactions. Willing to provide economic operators with a law capable of overcoming national boundaries, described as being the “merchants’ worst enemy,”<sup>1</sup> national regulators decided to intervene

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<sup>1</sup> See Franco Ferrari, *Specific Topics of the CISG in the Light of Judicial Application and Scholarly Writing*, 15 J.L. & COM. 4 (1995). On this point see also Francesco Galgano, *Il diritto uniforme e la vendita internazionale* [The Uniform Law and the International Sales], in *ATLANTE DI DIRITTO PRIVATO*

by adopting the legal instrument which is best capable of pursuing uniformity: international conventions.

The intention to create an internationally uniform discipline designed to “transcend national borders in order to maximize the utilization of resources”<sup>2</sup> pushed the International Institute for the Unification of Private Law (“UNIDROIT”) to undertake an extensive study on the field of sales law. Such efforts led to the adoption in 1964 of the Uniform Law on the International Sale of Goods (hereafter “ULIS”) and the Uniform Law on the Formation of Contracts for the International Sale of Goods (hereafter “ULF”). In spite of the limited success of these first attempts,<sup>3</sup> the United Nations Commission on International Trade Law (hereafter “UNCITRAL”) decided to continue on the same path and to revise the two conventions. When it became evident that a substantial modification was needed, UNCITRAL decided to incorporate the revisions in a new set of rules. The result was what has been defined as being the “most successful international document so far” in the field of sales law:<sup>4</sup> the 1980 United Nations Convention on Contracts for the International Sale of Goods (hereafter “CISG”).

Of the many issues addressed in the CISG, the one which has received the greatest amount of attention by both Courts and Scholars is certainly article 35, regulating the conformity of the goods to the contract. While on the one side this extensive bibliography has guaranteed a detailed analysis of all the terms and phrases of the provision, on the other, it has created some confusion on some of its most delicate aspects. The present discussion will concentrate on analyzing the single provi-

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COMPARATO [Atlas of Comparative Private Law] 211 (Francesco Galgano & Franco Ferrari eds. 1993) (affirming that “an obstacle to economic relationships which constantly increases among citizens of different countries; an obstacle above all for the enterprises that are involved in international commerce and that acquire primary resources or distribute goods in different countries which all have different law.”)

<sup>2</sup> Daniela Memmo, *Il contratto di vendita internazionale nel diritto uniforme* [The International Sale Contract in Uniform Law], 37 RIVISTA TRIMESTRALE DI DIRITTO E PROCEDURA CIVILE [Riv. Trim. Dir. Proc. Civ.] 181 (1983) (It.).

<sup>3</sup> Only 9 countries adopted the Conventions.

<sup>4</sup> BRUNO ZELLER, CISG AND THE UNIFICATION OF INTERNATIONAL TRADE LAW 94 (2007).

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sions regulating the conformity of the goods to the contract with a twofold intent: provide a clear and practical guide through this *mare magnum* of sources and ascertain whether article 35 has contributed to the process of achieving uniformity in international trade.

In the first chapter, the discussion will focus on the single express and implied conformity obligations covered, respectively, in the first and second paragraphs of art. 35. After having presented a detailed scrutiny of the conformity issue as regulated under the CISG, the analysis will then proceed to present those cases in which the seller will not be held liable even where it delivered non-conforming goods.

In a purely methodological key, it must be underlined that the analysis will always start from the history behind the provision and, where possible, will present opinions of both courts and scholars coming from the most diverse legal backgrounds. Considering the international nature of the CISG, terms and phrases will always be attributed their own “proper” meaning so to avoid the tendency of interpreting foreign legal concepts in light of national categories.

## 2. CONFORMITY OF THE GOODS TO THE CONTRACT IN LIGHT OF ARTICLE 35 CISG

The CISG is divided into four distinct parts regulating, respectively, the sphere of application and other general provisions (Part I), the formation of the contract (Part II), the sale of goods (Part III) and, ultimately, the final provisions (Part IV). The structure of the CISG is one of the main features, which distinguishes it from the preceding international conventions. Indeed, the former Hague conventions regulated the formation of the contract in the Uniform Law on the Formation of Contracts for the International Sale of Goods and the substantive issues in the Convention relating to a Uniform Law on the International Sale of Goods. Drafters of the CISG decided to eliminate this strict partition and inserted both sets of rules in the second and third part of the Convention.<sup>5</sup>

The third part, which regulates the substantive issues re-

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<sup>5</sup> See PETER SCHLECHTRIEM & PETRA BUTLER, UN LAW ON INTERNATIONAL SALES – THE UN CONVENTION ON THE INTERNATIONAL SALE OF GOODS 2 (2009).

lated to the sale of goods, is then again sub-divided into 5 chapters and is characterized by the adoption of a “horizontal” structure which combines the obligations of one party with the remedies of the other party: the obligations of the seller (chapter II) are followed by the remedies of the buyer in case of the seller’s breach of contract and then again the obligations of the buyer (chapter III) are followed by the remedies for the seller.<sup>6</sup>

Within the second chapter dedicated to the obligations of the seller, the rules regulating the conformity of the goods to the contract are contained in the second section entitled, “Conformity of the goods and third party claims.” Amongst the ten provisions contained in this section, the one which specifically sets out when goods are deemed to conform with the contract is article 35.<sup>7</sup>

Art. 35 CISG is certainly one of the Convention’s most successful provisions and, as will be demonstrated below, has been reproduced by legislators worldwide when reforming the rules regulating the issue of conformity. Before proceeding with the analysis of the individual paragraphs, it is, however, first and foremost important to briefly concentrate on the legislative his-

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<sup>6</sup> *Id.*

<sup>7</sup> United Nations Convention on Contracts for International Sale of Goods, Apr. 11, 1980, U.N. Doc. A/Conf. 97/18 art. 35 [hereinafter CISG]. Art. 35 reads 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 judgment;
  - c. possess the qualities of goods which the seller has held out to the buyer as a sample or model;
  - 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.

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tory of this provision as it will provide the necessary insight on the reasons which led to the adoption of the current structure and wording.

### 2.1 *History of the provision*

Article 35 finds its roots<sup>8</sup> in the Uniform Law on the International Sale of Goods, specifically in articles 33<sup>9</sup> and 36.<sup>10</sup>

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<sup>8</sup> See Commentary on the Draft Convention on Contracts for the International Sale of Goods, art. 33, U.N. Doc. A/CONF.95/7 (March 14, 1979), *available at* <http://www.uncitral.org/pdf/english/texts/sales/cisg/a-conf-97-19-ocred-e.pdf>. Some commentators, when recalling the direct antecedents of Art. 35 CISG, also mention Art. 19(1) ULIS which reads as follows: “Delivery consists in the handing over of goods which conform with the contract.” See e.g., C. MASSIMO BIANCA & MICHAEL JOACHIM BONELL, COMMENTARY ON THE INTERNATIONAL SALES LAW: THE 1980 VIENNA SALES CONVENTION 269 (1987). The author of the present article does not deny that ULIS art. 19(1) imposes a duty to deliver conforming goods. However, art. 19(1) is the result of a distinction that has been abandoned by the drafters of the CISG. In this respect, it must be noted that while the ULIS considered the delivery of non-conforming goods as a breach of the delivery obligation, the CISG distinguishes clearly the failure to deliver the goods from the failure to deliver conforming goods. As art. 19(1) considers the seller liable for not having complied with his delivery obligations in the case of non-conformity of the goods, and since such category is now encompassed within the unique notion of defective performance, Art. 35 CISG does not find its roots in the article. On the adoption of a unique notion of non-conforming delivery, see *infra* Part 2.2.

<sup>9</sup> The Hague Convention Relating to a Uniform Law on the International Sale of Goods, 1 July 1964, 834 U.N.T.S. 107 (1972) art. 33 [hereinafter ULIS].

Art. 33 ULIS:

The seller shall not have fulfilled his obligation to deliver the goods where he has handed over:

- a. part of the goods sold or a larger or a smaller quantity of the goods than he contracted to sell;
- b. goods which are not those to which the contract relates or goods of a different kind;
- c. goods which lack the qualities of a sample or model which the seller has handed over or sent to the buyer, unless the seller has submitted it without any express or implied undertaking that the goods would conform therewith;
- d. goods which do not possess the qualities necessary for their ordinary or commercial use;
- e. goods which do not possess the qualities for some particular purpose expressly or impliedly contemplated by the contract;
- f. in general, goods which do not possess the qualities and characteristics expressly or impliedly contemplated by the contract.

No difference in quantity, lack of part of the goods or absence of any

The changes brought about by the drafters of the CISG have not been of a fundamental nature; however, a comparison of the two conventions<sup>11</sup> shows that article 35 CISG has a simpler and more comprehensive structure.<sup>12</sup>

The first difference, easily perceptible even at a first glance, is the approach used to address the conformity issues. As a matter of fact, Article 33 ULIS lists six cases in which the seller has *not* fulfilled his obligations to deliver goods in conformity to the contract. Article 35 CISG, on the contrary, defines the content of the seller's obligation in a positive way by underlining the conditions that have to be respected in order for the goods to be deemed as conforming.<sup>13</sup>

Proceeding with the textual match-up of the different provisions, a second difference can be noted in respect to the rule regarding the exclusion of liability. While in the ULIS this aspect was regulated in article 36, and thus kept separate from the issues regarding non-conforming delivery, within the CISG this aspect was integrated in the third paragraph of Article 35 to achieve a more comprehensive structure. On the exclusion of liability it is necessary to underline that the CISG not only re-allocated, but also extended the scope of the provision.<sup>14</sup> While the text of the ULIS did not provide for an exclusion of liability in the case of sale by sample or model, Article 35(3) recalls this hypothesis, thus guaranteeing a more homogeneous regulation.

A third textual difference is the distinction between material and immaterial non-conforming delivery. The second paragraph of Article 33(2) ULIS excludes the seller's liability

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quality or characteristic shall be taken into consideration where it is not material.

<sup>10</sup> *Id.* art. 36 states:

The seller shall not be liable for the consequences of any lack of conformity of the kind referred to in sub-paragraph (d), (e), or (f) of paragraph 1 of Article 33, if at the time of the conclusion of the contract the buyer knew, or could not have been unaware of, such lack of conformity.

<sup>11</sup> *Match-up of CISG Article 35 with ULIS Art. 33 and 36*, INST. OF INT'L COMMERCIAL LAW, <http://www.cisg.law.pace.edu/cisg/text/matchup/matchup-u-35.html> (last visited Mar. 9, 2014).

<sup>12</sup> PETER SCHLECHTRIEM & INGBORG SCHWENZER, COMMENTARY ON THE UN CONVENTION ON THE INTERNATIONAL SALE OF GOODS 569 (Ingeborg Schwenzer ed., 3d ed. 2010).

<sup>13</sup> See BIANCA & BONELL, *supra* note 8, at 269.

<sup>14</sup> SCHLECHTRIEM & SCHWENZER, *supra* note 12, at 569.

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when the difference in quantity, the lack of part of the goods or the absence of any quality or characteristic is not material. This provision refers to those circumstances in which the seller delivered non-conforming goods, but the difference between what was delivered and what should have been delivered is so irrelevant that it may not be considered as breaching the contract.<sup>15</sup> The *rationale* behind Article 33(2) ULIS was to avoid pointless litigation and to dissuade buyers from acting in bad faith.<sup>16</sup> In spite of the noble intentions that inspired the drafters of the ULIS, the Officers participating to the Conference on Contracts for the International Sale of Goods<sup>17</sup> ultimately decided to exclude this provision from the Convention.<sup>18</sup> Even though some countries were still in favor of including such a rule in article 35 CISG,<sup>19</sup> the majority found it unjustified.<sup>20</sup> It

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<sup>15</sup> Recalling the words of André Tunc, author of the official commentary to the ULIS text, the concept of immaterial non-conformity “is not to be confused with the distinction between fundamental and non-fundamental breach of the contract. It contemplates a case of non-fundamental breach which is so slight as not to be considered as a breach and therefore not entitling the buyer to any remedy.” See André Tunc, *Commentary on the Hague Conventions of the 1st of July 1964 on International Sale of Goods and the Formation of the Contract of Sale*, <http://www.cisg.law.pace.edu/cisg/biblio/tunc.html> (last updated Apr. 30, 1998).

<sup>16</sup> *Id.*

<sup>17</sup> To briefly clarify the road which led to the adoption of the CISG it must be noted that in 1966 the General Assembly of the UN constituted the “United Nations Commission on International Trade Law” (“UNCITRAL”). In 1968 the Commission established the “Working Group” on International Sale of Goods instructing it to ascertain whether the Uniform Laws could be modified so as to render them capable of wider acceptance by countries of different legal, social and economic systems. It was in 1977 that the working group approved the text of a draft Convention, which was then presented to the Commission. The Commission reviewed the text and presented the draft Convention on Contracts for International Sale of Goods to the UN General Assembly. The General Assembly convened the United Nations Conference on Contracts for the International Sale of Goods to consider the draft Convention prepared by the UNCITRAL and to embody the results of its work in an international convention. The United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980) was finally adopted on 10 April 1980. For a detailed history on the adoption of the CISG see UNCITRAL, at 21, para. 40, U.N. Sales No. E.86.V.8 (1973), available at [http://www.uncitral.org/pdf/english/publications/sales\\_publications/UNCITRAL-e.pdf](http://www.uncitral.org/pdf/english/publications/sales_publications/UNCITRAL-e.pdf).

<sup>18</sup> See UNCITRAL, [1973] Y.B. Vol. IV 64, para. 43, U.N. Doc. A/CN.9/SER.A/1973, available at [http://www.uncitral.org/pdf/english/yearbooks/yb-1973-e/1973\\_e.pdf](http://www.uncitral.org/pdf/english/yearbooks/yb-1973-e/1973_e.pdf).

<sup>19</sup> During the 15th meeting of the First committee held on the 20th of March 1980, the CISG’s Working Group discussed the Australian amend-

was argued that:

First, there was the uncertainty of the test of "insignificant." Depending on findings of 'insignificant' non-conformity, the provision might deprive the buyer of his right to remedies for breach. Second, a breach, however insignificant, was nevertheless a breach for which the seller should be liable, and the buyer should not be denied his right to available remedies.<sup>21</sup>

Finally, the last relevant difference that may be noted when comparing the CISG with the ULIS is the addition of the packaging duty. Article 35(2)(d) of the CISG imposes on the seller an obligation to deliver goods packaged or contained in the "manner usual for such goods" or, in any case, in a way which guarantees the preservation and protection of the goods. While no corresponding provision can be found in the ULIS, this provision is not new to the common law tradition, as a similar rule may be found in section 2 – 314 of the United States Uniform Commercial Code.<sup>22</sup>

Going beyond a mere textual comparison of the present

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ment (A/CONF.97/C.1/L.74) which proposed to add a new paragraph reading as follows: " No difference in quantity, quality, description or packaging is to be taken into consideration if it is clearly insignificant". The Australian delegate, Mrs. Kamarul, "explained that her proposal, which was based on art. 3, paragraph 2 ULIS was intended as a precaution," and then added that even if "[s]ome delegations might regard it as superfluous...the matter was of concern to her delegation since the Australian courts had made it clear that they were inclined to be strict when there was a question of conformity between the goods delivered and the contract." The proposal was supported by the Egyptian and the Italian delegates. *See 1980 Vienna Diplomatic Conference Summary Records of Meetings of the First Committee 15th Meeting*, Institute of International Commercial Law, para. 89-100 (Mar. 20, 1980, 10 a.m.), <http://www.cisg.law.pace.edu/cisg/text/link36.html>.

<sup>20</sup> The amendment was put to the vote during the 15th Meeting of the First Committee and was finally rejected 27 votes to 9. *See United Nations Conference on Contracts for International Sale of Goods, Documents of the Conference and Summary Records of the Plenary Meetings and of the Meetings of the Main Committees*, 104, para. 6, U.N. Doc. A/CONF.97/19 (Mar. 10-Apr. 11 1980), available at [www.uncitral.org/pdf/english/texts/sales/cisg/a-conf-97-19-ocred-e.pdf](http://www.uncitral.org/pdf/english/texts/sales/cisg/a-conf-97-19-ocred-e.pdf).

<sup>21</sup> These were the words used by the Japanese delegate, Mr. Michida, when intervening during the 15th Meeting of the First Committee. *See 1980 Vienna Diplomatic Conference Summary Records of Meetings of the First Committee 15th Meeting*, *supra* note 19, at para. 92.

<sup>22</sup> Section 2 – 314 para. 2(e) expressly recalls that "Goods to be merchantable must be at least such as...(e) are adequately contained, packaged, and labeled as the agreement may require." *See U.C.C. § 2 –314 (1977)*.

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and past conformity provisions, the main difference between article 35 CISG and the corresponding ULIS provisions may be found in the dogmatic classification of non-conformity.<sup>23</sup> To fully comprehend the innovation brought about by the 1980 Vienna Convention, a clarification on the conceptual difference between failure to deliver and defective delivery is necessary.

## 2.2 *The unitary notion of non-conformity under the CISG*

Chapter III, Section I of the ULIS entitled “Delivery of the Goods” opened with article 19 ULIS, which defines delivery as the handing over of the goods, which conform to the contract. It follows that under the ULIS the seller’s failure to deliver conforming goods amounts to a breach of the delivery obligations.<sup>24</sup> The drafters of the CISG, however, have abandoned this approach.

The 1980 Vienna Convention distinguishes clearly the issue of delivery from the one of conformity.<sup>25</sup> Under articles 31–34 CISG, the seller has fulfilled its delivery obligations by handing over or placing at the buyer’s disposal “goods which meet the general description of the contract even though th[e] goods do not conform in respect of quantity and quality.”<sup>26</sup> Only once the goods have been delivered, the buyer has a duty to inspect the goods<sup>27</sup> and eventually notify<sup>28</sup> the seller whenever

<sup>23</sup> See SCHLECHTRIEM & SCHWENZER, *supra* note 12, at 569.

<sup>24</sup> See Commentary on the Draft Convention on Contracts for the International Sale of Goods, *supra* note 8, at para. 2.

<sup>25</sup> This distinction is emphasized by the structure adopted in the CISG. Part II, Section II entitled “Obligations of the seller” separates the provisions regarding the delivery of the goods from the ones regulating the conformity of the goods to the contract. While the former are contained within the first section entitled “Delivery of goods and handing over of the documents” the latter may be found within section II dedicated to the Conformity of the Goods and third party claims.”

<sup>26</sup> See BIANCA & BONELL, *supra* note 8, at 269.

<sup>27</sup> CISG, *supra* note 7, art. 38. Art. 38 CISG:

The buyer must examine the goods, or cause them to be examined, within as short a period as is practicable in the circumstances.

If the contract involves carriage of the goods, examination may be deferred until after the goods have arrived at their destination.

If the goods are redirected in transit or redispached by the buyer without a reasonable opportunity for examination by him and at the time of the conclusion of the contract the seller knew or ought to have known of the possibility of such redirection or redispach, examination may be

the product received breaches the conformity requirements set by Article 35 CISG. This clear distinction between failure to deliver goods and failure to deliver conforming goods has deep consequences when it comes to the remedies available to the buyer. Indeed, in case of lack of conformity, the buyer may resort solely to those remedies provided for non-conforming delivery, while it will never allow the buyer to invoke the provisions regarding failure to deliver the goods.<sup>29</sup>

This distinction may be found when dealing with avoidance of the contract as provided by Article 49. Under the CISG, the contract may be avoided in two distinct circumstances: when the seller fundamentally breaches the contract by failing to comply with one of its contractual duties or when the seller fails to deliver goods within the additional time period fixed by the buyer.<sup>30</sup> It follows that, while in the case of non-conforming delivery the buyer will have to prove the fundamental nature of the breach, when the goods have not been delivered the buyer is entitled to avoid the contract “without having to determine whether the total delay actually has reached 'fundamental' proportions.”<sup>31</sup> The sole notice of avoidance will therefore, suffice to untie the contractual relationship<sup>32</sup> only in the case of

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deferred until after the goods have arrived at the new destination.

<sup>28</sup> *Id.* art. 39. Art. 39 CISG states:

The buyer loses the right to rely on a lack of conformity of the goods if he does not give notice to the seller specifying the nature of the lack of conformity within a reasonable time after he has discovered it or ought to have discovered it.

*In any event, the buyer loses the right to rely on a lack of conformity of the goods if he does not give the seller notice thereof at the latest within a period of two years from the date on which the goods were actually handed over to the buyer, unless this time-limit is inconsistent with a contractual period of guarantee.*

<sup>29</sup> SCHLECHTRIEM & SCHWENZER, *supra* note 12, at 569; Commentary on the Draft Convention on Contracts for the International Sale of Goods, *supra* note 8, at para. 2.

<sup>30</sup> See Harry M. Flechtner, *Remedies Under the New International Sales Convention: The Perspective from Article 2 of the U.C.C.*, 8 J.L. & COM. 53 (1988).

<sup>31</sup> See JOSHEPH LOOKOFSKY, *The 1980 United Nations Convention on Contracts for the International Sale of Goods*, in 29 INTERNATIONAL ENCYCLOPEDIA OF LAWS, CONTRACTS 120 (J. Herbots & R. Blanpain eds. 2000).

<sup>32</sup> JOHN O. HONNOLD, UNIFORM LAW FOR INTERNATIONAL SALE UNDER THE 1980 UNITED NATIONS CONVENTION 313 (3rd ed. 1999).

non-delivery.<sup>33</sup>

The CISG has, therefore, adopted a unitary notion of defective performance: any difference between what the parties have contracted for and what the seller has delivered falls within the concept of lack of conformity.<sup>34</sup> This approach not only distinguishes the CISG from its predecessor, the ULIS, but also represents an innovation when compared to many national legal systems. Indeed, most domestic sales law contain subtle distinctions when it comes to non-conforming delivery.<sup>35</sup>

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<sup>33</sup> This interpretation is consistent with the intentions of the drafters made clear during the *travaux préparatoires* of the CISG. On this point see HONNOLD, *supra* note 32, at 314, “In UNCITRAL and at the Diplomatic Conference proposals were made to extend the notice-avoidance procedure to cases where the seller delivers goods that fail to conform to the contract. UNCITRAL rejected these proposals on the ground that the notice-avoidance procedure could be abused to convert a trivial breach into a ground for avoidance. For instance, a buyer who wishes to escape from his contractual obligations—e.g., after a price-collapse—might notify the seller that it has a specified time to correct specified minor defects in the goods although the distance separating the parties makes it impractical for the seller to comply with the notice. This understanding of the decisions taken by UNCITRAL was confirmed at the Diplomatic Conference by the rejection of proposals to broaden the scope of notice-avoidance to include non-conformity; in addition, to avoid any possible misunderstanding, the Diplomatic Conference added the words “in case of non-delivery” at the beginning of the notice-avoidance provision in Article 49(1)(b).”

<sup>34</sup> On the unitary notion of lack of conformity Cf. Marino Bin, *La non conformità dei beni nella convenzione di Vienna sulla vendita internazionale [Lack of Conformity of the Goods Under the CISG]*, 44 RIVISTA TRIMESTRALE DI DIRITTO E PROCEDURA CIVILE 755 (1990) (It.); Patricia Orejudo Prieto de los Mozos, *Funcion y alcance de la Lex Mercatoria en la conformidad material de las mercancías [“Conformity of the Goods” as Regulated by the CISG and the UNIDROIT Principles]*, 5 ANUARIO ESPAÑOL DE DERECHO INTERNACIONAL PRIVADO para. II(1)(A) (2005) (Sp.), available at [http://www.cisg.law.pace.edu/cisg/biblio/orejudo.html#\\*](http://www.cisg.law.pace.edu/cisg/biblio/orejudo.html#*); Teija Poikela, *Conformity of Goods in the 1980 United Nations Convention of Contracts for the International Sale of Goods*, 1 NORDIC J. COM. L. para. 4.1.1 (2003), available at <http://www.cisg.law.pace.edu/cisg/biblio/poikela.html>.

<sup>35</sup> Just to cite a few of them, starting from the United States, the Uniform Commercial Code distinguishes between express and implied warranties. U.C.C. §§ 2-313, 2-314 (1977). The English sales law differentiates between conditions and warranties. Sale of Goods Act, 1979, c. 54, §§ 14, 15 (U.K.) In the French legal system there is a distinction between *vice caché* and *vice apparent*. CODE CIVIL [C. CIV.] arts. 1641, 1642. The Italian *Codice Civile* considers separately the delivery of a different good (so called *aliud pro alio*) from the delivery of a defective good. Codice civile 16 marzo 1942, ns. 1490, 1497. Finally, under the Swiss law judges must distinguish the ordinary characteristics of the goods (so-called *Sacheigenschaft*) from the special characteristics

The CISG, on the contrary, unifies hidden defects, lack of quality and delivery of different goods under the umbrella of non-conforming delivery thus providing the same remedies regardless of the specific circumstance.<sup>36</sup> It has been argued,<sup>37</sup> that this approach better responds to the needs of international traders. Accordingly, this classification not only simplifies the situation by setting a clear line between proper performance of the contract and defective performance, but also avoids complex distinctions within the category of non-conforming delivery.

### *2.3 Allocating responsibility under article 35 CISG: caveat emptor or caveat venditor?*

The issue of non-conformity has always been common to all legal systems. Still, there are different ways in which it has been addressed. Ernst Rabel, one of the founding fathers of the modern international sales of goods law,<sup>38</sup> in his *Das Recht des Warenkaufs*<sup>39</sup> analyzed different sales law and reached the conclusion that there were differing views as to who must bear the responsibility for the defectiveness of the goods. One approach, based on the Roman law principle *tale quale* according to which the goods are “bought as seen”, considers that, since the buyer has selected the goods, it must bear the responsibility of the lack of conformity. This principle was commonly referred to as “*caveat emptor*” (i.e. “let the buyer beware”) and was certainly reasonable in a market economy based on the direct exchange of goods between seller and buyer. Since the end of the 19<sup>th</sup> century, however, many sales laws<sup>40</sup> have adopted a

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warranted by the seller (so called *Zusicherung*). OBLIGATIONENRECHT [OR][Civil Code] Mar. 30, 1911, SR 220, RS 220, art. 197. Cf. Sannini Ilaria, *L'applicazione della Convenzione di Vienna sulla vendita internazionale negli Stati Uniti*, *Op. Cit.*, 229 No. 698; SCHLECHTRIEM & BUTLER, *supra* note 5, at 113; SCHLECHTRIEM & SCHWENZER, *supra* note 12, at 570.

<sup>36</sup> See Cesare Massimo Bianca, ‘Consegna di *Aliud pro alio* e decadenza dai rimedi per omessa denuncia nella direttiva 1999/44/EC’ (2001) 1 *Contratto e Impresa/Europa*, 16.

<sup>37</sup> See BIANCA & BONELL, *supra* note 8, at 271.

<sup>38</sup> For a brief biography of Professor Rabel, see Prof. Dr. Ernst Rabel – Curriculum Vitae, GLOBAL SALES LAW, <http://www.globalsaleslaw.org/index.cfm?pageID=649>.

<sup>39</sup> ERNST RABEL, *DAS RECHT DES WARENKAUFS* (1957).

<sup>40</sup> Cf. ULRICH KRÜGER, *MODIFIZIERTE ERFOLGSHAFTUNG IM UN-*

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more buyer friendly approach, providing for the seller's liability in case of non-conforming goods. The diffusion of this so called *caveat venditor* principle (i.e. "let the seller beware"), is justified by the need to provide economic operators a set of rules which better suits the structure of international trade. Indeed, in an international transaction the buyer hardly will have had the chance to personally choose and inspect all the goods before the conclusion of the contract. It would therefore, be unreasonable for the buyer to bear the risk of the defective goods given that they clearly fall outside its sphere of influence.

There is no need to attentively analyze the individual paragraphs of art. 35 to understand that the Convention, in line with the most modern sales laws, is based on the assumption that the seller is liable in case of defective goods. Applying old categories to modern legal instruments, it may well be affirmed that the drafters of the CISG opted for the *caveat venditor* principle.<sup>41</sup> This, however, is not an absolute truth but rather just a starting point. As a matter of fact, if the concrete circumstances modify the premises of the argument, the responsibility for the non-conforming goods may well shift to the buyer. Suppose, for example, that the buyer, an experienced firm in the trade, has sent an employee to inspect a sample of the goods and then has ordered goods "as per sample". If the final goods perfectly conform to the sample but are not fit to be used for the intended purpose, the seller may not be found liable for the alleged defect. In those circumstances it was the buyer who had a greater influence on the characteristics of the goods (personally chose the goods) compared to the seller (merely delivered the goods chosen by the buyer) and therefore it must bear the responsibility in case the final product does not conform to what was expected.

Stating that the CISG, *in toto*, adopted the *caveat venditor* principle is therefore, incorrect. No one denies that article 35

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KAUFRECHT: DIE HAFTUNGSBEFREIUNG BEI LIEFERUNG VERTRAGSWIGRIGER WARE GEMAESS ART. 79 CISG, 25 (1997).

<sup>41</sup> See LOOKOFKY, *supra* note 31, at 90 (recognizing that, "As under most modern domestic rule-sets, so too under the CISG: *caveat emptor* ('let the buyer beware') is no longer the *supplementary* rule, because today's international buyer is *entitled to expect* the goods to possess certain basic qualities, even if the contract does not expressly so state. Indeed, it would seem that *caveat venditor* has become the supplementary CISG rule.")

CISG is based on the assumption that the seller bears the risk of defective goods; this assumption, however, may be contradicted if the facts of the case show that the buyer's influence on the goods is greater than the seller's one. In conclusion, it may be affirmed that, "Article 35 [...] [is] a rule in which the principles of *caveat emptor* and *caveat venditor* meet"<sup>42</sup> and, according to the specific circumstances, the responsibility will be allocated to the party, which is more closely linked to the disputed factors.

#### 2.4 *Autonomous and uniform interpretation under article 7 CISG: rejecting a "homeward trend" and promoting uniformity*

Article 35 CISG provides a defined set of rules that apply to the issues regarding conformity of the goods to the contract. A uniform law, however, does not guarantee a uniform application of the given set of rules. Indeed, before being enacted, every law has to be interpreted and this creates a risk related to the manner the interpreter will approach the legal provision.<sup>43</sup> The problem of interpretation is inherently related to any legal system, but the risk of diverging conclusions increases when dealing with international conventions, as these are constantly used by legal practitioners having different legal backgrounds.<sup>44</sup> It follows, that in order to understand how the pro-

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<sup>42</sup> René Franz 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*, 1 NORDIC J. COM. L. 4 (2004), available at <http://www.cisg.law.pace.edu/cisg/biblio/henschel2.html>.

<sup>43</sup> See R.J.C. Munday, *The Uniform Interpretation of International Conventions*, 27 INT'L & COMP. L.Q. 450, 450 (1978) (affirming that "[t]he principal objective of an international convention is to achieve uniformity of legal rules within the various States party to it. However, even when outward uniformity is achieved [...], uniform application of the agreed rules is by no means guaranteed, as in practice different countries almost inevitably come to put different interpretations upon the same enacted words.").

<sup>44</sup> On this point, see Franco Ferrari, *Uniform Interpretation of the 1980 Uniform Sales Law*, 24 GA. J. INT'L & COMP. L. 183, 198 (stating, "Of course, interpretive problems can arise in relation to national legal systems as well, but such problems are much more prevalent when it comes to the determination of the precise meaning of a law which, like the 1980 Vienna Sales Convention, has been drafted on an international level.") See also Giuseppe Benedetti in Cesare Massimo Bianca, *Convenzione di Vienna sui contratti di vendita internazionale di beni mobili* (CEDAM, Padova, 1989 – 1992), 9, recognizing the difficulties related to the interpretation of a convention which "does not constitute an exhaustive source of its subject, but regulates only

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vision will be applied, one must have clear in mind the rules regulating its interpretation. In order to avoid the dangers of inconsistent interpretation and prevent any misunderstanding, it is necessary, at the outset, to briefly present the method, which has to be followed when analyzing the provision.

There are two opposing views as to the way the interpreter must proceed when dealing with international conventions.<sup>45</sup> On the one hand, it is believed that they must be interpreted in light of the interpretative techniques of the country in which they will be applied.<sup>46</sup> According to the opposing view, instead, the interpreter must approach the conventions autonomously<sup>47</sup> leaving aside any national category, which would not only endanger the uniform application, but also lead towards episodes of forum shopping.<sup>48</sup> Aware of the risks related to the interpretation, drafters of the CISG introduced a rule regulating it.

Article 7(1) CISG<sup>49</sup> is an innovation for which there is no corresponding provision in the ULIS.<sup>50</sup> It sets three guidelines for interpreting the CISG: the first one is the international

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certain issues of it excluding others" and which "does not want to identify itself with any legal system, because it wants to conjugate with all."

<sup>45</sup> Cf. Ferrari, *supra* note 44, at 198.

<sup>46</sup> Cf. Sergio Carbone, *L'ambito di applicazione ed i criteri interpretativi della convenzione di Vienna*, in LA VENDITA INTERNAZIONALE: LA CONVENZIONE DI VIENNA DELL'11 APRILE 1980: ATTI DEL CONVEGNO DI STUDI DI S. MARGHERITA LIGURE (26-28 SETTEMBRE 1980) 63, 84 (1981) (stating "in virtue of national proceedings, the conventions transform themselves into domestic law and therefore their interpretation and integration must take place according to the interpretive techniques . . . of the domestic system in which they are transplanted and will be applied.")

<sup>47</sup> Cf. BERNARD AUDIT, LA VENTE INTERNATIONALE DE MARCHANDISES: CONVENTION DES NATIONS-UNIES DU 11 AVRIL 1980, at 47 (1990).

<sup>48</sup> See HONNOLD, *supra* note 32, at 142 (stating that "[t]he settlement of disputes would be complicated and litigants would be encouraged to engage in forum shopping if the courts of different countries persist in divergent interpretations of the Convention.")

<sup>49</sup> Art. 7 CISG:

In the interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade.

Questions concerning matters governed by this Convention which are not expressly settled in it are to be settled in conformity with the general principles on which it is based or, in the absence of such principles, in conformity with the law applicable by virtue of the rules of private international law.

<sup>50</sup> Cf. Ferrari, *supra* note 44, at 199.

character of the text, the second is the need to promote uniformity and, finally, the third is the observance of good faith in international trade.<sup>51</sup> By imposing a duty to interpret the Convention having regard to its “international character”, the drafters of the CISG opted for an autonomous interpretation. It follows that when approaching the legal provisions reported therein; the interpreter must leave behind any national preconception and assign the meaning that results from the structure, the underlying principles and the drafting history of the CISG itself.<sup>52</sup> Words and phrases, therefore, should not be interpreted in light of domestic law even when they correspond to a particular concept present in a given legal system.<sup>53</sup>

The choice to opt for an “autonomous” interpretation is consistent with the goal of promoting uniformity in international trade.<sup>54</sup> Indeed, if every party to the Convention were to

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<sup>51</sup> Cf. PETER HUBER & ALASTAIR MULLIS, *THE CISG: A NEW TEXTBOOK FOR STUDENTS AND PRACTITIONERS* 7 (2007).

<sup>52</sup> Cf. *id.*

<sup>53</sup> See Franco Ferrari, *Have the Dragons of Uniform Sales Law Been Tamed? Ruminations on the CISG's Autonomous Interpretation by Courts*, in *SHARING INTERNATIONAL COMMERCIAL LAW ACROSS NATIONAL BOUNDARIES: FESTSCHRIFT FOR ALBERT H. KRITZER ON THE OCCASION OF HIS EIGHTIETH BIRTHDAY 140* (Camilla Andersen & Ulrich Schroeter eds. 2008) (stating that “one should not have recourse to any domestic concept [...] to solve interpretive problems arising from the CISG, as difficult as this may be. Many commentators have argued that what has just been said is true even where the expressions employed by the CISG (but this is generally true for any uniform law convention) are textually the same as expressions which within a particular legal system have a specific meaning -- such as “avoidance”, “reasonable”, “good faith”, “trade usages”, etc. In effect, these expressions as well have to be considered to be independent and different from the domestic concepts.”)

<sup>54</sup> It is noteworthy to underline that achieving uniformity in international trade is not only the objective of the CISG, but is the far reaching goal pursued by the United Nations Commission on International Trade Law (UNCITRAL). This is supported by the UN's Resolution establishing the UNCITRAL which expressly recognizes that “The Commission shall further the progressive harmonization and unification of the law of international trade by [...] (c) Preparing or promoting the adoption of new international conventions, model laws and uniform laws and promoting the codification and wider acceptance of international trade terms, provisions, customs and practices, in collaboration, where appropriate, with the organizations operating in this field; (d) Promoting ways and means of ensuring a uniform interpretation and application of international conventions and uniform laws in the field of the law of international trade”. See UN - General Assembly resolution 2205 (XXI) of 17 December 1966, *Establishment of the United Nations Commission on International Trade Law*, available at <http://www.jus.uio.no/>

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enforce the provisions according to a “nationalistic” interpretation, the CISG would result in nothing more than a uniform set of rules applied inconsistently<sup>55</sup> and this would deprive the “signatories of the predictability and reliability of law which the CISG was meant to create”.<sup>56</sup>

Interpreting the provisions autonomously may avoid the dangers of “homeward trend”,<sup>57</sup> but does not alone suffice to guarantee a uniform interpretation of the CISG worldwide.<sup>58</sup>

To achieve consistency it is necessary that all interpreters, regardless of their legal background, assign similar meanings to the same words and phrases when “autonomously” interpreting the CISG. Drafters of the CISG were well aware of this and therefore, introduced a second guideline calls on the interpreter to have regard to the need to promote uniformity in its application. One method to attain this kind of uniformity is resorting to the so-called “global jurisconsultorium.”<sup>59</sup> This concept calls for a truly international approach in which the interpreter

lm/uncitral.2205-xxi/doc.html#3 [accessed 19 September 2011].

<sup>55</sup> As correctly noted by Viscount Simonds in *Scruttons Ltd. v. Midland Silicones Ltd.*, [1962] A.C. 446 (H.L.) 4 (expounding that inconsistent interpretation should be avoided as “it would be deplorable if the nations should, after protracted negotiations, reach agreement [...] and that their several courts should then disagree as to the meaning of what they appeared to agree upon.”)

<sup>56</sup> Marcus G. Larson, *Applying Uniform Sales Law to International Software Transactions: The Use of the CISG, its Shortcomings, and a Comparative Look at How the Proposed U.C.C. Article 2B Would Remedy Them*, 5 TUL. J. INT’L & COMP. L. 445, 459 (1997).

<sup>57</sup> See Harry Flechtner & Joseph Lookofsky, *Nominating Manfred Forberich: The Worst CISG Decision in 25 Years?* 9 VINDOBONA J. INT’L COM. L. & ARB. 199, 202 (2005) (defining the concept of “homeward trend” as the “tendency of those interpreting the CISG to project the domestic law in which the interpreter was trained (and with which he or she is likely most familiar) onto the international provisions of the Convention.”)

<sup>58</sup> In *SO. M. AGRI s.a.s di Ardina Alessandro & C. v. Erzeugerorganisation Marchfeldgemüse GmbH & Co. KG*, Tribunale di Padova, No.40552, 25 Feb. 2004, available at <http://www.cisg.law.pace.edu/cases/040225i3.html> [last visited 19 September 2011] it has been clearly stated that “the mere autonomous interpretation of [CISG] – [i.e. an] interpretation that does not refer to the meaning attributed to specific expressions by a particular national regulation – is by itself inadequate to assure the uniformity to which [CISG] aims in order to promote the development of international trade.”

<sup>59</sup> See CAMILLA BAASCH ANDERSEN, FRANCESCO G. MAZZOTTA, & BRUNO ZELLER, *A PRACTITIONER'S GUIDE TO THE CISG 1* (2010), available at <http://www.cisg.law.pace.edu/cisg/biblio/andersen-mazzotta-zeller.html>.

must rely on international scholarly materials and practice of other contracting States.<sup>60</sup> Judges and arbitrators, therefore, should conform to the findings of foreign judicial bodies when they have solved similar or analogous questions.<sup>61</sup> To aid legal practitioners in this hard task, since 1988<sup>62</sup> UNCITRAL has adopted a reporting system according to which national correspondents submit to the UNCITRAL Secretariat decisions applying the different UNCITRAL instruments. With the goal of promoting uniform interpretation and application of the texts, decisions are then made available in the six UN languages in both hard copy and on the internet.<sup>63</sup> This “official” initiative, together with the other valuable unofficial ones<sup>64</sup>, has been es-

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<sup>60</sup> Cf. CAMILLA BAASCH ANDERSEN, UNIFORM APPLICATION OF THE INTERNATIONAL SALES LAW: UNDERSTANDING UNIFORMITY, THE GLOBAL JURISCONSULTORIUM AND EXAMINATION AND NOTIFICATION PROVISIONS OF THE CISG 47 (2007); HERBERT BERNSTEIN & JOSEPH LOOKOFKY, UNDERSTANDING THE CISG IN EUROPE 32 (2002).

<sup>61</sup> See Dietrich Maskow, *The Convention on the International Sale of Goods from the Perspective of the Socialist Countries*, in LA VENDITA INTERNAZIONALE: LA CONVENZIONE DI VIENNA DELL' 11 APRILE 1980 39, 54 (1981). On this point, see also Albert H. Kritzer, *The Convention on Contracts for the International Sale of Goods: Scope, Interpretation and Resources*, in CORNELL REVIEW OF THE CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS 147, 155 (1995).

<sup>62</sup> On the adoption of this system of reporting, see Rep. of the U.N. Comm'n on Int'l Trade Law, 21st Sess., Apr. 11-20, 1988, U.N. Doc. A/43/17 (1988), reprinted in [1988] UNCITRAL Y.B. XIX – U.N. Sales No. E.89.V.8, para. 98 - 109, available at [http://www.uncitral.org/pdf/english/yearbooks/yb-1988-e/yb\\_1988\\_e.pdf](http://www.uncitral.org/pdf/english/yearbooks/yb-1988-e/yb_1988_e.pdf) (affirming “[i]nformation on the application and interpretation of the international text would help to further the desired uniformity in application and would be of general informational use to judges, arbitrators, lawyers and parties to business transactions.”)

<sup>63</sup> Abstracts of the decisions are available free of charge on the “Case Law on UNCITRAL Texts” (CLOUT) which “a system for collecting and disseminating information on court decisions and arbitral awards relating to Conventions and Model Laws that have emanated from the work of the Commission [...] The purpose of the system is to promote international awareness of such legal texts elaborated or adopted by the Commission, to enable judges, arbitrators, lawyers, parties to commercial transactions and other interested persons to take decisions and awards relating to those texts into account in dealing with matters within their responsibilities and to promote the uniform interpretation and application of those texts.” For more information on the CLOUT system see UNCITRAL, Case Law on UNCITRAL Texts (CLOUT) (2010, No. A/CN.9/SER.C/GUIDE/1/Rev.2), available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/V10/547/96/PDF/V1054796.pdf?OpenElement>.

<sup>64</sup> Of the many, the main ones are certainly the “Albert H. Kritzer – CISG Database” created by the Pace University Institute of International Commercial Law, available at <http://www.cisg.law.pace.edu/> and the

sential for the process of uniform application of the CISG.<sup>65</sup>

In the present dissertation, Article 35 CISG will be analyzed consistently with the underlying interpretation principles of the 1980 Vienna Convention. To this extent, terms and phrases will be given a proper “CISG-meaning” detached from any national preconception or category; moreover, case law of the contracting States will often be invoked to explain concepts or support a thesis.

### 2.5 Conformity of the goods under CISG Article 35

Article 35 is the sole provision within the CISG that regulates the seller’s obligation to deliver goods in conformity to the contract. The provision has a threefold function: it states the seller’s general obligation to deliver conforming goods, sets the criteria by which the goods are deemed to conform to the contract and, finally, provides for an exception to the seller’s liability.<sup>66</sup>

The conformity provision is divided in three distinct paragraphs. Article 35(1) of the CISG deals with the “express” conformity obligation and imposes upon the seller the duty to deliver goods of the quantity, quality, and description and

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“UNILEX” database created by the Centre for Comparative and Foreign Law Studies of Rome, *available at* <http://www.unilex.info/>.

<sup>65</sup> Several cases show that judges are well aware and use these instruments when having to deal with cases regulated by the CISG. *See* for example, *Al Palazzo S.r.l v. Bernardaud di Limoges S.A.*, Tribunale di Rimini, No. 3095, 26 November 2002, *available at* <http://www.cisg.law.pace.edu/cases/021126i3.html> (stating “there are many worthwhile publications that help to reduce interpretative differences, namely data bases that collect and edit international case law. *See*, for example, <http://www.unilex.info/>); *See also*, *Chicago Prime Packers, Inc., v. Northam Food Trading Co.*, 408 F.3d 894 (7<sup>th</sup> Cir. 2005), *available at* <http://cisgw3.law.pace.edu/cases/050523u1.html> (where it is affirmed that the “Court relie[d] upon the detailed abstracts of those decisions provided by UNILEX, an “intelligent database” of international case law on the CISG. All of the abstracts cited therein are *available at* [unilex.info](http://www.unilex.info/).”)

<sup>66</sup> Many commentators to the CISG define Art. 35 as a rule defining the conformity obligation. It is the author’s opinion, however, it is necessary to be more precise. Art. 35 differentiates between the duty to deliver conforming goods and the criteria, which determine a conforming delivery. On this (indeed subtle) distinction *Compare*, *See* BIANCA & BONELL, *supra* note 8, at 268, (affirming that “Article 35 states that the seller must deliver goods conforming to the contract (conformity principle) and lays down the conformity criteria.”)

packaged in the way provided by the contract. Article 35(2) sets four “implied” conformity obligations, which apply only if not otherwise agreed. Lastly, article 35(3) regulates the conditions for the exclusion of the seller’s liability in the case of non-conforming delivery.

### 2.5.1 Article 35(1) CISG: the express conformity obligations

When it comes to determining whether the seller has complied with its conformity obligations, Article 35(1) places primary importance on the agreement of the parties as expressed in the contract. Borrowing the words used in the Secretariat Commentary, “[T]his provision recognizes that the overriding source for the standard of conformity is the contract between the parties.”<sup>67</sup> Indeed, Article 35 rejects an “objective” notion of conformity and opts, as have other domestic legal systems,<sup>68</sup> for the concept of “subjective” defect.<sup>69</sup> Goods are deemed to be conforming not when they meet abstract and objective standards, but rather when they correspond to the concrete description contained in the contractual agreement.<sup>70</sup> The highlight placed on the will of the parties is yet another example of the CISG’s fundamental principle according to which the primary source of rules governing international sales is the agreement

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<sup>67</sup> Secretariat Commentary on article 33 of the 1978 Draft (draft counterpart of CISG article 35), para. 4.

<sup>68</sup> The reference is to the German, French and Swiss legal systems, which adopt a similar “subjective” approach to the conformity obligations. *See also*, P. Schlechtriem, *Schuldrecht, Besonder Teil* (Mohr siebeck, Tübingen, 2003), para. 33; Ben Abderrahmane, ‘*La Conformité des Merchandise dans la Convention du 11 Avril 1980 sur le Contrats de Vente Internationale de Merchandises*’, DROIT ET PRATIQUE DU COMMERCE INTERNATIONAL/INTERNATIONAL TRADE LAW AND PRACTICE (Paris) 15 (1981) 551; H. Honsell, *Schweizerisches Obligationenrecht – Besonder Teil* (Stämpfli Verlag, Bern, 2006), 74.

<sup>69</sup> *See* SCHLECHTRIEM & BUTLER, *supra* note 5, at 11, 113 (recognizing that “The conformity of the goods with the contract is not determined objectively but depends first and foremost on the “subjective” description of the goods in the contract.”)

<sup>70</sup> *See* R. HYLAND in SCHLECHTRIEM P. (ed.), *Conformity of Goods to the Contract Under United Nations Sales Conventions and the Uniform Commercial Code*, EINHEITLICHES KAUFRECHT UND NATIONALES OBLIGATIONENRECHT, 319 (Nomos, Baden-Baden, 1987), (affirming that according to a subjective notion of defect “goods are defective when they do not possess the characteristics the parties assumed they possessed at the moment the contract was concluded.”)

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of the parties.<sup>71</sup>

Given the central role played by the contract, whenever the contractual provisions are unclear, serious doubts arise as to the extent of the conformity obligations. In those circumstances, in order to ascertain the characteristics the parties have agreed upon, the contract must be interpreted<sup>72</sup> using the criteria set by Article 8 CISG.<sup>73</sup> To this extent, one must look at the intent of the party who made the statement so long as the other party knew or could not have been unaware of what the intent was or, if not applicable, in light of the understanding that a reasonable person would have had in the same circumstances.<sup>74</sup>

The conformity obligations, however, are not limited solely to what the contract expressly reports; the seller must also comply with the implied contractual requirements.<sup>75</sup> Implied requirements may arise, for example, from practices estab-

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<sup>71</sup> See LOOKOFSKY, *supra* note 31, at 89; On the central nature of this principle see UNCITRAL, 'UNCITRAL Digest of case law on the United Nations Convention on the International Sale of Goods – Article 6, para. 2 (2004, No. A/CN.9/SER.C/DIGEST/CISG/6), available at <http://daccess-dds-n.y.un.org/doc/UNDOC/GEN/V04/547/50/PDF/V0454750.pdf?OpenElement> [accessed 19 September 2011].

<sup>72</sup> Cf. HUBER and MULLIS, *supra* note 51, at 131.

<sup>73</sup> Art. 8 CISG:

For the purposes of this Convention statements made by and other conduct of a party are to be interpreted according to his intent where the other party knew or could not have been unaware what that intent was.

If the preceding paragraph is not applicable, statements made by and other conduct of a party are to be interpreted according to the understanding that a reasonable person of the same kind as the other party would have had in the same circumstances.

In determining the intent of a party or the understanding a reasonable person would have had, due consideration is to be given to all relevant circumstances of the case including the negotiations, any practices which the parties have established between themselves, usages and any subsequent conduct of the parties.

<sup>74</sup> For the sake of clarity it is noteworthy to underline that even though the wording of Art. 8 CISG only refers to the “statements” and “conduct” of a party, it is commonly accepted that the rules presented therein also apply to the interpretation of the contract. See R. Brand, F. Ferrari & H. M. Flechtner, *The Draft Uncitral Digest And Beyond - Cases, Analysis And Unresolved Issues in the U.N. Sales Convention* (Sellier European Law Publishers, 2003), 175; P. Huber, 'Some introductory remarks on the CISG' (2006) 6 *Internationales Handelsrecht*, 235.

<sup>75</sup> See SCHLECHTRIEM & SCHWENZER, *supra* note 12, at 571.

lished between the contracting parties or from a trade usage the parties were aware of and which is widely known in the trade industry.<sup>76</sup> Even if the contract is silent, the seller has the duty to comply with these implied requirements in order to fulfill the conformity obligations. The importance of the implied conformity obligations was emphasized by a leading Austrian case decided in February 2003. The dispute dealt with the delivery of frozen fish and the Austrian Supreme Court recognized that, regardless of the contractual provisions, “where [...] international business customs with respect to certain characteristics exist, these must be presented as a minimum of quality.”<sup>77</sup>

Implied conformity obligations, which are binding for the seller, should not be confused with statements made by the parties during preliminary negotiations.<sup>78</sup> Under Article 35(1), conformity obligations arise solely from what is (either expressly or impliedly) provided within the contract. What is left outside of the contract has not been agreed between the parties and, therefore, may not be considered as a source of legal obligations; however, not directly binding, negotiations are fundamental when it comes to the interpretation of the contractual provisions. Indeed, in recalling the circumstances, which have to be kept in mind when determining both the intent of the parties or the understanding of a reasonable person, Article 8(3) expressly refers to the negotiations. It follows that statements and conduct during the pre-contractual phase will not *per se* create legal obligations but will aid the interpreter to better understand the extent of the latter.

When addressing the seller’s obligations under Article

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<sup>76</sup> Both circumstances are provided by the Convention itself under Art. 9 which clearly affirms that :

The parties are bound by any usage to which they have agreed and by any practices, which they have established between themselves.

The parties are considered, unless otherwise agreed, to have impliedly made applicable to their contract or its formation a usage of which the parties knew or ought to have known and which in international trade is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade concerned.

<sup>77</sup> *Oberster Gerichtshof*, No. 2 Ob 48/02a, Austria, 27 February 2003, available at <http://cisgw3.law.pace.edu/cases/030227a3.html> [accessed 19 September 2011].

<sup>78</sup> See HYLAND, *supra* note 70, at 308.

35(1), it must be recalled that liability arises if there is a failure to provide goods in respect of the following four criteria: quantity, quality, description and packaging.

### 2.5.1.1 Contractual quantity

The delivery of an amount of goods, which differs from the contractually agreed quantity constitutes a breach of the conformity obligations. The general rule imposes upon the seller a duty to deliver the exact quantity of goods stipulated in the contract;<sup>79</sup> any discrepancy, regardless of the significance, allows the buyer to invoke the remedies provided for non-conforming delivery.<sup>80</sup> Regardless of the general rule, the contract may well provide for the seller to deliver goods falling “around” a given quantity. As the standard for conforming delivery is set by the contract, the seller may not be found liable if the amount of goods falls within the tolerated range.<sup>81</sup>

When dealing with contractual quantity, Article 35(1) CISG does not distinguish between the delivery of more or less than the agreed amount of goods. Both circumstances constitute a violation of the conformity obligations.<sup>82</sup> What differs,

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<sup>79</sup> On the practical application of this principle, *see, Oberlandesgericht Düsseldorf*, No. 17 U 82/92, Germany, 8 January 1993, *available at* <http://cisgw3.law.pace.edu/cases/930108g1.html> [accessed 19 September 2011] where the seller was found in principle liable under Art. 35(1) as it failed to deliver the exact amount of cucumbers. In the specific circumstance, however, the buyer lost the right to rely on such non-conformity as it failed to give a timely notice under Art. 39 CISG.

<sup>80</sup> *See* HUBER and MULLIS, *supra* note 51, at 131, fn. 469, drawing the following parallel “In English law, the courts have refused to allow buyers to take advantage of a merely “de minimis” variation [...]. Whether the position would be the same under the Convention is open to doubt.” It, however, then adds “Unless there is a contractual term, previous course of dealing or trade usage allowing variation, it is suggested that any variation including those which are merely de minimis” amount to a breach of contract.

<sup>81</sup> *See* SCHLECHTRIEM & SCHWENZER, *supra* note 12, at 569.

<sup>82</sup> For the sake of completeness it must be recalled that in a case regarding the supply of electronic components, the Appellate Court of Paris (*see* Fauba France FDIS GC Electronique v. Fujitsu Microelectronik GmbH, Cour d’appel de Paris, No. 92-000 863, France, 22 April 1992, *available at* <http://cisgw3.law.pace.edu/cases/920422f1.html> [accessed 19 September 2011]) found that the buyer was bound to retain the excessive goods as it should have immediately returned them to the seller rather than notifying the discrepancy. Notwithstanding the fact that the decision was confirmed by the French Supreme Court (*see Cour de Cassation*, No. 92-16.993, France, 4

however, are the remedies reserved to the buyer. If the seller has delivered less than what has been agreed<sup>83</sup> the situation is regulated by Article 51 CISG.<sup>84</sup> Under this provision, the buyer may, alternatively, fix an additional time period for delivery of the missing part,<sup>85</sup> accept the non-conforming delivery contracting a price reduction,<sup>86</sup> declare the contract partially avoided with respect to the missing parts<sup>87</sup> or, avoid the entire contract if the partial non-delivery constitutes a fundamental breach of the whole contract. In any case, the seller is entitled to damages arising from the partial delivery.<sup>88</sup>

The delivery of an excessive quantity of goods, instead, falls under the scope of article 52,<sup>89</sup> which provides that the

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January 1995, available at <http://cisgw3.law.pace.edu/cases/950104f1.html> [accessed 19 September 2011]), this opinion is to be considered incorrect. For a more detailed criticism of the decision see Poikela, *supra* note 34, at para. 5.1.1.

<sup>83</sup> It goes without saying that this circumstance solely applies to separable goods. When the contract provides for the delivery of a single good delivering "less" than the agreed quantity would entail a non-delivery situation.

<sup>84</sup> Art. 51 CISG:

If the seller delivers only a part of the goods or if only a part of the goods delivered is in conformity with the contract, articles 46 to 50 apply in respect of the part which is missing or which does not conform.

The buyer may declare the contract avoided in its entirety only if the failure to make delivery completely or in conformity with the contract amounts to a fundamental breach of the contract.

<sup>85</sup> Cf. M. Will in BIANCA and BONELL, *supra* note 8, at 378.

<sup>86</sup> Cf. HONNOLD, *supra* note 32, at 344.

<sup>87</sup> See Secretariat Commentary on article 47 of the 1978 Draft (draft counterpart of CISG article 51), para. 2, available at <http://www.cisg.law.pace.edu/cisg/text/secomm/secomm-51.html> [accessed 19 September 2011]. "This rule was necessary because in some legal systems a party cannot avoid only a part of the contract [...] However, under article 47(1) [draft counterpart of CISG article 51(1)] it is clear that under this Convention the buyer is able to avoid a part of the contract if the criteria for avoidance are met as to that part."

<sup>88</sup> See UNCITRAL, 'UNCITRAL Digest of case law on the United Nations Convention on the International Sale of Goods – Article 51' (2004, No. A/CN.9/SER.C/DIGEST/51), para. 5, available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/V04/553/20/PDF/V0455320.pdf?OpenElement> [accessed 19 September 2011] stating that the buyer may in any case request damages as "this remedy remains unimpaired and can be exercised in addition to or instead of the remedies referred to in article 51 (1). Even if the buyer has lost its right to declare a part of the contract avoided because of lapse of time, it may still claim damages."

<sup>89</sup> Art. 52 CISG:

If the seller delivers the goods before the date fixed, the buyer may take

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seller is entitled either to accept (all or part of) the excess goods or, on the contrary, refuse the excess quantity. Moreover, even though not expressly regulated within the provision, it is accepted that the whole contract may be avoided if the buyer is not able to reject the “extra” goods and the excessive delivery fundamentally breaches the sales contract.<sup>90</sup> If, for some reason, the buyer has to take the excess quantity of the goods, it may claim for any damages thereby suffered.<sup>91</sup>

### 2.5.1.2 Contractual quality

The second condition set by article 35(1) CISG upon the seller, is to deliver goods of the quality provided in the contract. The Convention does not set a threshold as to the allowed divergence from the agreed standard; any variation, therefore, is to be considered a lack of conformity regardless of the consequences on the usability or value of the goods.<sup>92</sup>

The circumstances falling under the scope of this provision are the most diverse given the broad significance attributed to the word “quality”. Indeed, it is commonly accepted that the term must be interpreted widely<sup>93</sup> so as to comprise not only the lack of physical conditions, but also “all factual and legal circumstances concerning the relationship of the goods to their

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delivery or refuse to take delivery.

(2) If the seller delivers a quantity of goods greater than that provided for in the contract, the buyer may take delivery or refuse to take delivery of the excess quantity. If the buyer takes delivery of all or part of the excess quantity, he must pay for it at the contract rate.

<sup>90</sup> See United Nations Conference on Contracts for International Sale of Goods – Official Records (1980), *Op. cit.*, 44, para. 9, reporting that “If it is not feasible for the buyer to reject only the excess amount, as where the seller tenders a single bill of lading covering the total shipment in exchange for payment for the entire shipment, the buyer may avoid the contract if the delivery of such an excess quantity constitutes a fundamental breach.”

<sup>91</sup> See UNCITRAL, ‘UNCITRAL Digest of case law on the United Nations Convention on the International Sale of Goods – Article 52’ (2004, No. A/CN.9/SER.C/DIGEST/CISG/52), para. 5, available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/V04/553/26/PDF/V0455326.pdf?OpenElement> [accessed 19 September 2011].

<sup>92</sup> See K. Maley, *The Limits to the Conformity of Goods in the United Nations Convention on Contracts for the International Sale of Goods*, 12 INT’L TRADE & BUS. L. REV. 104 (2009).

<sup>93</sup> See HUBER and MULLIS, *supra* note 51, at 132.

surroundings”.<sup>94</sup> The most common situation is that the seller must deliver goods possessing the agreed physical characteristics. One example is a French decision regarding the delivery of wine. The *Cour de Cassation* recognized that by delivering chaptalized<sup>95</sup> wine that had then turned into vinegar, the seller, “had not honored its contractual obligation to supply a wine conforming to the contract and of fair merchantable quality.”<sup>96</sup> Another simple yet illustrative case regards the delivery of steel bars. As the parties had agreed for a specific weight allowing a +/- 5% variation, the delivery of bars falling outside this range was considered a breach of the contractual obligations in respect to quality.<sup>97</sup>

Physical conditions are not the sole characteristics to be assessed. As already noted, due regard is to be given to all other factual and legal circumstances established between the parties. Given the paramount role played by party autonomy, there are no limits to these situations as the parties are free to agree upon any non-physical characteristic.<sup>98</sup>

Indeed, the contract may well provide for goods to originate from a specific location,<sup>99</sup> to be produced respecting cer-

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<sup>94</sup> SCHLECHTRIEM & SCHWENZER, *supra* note 12, at 573.

<sup>95</sup> Chaptalization is the process of adding sugar to unfermented grape must in order to increase the alcohol content after fermentation.

<sup>96</sup> See *Cour de cassation* [Cass.] [supreme court for judicial matters], No. 173 P/B 93-16.542, France, Jan. 23, 1996, available at <http://cisgw3.law.pace.edu/cases/960123f1.html>.

<sup>97</sup> See *Madden v. Thyssen (Syria v. Ger.)*, No. 6653, Mar. 26, 1993 [ICC Int'l Ct. Arb.], available at <http://cisgw3.law.pace.edu/cases/936653i1.html>.

<sup>98</sup> Kristian Maley, *The Limits to the Conformity of Goods in the United Nations Convention on Contracts for the International Sale of Goods (CISG)*, 12 INT'L TRADE & BUS. L. REV. 82, 103 (2009) (citing RENÉ FRANZ HENSCHEL, *THE CONFORMITY OF GOODS IN INTERNATIONAL SALES* (2005), 162. Recalling the words of Prof. Henschel, “The starting point is that there are no limits to the contractual requirements which the parties may agree with respect to the goods, for example, that the goods may not be made by child workers, that the goods should be produced in an environmentally-friendly way ... that the goods should satisfy the special safety and environmental requirements of the buyer's country, etc. Only the imaginations of the parties and mandatory public law rules can set limits to what can be validly agreed.”)

<sup>99</sup> See *Bundesgerichtshof* [BGH] [Federal Court of Justice] Apr. 3, 1996, No. VIII ZR 51/95, (Ger.), available at <http://www.cisg.law.pace.edu/cases/960403g1.html>. (Where the parties had agreed that the cobalt sulfate had to be of British origin and that the plaintiff should supply certificates of origin and of quality.)

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tain ethical principles<sup>100</sup> or to respect certain manufacturing standards in the production process. Were the seller to violate these provisions, the goods would be non-conforming.

Article 35(1) does not distinguish between the delivery of better or worse quality than the one agreed. Indeed, both circumstances constitute a breach of contract, which, if correctly notified *ex* article 39, allows the buyer to invoke the remedies, provided in articles 46 – 52. Contrary to the situation of defective quantity, there is no specific limitation to the remedies available to the buyer when goods are of non-conforming quality.

### 2.5.1.3 Contractual description

The third situation addressed in article 35(1) CISG regards the delivery of goods that do not correspond to the contractual description. As is true of defective quality, this requirement covers a wide range of events given that the concept of description has been broadly defined as, “the usual way through which the parties determine the content of their obligation”.<sup>101</sup>

When drafting the agreement, there are no limits to the way goods may be described. Indeed, parties may decide to refer to the goods through express contractual provisions or, on the contrary, impliedly by referring to an external document that illustrates the goods and their qualities.<sup>102</sup> Moreover, parties have the possibility to determine the extent of the obligation as the contract may provide for the sale of either generic or specific goods. In the first event, the seller would be bound to deliver goods comprised within the described category. Where

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<sup>100</sup> See P. Schlechtriem, *Non-Material Damages - Recovery under the CISG?* 19 PACE INT'L L. REV. 89, 100 (2007), available at <http://digitalcommons.pace.edu/cgi/viewcontent.cgi?article=1061&context=pilr> (stating, “A prospective buyer [...] can and should try to stipulate that certain standards of production have to be observed. Such standards then become requirements of quality, i.e. conformity, under Article 35 (1) of the CISG. Goods produced in violation of these standards are non-conforming. The purchaser of rugs, for example, can demand to stipulate that the weavers should not be younger than sixteen and should work no more than forty-eight hours a week”).

<sup>101</sup> See BIANCA & BONELL, *supra* note 8, at 273.

<sup>102</sup> An example often recalled is the reference to an advertisement or a brochure describing the goods.

the parties have instead contracted for a specific good, the conformity obligation is fulfilled only with the delivery of “the” good that has been agreed upon.

When dealing with the extent of the contractual description, an issue that has been debated amongst scholars is whether the delivery of an *aliud* (i.e. goods of a different kind) is to be considered as falling under the scope of this provision.<sup>103</sup> On the one side, it is argued that handing over goods that are totally different from what has been agreed should not be regarded as delivery of non-conforming goods but rather as failure to deliver.<sup>104</sup> Supporters of this position recall the words of the Secretariat Commentary according to which “if the contract calls for the delivery of corn, the seller has not delivered if he provides potatoes”.<sup>105</sup> On the other side, the distinction between defective delivery and failure to deliver goods is firmly rejected.

In light of this opposing view, the delivery of an *aliud* is to be regarded as a non-conforming delivery *ex art. 35(1)*.<sup>106</sup>

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<sup>103</sup> Cf. HUBER and MULLIS, *supra* note 51, at 133.

<sup>104</sup> See BIANCA & BONELL, *supra* note 8, at 273. (Stating that there is a “necessity to draw a line between the delivery of the goods bargained for and the delivery of what is absolutely extraneous to the seller's obligation. Neither the text of the rule nor international trade [...] support the extreme opinion which assumes that the seller has delivered the goods even when he has handed over goods which, according to common sense, are totally different from the goods expected by the buyer”).

<sup>105</sup> See Secretariat Commentary on article 29 of the 1978 Draft (draft counterpart of CISG article 31), para. 3, *available at* <http://www.cisg.law.pace.edu/cisg/text/secomm/secomm-31.html>.

<sup>106</sup> See P. SCHLECHTRIEM, *The Seller's Obligations Under the United Nations Convention on Contracts for the International Sale of Goods in INTERNATIONAL SALES: THE UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS*, 6-1, 6-12 (N. M. Galston & H. Smit eds. Matthew Bender, New York, 1984) (affirming that, “There is delivery even when goods entirely different from the ones ordered have been handed over [...] The view of the UNCITRAL Secretariat's Commentary that where something entirely different has been delivered there is not delivery within the meaning of Article 30 and following seems to me to be mistaken and even dangerous. The danger lies in the risk of transferring to the Convention a most unfortunate controversy from German legal science and practice, namely, the question whether 'merely defective' goods (a "peius") have been delivered, or whether there is no delivery at all because an "aliud" has been handed over [...] This situation should be avoided by assuming delivery whenever the goods handed over to the buyer or carrier have been selected for the purpose of performing the sales contract in question.”)

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Notwithstanding the valuable arguments proposed by supporters of both positions, the second opinion is preferable for two main reasons. Primarily, the choice to reject any distinction between delivery of non-conforming goods and failure to deliver is certainly more in line with the underlying principles of article 35. As discussed above,<sup>107</sup> drafters of the CISG decided to opt for a unitary notion of non-conformity, which comprises under the same heading delivery of non-conforming goods and delivery of an *aliud*. Recalling the words of Prof. Audit:

In the Vienna Convention, 'delivery' has been used for what it means in English: the handing over of the goods. ... Delivery is accomplished by the physical acts that the seller must perform in order to discharge his obligation, such as handing over the goods together with the necessary documents to a carrier. ... Conformity is regulated by a separate set of provisions.<sup>108</sup>

Secondly, the wording of article 35 calls for an inclusion of the delivery of an *aliud*. Indeed, if the delivery of goods of a different kind were not to be delivery of non-conforming goods, then a breach of article 35 would occur only when the seller handed over goods that correspond to the general contractual description but are missing some agreed qualities. That would render the concept of “description” a mere repetition of the “quality” notion, thus redundant and futile.

In conclusion, both the drafting history and the wording of the CISG call for an extensive interpretation of the term “description” as to comprehend also the case of delivery of totally different goods.

#### 2.5.1.4 *Packaging*

The issue of packaging is central in international trade as it affects directly the quality, usability and resaleability of the contracted products. Given the importance of a correct packaging, article 35 CISG addresses this issue both in the express

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<sup>107</sup> See above at 0, “2.2The unitary notion of non-conformity under the CISG.”

<sup>108</sup> B. Audit, *The Vienna Sales Convention and the Lex Mercatoria*, in *LEX MERCATORIA AND ARBITRATION: A DISCUSSION OF THE NEW LAW MERCHANT*, 173, 180 (T. E. Carbonneau ed., Transnational Juris Publications, Dobbs Ferry, N.Y., 1990).

and implied conformity provisions.<sup>109</sup> The consequence of this “double approach” is that, regardless of the specific situation, the seller must always comply with a specific set of rules when packing the goods. Indeed, either these rules are provided, *ex* article 35(1) CISG, directly in the contract or they derive from the general practices adopted in the market as provided by article 35(2)(d). Leaving aside, for the moment, the implied conformity obligation, under article 35(1), the seller is bound to deliver goods that are contained or packaged in the manner required by the contract. In light of this provision, therefore, the seller’s liability is strictly related to what the parties have agreed upon. It follows that to comply with the conformity obligations it is not sufficient that the packaging occurs, “in a manner adequate to preserve and protect the goods”; it must be done in compliance with the contractual terms.<sup>110</sup>

An illustrative case, which addressed the issue of defective packaging is the *Polypropylene case* decided under the CIETAC rules.<sup>111</sup> The buyer ordered polypropylene specifying the following: Packaging: 25 kilograms each bag, packed with one-layer brown paper lined with PE film; the packing shall be strong enough to be suitable for sea, land, and inland waterway transportation; and each 15 tons of the goods shall be loaded in a 1×20 foot container. When the buyer received the goods, however, it realized that the goods had been packed in a three layer brown paper and consequently filed a claim against the seller. When assessing the merits of this case, the arbitral tribunal found the seller in breach of contract for having packed the goods in a way, “which was not in conformity with the Contract”. As the defective packaging had damaged the goods, the seller was liable for the losses suffered by the buyer.

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<sup>109</sup> Cf. A. Vincze, *Conformity of the Goods under the UN Convention on Contracts for the International Sale of Goods (CISG): Overview of CIETAC's Practice*, in *SHARING INTERNATIONAL COMMERCIAL LAW ACROSS NATIONAL BOUNDARIES: FESTSCHRIFT FOR ALBERT H. KRITZER ON THE OCCASION OF HIS EIGHTIETH BIRTHDAY*, 552, 577. (C. B. Andersen & U. G. Schroeter eds., Wildy, Simmonds & Hill Publishing, 2008).

<sup>110</sup> Cf. HUBER and MULLIS, *supra* note 51, at 134.

<sup>111</sup> See China International Economic & Trade Arbitration Commission (CIETAC), No. CISG/1997/23, China, July 23, 1997, available at <http://cisgw3.law.pace.edu/cases/970723c1.html>.

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### 2.5.2 Art. 35(2) CISG: the implied conformity obligations

When drafting an international sales contract it is rare, if not impossible, for the parties to spell out all the features that the contracted goods must possess.

Indeed, much is taken for granted. Suppose, for example, that a buyer orders 10 kilos of apples to be delivered at his warehouse by a given date. Rarely will the contract will specify that the apples need not to be rotten or that they have to be fit for human consumption or, still, that they have to be packed as to guarantee their integrity. Now the question is: if goods delivered do not comply with such conditions, will the seller be found liable for having failed to comply with its conformity obligations? In light of article 35(2) CISG, the answer to this question is yes.

Well aware that the contract rarely provides for a detailed description of all the characteristics of the goods, drafters of the CISG introduced a number of objective criteria that regulate what has not been, expressly or impliedly, agreed in the contract.<sup>112</sup> These provisions have to be considered as, “what reasonable parties would have agreed upon had they put their mind to it.”<sup>113</sup>

When dealing with the conformity obligations set by article 35(2) CISG, it is first and foremost important to underline that they have a limited scope. As the wording of the CISG makes clear, these provisions operate as supplementary rules that apply insofar as the parties have *not* agreed otherwise.<sup>114</sup> It follows, that the implied conformity obligations are default rules that fill in possible gaps left open by incomplete contractual de-

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<sup>112</sup> Cf. SCHLECHTRIEM & SCHWENZER, *supra* note 12, at 575.

<sup>113</sup> SCHLECHTRIEM & BUTLER, *supra* note 5, at 115.

<sup>114</sup> UNCITRAL, ‘2012 UNCITRAL Digest of case law on the United Nations Convention on the International Sale of Goods – Article 35’, para. 1, available at <http://cisgw3.law.pace.edu/cisg/text/digest-2012-35.html> (affirming that “Article 35(2) states standards relating to the goods’ quality, function and packaging [...]” In other words, these standards are implied terms that bind the seller even without affirmative agreement thereto. If the parties do not wish these standards to apply to their contract, they can (in the words of article 35) “agree [...] otherwise.” Unless the parties exercise their autonomous power to contract out the standards of article 35 (2), they are bound by them.”).

terminations.<sup>115</sup>

By recognizing the predominance of the parties' agreement, the Convention not only restates the central role played by party autonomy in international trade, but also avoids possible conflicts between express and implied conformity obligations.<sup>116</sup> While in theory what the parties have expressly agreed and what the Convention provides can conflict, in practice, the conflict may never occur as the latter will apply only in those limited circumstances in which the parties' agreement does not provide otherwise.<sup>117</sup>

Similarly to the rules adopted in other jurisdictions,<sup>118</sup> Article 35(2) prescribes four objective criteria that have to be consulted when determining the conformity of the goods to the contract: fitness for the ordinary purpose (35(2)(a)), fitness for a particular purpose (35(2)(b)), conformity to a model or sample (35(2)(c)) and, finally, adequate packaging (35(2)(d)).

#### 2.5.2.1 Article 35(2)(a) CISG: fitness for the ordinary purpose

The first subsection of paragraph 2 embodies the obvious, yet fundamental rule according to which goods delivered must be fit to be used for their ordinary purpose. The reason why

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<sup>115</sup> See T. Neumann, *Features of Article 35 in the Vienna Convention; Equivalence, Burden of Proof and Awareness*, 11 VINDOBONA J. OF INT'L COMM. L. & ARB. 81, 82 (2007), available at <http://www.cisg.law.pace.edu/cisg/biblio/neumann.html#v> (The provisions of Art. 35 section 2 have been defined as "gap-filling device[s].")

<sup>116</sup> See H. M. Flechtner, *Conformity of Goods, Third Party Claims, and Buyer's Notice of Breach under the United Nations Sales Convention ("CISG"), with Comments on the "Mussels Case," the "Stolen Automobile Case," and the "Ugandan Used Shoes Case"*, UNIVERSITY OF PITTSBURGH SCHOOL OF LAW WORKING PAPER SERIES, Working Paper No. 64, 1, 5 (2007), available at <http://law.bepress.com/cgi/viewcontent.cgi?article=1065&context=pittlwps> (affirming that "Article 35(2) fine-tunes the rule of party autonomy in Article 35(1) by identifying obligations concerning the quality and packaging of the goods that the parties are presumed to have intended unless they affirmatively agree otherwise.")

<sup>117</sup> See HUBER and MULLIS, *supra* note 51, at 134.

<sup>118</sup> For example: the German BGB (section 434) provides for the goods to be fit for the ordinary and particular purpose; the English Sale of goods act (1979) binds the seller to deliver goods fit for the particular or ordinary purposes (section 14) or in conformity with the sample eventually provided (section 15); the United States Uniform Commercial Code (section provides the seller to warrant the merchantability of the goods (section 2 – 314) and, eventually, their fitness for a particular purpose (2 – 315).

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such a provision is needed is that while goods are always bought for a use, this use is not always specified within the contract. This is particularly true when dealing with routine transactions as the parties would find it futile to specify what “goes without saying”:<sup>119</sup> it is clear that food must be edible, cars must be drivable, clothes must be wearable and so on. To avoid overly specific contracts and reduce the risk that sellers will take advantage of the contractual “silence” to deliver inferior quality goods, the drafters of the CISG introduced a default rule reflecting what the parties would have agreed if only they had negotiated on the term.<sup>120</sup> It follows that even in the absence of a specification on the use, the seller must guarantee that the goods will, at the minimum, be fit for their ordinary uses.<sup>121</sup>

Given its supplementary nature, however, article 35(2)(a) CISG is legally binding only if certain conditions are respected. The first condition is the absence of a conflicting contractual term.<sup>122</sup> The second condition is the absence of a particular purpose *ex* article 35(2)(b). If a specific purpose for which the goods were to be used was made known to the seller, it takes priority over the ordinary purposes.<sup>123</sup>

Given the broad range of situations this provision had to regulate, the CISG does not set any specific condition or technical standard under which goods are deemed to be conforming.<sup>124</sup> It follows that an evaluation under this provision can be

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<sup>119</sup> See J. O. Honnold, *Uniform Law for International Sale under the 1980 United Nations Convention*, 3, 255 (1999), available at <http://www.cisg.law.pace.edu/cisg/biblio/honnold.html>.

<sup>120</sup> Cf. C. P. Gillette & F. Ferrari, *Warranties and "Lemons" under CISG Article 35(2)(a)*, *Internationales Handelsrecht* 1/2010, 2, (2010), available at <http://www.cisg.law.pace.edu/cisg/biblio/gillette-ferrari.html>.

<sup>121</sup> Cf. Poikela, *supra* note 34, at para. 5.2.1.

<sup>122</sup> See LOOKOFSKY, *supra* note 31, at 91. (An example, presented by Prof. Lookofsky, of a contractual provision which would exclude Art. 35(2)(a) would be the following: “the seller ‘undertakes no obligations whatsoever in respect of the goods fitness for ordinary and/or particular purposes’.”)

<sup>123</sup> Cf. HUBER and MULLIS, *supra* note 51, at 135, recognizing that “Art. 35(2) lit. (b) should take priority over lit. (a) in the sense that if any specific purpose was made known to the seller under lit. (b), goods that do not meet this standard will not be in conformity of the contract even if they are fit for the ordinary purposes.”

<sup>124</sup> Cf. HONNOLD, *supra* note 32, at 255.

made only through a case-by-case approach<sup>125</sup> that compares the purposes for which the good *can* be used with the purposes for which goods of the same description would *ordinarily* be used. Aware of the fact that often there is more than one ordinary use, article 35(2)(a) recalls not the one but the many *purposes* for which the goods may be employed. The employment of the plural has a two-fold function: on the one side it avoids litigation related to the determination of *the* ordinary purpose and, on the other side, it guarantees that even in the absence of a specific contractual determination, the goods delivered will be fit for all the ordinary uses. Fitness to only some of the ordinary purposes will amount to a breach of contract.<sup>126</sup>

Due to its broad language, there has been, and there still is, much debate amongst courts and scholars on the extent of this provision. The two main interpretative issues related to article 35(2)(a) CISG regard the meaning of ordinary purpose and the standards, which have to be applied when measuring it.

#### 2.5.2.1.1 Complying with the ordinary purpose: average quality, reasonable quality or merchantable quality?

Whether a product is deemed to be conforming under article 35(2)(a) CISG depends on what is considered as being the “ordinary” purpose of that category of products. It follows, that in order to avoid the negative consequences related to a non-conforming delivery, the seller must understand what is normally expected from the contracted goods. Given that the Convention does not provide any guidance on how to ascertain the ordinary purposes, courts and scholars have attempted to set some criteria, which may aid the seller in this complex task.

As a starting point, it is assumed that the fitness of the goods for their ordinary purposes, “must be decided by refer-

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<sup>125</sup> See Maley, *supra* note 92, at 112. (Calling for a case-by-case approach.)

<sup>126</sup> To avoid responsibility, by triggering the exception set out in art. 35(3) CISG, the seller should inform the buyer of the non-conformity before the conclusion of the contract. On this point SCHLECHTRIEM & SCHWENZER, *supra* note 12, at 575 (suggesting that “if the goods are not fit for all, but merely some, of the purposes for which goods of that type are ordinarily used, the seller must inform the buyer of the fact.”)

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ence to the objective view of a person in the trade sector concerned”.<sup>127</sup> This criteria, however, is not *per se* sufficient. Not only because there is a high degree of uncertainty related to the determination of an “objective view”, but also because there is no indication as to *how* the standard will be fixed by those who operate in the trade sector.

Many commentators have taken the analysis one step further, and have attempted to define what is intended by fitness for the ordinary purposes. While it is agreed that the standard set by art 35(2)(a) does not impose upon the seller a duty to deliver perfect or flawless goods, unless perfection is necessary to fulfill the ordinary purposes,<sup>128</sup> there has been much disagreement on what the standard positively requires.<sup>129</sup> A detailed analysis of the different interpretations of art. 35(2)(a) CISG was carried out by the Netherland Arbitration Institute in the *Condensate crude oil mix case*.<sup>130</sup>

The facts of the case were the following.<sup>131</sup> A group of Dutch companies, sellers in the dispute, had entered into several contracts for the supply of a condensate crude oil mix referred to as “Rijn Blend” with an English firm, buyer in this circumstance. After the first deliveries, the buyer informed the sellers that it would not accept the next products, because, due to high levels of mercury, further processing or sales were impossible. The buyer’s refusal to take the goods, forced the sellers to enter into a substitute sale at a lower price. One of the issues raised in the ensuing arbitration was that the Rijn Blend, even with increased levels of mercury, “was in accord-

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<sup>127</sup> SCHLECHTRIEM & SCHWENZER, *supra* note 12, at 576; Cf. Secretariat Commentary, *supra* note 67, at para. 5.

<sup>128</sup> See Brand, Ferrari & Flechtner, *supra* note 74, at 630. (For a concrete decision supporting this statement); see also *Handelsgericht Kantons Zürich*, No. HG 960527/O, Switzerland, Sept. 21, 1998, available at <http://cisgw3.law.pace.edu/cases/980921s1.html>. (Recognizing that one misplaced line of text, which did not impede the legibility of the text, did not render an art exhibition catalogue non-conforming.)

<sup>129</sup> See Adam 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*, 18 FLA. J. INT’L L. 331, 352 (2006).

<sup>130</sup> See *Condensate Crude Oil Mix Case (Neth. v. U.K.)*, Case No. 2319 (Neth. Arb. Inst. 2002), available at <http://cisgw3.law.pace.edu/cases/021015n1.html>.

<sup>131</sup> See *id.*

ance with the contracts since no specific quality requirements had been agreed upon".<sup>132</sup> By refusing to take delivery, the buyer therefore, breached the contract. The buyer, on the contrary, affirmed that, in light of the non-conformity, it was entitled to refuse delivery and to suspend its obligations.

When addressing the merits of the case, the court found that the dispute had to be solved in light of article 35(2)(a) CISG. It then analyzed the three approaches to this provision: "merchantable" quality, "average" quality and "reasonable" quality.

According to the first view, the seller must deliver goods of "merchantable" quality. In light of this standard, goods are deemed to be conforming if there is a substitute market for the goods.<sup>133</sup> This concept roots back to the English common law and was amply debated during the *travaux préparatoires* when drafters of the CISG discussed how article 35 should be interpreted. On the one side, common law countries argued in favor of the adoption of the "merchantability" standard. On the other side, Civil law countries argued in favor of "average" quality.<sup>134</sup> To clarify which standard should apply, during the 14th meeting of the First Committee, the Canadian delegation proposed an amendment to article 35 in light of which, to comply with the ordinary purposes, the goods would have to be, "of fair average quality within the description."<sup>135</sup> The endorsement of this civil law approach was justified in light of the uncertainties that the concept of merchantable quality had created in the common law jurisdictions.<sup>136</sup> However, after consulting with

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<sup>132</sup> *Id.*

<sup>133</sup> *See id.*

<sup>134</sup> *See* Gillette, *supra* note 120, at 7.

<sup>135</sup> 1980 Vienna Diplomatic Conference, Vienna, Austria, Apr. 7, 1980, *Report of the First Committee*, U.N. Doc. A/CONF.97/C.1/L.115, at para. 3. (For the whole text of the Canadian amendment (A/CONF.97/C.1/L.115) to art. 35), available at <http://www.cisg.law.pace.edu/cisg/1stcommittee/summaries35.html>.

<sup>136</sup> 1980 Vienna Diplomatic Conference, Vienna, Austria, Mar. 19, 1980, *Report of the First Committee*, U.N. Doc. A/CONF.97/C.1/L.115, at para. 30, available at <http://www.cisg.law.pace.edu/cisg/firstcommittee/Meeting14.html> (reporting that the Canadian delegate, Mr. Shore, explained that the amendment would "spell out more fully the meaning of the concept of general fitness as used in paragraph [(2)(a)] of the article. The comparable concept of "merchantability" in common law jurisdictions had attracted an enormous amount of litigation and in the absence of clearer guidance, similar difficul-

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several other common law delegates, the proposal was withdrawn.<sup>137</sup> Even though the drafters of the CISG did not express themselves in favor of any specific standard, supporters of the “merchantability” consider the decision to withdraw the proposal as impliedly favoring this approach. However, as of today, there is no known case law under the CISG recognizing the merchantable quality as sufficient.<sup>138</sup>

The view that the goods must be of “average” quality is strongly endorsed by several leading commentators<sup>139</sup> on the basis that many domestic legal systems had opted for a similar rule.<sup>140</sup> The “average” quality standard has been expressly acknowledged in at least one case. An Italian seller of shoes filed a claim against a German buyer after the latter had refused to pay the whole purchase price claiming the non-conformity of the shoes. When addressing the issue of conformity, the District Court of Berlin recognized that “to fulfill the requirement of [article 35 CISG] the goods must be fit for the purposes for which goods of the same description would ordinarily be used or for any particular purpose made known to the seller. The goods must be of average quality, and it does not suffice that they can only just be traded”.<sup>141</sup> Notwithstanding this (limited) acknowledgment, the average quality standard is

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ties might be encountered with the provisions of article [35 (2)] (a) if left unchanged.”)

<sup>137</sup> See *id* at para. 45.

<sup>138</sup> See *Condensate Crude Oil Mix Case supra* note 130 at para. 68.

<sup>139</sup> See Cesare Massimo Bianca, art. 35, in *Commentary on the International Sales Law: The 1980 Vienna Sales Convention* Giuffr , Milan 268, 273 (C.M. Bianca & M.J. Bonell ed., 1987), available at <http://www.cisg.law.pace.edu/cisg/biblio/bianca-bb35.html>. (Affirming that “The goods can be more or less fit for their purposes, but the seller must on the whole deliver goods of average fitness”); see also Rolf Herber and Beate Czerwenka, *Internationales Kaufrecht, Kommentar zu dem Ubereinkommen der Vereinten Nationen vom 11. April 1980 Uber Vertage Uber den Internationalen Warenkauf*, (C. H. Beck, M nchen, 1991), Art. 35, para. 4.

<sup>140</sup> U.C.C. § 2-314(2)(b) (2002) (For example, expressly provides for goods to be “of fair average quality within the description.”); see also § 243(1) BGB (Similar provisions may also be found in the German legal system); see also *Obligationenrecht* art. 71(2) (The Swiss legal system); see also art. 1246 Code Civil (The French legal system).

<sup>141</sup> Landgericht Berlin [LG] [regional court] Sept. 15, 1994, 52 S 247/94 (Ger.), English abstract available at <http://cisgw3.law.pace.edu/cases/940915g1.html>.

to be rejected.<sup>142</sup> Not only because, as shown above, the proposal to introduce such a rule in the Convention was withdrawn,<sup>143</sup> but also because interpreting the Convention in light of what domestic legal systems provide goes against the international character of the convention.<sup>144</sup>

The third view considers article 35(2)(a) as calling for the delivery of “reasonable” quality goods. Whether the goods were of reasonable quality has to be determined on a case-by-case basis since it calls for the, “quality a reasonable person in the position of the buyer would be entitled to expect”.<sup>145</sup> The qualitative standard, therefore, cannot be fixed *a priori* in abstract but has to be determined in the specific circumstances. Similarly to the “average” quality, this approach has been upheld also in case law. The Stockholm Chamber of Commerce, in *Beijing Light Automobile Co. v. Connell*, acknowledged that, “the principle of the buyer's reasonable expectancy with respect to the general and particular purpose of the goods [...] can hardly be regarded as controversial. [...] Without explicit contractual provisions dealing with these natural expectations of the buyer, it is difficult to see how this provision [...] can be effectively set aside”.<sup>146</sup>

Moreover, the Netherland Arbitration Institute opted for the notion of “reasonable” quality considering it the most consistent with the legislative history and interpretative methodology of the CISG. The tribunal started the reasoning by recognizing that, in accordance with the guidelines set by the CISG, article 35(2)(a) had to be interpreted in light of its international

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<sup>142</sup> See HUBER and MULLIS, *supra* note 51, at 135.

<sup>143</sup> See *id.* above the history of the Canadian amendment calling for an introduction of the average quality rule.

<sup>144</sup> See *Condensate Crude Oil Mix Case supra* note 130 at para. 70. (The Arbitral tribunal in the *Condensate crude oil mix case* recognized that “some French authors have specifically stated that the average quality rule of the French Civil Code is not applicable to CISG cases”). For opinions rejecting the application of the domestic views to the CISG see AUDIT, *supra* note 47, at 96; V. Heuzé, *La vente internationale de marchandises* (Paris, GLN Joly, 1992), 219.

<sup>145</sup> See HUBER and MULLIS, *supra* note 51, at 135. On this point see also Maley, *supra* note 92, at 112.

<sup>146</sup> *Beijing Light Automobile Co., Ltd v. Connell Limited Partnership*, Stockholm Chamber of Commerce, 5 June 1998, *available at*: <<http://cisgw3.law.pace.edu/cases/980605s5.html>> [accessed 19 September 2011].

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character and aware of the need to foster uniformity in its application. It followed that both the “merchantable” and the “average” quality standards were to be rejected as being domestic notions of quality.<sup>147</sup> Applying these standards when interpreting the Convention would mean resorting to a “homeward trend” analysis, thus violating the interpretive methodology set by article 7.<sup>148</sup> The tribunal therefore affirmed that “reasonable” quality was the preferable standard. Given that there was no consensus as to which standard should apply, the drafters of the CISG had decided to opt for an “open texture” provision. In the absence of a precise indication as to how the provision should be interpreted, the tribunal considered that, in accordance with article 7(2), the matter should be solved resorting to the general principles upon which the CISG is based. Being that reasonableness is one of the general principles, it was concluded that the “reasonable” quality was the concept that best suited the intentions of the drafters and interpretation standards set by the Convention. The conclusions reached in the *Condensate crude oil mix case* are certainly not flawless,<sup>149</sup> but offer interesting insights on the meaning of article 35(2)(a).

What clearly emerges from the analysis of this case is that the consensus on how the provision should be interpreted is still far from being achieved. This, however, is the consequence of a provision that is, “necessarily and inherently ambiguous”<sup>150</sup> as it had been designed to apply to the countless circumstances in which the parties have failed to set a minimum qualitative threshold. Given the broad range of situations fall-

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<sup>147</sup> See L. DiMatteo *et al.*, *The Interpretive Turn in International Sales: An Analysis of Fifteen Years of CISG Jurisprudence*, 24 NW. J. INT'L L. & BUS. 399 (2004).

<sup>148</sup> *Contra* Gillette, *supra* note 120, at 9, criticizing this conclusion affirming the following: “The Tribunal [...] rejected “average quality” as being so linked with “national notions regarding quality of goods” that it could not be used to interpret Article 35(2)(a), since the CISG implicitly rejected the use of domestic concepts to create international sales law. But this argument is [...] flawed. It is true that domestic law should not be used to interpret the CISG where the sole reason for adopting an interpretation is that it is consistent with domestic law. But if a particular interpretation, such as average quality, has independent merit, the fact that it is also consistent with domestic law should not disqualify it from being used to construe a provision of the CISG.”

<sup>149</sup> For a detailed criticism of the decision see Gillette, *supra* note 120, at 8 ff.

<sup>150</sup> See Gillette, *supra* note 120, at 3.

ing under its scope, it would be impossible to set precise conditions on when goods are deemed to be conforming to the ordinary purposes. Notwithstanding its vagueness, the “reasonable” quality standard is the one that best adapts to the features of article 35(2)(a). Not only because it guarantees the highest degree of flexibility but also because it accommodates the application of the other standards where “reasonable”. Nothing precludes that in the specific circumstance the seller must deliver goods of “merchantable” or “average” quality, if that is the standard a reasonable person in the position of the buyer would be entitled to expect.

#### 2.5.2.1.2 Complying with the ordinary purpose: seller’s or buyer’s national standards?

The difficulty of applying article 35(2)(a), also lies in the differences amongst what is considered as being the “ordinary” purpose of the goods: what may be considered sufficient in one country may not be enough in another one. It follows, therefore, that the choice of the applicable national standard is an issue that deeply influences the judgment on the conformity of the goods to the contract. What needs to be determined is whether the goods must comply with the public law standards of the seller’s state or with those of the buyer’s state.<sup>151</sup>

On the one side, it has been argued that the ordinary use will be defined by the standards of the country or region in which the buyer intends to use the goods.<sup>152</sup> As the seller will not always be aware of this information, supporters of this opinion have recognized that it would be “advisable” for the buyer to inform the seller where the goods will be employed.<sup>153</sup> The underlying idea of this view is that, once the seller is aware of the destination of the goods, it must, unless otherwise agreed, comply with the standards existing in that country. The Appellate Court of Grenoble upheld this opinion in *Caito*

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<sup>151</sup> See Henschel, *supra* note 42, at para. 4.1(a), affirming that “The starting point for assessing the ordinary use of the goods is the objective norm in the relevant commercial sector”. On this point see also P. Schlechtriem, *Internationales UN-Kaufrecht* (Mohr Siebeck, Tübingen, 1996), p. 80 ff.

<sup>152</sup> See SCHLECHTRIEM, *supra* note 106, at 6 ff.

<sup>153</sup> See SCHLECHTRIEM & BUTLER, *supra* note 5, at 119.

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*Roger v. Société française de factoring*.<sup>154</sup> In that case the seller was found liable under article 35(2)(a) as the parmesan cheese failed to comply with the French marketing regulations. The court justified the decision in affirming that, “the [seller] knew that the parmesan sachets ordered by the [buyer] would be marketed in France [...] this knowledge imposed the duty on him, according to the provision of Article 8(1) of the Vienna Convention, to interpret the order as pertaining to goods, which have to comply with the marketing regulations of the French market”.<sup>155</sup> This view, however, has been widely criticized. Accepting it would mean not only placing upon the seller a burden, which if placed upon the buyer, would be much lighter,<sup>156</sup> but also forcing the seller to modify its production process. In the modern economy goods are often produced in series well before there has been a contact between the buyer and the seller. It would clearly be impossible for the seller to produce goods respecting different national regulations, which perhaps, were not even identifiable at the time of production. It follows, that the indication of the country in which the goods will be used, without further specification, does not *per se* bind the seller to deliver goods complying with that specific national standard.<sup>157</sup>

The alternative position is that the regulations that have to be consulted when evaluating the conformity of the goods to the contract are those in force in the seller’s state. This approach is based on the idea that it would be unrealistic to expect the seller to be aware of the particular requirements of all the different states in which the goods will be used. Of the two views, this is certainly the one, which has received the greatest support.<sup>158</sup> The same German Supreme Court, in one of the

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<sup>154</sup> See *Caito Roger v. Société française de factoring*, *Cour d'Appel de Grenoble, Chambre Commerciale*, No. 93/4126, France, 13 September 1995, available at <http://www.cisg.law.pace.edu/cisg/wais/db/cases2/950913f1.html> [accessed 19 September 2011].

<sup>155</sup> *Id.* at para. 2.

<sup>156</sup> See Henschel, *supra* note 42, at para. 4.1(a), recognizing that “This can also be justified on economic grounds, since the buyer can obtain the relevant information more effectively and cheaply than the seller can.”

<sup>157</sup> See BIANCA & BONELL, *supra* note 8, at 275.

<sup>158</sup> See F. ENDERLEIN & D. MASKOW, *International Sales Law - United Nations Convention on Contracts for the International Sale of Goods* (Oceana Publications, New York, 1992), 144; B. PILTZ, *Internationales Kaufrecht: Das*

leading cases on the matter, expressly acknowledged the predominance of this standard. In that circumstance, a Swiss seller had entered into a contract for the delivery of mussels with a German buyer. The buyer, however, claimed a breach of article 35(2)(a) as the mussels contained a level of cadmium which, while acceptable in Switzerland, violated the German food regulations and thus could not have been resold in the market. When analyzing the merits of the case the *Bundesgerichtshof* found that,

a foreign seller can simply not be required to know the not easily determinable public law provisions and/or administrative practices of the country to which he exports, and [...] the purchaser, therefore, cannot rationally rely upon such knowledge of the seller, but rather, the buyer can be expected to have such expert knowledge of the conditions in his own country or in the place of destination, as determined by him, and, therefore, he can be expected to inform the seller accordingly.<sup>159</sup>

Recognizing the predominance of the seller's national regulations, however, does not preclude in absolute terms the application of other standards. Indeed, in the absence of a precise indication contained within the Convention, the choice of the applicable standard must be made on a case-by-case basis taking into consideration the specific circumstances. In the *Frozen pork liver case*,<sup>160</sup> for example, the Austrian supreme court listed the situations in which the seller would be bound to respect the rules existing in the buyer's state: when the same standards apply in the seller's state, when the buyer drew the seller's attention to the standards in the buyer's state or, finally, when the seller knew or could not have been unaware of them. If any one of the three is respected, the goods will have to conform to the regulations in force in the seller's country.

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*UN-Kaufrecht in praxisorientierter Darstellung* (Verlag C.H. Beck, Munich, 1993), 4.

<sup>159</sup> *Bundesgerichtshof*, No. VIII ZR 159/94, Germany, 8 March 1995, available at <http://www.cisg.law.pace.edu/cisg/wais/db/cases2/950308g3.html> [accessed 19 September 2011].

<sup>160</sup> See *Oberster Gerichtshof*, No. 7 Ob 302/05w, Austria, 25 January 2006, available at [http://cisgw3.law.pace.edu/cases/060125a3.html#\\*](http://cisgw3.law.pace.edu/cases/060125a3.html#*) [accessed 19 September 2011].

### 2.5.2.1.3 Functions and effects of article 35(2)(a) on international trade

In line with the *caveat venditor* principle that underlines the conformity obligations,<sup>161</sup> article 35(2)(a) places the risk of defective delivery upon the seller. Even though the CISG does not use this wording, under this provision the seller substantially warrants a certain qualitative standard.<sup>162</sup> It has been argued that, “the primary explanation for [this] implied warranty is related to the question of asymmetric information”.<sup>163</sup> This concept refers to the situation in which one party to the transaction possesses relevant information unknown to the other party. When it comes to international trade, it is realistic to assume that, unless the specific circumstances show the contrary, sellers will have more information than buyers about the quality of the contractually agreed goods.<sup>164</sup> Given this situation, if the buyers are unable to detect *ex ante* the qualitative level of a particular good, there is a concrete risk that the seller, abusing his superior position, will charge a price that does not reflect the actual quality of the good. In the long run, buyers would lose confidence in the market and would be inclined to treat all such goods as being of low quality.<sup>165</sup> Aware of this risk, the CISG obliges the seller to deliver goods that comply with a minimum qualitative standard. This default warranty has a twofold function. First of all, it reduces the risk of fraudulent actions: the seller will have no interest in substituting high quality goods with low quality ones as under Article. 35(2)(a) it would have to make up for (and eventually reimburse the damages deriving from) any lack of quality affecting the ordinary usability of the goods. Secondly, this provision partially reduces the informational gap between the seller and the buyer. Indeed, even though the seller knowledge remains superior, the buyer can rely on the fact that the goods will cer-

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<sup>161</sup> See *supra* Part 0 (for an analysis of the *caveat venditor* principle).

<sup>162</sup> Cf. DiMatteo, *supra* note 147, at 390 (referring to art. 35(2)(a) as a warranty).

<sup>163</sup> Gillette, *supra* note 120, at 4.

<sup>164</sup> Cf. Henschel, *supra* note 42, at para. 2.

<sup>165</sup> See G. A. Akerlof, *The Market for 'Lemons': Quality Uncertainty and the Market Mechanism*, 84 *Quarterly Journal of Economics*, 488 (1970), for a more in depth analysis of the problems and consequences related to asymmetric information.

tainly possess those characteristics that make it suitable for the ordinary purposes.

An example may better illustrate this point.<sup>166</sup> Assume, for example, that a given good has only one purpose: either it is fit to be used for this purpose, and therefore has a value of 10, or it is not fit for this purpose, and therefore, has a value of 0. Suppose, moreover, that the cost of production varies according to the quality of the good: high quality goods, which are fit to be used, cost 7, while low quality goods that are not fit to be used, cost 3. Suppose, in addition, that there are only 2 kinds of suppliers in the market: suppliers of high quality goods and suppliers of low quality goods. Assume, finally, that there is no possibility to distinguish the two *ex ante* and, therefore, there is an equal chance of receiving either one of the goods. The asymmetry in the information possessed by the parties, would tempt suppliers of low quality goods to sell their products at the price of high quality ones. Leaving aside any moral issue, whether this temptation actually leads to fraudulent behavior depends upon the existence of a warranty on the usability of the goods.

Lacking any warranty on the usability of the product, the suppliers of low quality goods will be tempted to sell their products at the price of high quality ones. Aware that there is a 50% chance of receiving a defective good, buyers will be willing to pay a price that reflects the expected value of the goods. In this circumstance, the expected value would be the following:<sup>167</sup>

$$E x = 10 \cdot 0.5 + 0 \cdot (0.5) \\ E x = 5$$

With a market price of five, suppliers of high quality goods would be facing losses, as the production costs would be greater than the revenues. It follows, that either these producers manage to distinguish themselves from low quality producers warranting directly the products, or the losses will eventually force them out of the market. In this second event, the market will

<sup>166</sup> See Gillette, *supra* note 120, at 4 for an example.

<sup>167</sup> Where  $E x$  stands for the expected value of a random good,  $x_1$  represents the price of high quality goods,  $p_1$  represents the probability that the good received is of high quality,  $x_2$  stands for the price of the low quality good and finally  $p_2$  is the probability the the good received is a low quality good.

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eventually fail once buyers realize that no more high quality goods are traded in the market.<sup>168</sup>

The situation changes drastically if the seller is bound by Article 35(2)(a) CISG to provide goods that are fit for the ordinary purpose. Producers of low quality goods may still fraudulently try to sell their goods as high quality ones, but the initial profit will fade in the long run. Once the buyer realizes that the goods are not fit for their ordinary purposes, it may avoid the contract claiming restitution of the purchase price and, eventually, damages. Aware of the risks related to deceptive conduct, the sellers will be more inclined to disclose truthful information to the buyers thus minimizing asymmetry in the market.

In conclusion it may be affirmed that an implied conformity obligation as the one provided by Article 35(2)(a), has more than one beneficial effect on the market. Indeed, this approach not only fosters international trade by spreading trust amongst economic operators but also pushes the sellers towards efficiency and innovation. As to the first point, if a minimum standard is guaranteed, the buyers will be more inclined to engage in a transaction given that they trust the quality of the goods. As for the second point, the seller who wishes to increase its profit must necessarily invest in efficiency and innovation. If goods must comply with a minimum standard, the seller wishing to increase its profits will be forced to reduce the production costs rather than the quality; this can be achieved either rendering the current production process more efficient or by discovering a new and cheaper method to produce the same goods.

#### *2.5.2.2 Article 35(2)(b): fitness for the particular purpose*

In any transaction, goods are bought to be used for a specific purpose. When this purpose corresponds to the ordinary employment of the goods, there is no need for the buyer to specify as Article 35(2)(a) will safeguard its right to receive goods fit for such ordinary use. The situation changes when the buyer intends to employ the goods for a special or particular purpose.

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<sup>168</sup> Mathematically, once no more high quality goods are produced, the expected price falls to zero.

$E_x = 10 \cdot 0 + 0 \cdot (1) = 0$

Suppose, for example,<sup>169</sup> that the buyer orders a set of drills intended to drill a plate of carbon steel. If the seller were to deliver ordinary drills, these would break when drilling the resistant carbon steel. Thus, the buyer would be unable to use them for the intended purpose. Aware of such risks, the CISG provides for a default rule intended to protect the buyer: Article 35(2)(b) CISG places upon the seller an obligation to deliver goods fit for the particular purpose expressly or impliedly communicated at the time the contract was concluded.

Similarly to article 35(2)(a) CISG, the function of this implied conformity obligation is to set a minimum qualitative standard. Indeed, once the particular purpose has been communicated, the seller is bound to deliver goods possessing those qualities that make them fit for the specific use. The main difference between the two provisions lies in the relevant yardstick consulted to establish the conformity of the goods to the contract. While in paragraph (2)(a) the goods need to comply with an objective standard, meaning the qualitative level a reasonable person in the position of the buyer would be entitled to expect, in paragraph (2)(b) the conformity of the goods is to be considered solely in light of the buyer's intentions. It follows that to determine the conformity of the goods to the contract one must proceed with a case-by-case analysis comparing the use that *can* be made of the goods with the particular use the buyer *intended* to make of the goods. This implied conformity obligation, which protects the concrete intentions of the buyer, is a specification of the general warranty contained in art. 35(2)(a) CISG.<sup>170</sup>

In line with the principle of party autonomy, the relationship between the ordinary and particular purposes is based on the predominance of Article 35(2)(b). It follows that, regardless of their ordinary purposes, when goods are bought for a specific purpose, the seller must deliver a product suitable to be employed for that purpose. This, however, does not necessarily imply that the goods will not be fit for their ordinary uses. In many cases, in fact, the implied conformity obligations set by

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<sup>169</sup> See HONNOLD, *supra* note 32, at 257.

<sup>170</sup> See HUBER and MULLIS, *supra* note 51, at 138 (affirming that "Art. 35(2) lit. (b) CISG provides the buyer with an additional protection over and above that provided by lit. (a).")

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paragraphs (a) and (b) overlap. If that is the case, conformity will still be measured in relation to the particular purpose but the same result could be reached by referring to the standard set by Article 35(2)(a) CISG.<sup>171</sup> The situation changes when there is no correspondence between ordinary and particular purposes. That may occur either when the two deal with autonomous and independent situations or when the particular purpose renders the goods not fit for the ordinary uses. In the first case, Article 35(2)(b) covers a series of situations, which in the absence of contractual specification, would not be protected under Article 35(2)(a). An example that may be recalled is that of the drills mentioned above. Drills to be used on carbon plates need to be more resistant than normal ones, yet this extra resistance is not usually contemplated as drilling carbon plates is not an ordinary purpose of the good. Article 35(2)(b), therefore, covers a situation which, unless specifically agreed, would be excluded from Article 35(2)(a).

The second case, instead, deals with those circumstances in which the particular and ordinary purposes conflict with one another. Complying with the former necessarily entails a violation of the latter. In light of the prevailing role played by the will of the parties, the seller will be bound to deliver goods complying with Article 35(2)(b) CISG even at the expense of the ordinary usability.<sup>172</sup> A concrete example of this situation would be the purchase of a car to be used in the F1 driving championship. To be fit for such use these cars need to possess certain characteristics that render them not drivable on regular roads.

#### 2.5.2.2.1 Communicating the particular purpose

The obligation to deliver goods fit for a particular purpose is not triggered automatically; it arises only if the seller has been informed of the specific use the buyer intends to make of the goods.<sup>173</sup> Notwithstanding this broad wording, article 35(2)(b) CISG has a very narrow scope of application that

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<sup>171</sup> See Lookofsky, *supra* note 31.

<sup>172</sup> Cf. J. O. HONNOLD & H. M. FLECHTNER, *UNIFORM LAW FOR INTERNATIONAL SALES UNDER THE 1980 UNITED NATIONS CONVENTION* at art. 35, para. 231 (4<sup>th</sup> ed., The Hague, Kluwer Law International, 2009).

<sup>173</sup> See Flechtner, *supra* note 116, at 5.

needs to be clearly defined. What must be underlined, at the outset, is that this provision does not deal with those cases in which the buyer and the seller have contractually agreed upon the fitness for a particular purpose. A breach of a contractual term entails a violation of the express conformity obligations, thus calling for the application of Article 35(1) CISG. This provision, instead, is designed to apply in those circumstances in which the buyer merely displays the intention to use the goods for a particular purpose.<sup>174</sup> This interpretation not only best suits the structure of the implied conformity obligations, but is also consistent with the conclusions reached during the 1980 Diplomatic Conference which led to the adoption of the Convention. The Official Records report that during the 15th meeting, the delegate from the Federal Republic of Germany submitted an amendment<sup>175</sup> aimed at eliminating the ambiguities related to Article 35(2)(b). It was stated that the particular purpose should be recognized if only it had been made, either expressly or impliedly, part of the contract.<sup>176</sup> The amendment, however, was rejected on the grounds that, "limiting the provision to particular purposes which were made part of the contract was an unjustified narrowing of the seller's obligations and that accordingly it was not desirable".<sup>177</sup> Article 35(2)(b) was applied in this sense in the *Coin Change machine case*.<sup>178</sup>

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<sup>174</sup> See BIANCA & BONELL, *supra* note 8, at 275.

<sup>175</sup> See Amendment A/CONF.97/C.1/L.73 in United Nations Conference on Contracts for International Sale of Goods – Official Records (1980), at 104, para. 1 (proposing to "Re-word paragraph (1), sub-paragraph (b) as follows: "(b) are fit for any particular purpose expressly or impliedly made part of the contract.")

<sup>176</sup> On this point see United Nations Conference on Contracts for International Sale of Goods – Official Records, *supra* note 90, at 306, para. 57, clearly reporting the following "Mr. KLINGSPORN (Federal Republic of Germany) explained that his delegation had submitted amendment A/CONF.97/C.1/L.73 because it thought that the present text of [draft] article 33, paragraph 1(b), was too complicated and liable to give rise to litigation. In order to remove all ambiguity, it should be expressly stated that the delivery of goods which were not fit for the purpose to which the buyer intended to put them was not a breach of contract unless the parties had expressly or impliedly made that purpose part of the contract."

<sup>177</sup> See United Nations Commission on International Trade Law, 'Yearbook – Volume VIII (1977)', 316, para. 172, available at [http://www.uncitral.org/pdf/english/yearbooks/yb-1977-e/yb\\_1977\\_e.pdf](http://www.uncitral.org/pdf/english/yearbooks/yb-1977-e/yb_1977_e.pdf) (last visited Sept. 19 2011).

<sup>178</sup> See *Société P[...] Service et Société L[...] de transport en commun v.*

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A French buyer had purchased from a German seller banknote-to-coin changing machines possessing specific characteristics. Once the machines turned out not to work as anticipated, the buyer brought an action against the seller claiming termination of the contract and restitution of the purchase price. When addressing the merits of the case, the Appellate Court of Lyon declared the seller liable under Article 35(2)(b) CISG as it failed to deliver goods fit to be used for the particular purpose. The court found that even though the particular purpose had not been expressly contracted for, the seller's knowledge of the intended use sufficed to establish its liability.<sup>179</sup>

The wording of the provision indicates that the particular purpose can be made known either expressly or impliedly. While the concept of "express" communication is so straightforward that it does not need to be explained, what is intended for "implied" communication is less obvious. The purpose is to be considered "impliedly" communicated when, in light of the concrete circumstances, the seller should have understood the use the buyer intended to make of the goods. The problems arise when the seller should have recognized the particular purpose, but failed to do so.<sup>180</sup> The seller is, nevertheless, considered to be aware of the particular purpose if a reasonable person in the same position would have recognized the use the buyer intended to make of the goods.<sup>181</sup> This same conclusion was reached in the *Channel Steel case*<sup>182</sup> where the parties had entered into a contract for the sale of channel steels. Even though nothing was said with regard to the intended use of the goods, the contract strictly specified the width and height of the goods. As these did not conform to the contract, the buyer

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Société F[...] automatique et Société G[...] et Société N[...], *Cour d'Appel de Lyon*, France, Dec. 18 2003, available at <http://www.cisg.law.pace.edu/cases/031218f1.html> (last visited Sept. 19, 2011).

<sup>179</sup> See *id.* at para. 3(B) (In this specific circumstance the Court found that the seller "had knowledge of the set of requirements specifying the demands of [the buyer] when they concluded and agreed to the transaction, as indicated in the minutes of the meeting on 22 June 1995 that took place between" the parties.)

<sup>180</sup> See HYLAND, *supra* note 70, at 321.

<sup>181</sup> Cf. HUBER and MULLIS, *supra* note 51, at 139.

<sup>182</sup> See China International Economic & Trade Arbitration Commission (CIETAC), No. CISG/1996/48, China, (Oct. 23 1996), available at <http://cisgw3.law.pace.edu/cases/961023c1.html> (last visited Sept. 19, 2011).

commenced arbitration proceedings. When addressing the merits of the case the Arbitral Tribunal considered that the specifications on width and height were an implied indication that the goods were intended for a particular use. The seller, therefore, was found liable under art. 35(2)(b) for having delivered goods that were not fit for the particular purpose impliedly communicated.

As for the time when the particular purpose must be communicated, Article 35(2)(b) specifies that this needs to be done, “at the time of the conclusion of the contract”.<sup>183</sup> Subsequent notifications, therefore, would not suffice to trigger the application of Article 35(2)(b).<sup>184</sup> The reason behind this timing is that it allows the seller to evaluate its capability to comply with the particular purpose and eventually refuse the transaction if it is unable to provide adequate goods or to ask for a higher price.<sup>185</sup>

#### 2.5.2.2.2 Reliance on the seller’s skills and judgment

The violation of art. 35(2)(b) CISG may be invoked only when there has been a reasonable reliance on the seller’s skill and judgment. This second condition is an expression of the principle of fairness upon which the implied conformity provision is based.<sup>186</sup> Parties who enter a contract may have different levels of knowledge about the goods. Suppose, for example, that the buyer is an experienced firm in the trade while the seller is an intermediary not aware of the characteristics the goods must possess to comply with the highly technical particular purpose.<sup>187</sup> Obliging the seller to warrant that the goods were fit for the particular purpose would “unfairly” place upon the less knowledgeable seller an obligation that the expert buyer could handle more easily. The situation is less clear

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<sup>183</sup> Art. 35(2)(b).

<sup>184</sup> Cf. U. Magnus in J. von Staudingers, *Kommentar zum Bürgerlichen Gesetzbuch mit Einführungsgesetz und Nebengesetzen. Wiener UN-Kaufrecht (CISG)*, (Sellier-de Gruyter, Berlin, 1999) Art. 35, para. 30.

<sup>185</sup> See Secretariat Commentary, *supra* note 67, at para. 8.

<sup>186</sup> See Neumann, *supra* note 115, at 9.

<sup>187</sup> See F. ENDERLEIN, IN P. SARCEVIC & P. VOLKEN (eds.) *International Sale of Goods: Dubrovnik Lectures*, at 157 (Oceana Publications 1986) (recognizing that the seller may not rely on the seller’s skills and judgment “If the buyer uses the goods himself in his factory, he may well be better informed than a seller who is a trader and not a producer.”)

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when the seller and the buyer have the same level of expertise with regard to the contracted goods. A closer examination of the facts must be undertaken to determine whether the buyer has actually relied on the seller's expertise.

The circumstances in which the buyer deserves protection as it relied on the seller's skills and judgment cannot be identified in advance, but must be determined on a case-by-case basis.<sup>188</sup> Nonetheless, as a general consideration, the cases covered by Article 35(2)(b) are those in which the buyer is purchasing the goods for a particular purpose but does not know the characteristics the goods must possess in order to fulfill that purpose.<sup>189</sup> It follows that the buyer has no obligation to inform the seller of any difficulty related to the selection of the appropriate goods. The mere communication of the intended use suffices to trigger the application of this implied conformity obligation.<sup>190</sup>

In general, there has been no reliance if the buyer selected or inspected the goods before the purchase.<sup>191</sup> Where the buyer did so, it directly influenced the manufacture or specification of the goods<sup>192</sup> thus bypassing the seller's evaluation on the fitness for the specific purposes. Doubts on the reliance arise when the buyer did not directly select a good but rather insisted on a particular brand. Some authors believe that there can be no reliance once the buyer has indicated a specific brand.<sup>193</sup> This approach, however, has been contested on the basis that "a mere purchase under a trade name does not prove that the purchaser is not relying at all on the skill and judgment of the

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<sup>188</sup> See BIANCA & BONELL, *supra* note 8, at 275.

<sup>189</sup> Poikela, *supra* note 34, at para. 5.3.1.

<sup>190</sup> See R. H. FOLSOM, M. W. GORDON & J. A. SPANOGLE, INTERNATIONAL BUSINESS TRANSACTIONS IN A NUT SHELL, 88 (West Publishing Co. 3d ed. 1988), (affirming that "There is no express requirement that buyer inform seller of buyer's reliance, but only of the particular purpose. More importantly, there is no requirement that buyer inform seller of any of the difficulties which buyer may know are involved in designating or designing goods to accomplish this particular use.")

<sup>191</sup> See Henschel, *supra* note 42, at 236.

<sup>192</sup> See Neumann, *supra* note 115, at para. 9.

<sup>193</sup> See ENDERLEIN & MASKOW, *supra* note 158, at [insert page number]; Cf. Peter Huber & Ingeborg Schwenzer, *Obligations of the Seller*, in COMMENTARY ON THE UN CONVENTION ON THE INTERNATIONAL SALE OF GOODS (CISG) (Peter Schlechtriem ed., 2nd ed., Oxford University Press, 1998). Art. 35, para. 23.

seller.”<sup>194</sup> It has been argued that the choice of the brand does not *per se* exclude the reliance on the seller’s skills and judgment, as this is only one of the many factors to consider when evaluating the specific circumstances.<sup>195</sup>

However, even though the buyer relied on the seller’s expertise, the reliance would be unreasonable if the seller did not possess the skills needed to deliver goods fit for the particular purpose.<sup>196</sup> As a general rule, this exception applies when the seller does not have any special knowledge of the contracted goods.<sup>197</sup> It would be “unfair” to consider him liable if the goods were not fit for the particular purpose for which they were purchased. To ascertain whether it was reasonable for the buyer to rely on the counterpart, what has to be considered is the average knowledge in the seller’s trade branch. If the knowledge necessary to deliver goods fit for the particular purpose is not common in the seller’s trade, there can be no reliance on the seller’s skills and judgment.

A last issue strictly related to the reliance on the seller’s expertise is the conflict between the express contractual terms and the fitness for the particular purpose. If the seller has informed the buyer that the goods are not fit for the particular purpose,<sup>198</sup> but the buyer proceeds to purchase the goods anyway, it is clear that art. 35(2)(b) CISG would not apply as there has been no reliance on the seller’s skills and judgment.

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<sup>194</sup> See *Pabellon v. Grace Line, Inc.*, 191 F.2d 169, 172 (2d.Cir. 1951) (even though this case was decided under the United States Uniform Commercial Code, this principle may well apply also to Article 35(2)(b) CISG considering the similarities between this article and section 2 – 315 UCC.)

<sup>195</sup> See Maley, *supra* note 92, at 120 (recognizing that, “[a]s the seller knows the characteristics of the goods better than the buyer, it is probable that there is reliance. It would be an absurd outcome if the seller escaped liability merely because the buyer had requested a particular brand...Hence, although a choice of brand or trademark may indicate that the seller has relied on its own skill and judgment [sic], this is merely one factor to consider.”)

<sup>196</sup> Cf. Excerpt from “*The Application and Interpretation of the CISG in Finnish Case Law 1997-2005*”, CISG DATABASE, Apr. 2009, available at <http://cisgw3.law.pace.edu/cases/980630f5.html>.

<sup>197</sup> See BIANCA & BONELL, *supra* note 8, at 275.

<sup>198</sup> See *Secretariat Commentary on Article 33 of the 1978 Draft [draft counterpart of CISG article 35] [conformity of the goods]*, CISG DATABASE, Aug. 29, 2006 at para. 9, available at <http://www.cisg.law.pace.edu/cisg/text/secomm/secomm-35.html>.

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ment.<sup>199</sup>

2.5.2.3 Art. 35(2)(c) CISG: conformity to a sample or model

The third implied conformity obligation imposes upon the seller a duty to deliver goods in conformity with the sample or model provided. This provision is designed to address those circumstances in which the buyer, rather than describing the physical features of the goods analyzes a representative sample or model of the product and places the order according to it. Similarly to Article 35(2)(b) CISG, this obligation does not arise automatically with the conclusion of the contract, but rather comes into play only if the seller has held out a sample or model of the contracted goods.<sup>200</sup>

The first question is whether the mere holding out suffices under Article 35(2)(c) CISG or an agreement between the parties is also necessary. It is clear that no such doubts arise if the seller supplied a model or sample and the contract directly provides for the goods to conform to the latter (*i.e.* the contractual term provides for goods to be “as per sample” or “as per model”). The seller would have a twofold obligation towards the buyer: the sample not only creates a legal obligation, for *example* Article 35(2)(c) of the CISG, but also serves the function of a contractual description, thus binding the seller under Article 35(1) CISG.<sup>201</sup> The problems arise when the buyer has received a sample or model but has ordered the goods without any reference to them. On one side, it has been affirmed that goods do not need to conform to a given sample or model if parties have not so agreed.<sup>202</sup> This position has been clearly acknowledged by the District Court of Berlin in the *Shoes* case<sup>203</sup> (already

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<sup>199</sup> See SCHLECHTRIEM & SCHWENZER, *supra* note 12, at 582.

<sup>200</sup> See Flechtner, *supra* note 116, at 5.

<sup>201</sup> See Poikela, *supra* note 34, at para. 5.4.1.

<sup>202</sup> See G.A., UNCITRAL Digest of case law on the United Nations Convention on the International Sale of Goods, Art. 35, para. 11, U.N. Doc. A/CN.9/SER.C/DIGEST/CISG/35 (2004) (recognizing that “the goods must conform to a model only if there is an express agreement in the contract that the goods will do so”); see also HERBER & CZERWENKA, *supra* note 139, at Art. 35, para. 6.

<sup>203</sup> Landgericht Berlin [LG] [District Court] Sept. 15, 1994, 52 S 247/94 (Ger.), English abstract available at, <http://www.cisg.law.pace.edu/cases/940915g1.html>.

mentioned above)<sup>204</sup> where the court stated that a “sample only has binding effects where the parties actually agreed so.”<sup>205</sup>

Supporters of the opposing view believe, instead, that there is no need for an implied agreement as the mere holding out of the model or sample suffices to create a binding legal relationship.<sup>206</sup> It has been argued that by submitting a sample or model the seller specifies his offer by showing those qualities that will be possessed by the final product.<sup>207</sup> An illustrative case which applied this second view was *Delchi Carrier v. Rotorex*<sup>208</sup> decided by the United States Court of Appeals for the Second Circuit. Rotorex Corporation and Delchi Carrier SpA entered into a contract in which Rotorex agreed to supply 10,800 compressors, which Delchi intended to use as part of the portable air conditioners it produced. Prior to the execution of the contract, the seller supplied the buyer with a sample compressor. When two of the three expected shipments were delivered, the buyer realized that the goods failed to conform to the sample as they had lower cooling capacity and consumed more power than the sample. After several unsuccessful attempts to cure the defect, the buyer decided to avoid the sales contract and filed a claim for restitution of the purchase price and damages. The Second Circuit Court affirmed the decision of the trial court finding the seller was liable as it had delivered goods that failed to conform to the sample provided. The Court held that the “agreement between [the parties] was based upon a sample compressor supplied by Rotorex” even though there was no reference of the sample in the contract.<sup>209</sup> The court consid-

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<sup>204</sup> See *id.* at para. 0. (2.5.2.1.1 Complying with the ordinary purpose: average quality, reasonable quality or merchantable quality?)

<sup>205</sup> Landgericht Berlin [LG] [regional court] Sept. 15, 1994, 52 S 247/94 (Ger.), English abstract available at <http://cisgw3.law.pace.edu/cases/940915g1.html>.

<sup>206</sup> See SCHLECHTRIEM & SCHWENZER, *supra* note 12, at 582.

<sup>207</sup> On this point see BIANCA & BONELL, *supra* note 8, at 276 (affirming that “the submission of a sample or a model involves by itself the seller's promise to provide goods possessing the same qualities as those shown to the buyer. Holding out a sample or a model is a concrete way for the seller to specify his offer. Without questioning the distinction between sale by sample or model and sale by description, it may be said that the submission of a sample or a model is a factual description and, therefore, a contractual way to determine the kind and quality of the goods the buyer is entitled to.”)

<sup>208</sup> *Delchi Carrier, S.p.A. v. Rotorex Corp.*, 71 F.3d 1024 (2d Cir. 1995).

<sup>209</sup> *Id.* at 1028.

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ered the mere holding out of the sample sufficient to trigger Article 35(2)(c) even in the absence of an express or implied contractual agreement between the parties.<sup>210</sup>

Of the two positions, the latter has received wider support, not only because it is more in line with the legislative history, but also because it is more consistent with the nature of the provision. Article 35(2)(c) CISG finds its antecedent in Article 33(c) of the ULIS. Matching up the two provisions what can be immediately noted is the different approach used by the drafters of the two conventions. Under the ULIS, the obligation to deliver goods in conformity with the model or sample followed the seller's express or implied undertaking.<sup>211</sup> The legal obligation, therefore, could not arise if the seller merely handed over a sample or model without creating an understanding that these would be representative of the final product. Drafters of the CISG, however, abandoned this approach and decided to eliminate any reference to the concept of express or implied undertaking.

This conclusion is certainly more consistent with the nature of the provision. Contrary to modern trend in comparative law,<sup>212</sup> the CISG considers the obligation to deliver goods in conformity with the sample or model as an implied rather than an express conformity provision. Even though the choice may be criticized,<sup>213</sup> it still is the undisputable structure of the 1980

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<sup>210</sup> *Id.*

<sup>211</sup> Precisely, Article 33(c) considered that the seller had not complied with its delivery obligation if it had delivered "goods which lack the qualities of a sample or model which the seller has handed over or sent to the buyer, unless the seller has submitted it without any express or implied undertaking that the goods would conform therewith."

<sup>212</sup> Indeed, in the United States legal system, the sample or model is considered an express contractual obligation similarly to an affirmation or description of the goods and is, in fact, placed under section 2 – 313 of the Uniform Commercial Code entitled "Express Warranties by Affirmation, Promise, Description, Sample". Moreover, section 494 of the German *BGB*, considers the sale by sample or model as an express guarantee. An intermediate approach may be found in the 1979 English Sales of Law Act, which in section 15 provides that "[a] contract of sale is a contract for sale by sample where there is an express or implied term to that effect in the contract."

<sup>213</sup> Professor Hyland correctly noted that: "As a practical matter, even the Convention's requirement that the goods conform to the sample or model will more closely resemble an express than an implied conformity requirement, for it is directly based on the seller's representations. It arises only when goods are 'held out...as a sample or model,' that is, in situations in which the

Vienna Convention and Article 35(2)(c) has to be considered accordingly. If the parties had to contractually agree on the conformity of the goods to the model or sample, Article 35(2)(c) would function as a default rule of an implied conformity obligation that operates only when the parties have *not* otherwise agreed would be negated.<sup>214</sup>

Moving on to the second condition, Article 35(2)(c) CISG clearly states that the model or sample must be held out by the seller. It follows that if the model or sample has been provided by the buyer (so-called 'order sample'), the seller will have no obligation under Article 35(2)(c) to deliver goods of that kind or possessing those specific qualities.<sup>215</sup> In order to hold the seller responsible two solutions have been suggested. On the one side, it has been proposed to apply this provision by analogy also to the cases in which the buyer supplies the sample.<sup>216</sup> This solution, however, disregards the wording of the provision. The second, more preferable, solution regards these cases as falling under Article 35(1); what must be ascertained is whether the qualities of the 'order sample' have been implicitly agreed between the parties.<sup>217</sup> In the *Marble Slabs* case,<sup>218</sup> the Appellate Court of Graz adopted this second solution. An Austrian buyer entered into a contract with an Italian seller for the purchase of granite slabs. The order had been made referring to a sample marble block that had been supplied to the seller. When the slabs were delivered, however, the buyer claimed a breach of contract as the color of the goods allegedly differed from the color of the sample provided. The Court of First Instance<sup>219</sup>

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required conformity between the goods and the sample or model might as easily be considered 'required by the contract'. The legislative history provides no hint of the reason for the characterization of the sample or model requirement as implied. In fact, it is doubtful that the drafters focused on the potential consequences". See HYLAND, *supra* note 70, at 305, 323.

<sup>214</sup> See Neumann, *supra* note 115, at 82.

<sup>215</sup> See SCHLECHTRIEM & SCHWENZER, *supra* note 12, at 584.

<sup>216</sup> Cf. HUBER and MULLIS, *supra* note 51, at 140.

<sup>217</sup> See SCHLECHTRIEM & BUTLER, *supra* note 5, at 120, affirming that "If the buyer uses an order sample it has to be ascertained whether the characteristics of that sample have been agreed upon impliedly and if requirements of Article 35(1) CISG have been met."

<sup>218</sup> Oberlandesgericht [OLG] [Higher Regional Court for Appeals from a Landesgericht], Nov. 9, 1995, docket No. 6 R 194/95, available at <http://cisgw3.law.pace.edu/cases/951109a3.html> (Austria).

<sup>219</sup> Landesgericht für Zivilrechtssachen [LGZ], June 28, 1995, docket No.

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ruled in favor of the buyer and recognized its right to reduce the final price by 20%. On appeal the *Oberlandesgericht* directly addressed the issue of the ‘order sample’ and recognized the following:

It is insignificant that Art. 35(2) CISG presupposes that the seller has held out the sample or model to the buyer, whereas in the present case the [buyer] has presented the color sample taken from a brochure [...] Even if one assumed that Art. 35(2)(c) CISG was not applicable to such a case, an agreement of the parties that the stone was to correspond to the color sample would constitute an agreement on a specific quality under Art. 35(1) CISG.<sup>220</sup>

Having analyzed the conditions that trigger the application of this implied conformity obligation, it is now possible to substantiate what is meant by conformity to the given model or sample.

#### 2.5.2.3.1 Determining the conformity to a model or sample

The seller provides the buyer a sample or model of the good with the intent of identifying and describing the subject matter of the contract. The main difficulty, however, concerns the fact that goods possess an infinite number of characteristics, and, unless the parties expressly specify, it is often difficult to determine which are illustrated by the sample or model.<sup>221</sup> As a preliminary issue, it must be noted that the situation differs according to whether the seller has provided a sample or a model. Indeed, while the former is taken from the goods that the seller intends to deliver, the latter is a representation of the goods that will be supplied although they are still not available.<sup>222</sup> Given the differences between samples and mod-

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Cg 321/93a-55, available at <http://cisgw3.law.pace.edu/cases/950628a3.html> (Austria).

<sup>220</sup> Oberlandesgericht [OLG] [Higher Regional Court for Appeals from a Landesgericht], Nov. 9, 1995, docket No. 6 R 194/95, available at <http://cisgw3.law.pace.edu/cases/951109a3.html> (Austria).

<sup>221</sup> See HYLAND, *supra* note 70, at 305, 324.

<sup>222</sup> The definition of the two words reflect this distinction. According to the Oxford English Dictionary, the term sample is defined as “a small part or quantity intended to show what the whole is like” and the term model is defined as a “representation of a person or thing or of a proposed structure, typically on a smaller scale than the original.” OXFORD’S ENGLISH DICTIONARY

els, the two may represent, to a different extent, the qualities the final product must possess. Unless the parties have otherwise agreed, when a sample is provided from the bulk of goods that is the subject matter of the contract, there should be a perfect identity between the sample and the final product. Indeed, where a seller has provided a sample, it has created an understanding that the final goods will possess all the features of that sample.<sup>223</sup>

However, “models may range from crude approximations to detailed replicas [and therefore] may be meant to portray one, several, many, or all of the characteristics of the goods”.<sup>224</sup> It is impossible to determine *ex ante* the level of correspondence intended. It follows that when a model is supplied, one must interpret the specific situation so to establish which of the many features of the goods are illustrated by the model.<sup>225</sup> This is fundamental as the seller will have complied with its conformity obligations only if the final goods possess those qualities that were portrayed by the model.<sup>226</sup> The level of correspondence, therefore, varies according to the number of features that the model represented.

Notwithstanding the differences in degree of correspondence, in both of the above situations the buyer ultimately has a precise understanding of the features the final good must possess to comply with the conformity requirements. This assertion, however, does not apply in those cases in which the seller provides a model or a sample only to give an approximate description of the goods offered to the buyer. In those circumstances, the final goods must possess the qualities illustrated

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<sup>223</sup> On this point see HONNOLD, *supra* note 32, at 258, affirming that “[w]here the seller has held out goods to the buyer as a sample or model he has created an understanding that the goods would conform to the sample.”

<sup>224</sup> See HYLAND, *supra* note 70, at 305, [32? **insert page number**] (Peter Schlechtriem ed., 1987).

<sup>225</sup> Cf. AUDIT, *supra* note 47, at 98.

<sup>226</sup> As clearly reported in the Secretariat Commentary on Article 35 “if the seller indicates that the sample or model is different from the goods to be delivered in certain respects, he will not be held to those qualities of the sample or model but will be held only to those qualities which he has indicated are possessed by the goods to be delivered”. See *Secretariat Commentary on article 33 of the 1978 Draft [draft counterpart of CISG article 35] [conformity of the goods]*, CISG DATABASE, Aug. 29, 2006 at para. 11, available at <http://www.cisg.law.pace.edu/cisg/text/secomm/secomm-35.html>.

either by the sample or by the model but slight deviations are to be tolerated.<sup>227</sup> In the absence of a precise indication on what is to be considered as an acceptable deviation from the agreed standard, due reference has to be given to the circumstances of the specific case, including the negotiations.

A last scenario, which completely differs from those described above, is one in which the seller provides a model or sample “without any obligation”. In those rather limited circumstances, the seller has no legal obligation to deliver goods in conformity with the model or sample as they do not become the agreed qualitative standard of the contract.

Although there are no doubts that the seller must deliver goods possessing those qualities that are easily noticeable upon a proper inspection of the sample, it is not clear whether the final product must also comply with those “hidden” features that could have been identified only with a thorough and detailed examination. It must be underlined that this issue applies solely to those circumstances in which the level of correspondence requested is at its maximum, meaning that goods presented as sample or model and goods delivered must be identical. In particular, when the seller warrants some specific features they must necessarily be present regardless of whether they are apparent at first glance or only after a detailed examination.

In the absence of a precise indication within the CISG, there are serious doubts as to whether the conformity obligations cover both apparent and “hidden” features of the sample. Starting from the commonly accepted assumption according to which when a sample is provided the final goods must possess *all* of its qualities, it has been argued that the seller must deliver goods possessing also those features that are identifiable only through a detailed inspection regardless of the buyer’s knowledge on the existence of the latter.<sup>228</sup> Supporters of this

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<sup>227</sup> See BIANCA & BONELL, *supra* note 8, at 276.

<sup>228</sup> As correctly noted by Professors Huber and Mullis “That the qualities not present in goods delivered were hidden or not apparent from the sample might be a relevant factor to take into account in deciding whether the breach was a fundamental one.” See HUBER and MULLIS, *supra* note 51, at 140. Indeed, when considering whether a breach is of fundamental nature or not, art. 25 CISG imposes to verify if the buyer has been deprived of what it was entitled to expect under the contract. It is clear that if the buyer was not even aware of the existence of a feature, it can hardly allege that it expected the final product to possess it. In support of this position see Franco Ferrari,

position argue that there is nothing in the CISG that suggests a limitation of the protection solely to the easily identifiable physical characteristics. Notwithstanding the uncertainties related to the issue, this conclusion seems the most reasonable as even if they were not readily identifiable during the initial inspection, the seller must still deliver a product possessing all the qualities of the sample, whether apparent or hidden.<sup>229</sup>

#### 2.5.2.3.2 Solving conflicts between Article 35(2)(c) and the other conformity obligations

It is not always possible for the seller to supply goods that comply with all the conformity obligations. Suppose, for example, that the buyer, an experienced firm in the fishing industry, is interested in purchasing hooks to catch fish weighing between 150 and 190 kg. Before the conclusion of the contract, the seller provides the buyer with different hook samples stating that they were representative of the product being offered. Of the many hooks provided, the buyer selects one which, however, is fit to catch fish weighing no more than 150 kg. When ordering the product, the buyer first identifies the hook stating that this had to be "as per sample #XXXXX" but then describes the goods by specifying that they had to be fit for catching fish weighing between 150 and 190 kg. Given the discrepancy between the sample and the contractual description of the goods, the seller must choose whether the expressed or the implied conformity obligations must take priority. Although the wording of the CISG might suggest that when the parties have "otherwise agreed"<sup>230</sup> the implied conformity obligation should not apply,<sup>231</sup> in case of contrast between the contractual terms and

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*Fundamental Breach of Contract Under the UN Sales Law – 25 Years of Article 25 CISG*, (2006) 25 J. L. & COM. 489, 497 (2006) affirming that "[f]rom the language of Article 25, it can be derived that the extent of the detrimental consequences of a breach of contract must be assessed by reference to what the damaged party could have expected under the contract."

<sup>229</sup> See HUBER and MULLIS, *supra* note 51, at 140.

<sup>230</sup> CISG, *supra* note 7, at art. 35(2).

<sup>231</sup> See ENDERLEIN & MASKOW, *supra* note 158, at 144. (Affirming that "In the case of a sample or model, a problem might arise if the contract described the quality of the goods in a different manner than is shown by the sample or model. Only if there is not a different description in the contract will the sample or model prevail. Otherwise, I do not think that the sample should prevail in any case if the description in the contract was clear and unambigu-

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the sample it has been argued that “the conflict must be interpreted on the facts of the individual case in order to establish which qualities the parties intended to take priority”.<sup>232</sup> This *contra legem* approach is justified in light of the fact that the sample is a “factual” description of the final goods that eventually become part of the contractual agreement.

The need to consider the facts of the specific case has been recognized by the Austrian Supreme Court in the *Frames for Mountain Bikes* case.<sup>233</sup> A German buyer and an Austrian seller entered into a contract for the sale of mountain bikes. The contractual relationship was premised on the seller’s presentation of a special model built with a milled frame that rendered the bicycle particularly light. However, the buyer had not placed an order on the occasion of the initial presentation but several months later. When placing the order, the buyer requested specific models of mountain bikes that had the normal frame. Once the bikes were delivered, the buyer realized that they did not possess the special milled frames and in turn refused to pay the outstanding price and asserted a claim for restitution for the amount paid, which the seller refused. In the ensuing litigation the Court of First Instance<sup>234</sup> dismissed the claim on the grounds that the buyer had misunderstood the presentation of the bicycles as the seller neither explicitly nor tacitly promised to deliver specially milled frames bicycles. On appeal the Court of Appeals<sup>235</sup> reversed the decision. It held that the fact that the buyer had ordered a specific model of normally framed bicycles was not relevant as the sample supplied by the seller had created an understanding that all the bicycles would have possessed such special frame. The seller, in turn appealed to the Austrian Supreme Court. The *Oberster Gerichtshof* reversed the Appellate Court’s decision and remanded the case to the Court of First Instance. In doing so, the

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ous.”)

<sup>232</sup> SCHLECHTRIEM & SCHWENZER, *supra* note 12, at 583.

<sup>233</sup> Oberster Gerichtshof, [OGH] [Supreme Court], Mar. 11, 1999, docket No. 2 Ob 163/97b, (Austria), available at <http://cisgw3.law.pace.edu/cases/990311a3.html> [accessed 19 September 2011].

<sup>234</sup> Landesgericht Innsbruck, [LGZ] Wien, Jul. 12, 1996, docket No. GZ 11 Cg 1/95k-62 (Austria).

<sup>235</sup> Oberlandesgericht Innsbruck, Nov. 15, 1996, docket No. GZ 4 R 244/96f-68 (Austria).

Supreme Court recognized the discrepancies in the contract and suggested that the solution on which qualities should take priority had to be found by interpreting the circumstances of the specific case.

A conflict between Art. 35(2)(c) and the expressed terms of the contract are not the only scenarios that may give rise to conflicts amongst conformity provisions. Indeed, complying with the sample may well lead to the delivery of goods that are not fit to be employed for their ordinary or particular purposes. Starting with the conflict between letters (a) and (c) of Art. 35(2), what can be affirmed, at the outset, is that there is no straightforward solution to this conflict. The leading opinion considers that in case of sale by sample or model the qualities of the latter should be complied with even if this means delivering a good which is not fit for its ordinary purpose. This view is based on the assumption that Art. 35(2)(c), to a certain extent, can be regarded as some sort of parties' agreement that should therefore take priority over the purely objective standards contained in Art. 35(2)(a).<sup>236</sup> This position, however, has not found unanimous support. Sponsors of the opposing view suggest that in case of contrast between the two implied conformity obligations, Art. 35(2)(c) CISG should prevail "only if it is clear that the parties understood that compliance with the model or sample inevitably meant that goods would not be fit for their usual purpose".<sup>237</sup> In the absence of a precise indication contained within the Convention, this last solution appears as being more reasonable also considering that the CISG does not set a precise hierarchy between the different implied conformity obligations.

A different solution is instead suggested when the contrast is between letters (c) and (b) of Art. 35(2) CISG. These are the cases in which, if the goods were to correspond with the sample or model, they would not be fit for the particular purpose intended by the buyer. An example of this situation would be the one illustrated above regarding fishing hooks. In that case, while the buyer wanted a special hook capable of catching fish weighing up to 190 kg, it ordered a product referring to a sample hook that was not fit to catch fish weighing more than 150

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<sup>236</sup> Magnus, *supra* note 184, at para. 37.

<sup>237</sup> See HUBER and MULLIS, *supra* note 51, at 140.

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kg. It is clear that if the seller complies with the model or sample, the final product will not be fit for the particular purpose. In case such a conflict was to arise, the seller must deliver goods in conformity with the sample or model as Art. 35(2)(c) CISG will take priority. The reason behind this conclusion has been summarized by Professor Schlechtriem: “Since the spirit and purpose of a sale by sample or model is to give the buyer the possibility of examining the goods or using them in a trial run, it should, as a rule, be assumed that qualities provided for under Art. 35(2)(c) CISG take priority, because, in that respect, the buyer places no reliance on the seller’s skills and judgment”.<sup>238</sup>

*2.5.2.4 Art. 35(2)(d): usual or adequate packaging*

The last implied conformity obligation deals with the way goods should be packaged in case parties have not expressly agreed on this point. Art. 35(2)(d) provides for two alternative ways in which goods must be packed: either in a manner which is usual for such goods or, if there is no such manner, in a way that guarantees an adequate protection. The 1978 Draft Convention only provided for goods to be “contained or packaged in the manner usual for such goods”.<sup>239</sup> The addition of the second part of the provision was suggested by the Australian delegation at the Diplomatic Conference. According to the proposal, Art. 35(2)(d) had to be amended so as to also provide for goods to be “packed in a manner which, in the circumstances, would generally afford greater protection than the manner usual for such goods, or where there is no manner usual for such goods, in a manner adequate to preserve and protect the goods”.<sup>240</sup> The reasoning behind the addition was that the initial text of Art. 35(2)(d) did not cover all those situations in which there was no established “usual” way to contain or pack the goods.<sup>241</sup>

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<sup>238</sup> See SCHLECHTRIEM & SCHWENZER, *supra* note 12, at 583.

<sup>239</sup> CISG, *supra* note 7, at 103.

<sup>240</sup> CISG, *supra* note 7, at 104.

<sup>241</sup> CISG, *supra* note 5, at 316, para. 72. Indeed, the Australian delegate, Mrs. Kamarul, pointed out that “Her delegation considered that paragraph 1(d), which indicated the way in which the goods should be contained or packaged, did not cover all possible situations. What would happen if the goods were of a new type and there was no usual container or packaging for them? The provision proposed by her delegation provided that in cases where

During the discussion that led to the adoption of the current wording, the Australian delegation, however, decided to withdraw the first part of the amendment. It had been heavily criticized not only in light of the fact that its application might have led to increase the price of the transaction,<sup>242</sup> but also because such a rule would place upon the seller an excessively heavy burden.<sup>243</sup> Once the proposed addition was restricted, the First Committee adopted the amendment.<sup>244</sup>

Similarly to Art. 35(2)(a), the function of this implied conformity obligation is to set a minimum standard the seller must respect when packing the goods.<sup>245</sup> It is clear that the standard set by Art. 35(2)(d) suffers a high degree of uncertainty as it will vary according to the circumstances of the specific case. Other than the type of goods involved in the transaction, the manner of packaging will change, amongst others, according to the quantity, the method of transportation, the type and duration of the carriage and the climate in the country of destination.<sup>246</sup> Aware of the infinite variables, which can influence this situation, the same drafters of the CISG have decided to adopt an open formula, which avoids any concrete indication as to how the packaging must occur.

Art. 35(2)(d) applies irrespective of whether the goods must be delivered at the buyer's place of business or merely have to be placed at his disposal for collection. This can be implied from

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new standards had not been established, the manner in which the goods would be contained or packaged should be adequate to preserve and protect them."

<sup>242</sup> CISG, *supra* note 5, at 316, para. 74. (Reporting the Swedish delegate's opinion which noted that "The buyer would obviously not complain if the goods he received were packaged in a better manner than was usual or than had been specified in the contract, but that would not be true if the packaging involved the buyer in extra expense.")

<sup>243</sup> CISG, *supra* note 5, at 317, para. 76. Mr. Szàsz, from Hungary, pointed out this issue affirming that the first part of the Australian amendment "might improve the minimum rules laid down in the present text of article 33, but in view of the doubts as to its implications, it would be better to leave it to the parties who wished to go further than the minimum rules to settle the matter in the contract between them."

<sup>244</sup> CISG, *supra* note 5, at 104, para. 6. Notwithstanding the second part of the amendment had been orally withdrawn, the Australian proposal was adopted by a margin of only 3 votes with 22 in favor and 19 against.

<sup>245</sup> Secretariat Commentary, *supra* note 8, at para.12.

<sup>246</sup> See ENDERLEIN & MASKOW, *supra* note 158, at 159.

the CISG itself, as the wording of the provision does not distinguish contracts of sale involving carriage of goods from other type of contracts. It follows that even if the goods need not to be delivered, they must be contained or packaged so to allow the buyer to load and carry them away.<sup>247</sup> The burden of packing the goods will shift from the seller to the buyer only if the contract expressly provides for such different allocation of duties.<sup>248</sup>

Whether the goods are delivered to the buyer or left at his disposition, the seller is to be considered liable for any damage caused by the inadequate packaging, regardless when it occurs. It follows that, contrary to the general rule;<sup>249</sup> the seller will also bear the costs of damages arising after the passing of the risk.<sup>250</sup> According to the first paragraph of such provision, the seller is to be considered liable for any lack of conformity “which exists at the time when the risk passes to the buyer, even though [this] becomes apparent only after that time”.<sup>251</sup> An example came before the Appellate Court of Koblenz in the *Bottles* case.<sup>252</sup> This dispute involved an Italian seller and a German buyer who had concluded a contract for the sale of a certain number of bottles. The product had to be delivered “ex-factory”<sup>253</sup> and then taken over by a carrier employed by the buyer. Once the bottles had been delivered, the buyer refused to pay the purchase price alleging that due to the inadequate packaging the bottles had been either broken or had lost their sterility and thus were not useable. The seller, therefore, filed a claim against the buyer requesting payment of the full pur-

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<sup>247</sup> Poikela, *supra* note 34, at para. 5.5.1.

<sup>248</sup> See BIANCA & BONELL, *supra* note 8, at 277.

<sup>249</sup> See Sylvain Bollée, ‘The Theory of Risks in the 1980 Vienna Sale of Goods Convention’ in PACE REVIEW OF THE CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS (Kluwer Law International, 1999-2000) at 271, available at <http://www.cisg.law.pace.edu/cisg/biblio/bollee.html>. Recognizing that “The buyer must bear loss of or damage to the goods from the moment at which risk passes to him.”

<sup>250</sup> See HUBER and MULLIS, *supra* note 51, at 141.

<sup>251</sup> CISG, *supra* note 7, at art. 36(1).

<sup>252</sup> Oberlandesgericht Koblenz, [OLG] [Higher Regional Court] Dec. 16, 2006, No. 2 U 923/06, (Ger.), available at <http://cisgw3.law.pace.edu/cases/061214g1.html> [accessed 19 September 2011].

<sup>253</sup> This is a commonly used International Commercial Term (so called Incoterms), which indicates those cases in which goods have to be collected at the seller’s premises.

chase price. The Court of First Instance rejected the claim and ruled in favor of the buyer, recognizing that the bottles had been improperly packaged. The seller challenged this finding alleging that the damage to the bottles occurred after the goods had been handed over to the carrier. The *Oberlandesgericht* of Koblenz, however, rejected the appeal on the basis that the damage was not due to their miscarriage, but rather to their improper packaging. It follows that, although the risk might have been shifted to the buyer, the seller is to be considered liable for those defects, which are due to his own non-compliance with the contract.

#### 2.5.2.4.1 Usual packaging

According to the first part of Art. 35(2)(d), the seller must deliver goods that are “contained or packaged in the manner usual for such goods”. When determining what constitutes the “usual” packaging, regard should be primarily had to any usage that applies in the particular trade branch.<sup>254</sup> It follows that in order to understand the extent of the seller’s obligation, one must identify if a specific trade usage exists. In the absence of a precise conventional definition of the concept,<sup>255</sup> a usage is deemed existing if the two conditions set by Art. 9(2) are respected.<sup>256</sup> According to the first “subjective” criterion, the parties are bound by those usages which they knew or ought to have known. The second condition is rather more objective and

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<sup>254</sup> See SCHLECHTRIEM & SCHWENZER, *supra* note 12, at 584.

<sup>255</sup> See Chan Leng Sun, ‘Interpreting an International Sale Contract’ in *Celebrating Success: 25 Years United Nations Convention on Contracts for the International Sale of Goods* (Coalition of Papers at UNCITRAL - SIAC Conference 22-23 Sept 2005, Singapore) at 84, available at <http://www.cisg.law.pace.edu/cisg/biblio/sun1.html>.

<sup>256</sup> Leonardo Graffi, *Remarks on Trade Usages and Business Practices in International Sales Law* 3 BELGRADE LAW REVIEW 105 (2011), available at <http://www.cisg.law.pace.edu/cisg/biblio/graffi1.html#ii> [accessed 19 September 2011]. The author recognizes two conditions under art. 9(2): CISG “includes two prongs: (a) a subjective one and (b) an objective one. The subjective prong essentially states that, unless otherwise agreed, the parties are deemed to have impliedly made applicable to their contract or its formation a usage of which the parties knew or ought to have known. This means that if the subjective test is met, both parties will be bound by the usage. The objective test requires that the usage be “widely known” in international trade, and be regularly observed by parties to contracts of the type involved in the particular trade concerned.”

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demands for the usage to be widely known and regularly observed by those who deal in the particular trade sector.

The situation becomes more complex if goods are differently contained or packaged from place to place. While some authors tend to believe that the local standards in the place of business of one or the other party need not be considered when assessing the “usualness” of the packaging,<sup>257</sup> others, instead, recognize that “a usage that is of local origin [...] may be applicable if it is 'widely known to and regularly observed by' parties to international transactions involving these situations”.<sup>258</sup> This second opinion was also upheld by the Appellate Court of Saarbrücken in the *Marble Panel* case.<sup>259</sup> To ensure a correct delivery of natural stone marble panels, the buyer had concluded a contract with a transport company. When the panels arrived in a damaged condition, the buyer commenced legal proceedings against the transport company. The transport company, in turn, filed a claim against the seller alleging that goods had been improperly packaged. In addressing this second claim, the Court of Appeals first recognized that, in the absence of a contractual determination as to the packaging, it must satisfy the criteria set by Art. 35(2)(d). The Court then proceeded to analyze the implied conformity obligation and stated that: “In order to determine whether or not the obligation to deliver has been breached, it must be examined whether the goods are contained or packaged in the manner usual and adequate for such goods. In general, the standards in the seller's country determine the adequacy for usual purposes.”<sup>260</sup>

This view is to be preferred because it is more consistent with the wording used by the CISG. Indeed, Article 35(2)(d) does not require for an internationally accepted standard and, therefore, nothing prevents a widely known and generally accepted packaging standard of local origin from being binding for the seller.

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<sup>257</sup> See SCHLECHTRIEM & SCHWENZER, *supra* note 12, at 584. Affirming that “attempts to regard the standards in the State of the place of business of one of the parties, e.g. of the seller, [...] do not seem appropriate.”

<sup>258</sup> HONNOLD, *supra* note 32, at 178.

<sup>259</sup> See *Oberlandesgericht Saarbrücken, [OLG] Jan. 17, 2007* No. 5 U 426/96-54 (Ger.), available at <http://cisgw3.law.pace.edu/cases/070117g1.html> [accessed 19 September 2011].

<sup>260</sup> *Id.* at para. 2.

## 2.5.2.4.2 Adequate Packaging

The second part of Article 35(2)(d) CISG is intended to deal with those cases in which the contract does not determine the manner goods should be packaged and there is no widely known and regularly observed way in which it should be done.

According to the provision, the seller is bound to deliver goods contained or packaged in a manner adequate to preserve and protect them. What follows is that the “adequateness” of the packaging cannot be ascertained *ex ante*. The sole criterion is the ability of the packaging to preserve and protect the goods. The peculiarity of this obligation is that the CISG does not call for the application of an objective standard, but rather adopts a functional approach that judges the conformity according to the results achieved. The seller has absolute freedom to pack or contain the goods as it deems appropriate, provided that this guarantees an adequate protection and preservation of the goods. However, the seller is not liable for any damage merely affecting the packaging. As has been pointed out “if the packaging is damaged during transport of the goods, without the goods themselves being damaged, the seller incurs in no liability if the sole purpose of the packaging was to ensure the protection of the goods during transport”.<sup>261</sup>

Although the “adequateness” of the packaging will be evaluated after the goods have been delivered in light of its capacity to protect and preserve, the packaging to be used must be determined prior to the shipment. Therefore, the seller, must predict what would guarantee the desired result. As a general rule, the manner is to be considered adequate when it seems appropriate in light of the circumstances of the specific case,<sup>262</sup> thus the seller will consider the nature of the goods, the duration, the type of transport, and the climatic conditions..<sup>263</sup> There is no way of verifying the correctness of the seller’s decision until the goods have been handed over to the first carrier or to the buyer.

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<sup>261</sup> See SCHLECHTRIEM & SCHWENZER, *supra* note 12, at 569, which also correctly adds “The position is different if the packaging forms part of the contract; for example, the original packaging of branded goods or permanent packaging intended for subsequent resale, such as bottles or bags.”

<sup>262</sup> See BIANCA & BONELL, *supra* note 8, at 269.

<sup>263</sup> *Id.* at 269. Cf. HUBER and MULLIS, *supra* note 51, at 141.

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When selecting the appropriate method, the buyer must consider that the packaging not only has to endure the carriage, but has to last until the goods have been delivered at the seller's place of destination. If the seller knew or should have known of a possible redirection or re-dispatch, the selected packaging must be fit to endure and last until the new destination.<sup>264</sup>

### 3. EXCLUSION OF LIABILITY IN CASE OF NON-CONFORMING DELIVERY

Article 35 paragraph (1) and (2) set those criteria which have to be used when evaluating the conformity of the goods to the contract. As a general rule, violating any of these provisions constitutes a breach of contract entitling the buyer to those remedies envisaged by the CISG. The same Convention, however, provides for cases in which the seller's liability is excluded even when a breach of the express or implied conformity obligation occurs. There are two main circumstances in which the buyer loses the right to rely on lack of conformity: 1) when it knew or could not have been unaware of the defectiveness of the goods, and 2) when it failed to give notice of the non-conforming delivery.

#### 3.1 *Article 35(3): Awareness of the Buyer*

Delivering goods that fail to comply with the conformity requirements provided by the Convention does not always allow the buyer to invoke the remedies provided for the breach of contract. Article 35(3) excludes the seller's liability for any lack of conformity if at the time of the conclusion of the contract, the buyer knew or could not have been unaware of the non-conformity. The underlying principle behind this provision is that the buyer who agreed to purchase goods notwithstanding their notable or apparent defectiveness cannot expect to receive a product of better quality and condition.<sup>265</sup> However, it is im-

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<sup>264</sup> See Poikela, *supra* note 34, at para. 5.5.1.

<sup>265</sup> Cf. SCHLECHTRIEM, *supra* note 106, at 6, recognizing "that the presumption of corresponding promises in article 35(2)(a-d) cannot hold where the parties knew the condition of the goods and the buyer thus could not expect the seller to impliedly warrant the ordinary or particular qualities requi-

portant to note that not all knowledge of the non-conformity is capable of triggering the exception provided by Article 35(3). Information gained after the contract has been concluded will not affect the seller's obligation to deliver conforming goods.<sup>266</sup>

Notwithstanding its clear wording, there is still much debate on the extent of Article 35(3) CISG. Although the provision expressly excludes the seller's liability "under [Article 35(2)] sub-paragraphs (a) to (d)," some authors<sup>267</sup> believe it should apply by analogy to the lack of conformity covered by paragraph (1). The main argument in support of this view is, in both common and civil law jurisdictions, express conformity requirements are sometimes excluded when the buyer either was aware of the defect or was offered the opportunity to examine the goods (and therefore could have become aware of the defect).<sup>268</sup> This position, however, should be rejected. Not only because according to the "autonomous" interpretation of the CISG, the solutions adopted by national regulators are not rel-

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site for the contractual purpose." See also D. Ramos Muñoz, *The Rules on Communication of Defects in the CISG: Static Rules and Dynamic Environments. Different Scenarios for a Single Player*, Dec. 2005, at para. VII (2)(B), available at <http://www.cisg.law.pace.edu/cisg/biblio/munoz.html#2>.

<sup>266</sup> See FOLSOM ET AL., *supra* note 190, at 88.

<sup>267</sup> See ENDERLEIN & MASKOW, *supra* note 158, at 147, expressly affirming that "We could imagine that paragraph 3 be applied analogously to the requirements under the contract pursuant to paragraph 1." On this point, see also *DAS UNCITRAL-KAUFRECHT IM VERGLEICH ZUM ÖSTERREICHEN RECHT*, 109 (Peter Doralt eds., Manz, Vienna, 1985); see also LOOKOFSKY, *supra* note 31, at 95 fn. 4.

<sup>268</sup> See HYLAND, *supra* note 70, at 327, recalling the following three examples "Under French law, the buyer who is aware of a defect may not recover for it. It would seem therefore that the buyer's knowledge, at the time the contract is concluded, of the absence of an agreed-upon characteristic of the goods would preclude the seller's liability. The buyer's duty to inspect under French law probably applies equally to qualities expressly required by the contract. Similarly, under German law, the buyer who knows of the absence of a guaranteed characteristic may not hold the seller for nonconformity. However, in the case either of a guaranteed characteristic or of a defect which the seller guaranteed would not be present, the buyer who does not *actually* know of the problem *may* recover, even if the buyer was grossly negligent for failing to inspect. Within the framework of the UCC, it is unclear what consequences should be ascribed to the buyer's knowledge that the goods do not conform to the seller's express representations. In some situations, the buyer's knowledge may prevent the representations from becoming part of the basis of the bargain. In others, the seller's representations may cause the buyer to believe that the goods will be brought into conformity with the contract before they are tendered."

evant when interpreting the provisions, but also because both the legislative history and the underlying principle of Article 35(3) of the CISG are inconsistent with this solution. Starting from the legislative history, it is clear from the Official Records that the drafters of the CISG expressly decided not to extend this exception to the express conformity obligations. In the course of the 37<sup>th</sup> meeting of the First Committee, the Norwegian delegate proposed to modify Article 35(3) CISG so as to include in the exception the cases provided by Article 35(1) CISG.<sup>269</sup> The proposal was rejected because it would modify the substance of the provision.<sup>270</sup>

When it comes to analyzing the underlying principles of Article 35, it is even clearer that the exception provided by Article 35(3) should solely cover the implied conformity obligations. The provisions contained in Article 35(2) sub-paragraphs (a) to (d) operate as default rules that apply insofar as the parties have not otherwise agreed. If the buyer had positive knowledge of the non-conformity in respect of one of the qualities at the time of contracting, it could not later expect the goods to conform in that respect.<sup>271</sup> The situation is clearly different when the parties contractually agreed on a specific quality. Even if the buyer knew or should have known that the goods were defective at the time of the conclusion of the contract, it can still contract for full performance assuming that

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<sup>269</sup> The Norwegian Amendment (A/CONF.97/C. 1/L.102) proposed to “replace the words subparagraphs (a) to (d) of paragraph [draft] (1) of this article’ by the words ‘the preceding paragraph.” This rewording was so justified “According to that phrase there was an exception to the subsequent subparagraphs when otherwise agreed, but any further liability agreed to would fall outside the scope of paragraph 2 and would fall under paragraph 1, to which paragraph 3 did not refer. Paragraph 3 as drafted thus appeared [...] to be too restrictive and confusing, and [it was] proposed that it be reworded to refer not merely to subparagraphs (a) to (d) of paragraph 2, but to [art. 35] in its entirety.” See United Nations Conference on Contracts for International Sale of Goods – Official Records *supra* note 90, at 426 para. 5.

<sup>270</sup> *Id.* at 427, para. 5, reporting that “Mr. HJERNER (Sweden) said he opposed the Norwegian amendment which, he thought, involved a change of substance. Paragraph 3 of article [35] provided for an exception to subparagraphs (a) to (d) of paragraph 2 by exonerating the seller from liability if, at the time of the conclusion of the contract, the buyer new or could not have been unaware of the lack of conformity. The introductory phrase of paragraph 2, which provided for express agreement between the parties, should not be linked to paragraph 3, which referred to a simple state of affairs.”

<sup>271</sup> See Poikela, *supra* note 34, at para. 5.6.

the seller will remedy the non-conformity prior to the delivery.<sup>272</sup> Indeed, when there is a specific contractual provision, the buyer's actual or supposed knowledge of the condition of the good is irrelevant as it does not modify the content of what the seller has promised to the buyer.<sup>273</sup> As pointed out by the United Nations Commission on International Trade Law, the theory behind the inapplicability of paragraph (3) to the express conformity obligations is based on the fact that "[t]he buyer's knowledge of defects in the goods may modify the implied obligations based on normal expectations, but not the promises or undertaking that relate to this specific transaction."<sup>274</sup> Any other solution would not only violate the principle of which the primary source of rules governing international sales is the agreement of the parties, but would also lead to the unrealistic consequence that the seller would never be bound by contractual provisions for better quality goods.

Another reason that justifies the inapplicability of Article 35(3) CISG to the express conformity obligations is the impossibility for this exception to operate with part of Article 35(1) CISG. Prior knowledge is inconceivable where the non-conformity implies differences in quantity or delivery of a product of a different type from that contracted.<sup>275</sup> Where the contract provides for a given quantity of a specific good, the buyer will realize the lack of conformity in respect of quantity or type of the goods only when they have been delivered.

The buyer's positive knowledge of the non-conformity, however, plays a role, though limited, in the interpretation of the contract. Even though it will not exempt the seller from the express conformity obligations under Article 35(1), the buyer's awareness of the non-conformity will eventually be considered when understanding whether the relevant features have actually been agreed upon.<sup>276</sup> The seller might well argue that, despite the wording of the provision, the parties have otherwise agreed<sup>277</sup> or, according to Article (8) CISG, any reasonable per-

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<sup>272</sup> See *supra* note 8, para. 14.

<sup>273</sup> See BIANCA & BONELL, *supra* note 8, at 279.

<sup>274</sup> See UNCITRAL, *supra* note 18, at 46, para. 74.

<sup>275</sup> See ENDERLEIN, *supra* note 187, at 160.

<sup>276</sup> Cf. HUBER and MULLIS, *supra* note 51, at 142.

<sup>277</sup> See Henschel, *supra* note 42, at para. 4.2.

son in the same position of the buyer would have understood that in these specific circumstances the final goods would not possess those specific characteristics.<sup>278</sup> Moreover, in the extreme situation where the buyer knows from the beginning that the lack of conformity cannot be rectified, the seller will not be bound to comply with the contract. Any insistence on compliance of the goods with that specific characteristic would not only constitute *venire contra factum proprium*<sup>279</sup> but would also violate the principle of good faith in international trade.<sup>280</sup>

As already pointed out when tracing the legislative history of this provision,<sup>281</sup> one crucial difference between Article 35(3) CISG and its predecessor is the inclusion of sale by sample or model. According to the current formulation, even when goods are sold on the basis of a sample or model, the buyer may not rely on apparent qualities he knows in reality are not present in the contracted goods.<sup>282</sup> As has been noted, Article 35(3) CISG, however, is of little practical importance when it comes to sale by sample or model.<sup>283</sup> Since the seller is obliged to deliver goods possessing all the qualities of the sample or model, the buyer cannot expect to receive goods of better quality, and the seller cannot deliver goods of lesser quality. Provided that the final product corresponds to the sample or model, there is no need to investigate whether the buyer had actual or implied knowledge of the defects in the goods.

Although the wording of Article 35(3) of the CISG does not expressly mention any exception, there are two cases in which the seller is liable even if the buyer knew or could not have known of the lack of conformity. The first situation regards those cases in which the buyer insisted on perfect goods. Even if the buyer was aware of the lack of conformity upon conclusion of the contract, the seller will be expected to remove the

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<sup>278</sup> Prof. Schlechtriem calls for a “corrective interpretation” of the contract according to Article 8(3) CISG “by which the contractual description loses its character as an obligation.” See SCHLECHTRIEM, *supra* note 106, at 6.

<sup>279</sup> See SCHLECHTRIEM & BUTLER *supra* note 5, at 121.

<sup>280</sup> Cf. W. A. ACHILLES, *KOMMENTAR ZUM UN- KAUFRECHTSÜBEREINKOMMEN (CISG)* 99 (Luchterhand, Neuwied, 2000).

<sup>281</sup> *Id.* at para. 0 – 2.1History of the provision.

<sup>282</sup> See BIANCA & BONELL, *supra* note 8, at 279.

<sup>283</sup> See SCHLECHTRIEM & SCHWENZER, *supra* note 12, at 588.

defects if the buyer expressly requested faultless quality.<sup>284</sup>

The second situation regards those cases in which the seller fraudulently misinterpreted the qualities of the goods to be better than what they actually were or deliberately concealed a defect.<sup>285</sup> The seller will have to bear the responsibility for the lack of conformity as a “buyer who is unaware of a defect merely on account of his gross negligence seems to be more worthy of protection than a seller who deliberately sets out to deceive the buyer.”<sup>286</sup> This exception to Article 35(3) was first presented by the Appellate Court of Koln in the *Used Car* case.<sup>287</sup> An Italian seller and a German buyer, both car dealers, entered into a contract for the sale of a used car. The documents indicated that the contracted car was licensed in 1992 and the odometer<sup>288</sup> displayed a low mileage. Once the car had been resold, the final customer started an action against the German car dealer when it discovered that the car had actually been licensed in 1990, and the mileage was higher than what was displayed in the odometer. After having paid the damages to its customers, the buyer brought an action against the Italian seller claiming reimbursement of the damages paid due to the car’s lack of conformity. The *Oberlandesgericht* of Koln stated that:

“It has to be inferred from the basic idea of Article (40) CISG, whereby a seller is not entitled to rely on the conduct of the buyer if the seller is to blame more, in connection with Article 7(1) CISG, that in case of a fraudulent conduct of the [seller], the [seller] has to accept responsibility even if the [buyer] could not be unaware of the non-conformity. [...] Even a grossly negligent unknowing buyer appears to be more protection-worthy than a seller acting fraudulently. Consequently, when there is fraudulent conduct of the seller, the inapplicability of Art. 35(3) CISG follows from Art. 40 in connection with Art. 7(1) CISG.”<sup>289</sup>

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<sup>284</sup> Cf. B. PILTZ, INTERNATIONALES KAUFRECHT: DAS UN-KAUFRECHT IN PRAXISORIENTIERTER DARSTELLUNG para. 5-53 (Verlag C.H. Bec, Munich, 1993). See also ENDERLEIN & MASKOW, *supra* note 158, at 149.

<sup>285</sup> See HUBER & MULLIS, *supra* note 51, at 143.

<sup>286</sup> Poikela, *supra* note 34, at para. 5.6.

<sup>287</sup> See Oberlandesgericht [OLG] [Provincial Court of Appeal] May 21, 1996, No. 22 U 4/96 [insert beginning page], 1996 (Ger.), available at <http://cisgw3.law.pace.edu/cases/960521g1.html>.

<sup>288</sup> The odometer is the instrument which indicates the distance traveled by a vehicle.

<sup>289</sup> See *Oberlandesgericht Koln*[OLG] [Provincial Court of Appeal] May

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Similarly to the mechanism adopted in art. 40 CISG,<sup>290</sup> the Appellate Court of Koln decided to deprive the seller in bad faith of a defense to which he would otherwise be entitled.<sup>291</sup> The underlying principle of this decision is that the seller should not be able to benefit from his fraudulent conduct.<sup>292</sup>

## 3.1.1 Actual or presumed knowledge of the non-conformity

The seller wishing to avoid liability on the grounds that the buyer either knew or could not have been unaware of the lack of conformity at the time of the conclusion of the contract, bears the heavy burden of proving the buyer's actual or presumed knowledge.<sup>293</sup> Demonstrating that the buyer was actually aware of the lack of conformity will never be an easy task. Other than the unlikely circumstance that the buyer directly admits they knew of the non-conformity, the seller will be able to prove the awareness only if the circumstances of the specific case contain an unequivocal indication in this respect.<sup>294</sup> Given the difficulties related to demonstrating the buyer's actual state of mind, the Convention allows the seller to invoke the exception provided by art. 35(3) also when the buyer "could not have been unaware" of the lack of conformity. This expression, also used in other provisions within the Convention,<sup>295</sup> is intended to lighten the seller's burden of proof as it "is more difficult to demonstrate what a party knew than to establish what a party should have been aware of".<sup>296</sup> Indeed, although the

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21, 1996, No. 22 U 4/96 [insert beginning page], 1996 (Ger.) at para. 2.

<sup>290</sup> Art. 40 CISG; *The seller is not entitled to rely on the provisions of articles 38 and 39 if the lack of conformity relates to facts of which he knew or could not have been unaware and which he did not disclose to the buyer.*

<sup>291</sup> See S. Kuoppala, *Examination of the Goods Under the CISG and the Finnish Sale of Goods Act*, (Sept. 19, 2011) para. 4.8, available at <http://www.cisg.law.pace.edu/cisg/biblio/kuoppala.html#v>.

<sup>292</sup> Cf. NEUMANN, *supra* note 115, at para. 9.

<sup>293</sup> AUDIT, *supra* note 47, at 101.

<sup>294</sup> HONNOLD, *supra* note 32, at 339. (Suggesting that the seller will have the hard task of proving "that facts that were before the eyes reached the mind.")

<sup>295</sup> See CISG arts. 8(1), 40, 42(1) and 42(2)(a).

<sup>296</sup> These were the words used by the Norwegian delegate, at the Vienna Diplomatic Conference to explain the difference between the two concepts. Mr. Rognlien also added that " 'could not have been unaware' [...] meant that a judge could not believe or accept, having regard for the circumstances which were in practice [...], that a party had not been aware of the other par-

apparent similarity between the facts a party “knows” and the facts a party “could not have been unaware” of, there is a slight difference between the two concepts.<sup>297</sup> The conceptual distinction was debated at the Vienna Diplomatic Conference after the United Kingdom’s delegation proposed to eliminate from Art. 7 the phrase “could not have been unaware” alleging that it could not be distinguished from the notion of actual knowledge.<sup>298</sup> After ample discussion, the Committee ultimately rejected the United Kingdom’s proposal by a large majority.<sup>299</sup>

Even though the phrase “could not have been unaware” is often used within the Convention, it has never been precisely defined. What follows is that one must necessarily rely on scholarly writings to fully understand when the buyer could not have been unaware of a specific fact. Notwithstanding the differing approaches, all authors agree that the concept is related to negligence.<sup>300</sup> The differences, however, arise when having to qualify the degree of negligence. While some believe that the buyer could not have been unaware of those facts which only a grossly negligent buyer would have missed,<sup>301</sup> others believe that more than gross negligence is required.<sup>302</sup>

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ty's intent. It contained a stricter criterion than "ought to have known" but one that was hardly less objective". See United Nations Conference on Contracts for International Sale of Goods, *supra* note 20, at 260 para. 6.

<sup>297</sup> In support of a distinction between the two concepts see C. Rauda and G. Etier, *Warranty for Intellectual Property Rights in the International Sale of Goods*, 4 VINDOBONA J. OF INT'L COMM. L. & ARB. 45 (2000). However, *contra* A. M. Shinn, *Liabilities under Art. 42 of the U.N. Convention on the International Sale of Goods*, 2 MINN. J. GLOBAL TRADE 124 (1993). (Considering these two terms as “tautological.”)

<sup>298</sup> See United Nations Conference on Contracts for International Sale of Goods, *supra* note 20, at 259, para. 4 (reporting how the United Kingdom’s delegate, Miss O’Flynn argued that “it seemed to her that to say that a party “could not have been unaware” [...] was to say that the party must have known.”)

<sup>299</sup> The proposal rejected by a vote of 7 in favor and 26 against. See United Nations Conference on Contracts for International Sale of Goods, *supra* note 20, at 88 para. 3(iii).

<sup>300</sup> Cf. V. Grosswald Curran, *Cross References and Editorial Analysis – Article 40*, available at <http://www.cisg.law.pace.edu/cisg/text/cross/cross-40.html#§15>.

<sup>301</sup> Cf. Magnus, *supra* note 184, at para. 47.

<sup>302</sup> See HUBER and MULLIS, *supra* note 51, at 142 (recognizing that “Could not have been unaware” denotes more than mere negligence or even ‘gross’ negligence and requires something much closer to ‘blind eye’ recklessness.”)

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Of the different solutions proposed, the one which seems to best fit this situation has been proposed by Professor John Honnold. According to his position, “an obligation based on facts of which one ‘could not have been unaware’ does not impose a duty to investigate — these are the facts that are before the eyes of one who can see”.<sup>303</sup> What follows is that the seller willing to rely on art. 35(3), will simply have to demonstrate that the lack of conformity was “before the eye” the buyer. In evaluating whether the buyer was in the position to “see” the non-conformity, the seller will not solely rely on purely objective standards but may also consider the circumstances of the specific case.<sup>304</sup>

### 3.1.2 Becoming aware of the lack of conformity

Although there are no limits to the ways the buyer can acquire the knowledge of the non-conformity, there are three situations which are considered the most likely to occur. In the first case, the buyer might discover the lack of conformity by carrying out an examination before the contract has been concluded. In the second case, the buyer will realize that the goods are defective as a result of something the seller told him. In the last case, the non-conformity can be implied by analyzing the circumstances of the specific case.

Starting from the first of the three possible scenarios, it must be underlined that the Convention does not impose upon the buyer a duty to examine the goods before entering into the contract.<sup>305</sup> As the choice on whether or not to carry out an inspection is left to the sole will of the buyer, the seller will not escape liability for lack of conformity merely by offering an opportunity to examine the goods: for art. 35(3) to apply, the buyer has to carry out an inspection.<sup>306</sup> Once the buyer decides to

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<sup>303</sup> See HONNOLD, *supra* note 32, at §229(a).

<sup>304</sup> Cf. J. Ghestin, *Les obligations du vendeur* in LA CONVENTION DE VIENNE SUR LA VENTE INTERNATIONALE ET LES INCOTERMS, 100 (Y. Derains and J. Ghestin eds. 1990).

<sup>305</sup> See R. F. Henschel, *Creation of Rules in National and International Business Law: A Non-National, Analytical-Synthetic Comparative Method* in SHARING INTERNATIONAL COMMERCIAL LAW ACROSS NATIONAL BOUNDARIES: Festschrift for Albert H. Kritzer on the occasion of his eightieth birthday 187 (C.B. Anderson and U.G. Schroeter ed., 2008).

<sup>306</sup> Cf. SCHLECHTRIEM & SCHWENZER, *supra* note 12, at 587 (which, how-

perform an examination, it will lose the right to claim the non-conformity of the goods in respect of those defects which were either discovered or could not have been ignored when inspecting the goods.<sup>307</sup> For example, In the *Second hand bulldozer case*, an Italian seller and a Swiss buyer entered into a contract for the sale of a Caterpillar bulldozer.<sup>308</sup> Prior to the conclusion of the contract, the buyer tested the bulldozer and requested the seller to substitute three defective parts. Once the product was delivered, however, the buyer filed a claim against the seller alleging the non-conformity of the goods. According to the Swiss Court of Appeal of Valais, the seller was not to be found liable for the non-conforming delivery. By inspecting the goods, the buyer became aware or, at least, could not have been unaware, of the bulldozer's defectives.

The second way in which the buyer is likely to acquire knowledge of the non-conformity is through a declaration of the seller. The seller will have to prove not only that the lack of conformity was communicated to the buyer, but also that, following this communication, any reasonable person in the same position as the buyer could not have been unaware of the lack of conformity. Moreover, where it is alleged that the buyer became aware of the defects as a result of something brought to his attention by the seller, a general indication that the goods have defects, without a specification on the nature of the latter, is considered as insufficient.<sup>309</sup> Indeed, if the seller wishes to rely on the exception provided by art. 35(3) CISG, it must prove

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ever, recognizes that notwithstanding this general rule, there is at least one case in which the seller's offer to inspect the goods suffices to exempt him from the conformity obligations: "If the seller combines the request to examine the goods with a reference to possible defects in the goods, then, in any event, the buyer loses his right under art. 35(3) in respect of defects which would have been obvious upon such an examination, even if he does not perform it.")

<sup>307</sup> See LOOKOFKY, *supra* note 31, at 95. See also BIANCA & BONELL, *supra* note 8, at 279 (which also adds that under the same standard, when large quantities of goods are involved "it is often sufficient for the buyer to examine a small part of the goods, without checking the entire amount he is intending to buy. The buyer may reasonably expect that the defects not discovered in the examined part do not affect the rest of the goods.")

<sup>308</sup> See excerpt from *Tribunal Cantonal de Vaud*, [Canton Appellate Court] Oct. 28, 1997, No. C1 97 167, (Switz.), available at <http://cisgw3.law.pace.edu/cases/971028s1.html>.

<sup>309</sup> See HUBER and MULLIS, *supra* note 51, at 143.

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that the buyer was made aware of the precise nature of the defect.

Finally, the buyer could become aware of the lack of conformity by analyzing the circumstances of the specific case. Regardless of whether the goods have been inspected or the seller communicated the lack of conformity, there are circumstances from which a reasonable buyer should deduce that the goods will not conform to the standards imposed by the Convention.<sup>310</sup> If, for example, the price corresponds to what is generally paid for poor quality goods, the buyer cannot expect to receive high quality goods.<sup>311</sup> Furthermore, if in the past the seller usually sold defective goods, the buyer should expect to receive non-conforming goods unless the contract specifically called for perfect goods.<sup>312</sup> A case in which the buyer should have deduced the non-conformity from the quality of the past deliveries was the *Hydraulic press case*.<sup>313</sup> The dispute involved an Italian seller and a Chinese buyer who had concluded a contract for the sale of an Hydraulic press. Inspection revealed defects that rendered the press unusable for its ordinary purposes. In the ensuing arbitration the Arbitral Tribunal recalled how the previous year the buyer had purchased the same type of machine from the seller. As the same defects were also present in the previous product delivered, the tribunal concluded that the buyer “knew that the machine had these defects when concluding the sales contract for the machine involved in this case. However, the [Buyer] did not put this forward in the contract for this machine, which indicated that [it] accepted these defects.”<sup>314</sup> The claim was therefore rejected in light of art. 35(3) as the buyer could not have been unaware of the lack of conformity.

### 3.2 *Failure to give notice of the non-conformity*

Art. 35(3) CISG is not the sole provision within the Con-

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<sup>310</sup> See BIANCA & BONELL, *supra* note 8, at 279.

<sup>311</sup> See ENDERLEIN & MASKOW, *supra* note 158, at 149.

<sup>312</sup> See Poikela, *supra* note 34, at para. 5.6.

<sup>313</sup> See *China International Economic & Trade Arbitration Commission (CIETAC)*, CISG Database, January 20, 1994, available at <http://cisgw3.law.pace.edu/cases/940120c1.html>.

<sup>314</sup> *Id.* at para. III(2).

vention to exclude the buyer's possibility to take action against a non-conforming delivery. Art. 39 provides that the buyer "loses" the right to rely on lack of conformity unless the buyer notifies the seller of the non-conformity within a reasonable time after he has discovered it or ought to have discovered it.<sup>315</sup> Before delving into a brief analysis of this provision, what must be underlined, at the outset, is that even though both art. 35(3) and art. 39 exclude the seller's liability in a case of non-conforming goods, there is a conceptual difference between the two. Under art. 35(3), the buyer's actual or supposed knowledge of the non-conformity excludes the seller's liability. According to art. 39, instead, the seller's liability is not excluded but rather the buyer loses "the right to assert any and all of the various remedies"<sup>316</sup> otherwise provided under the Convention for the breach. In the one case, therefore, the seller's liability is excluded *a priori* while, in the other case, the seller is liable but the buyer is precluded from enforcing the remedies.

### 3.2.1 Art. 39(1): communicating the defectiveness within a reasonable period of time

The buyer's obligation to notify the seller is designed to allow the seller to become aware of the non-conformity and, eventually, cure the defect or provide a substitute delivery. The biggest problem related to art. 39(1) CISG, is understanding what is intended by a "reasonable" time period to give notice. It is clear from the wording adopted, that the drafters of the CISG were willing to impose a flexible time period for notification that had to be determined in light of the circumstances of the specific case.<sup>317</sup> This solution was considered the most suitable in light of the many different situations which the provision had to regulate. What was gained in terms of flexibility, how-

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<sup>315</sup> See CISG, Art. 39.

<sup>316</sup> See LOOKOFSKY, *supra* note 31, at 105.

<sup>317</sup> This intention is confirmed by the words of the Working Group which clearly recognized that "for what is a "reasonable time" [is], of course, a question that depend[s] on the circumstances of each case". See United Nations Commission on International Trade Law, Progress report of the Working Group on the International Sale of Goods on the work of its third session, held in Geneva from 17 to 28 January 1972, A/CN.9/62/Add.1, 87 para. 78, available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/NL7/200/38/PDF/NL720038.pdf?OpenElement>.

ever, was lost in terms of uniformity.<sup>318</sup> Indeed, by leaving the interpreter free to determine what is intended by a “reasonable” period of time, there is a high risk of inconsistent application given the different legal backgrounds of the legal operators. As the CISG does not provide any guideline, one must necessarily rely on scholarly opinions and international practice to better understand how art. 39(1) CISG should be applied.

Notwithstanding the many contributions to this topic, the one which has received the greatest acceptance is Professor Schwenger’s “Noble Month doctrine.”<sup>319</sup> Starting from the basic assumption that in determining the period to give notice due consideration, is to be given to all relevant circumstances of the individual case (*i.e.* the nature of the goods, the remedies that are envisaged, the nature of the breach etc.), this theory suggests that for “durable goods, in the absence of any special circumstances, one should accept at least one month as a rough average period for timely notice”.<sup>320</sup> What greatly contributed to the diffusion of the “noble month” doctrine was the fact that the standard was applied by the German *Bundesgerichtshof*. The first time, shortly after the publication of the theory, the German Supreme court referred to it in the famous *Mussels case*.<sup>321</sup> In that occasion, the 30 days period was defined as an acceptable “rough average” that took into account the different legal traditions. A few years later the Noble Month doctrine received a stronger endorsement. In 1999, the German Supreme Court in the *Machine for producing hygienic tissues* case defined the one month period as being “*regelmässig*,” meaning regular or normal.<sup>322</sup> From the German legal system,<sup>323</sup> the

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<sup>318</sup> See Kuoppala, *supra* note 287, at para. 4.4.1.1 (recognizing that “The subjectivity of the term “reasonable” makes it flexible enough to be applied in different circumstances, but at the same time, it may turn out to be too imprecise to ensure uniformity in its application.”)

<sup>319</sup> This theory was first presented in I. Schwenger, *Art. 39*, in *KOMMENTAR ZUM EINHEITLICHEN UN-KAUFRECHT* 567 (P. Schlechtriem & C.H. Beck, 2<sup>d</sup> ed. 1995).

<sup>320</sup> I. Schwenger, *National Preconceptions that Endanger Uniformity*, 19 *PACE INT’L L. REV.* 112 (2007).

<sup>321</sup> See *Bundesgerichtshof*, [BGH] [Federal Court of Justice], Mar. 8, 1995, No. VIII ZR 159/94, (Ger.), available at <http://www.cisg.law.pace.edu/cisg/wais/db/cases2/950308g3.html>.

<sup>322</sup> See *Bundesgerichtshof*, [BGH] [Federal Court of Justice], Nov. 3, 1999,

“noble month” doctrine spread to the other CISG member states thanks to those Courts which, with the intent to promote uniformity in the interpretation of the Convention, relied on foreign case law.<sup>324</sup> Although uniformity on this point is far from being reached,<sup>325</sup> as of today the “noble month” doctrine seems a viable compromise which is flexible enough to cover all the specificities of an individual case.<sup>326</sup>

According to art. 39(1) CISG, the reasonable period of time must be measured from the day the lack of conformity was either discovered or ought to have been discovered. The Convention provides for two alternative starting periods both related to the discovery of the non-conforming delivery.

Under the first option, the time period for notification starts running from the day in which the buyer actually discovers the non-conformity. This day must not be confused with the day on which the goods were delivered. The two events may well occur on the same day, but they are considered separate.

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No. VIII ZR 287/98, (Ger.), available at <http://cisgw3.law.pace.edu/cases/991103g1.html>.

<sup>323</sup> After the German Supreme Court endorsed the “noble month” lower courts started to apply it very frequently. See *Oberlandesgericht Stuttgart* [OLGST] [Provincial Court of Appeal], Aug. 21, 1995, No. 5 U 195/94 (Ger.), available at <http://cisgw3.law.pace.edu/cases/950821g1.html>; *Amtsgericht Kehl* [AG] [Petty District Court], Oct. 6, 1995, No. 3 C 925/93 (Ger.), available at <http://cisgw3.law.pace.edu/cases/951006g1.html>; *Amtsgericht Augsburg* [AG] [Petty District Court], Jan. 26, 1996, No. 11 C 4004/95 (Ger.), available at <http://cisgw3.law.pace.edu/cases/960129g1.html>.

<sup>324</sup> See *Bundesgericht*, [BGer] [Federal Supreme Court] Nov. 13, 2003, No. 4C. 198/2003/gr1, (Switz.), available at <http://cisgw3.law.pace.edu/cases/031113s1.html>.

<sup>325</sup> Not only are there cases within the same German jurisdiction which contradict the 30 days standard (see e.g., *Landgericht Frankfurt am Main* [LG] [Regional Court] Apr. 11, 2005, No. 12/26 O 264/04, (Ger.), available at <http://cisgw3.law.pace.edu/cases/050411g1.html>. (Recognizing three weeks as not reasonable); There are also other courts (see *Oberster Gerichtshof*, [OGH] [Supreme Court] Oct. 15, 1998, No. 2 Ob 191/98x, (Austria), available at <http://cisgw3.law.pace.edu/cases/981015a3.html>. (Calling for a 14 day period) and scholars (see also M. Karollus, *Anmerkung zu BGH 8.3.1995, VIII ZR 159/94 (UN-Kaufrecht: Vertragswidrigkeit der Ware -- Muscheln mit Cadmiumbelastung)*, (Juristische Rundschau, 1996) which firmly criticize this approach.

<sup>326</sup> Cf. C. B. Andersen, ‘Reasonable Time in Art. 39(1) of the CISG -- Is Art. 39(1) Truly a Uniform Provision?’ (1998) in PACE REVIEW OF THE CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS, para. VI.2, available at <http://www.cisg.law.pace.edu/cisg/biblio/andersen.html>.

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The reasoning behind this distinction is based on the will to protect the buyer. Suppose for example that a complex machine, although apparently conforming, has a defective ventilation system that does not allow the engine to cool down. It is clear that such a defect would be noticeable only once the machine was fully installed and functioning. Suppose, moreover, that it takes around 2 months to install the machine. If the time to give notice started running from the day of delivery, the buyer would be precluded from relying on the lack of conformity as the reasonable period of time under Art. 39 CISG would have already expired. To avoid such unfair scenarios the drafters of the CISG provided that the time would run from the time the buyer was aware of the non-conformity. This solution is certainly more in line with the principle of good faith in international trade, as the buyer can make a conscious choice on whether to keep or reject the goods only when it has full knowledge of their actual condition.

The buyer's awareness, however, is not the sole condition which affects the commencement of the time period to give notice of the non-conformity. According to the second option presented in Art. 39 CISG, the reasonable period of time starts to run from the day on which the buyer "ought to have discovered" the lack of conformity. The intention behind this solution is to temper the "buyer friendly" approach adopted in the first option which, if taken to the extreme consequences, could lead to extremely unfair scenarios for the seller. This time, suppose that the parties entered into a contract for the sale of frozen fish. Suppose that the seller, instead of delivering the contractually agreed species, delivers a different species of fish. This defect is clearly visible just by opening a couple of boxes and inspecting a few samples of the product. Suppose, however, that the buyer decides to store the goods in its warehouse without inspecting the product. Eventually, six months after delivery and one month before the expiration date of the product, the buyer opens the boxes and realizes that the goods fail to conform to the contract. If the time to give notice started running only from the day of actual discovery of the non-conformity, the buyer would be granted six months to notify a defect that could have been discovered upon delivery if only he

had carried out a reasonable inspection.<sup>327</sup> It is clear that whether the buyer “ought to have discovered” the non-conformity depends on the circumstances of the specific case and, in particular, on who the buyer is.<sup>328</sup> What must be emphasized is the irrelevance of whether the buyer failed to discover the lack of conformity because it did not properly inspect the goods or because it did not inspect the goods at all; what matters is that the non-conformity was not discovered at the time when it could have been discovered.<sup>329</sup> The Convention, therefore, fixes a presumptive date with a double intent: on the one side to push the buyer to inspect the goods and eventually activate the remedies in the shortest possible period of time, on the other side, to protect the seller from the negative consequences arising from claims filed long after the goods have been delivered.

In order to preserve the right to rely on the lack of conformity, however, it is not sufficient that the buyer notifies the seller in time. According to Art. 39(1), the notice must specify the nature of the lack of conformity. In light of this provision, notifications reporting that the goods are of “bad quality”,<sup>330</sup> “defective in all parts”,<sup>331</sup> or that they “do not conform to contract specifications”<sup>332</sup> have been found not to comply with the

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<sup>327</sup> Cf. CISG Advisory Council, *Opinion No 2: Examination of the Goods and Notice of Non-Conformity: Articles 38 and 39* CISG DATABASE (2004), para. 4.1, available at <http://www.cisg.law.pace.edu/cisg/CISG-AC-op2.html#1>.

<sup>328</sup> See K. Sono in *See BIANCA & BONELLI*, *supra* note 8, at 310, which justifies the need to have regard of the specific circumstances by recognizing that “there may be buyers who are at a particular disadvantage in respect to expert buyers when it comes to examining a technologically complicated machinery. In this situation, the buyer may need to employ a skilled examiner from a distant venue and therefore require a longer time period for the process. The standard against which this necessity is judged will be that of «a reasonable person of the same kind».”

<sup>329</sup> Martin Karollus, *Judicial Interpretation and Application of the CISG in Germany 1988-1994* CORNELL REV. CONV. ON CONTRACTS FOR THE INT'L SALE OF GOODS, 69, Sept. 19, 2011, available at <http://www.cisg.law.pace.edu/cisg/biblio/karollus.html#v>.

<sup>330</sup> See *N.V. Namur-Kreidverzekering v. N.V. Wesco*, *Rechtbank van koophandel Kortrijk*, [Kh.] [Commece Tribunal], Dec. 16, 1996, No. A.R. 4328/93 (Belg.), available at <http://www.cisg.law.pace.edu/cases/961216b1.html>.

<sup>331</sup> See *Oberlandesgericht Frankfurt* [OLG] Apr. 20, 1994, No. 13 U 51/93 (Ger.), available at <http://www.cisg.law.pace.edu/cases/940420g1.html>.

<sup>332</sup> See *Handelsgericht Zürich* [HG] [Commercial Court] Nov. 30, 1998,

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specification requirement set by art. 39 CISG. Considering that the reason for the notice is to allow the seller to take appropriate action against the non-conformity, imposing upon the buyer the burden of specifying the nature of the defect is consistent with the underlying principle of art. 39 CISG. Indeed, only if the seller is fully aware of the non-conformity will he be able to decide whether to examine the goods, repair them or make a substitute delivery.<sup>333</sup>

### 3.2.2 Art. 39(2): the two year “cut-off” period

Regardless of whether the buyer was aware or ought to have been aware of the lack of conformity, Art. 39(2) CISG provides a “cut-off” period of two years from the handing over beyond which the buyer loses its right to notify the alleged non-conformity of the goods. Contrary to the choice adopted in the first paragraph, Art. 39(2) CISG suggests that the drafters decided to sacrifice flexibility to guarantee certainty. Indeed, not only the time frame has not to be determined in light of the circumstances of the specific case, but also the starting date does not vary from case to case.

According to the clear wording of the provision, the “cut-off” period will start to run from the moment the goods have been “actually” handed over to the buyer. As clearly underlined by the Working Group, the word “actually” before “handing over” was inserted “in order to make it clear that the two-year time-limit begins at the time the buyer is in a position to examine the goods”.<sup>334</sup> This means that time will start running from the date of physical handing over of the goods so to exclude the transit time from entering the “cut-off” period.<sup>335</sup>

This provision becomes particularly relevant when dealing with “latent” defects, meaning those non-conformities that are not reasonably discoverable through normal inspection. Under

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No. HG 930634/O, (Switz.), available at <http://www.cisg.law.pace.edu/cases/981130s1.html>.

<sup>333</sup> Compare F. Ferrari, *Tribunale di Vigevano: Specific Aspects of the CISG Uniformly Dealt With* 20 J.L. & COM. 235, (2001), available at <http://www.cisg.law.pace.edu/cisg/biblio/ferrari6.html#vi>.

<sup>334</sup> See *United Nations Commission on International Trade Law*, 1988 Y.B. – Vol. XIX, 40, para. 63.

<sup>335</sup> See HONNOLD, *supra* note 32, at .

¶. (2), the buyer will be precluded from relying on the remedies provided for the non-conforming delivery even if it has not discovered the non-conformity within the two years.<sup>336</sup> Although apparently harsh on the buyer, two years was considered as a fair compromise which, on the one side, gave the buyer enough time to discover any defect but, on the other side, protected the seller from late claims of doubtful validity.<sup>337</sup>

### 3.2.3 Exceptions to art. 39

Art. 39 was one of the most debated provisions at the Vienna Diplomatic Conference. Representatives of the least developed countries were profoundly dissatisfied with the drastic consequences related to the failure to give notice of the non-conformity. Their main concern was that “traders in jurisdictions which did not have a rule requiring notice to the seller might be unduly penalized, since they were not likely to be aware of the new requirement until it was too late”.<sup>338</sup> Moreover, considering that many traders in developing countries are illiterate, these will often learn of the notice requirement only after having consulted a lawyer; by that moment the time to give notice under art. 39 could have already expired.<sup>339</sup> With

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<sup>336</sup> See LOOKOFKY, *supra* note 31, at 107, (stating that “a buyer who first discovers and gives notice of a latent defect after the expiration of this period (and who has not secured a guarantee which effectively extends the period) *can claim no remedy*, however 'undiscoverable' the non-conformity in question might have been.”)

<sup>337</sup> On this point see Secretariat Commentary on article 37 of the 1978 Draft (draft counterpart of CISG art. 39, para. 2 Commentary 5, *available at* <http://www.cisg.law.pace.edu/cisg/text/secomm/secomm-39.html> affirming that:

“Even though it is important to protect the buyer's right to rely on latent defects which become evident only after a period of time has passed, it is also important to protect the seller against claims which arise long after the goods have been delivered. Claims made long after the goods have been delivered are often of doubtful validity and when the seller receives his first notice of such a contention at a late date, it would be difficult for him to obtain evidence as to the condition of the goods at the time of delivery, or to invoke the liability of a supplier from whom the seller may have obtained the goods or the materials for their manufacture.”

<sup>338</sup> United Nations Conference on Contracts for International Sale of Goods, *supra* note 20, at 320, para. 32.

<sup>339</sup> C. Date-Bah, *The Convention on the International Sale of Goods from the Perspective of the Developing Countries*, in *LA VENDITA INTERNAZIONALE*.

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the intent to alleviate the severity of this provision, drafters of the Convention decided to introduce 3 exceptions: one which applies to the first paragraph, one which applies to the second paragraph and, finally, one which applies to art. 39 as a whole.

The first exception, limited solely to the cases falling under art. 39(1) CISG, relieves the buyer from some detrimental effects which follow the failure to communicate the non-conformity within a reasonable period of time.<sup>340</sup> According to Art. 44,<sup>341</sup> the buyer may reduce the purchase price or claim damages, except for loss of profit, if it can prove there was a reasonable excuse for his failure to give the required notice. The exception provided by Art. 44 was not present in the 1978 Draft Convention submitted to the Diplomatic Conference. The provision derives from a joint proposal of Finland, Ghana, Kenya, Nigeria, Pakistan and Sweden<sup>342</sup> which tried to find a compromise between the need to protect the buyer and the necessity of a timely notice.<sup>343</sup> To trigger the application of Art. 44, the buyer will have to prove the existence of “reasonable” excuse. What constitutes a “reasonable” excuse cannot be determined *a priori* but rather must be measured in light of the circumstanc-

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*LA CONVENZIONE DI VIENNA DELL' 11 APRILE 1980* (Giuffrè, 1981), 48.

<sup>340</sup> HONNOLD, *supra* note 32, at 283.

<sup>341</sup> See CISG, *supra* note 5, at art. 44, which reads:

Notwithstanding the provisions of paragraph (1) of article 39 and paragraph (1) of article 43, the buyer may reduce the price in accordance with article 50 or claim damages, except for loss of profit, if he has a reasonable excuse for his failure to give the required notice.

<sup>342</sup> See Amendment A/CONF.97/C.I/L.204 in United Nations Conference on Contracts for International Sale of Goods – Official Records (1980), at 108, para. 7, proposing the following provision:

“Notwithstanding the provisions of paragraph (1) of article 37, paragraph (2) of article 39 and paragraph (3) of article 40, the buyer may declare the price reduced in accordance with article 46 or claim damages except for loss of profit if he has a reasonable excuse for his failure to give the required notice. However, the seller shall be entitled to set off, in any claim by the buyer pursuant to this paragraph any foreseeable financial loss caused him by the buyer's failure to give the notice.”

<sup>343</sup> Mr. Date-Bah (Ghana), introduced the joint proposal explaining that “the sponsors had endeavored to draft a compromise under which a buyer who had a reasonable excuse for failure to give notice did not lose all his rights to rely on a lack of conformity, but which at the same time recognized that the requirement for due notice by the buyer was an important aspect of the seller's right to cure.” See United Nations Conference on Contracts for International Sale of Goods, *supra* note 20 at 345, para. 1.

es of the specific case.<sup>344</sup> In evaluating the specific circumstances, due regard is to be had to the interests pursued by each party in so far as they merit protection, the seriousness of the buyer's breach of duty, the type of the buyer's business, the nature of the goods and, eventually, the buyer's lack of experience.<sup>345</sup> It must be underlined, however, that the buyer who can provide a "reasonable" excuse for the tardy notification will not be treated as the buyer who notified the non-conformity in accordance with Art. 39(1). While the latter can invoke all the remedies provided by the CISG for non-conforming delivery, the former can solely request a reduction of the purchase price or claim damages, other than for loss of profit.<sup>346</sup> Accordingly, the buyer will be precluded from avoiding the sales contract even if the breach were to be considered fundamental *ex art.* 25.

The second exception, recalled directly in Art. 39(2), is intended to limit the application of the two year "cut-off" period. According to the wording of the provision, if this time limit is inconsistent with the contractual period of guarantee, art. 39(2) will not apply. Suppose, for example, that the seller guarantees the proper functioning of a machine for three years. In the absence of such an exception, if a defect were to be discovered in

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<sup>344</sup> See HONNOLD, *supra* note 32, at 283, affirming that "the use of the expression "reasonable excuse" indicates the applicability of more individualized considerations than would otherwise be relevant under Article 39(1)."

<sup>345</sup> Cf. P. Huber in COMMENTARY ON THE UN CONVENTION ON THE INTERNATIONAL SALE OF GOODS (CISG) (P. SCHLECHTRIEM ed., Oxford University Press 2d ed. 1998).

<sup>346</sup> It goes without saying that what the buyer claims will not always correspond to what he will get. As correctly noted by Prof. Schlechtriem "even if the buyer has a "reasonable excuse" for not sending timely notice, it must still be determined whether his claim for damages may be reduced under Article 77 or whether his demand for a price reduction could be countered on the basis of Article 80. The seller might argue, for example, that he would have had an opportunity to cure the lack of conformity if he had been notified in a timely manner. Though notice cannot be regarded as a measure "reasonable in the circumstances" under Article 77, even in cases where the buyer has a "reasonable excuse" in the sense of Article 44, the *failure to examine the goods* (which is *not* excusable on the basis of Article 44) might be the cause of increased damages. And the seller, on the basis of Article 80, could maintain that timely examination and notice would have permitted him to cure the defects completely". See P. Schlechtriem, *Uniform Sales Law - The UN-Convention on Contracts for the International Sale of Goods* (Manz, Vienna: 1986) 71.

the third year, Art. 39 CISG would preclude the buyer from relying on the lack of conformity even if the contractual guarantee is still in force. This exception finds its roots in Art. 6, which recognizes the parties' freedom to derogate from, or vary the effect of, any CISG provision. In light of the priority recognized to party autonomy, the contractual clause guaranteeing performance for more than two years will override the gap-filling two-year period in Article 39(2).<sup>347</sup> An issue which still remains unclear is whether a contractual guarantee shorter than two years can be considered "inconsistent" with the "cut-off" period.

Although Art. 39 does not provide any indication on the point, Scholars are inclined to believe that the two year limit may not be reduced unless the parties derogate from it with an express contractual provision. A contractual clause guaranteeing the performance for less than two years will not, therefore, suffice to shorten such time frame.<sup>348</sup> In support of such position, it has been argued that "where the guarantee period is shorter than two years and where it [...] guarantees a certain standard of performance for the short period [...] the guarantee of certain standards [...] may expire after the short period but claims for the original non-conformity will probably not expire until after the expiry of the two-year period".<sup>349</sup>

The third and last exception applying to art. 39 CISG as a whole, may be found in art. 40 CISG. The buyer who invokes the application of this provision to justify the failure to notify, must establish that the seller "knew or could not have been unaware" of the facts to which the lack of conformity relates. Art. 40 CISG, therefore, operates as a "safety valve" that relieves the buyer from having to examine the goods or notify the non-conformity.<sup>350</sup> The exception provided by art. 40 CISG is

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<sup>347</sup> See LOOKOFKY, *supra* note 31, at 108.

<sup>348</sup> Cf. Secretariat Commentary on article 37 of the 1978 Draft (draft counterpart of CISG article 39), para. 7, available at <http://www.cisg.law.pace.edu/cisg/text/secomm/secomm-39.html> presenting examples indicating that a shorter, one-year guarantee would be unlikely to affect the two-year CISG limit.

<sup>349</sup> K. Sono in COMMENTARY ON THE INTERNATIONAL SALES LAW: THE 1980 VIENNA SALES CONVENTION, *supra* note 8, at 312, available at <http://www.cisg.law.pace.edu/cisg/biblio/sono-bb39.html>.

<sup>350</sup> See Alejandro M. Garro, *The Buyer's "Safety Valve" Under Article 40: What is the Seller Supposed to Know and When?* 25 J.L. & COM. 253

perfectly consistent with the *ratio* of the notification duty. The whole purpose of art. 39 CISG is to guarantee that the buyer informs the seller of any non-conformity within a reasonable period of time. However, when the lack of conformity is already known or could not have been ignored, the seller has no reasonable basis to demand a notification informing him of what is already known.<sup>351</sup> To trigger this exemption, the buyer bears the burden of proving that the seller was aware or could not have been unaware of the facts relating to the non-conformity. As for this first condition, where the buyer cannot prove the seller's actual knowledge it may demonstrate that the defect was so obvious that no reasonable person in the same condition of the seller could have ignored it.<sup>352</sup> The exception provided by art. 40, however, does not apply if the seller is able to demonstrate that the lack of conformity was disclosed to the buyer. For this condition to be fulfilled, the seller's disclosure of the non-conformity must be express and straightforward; letting the buyer deduce that there is a risk that the goods may not conform to the contract would not suffice.<sup>353</sup> Under art. 40, therefore, the burden of proof is equally allocated between buyer and seller: once the buyer has proved that the seller was aware or should have been aware of the non-conformity, it is up to the seller to show that the non-conformity was disclosed to the buyer. In conclusion what can be affirmed is that, in line with the principle of good faith in international trade,<sup>354</sup> this exception is designed to avoid that the seller benefits from its own wrongdoing. In the absence of such a provision, a seller that was aware or could not have been unaware of a lack of conformity could eventually benefit from hiding this information to the buyer.<sup>355</sup>

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(2005/2006), available at:

<http://www.cisg.law.pace.edu/cisg/biblio/garro4.html>

<sup>351</sup> See Secretariat Commentary on art. 37 of the 1978 Draft (draft counterpart of CISG article 39), *supra* note 337, at para. 1.

<sup>352</sup> Cf. Heuzé, *supra* note 144, at 237.

<sup>353</sup> See Garro, *supra* note 350 at 255.

<sup>354</sup> C D. Ramos Muñoz, *supra* note 265 at para. VII(B)(1).

<sup>355</sup> Cf. Kuoppala, *supra* note 291 at para. 4.8.

## 4. CONCLUSION

The success of the United Nation Convention on Contracts for the International Sale of Goods can clearly be seen. From the initial 11 Contracting States, the CISG has now been ratified in 80 countries thus becoming the law regulating a significant percentage of the many international sales contracts concluded every single day. Of the many factors that contributed to its success, a central role was certainly played by the provisions regulating the conformity of the goods to the contract. The simple yet balanced structure achieved in art. 35 CISG not only guarantees an efficient allocation of responsibilities between buyers and sellers, but also allows economic operators coming from the most diverse legal and social backgrounds to easily understand the provision.

Art. 35 CISG, however, went far beyond the initial expectations. What started as a provision intended to regulate the conformity of the goods to the contract in international sales between professionals, ended up having a broader influence.<sup>356</sup> The most evident example of this strong influence can be found in the European Union Directive 1999/44 on certain aspects of the sale of consumer goods and associated guarantees.<sup>357</sup> When the European Commission had to lay down those rules regulating the conformity of the consumer goods to the contract, it expressly relied on the solutions adopted in art. 35 CISG. Indeed, rather than following the “Roman” tradition that distinguished the delivery of defective goods from the delivery of an *aliud pro alio*, it opted for the CISG’s “unitary” notion of non-conformity

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<sup>356</sup> The importance of the 1980 Vienna Convention was expressly recognized by the European Parliament itself. In the Resolution on the approximation of civil and commercial Law of the Member States (see ‘Resolution of the European Parliament on the approximation of civil and commercial Law of the Member States’, COM (2001), para. J) it was clearly stated that “the United Nations Convention on contracts for the international sale of goods (CISG) could provide a basis for a future common body of law”. Moreover, the wide diffusion of the CISG amongst the different member states has pushed some scholars to consider the 1980 Vienna Convention as being *acquis communautaire*, meaning a part of the common European Union body of law. See Pilar Perales Viscasillas, *Late Payment Directive 200/35 and the CISG*, 19 PACE INT’L L. REV. 130, available at <http://www.cisg.law.pace.edu/cisg/biblio/perales8.html#23>.

<sup>357</sup> Council Directive 1999/44, 1999 O.J. (L 171/12) (EC). (Explaining certain aspects of the sale of consumer goods and associated guarantees).

according to which any difference between what has been contracted and what has been delivered is considered a lack of conformity. Considering that the Directive had to be transposed within the single EU Member States, this choice forced all European legislators to align their sales law to the model presented in the CISG.

The great success of these rules regulating the conformity of the goods to the contract is not a mere coincidence. There are two factors that undoubtedly contributed to the influence of the provision: the international character and the pragmatic approach. As for the first, it must never be forgotten that art. 35, alongside with the rest of the CISG, has been purposely drafted by scholars with different legal backgrounds. The result of this collaboration is a provision that is both independent from and compatible with any national legal system. Moving now to the second decisive factor, it can be noted that the conformity provisions in art. 35 CISG are designed to be as simple and linear as possible. Contrary to the many legal texts that use complex technicalities, the drafters of the CISG created a set of rules that any economic operator, regardless of their cultural background, could easily understand and apply. Abandoning the complex distinctions between *aliud pro alio* and defective delivery in favor of a “unitary” notion of non-conformity, is certainly a clear demonstration of that intent.

Thirty years after the introduction of the CISG, the goal of achieving uniformity in the field of international trade is no longer out of reach. The convergence which followed the diffusion of the 1980 Vienna Convention brought legal systems which were once far apart, to adopt similar solutions. This is especially true when dealing with the issue of conformity of the goods to the contract and its exceptions. Indeed, many major legal systems, *in primis* the European ones, have revised their sales law relying on the provisions set out in art. 35 CISG. Achieving a common set of rules, however, is just one of the two steps that must be taken in the long road leading to uniformity in international trade. In order to achieve this ambitious goal, the United Nations Commission on International Trade Law, together with national regulators, must work to foster the uniform interpretation and application of common rules. It is unquestionable that a truly uniform regulation of the conformity

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of the goods to the contract will be attained only when legal operators scattered around the globe will attribute the same meaning to the same provisions.