René Franz Henschel

Conformity of Goods in International Sales

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Preface

The purpose of this book is to analyse the concept of lack of conformity in Article 35 of the CISG and its interrelationship with the general rules of contract law. The book is a thoroughly reworked version of my PhD dissertation, which was submitted to and defended successfully at the Aarhus School of Business, Denmark, in 2003.

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Last, but not least, I would like to thank Albert Kritzer, Pace University, School of Law, who is the father of the *Pace Database on the CISG and International Trade Law*, for his valuable comments on the manuscript.

The manuscript was completed on 1 February 2005. Comments, suggestions etc. regarding the contents of this book can be sent to: rfh@asb.dk

This book is dedicated to my wife Britt, our sons Jonathan and Julius, and to my mother and father.

Aarhus, 1 June 2005 *René Franz Henschel*

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General introduction

Chapter 1

Introduction

1.1. Introduction to Article 35, problem description and hypotheses: the sphere of influence and the problem of uniform interpretation

In his pioneering work *Das Recht des Warenkaufs*, Ernst Rabel undertook a comparative analysis of sales laws with a view to postulating common global rules on the sale of goods. Following a review of the concept of 'lack of conformity' of goods[1] to the contract in different western legal systems, Rabel reached the following conclusion:[2]

> "Das »Wesen« der Gewährleistung ist nur historisch erklärbar. In einem rationellen System ein Stück Vertragsrecht, das ausdrüchliche Fürsorge nur in einem bescheidenen Maße benötigt."

The background to Rabel's conclusion was that the legal systems which he had studied had differing views about the legal conditions for a buyer to claim that the goods lack conformity to the contract.[3] Thus, he found that some legal systems considered lack of conformity from a standpoint which, has roots in the Roman law principle of *tale quale*, where it is assumed that the goods are 'bought as seen' (later refered to as the principle of *caveat emptor*[4]), according to which there is an assumption that the buyer bears the risk if it appears that the goods do not conform to the contract.[5] Other legal systems

1. Cf. Rabel: *Warenkaufs II*, p. 101 *et seq*. This applies to actual lack of conformity (Sachmängelhaftung), but the same conclusion applies to the sale of specific goods (*Gewährleistung für Speciesachen*), p. 111. For a general discussion of the differences between concepts of lack of conformity in various legal systems, see pp. 119-130, for guarantees see pp. 146-148, and for sales made on the basis of a sample or model see pp. 154-157.
2. Cf. Rabel: *Warenkaufs II*, p. 132 and p. 282 *et seq*.
3. Cf. Rabel: *Warenkaufs II*, pp. 101-104.
4. *Caveat emptor* is not the original Roman law term, but a concept developed in English law which nevertheless reflects the Roman law principle with the same content, cf. Stig Iuul.: *Caveat emptor-reglens oprindelse*, in Festskrift til Henry Ussing, p. 220.
5. This was because the earlier Roman law was strongly influenced by the direct exchange of goods in the open market, cf. Bruno Huweiler: *Die »Vertragsmässigkeit der ware«. Romanistische Gedanken zu art. 35 und 45 ff. des Wiener Kaufrechts*, in Bucher: Kaufrecht, p. 249 *et seq*.

had developed more balanced rules, where the assumption was that the seller is responsible for defects in the goods, including those based on explicit or implicit guarantees about the quality of the goods (and the principle of *caveat venditor* which is derived from this), while yet other legal systems have operated without codified definitions of lack of conformity.[6] Here the assessment of lack of conformity was developed in the practice of the courts and in theory on the basis of principles, which were largely similar to those known from the other legal systems with codified rules for assessing lack of conformity.

On this basis, Rabel recommended that an attempt should be made to work out a common definition for lack of conformity of goods to the contract:

> "Es bleibt nötig, den Begriff des Sachmangels zu definieren, aber nur deshalb, weil die Mängelskataloge derzeit abweichen und zusammengefaßt werden müssen."[7]

Among other things, it was on the basis of Rabel's work that the uniform sales laws, ULIS[8] and ULF[9] were developed, and these later led to the adoption of the CISG in 1980.[10] On the basis of Rabel's recommendations, it was decided to include a rule in the uniform sales laws and in the CISG on the conformity of the goods to the contract. The provisions in the CISG on the conformity of goods to the contract are the subjects of this treatise; they are included in Article 35 of the CISG and are as follows:[11]

> Article 35
>
> (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.

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6. Cf. also Schwartze: *Sachmängelgewährleistung*, p. 26; Zimmermann: *Obligations*, p. 307.
7. Cf. Rabel: *Warenkaufs II*, p. 288.
8. Uniform Law for the International Sale of Goods.
9. Uniform Law on the Formation of Contracts for the International Sale of Goods.
10. United Nations Convention on Contracts for the International Sale of Goods. Following a diplomatic conference the Convention was adopted in Vienna on 11th April 1980 (see UN document A/CONF.97/18). "CISG" can either be pronounced letter-by-letter, or as a word with a sibilant 'c'. As for the abbreviation of CISG in relation to other abbreviations in theory and practice, see Schlechtriem in Schlechtriem: *Kommentar*, p. V, note 1.
11. The official English version of the Convention is used in this treatise.

(2) Except where the parties have agreed otherwise, the goods do not conform with the contract unless they:
   (a) are fit for the purposes for which goods of the same description would ordinarily be used;
   (b) are fit for any particular purpose expressly or impliedly made known to the seller at the time of the conclusion of the contract, except where the circumstances show that the buyer did not rely, or that it was unreasonable for him to rely, on the seller's skill and judgement;
   (c) possess the qualities of goods which the seller has held out to the buyer as a sample or model;
   (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.

This article is in three sections, of which the first, the conformity of the goods to the terms of the contract, consists of the primary rule for assessing lack of conformity. Only where the parties have not agreed otherwise will the *secondary* rule in Article 35(2) apply, laying down a number of positively expressed assumptions about the contractual requirements for the goods. Finally, Article 35(3) contains an exception to the seller's liability for some lack of conformity of goods, where the buyer knew or could not have been unaware of the lack of conformity; however, according to its wording, this exception only refers to the Article 35(2) assumptions and thus not to contractually agreed terms.[12] This means that the interpretation of the agreement between the parties is of decisive importance to assessing the conformity of goods to a contract, and this is reflected in the Convention.[13]

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12. For an analysis of this, see chapter 9.
13. Cf. Honnold: *Uniform Law*, p. 3: "The dominant theme of the Convention is the role of the contract construed in the light of commercial practice and usage – a theme of deeper significance than may be evident at the first glance." Compare this with, for example, Ramberg: *Transactions*, p. 87: "CISG, in Art. 35.1, declares what seems to be obvious, namely that the seller must deliver goods of quantity, quality, description and packaged as required by the contract. If something is required by the contract, so be it. But does this stipulation give us any guidance at all? The answer is, of course, that it does not. But it still reminds us of the necessity to interpret the contract not only on the basis of what is explicitly said therein but also by using an appropriate method for contract interpretation." See also Lookofsky: *CISG Scandinavia*, p. 74: "The Con-

Article 35 can therefore be considered as a rule in which the principles of *caveat emptor* and *caveat venditor* meet. It is only through a careful balancing of these principles that it is possible to decide whether a good complies with the contractual obligations or not. It is the proposition of this treatise that the principles of *caveat emptor* and *caveat venditor*, as expressed in Article 35, should to a large extent be assessed on the basis of which party's *sphere of influence* is more closely linked to the conformity of the goods to the contract, and on the basis of a number of suggested presumptions.[14] For example, the starting point is that it is assumed that the seller should supply goods which are of the description laid down in the contract, cf. Article 35(1), or are fit for the purposes for which goods of the same description would ordinarily be used, cf. Article 35(2)(a). If the goods do not meet these standards, they do not comply with the contract. In other words, the starting point is the principle of *caveat venditor*. But what if there is a difference between the normal quality standards or fitness for purpose between the seller's country and the buyer's country? In this case, is it assumed that the seller should supply goods, which meet the normal quality standards and fitness for purpose in the buyer's country or in the seller's country? This can only be decided if a choice is made between the principles of *caveat emptor* and *caveat venditor*. It is the proposition of this treatise that *the party with whose sphere of influence the disputed factors are judged to be more closely linked ought to be liable for ensuring that the goods comply with such contractual requirements*. The sphere of influence is closely linked to the sphere of knowledge, meaning the actual or presumed knowledge of a party.

This treatise is also based on the argument in Rabel's general conclusion that the assessment of lack of conformity is not an independent legal category, but is part of the law of contract. The law of contract is customarily divided into special parts, e.g. the sale of goods, and the general part containing the basic legal principles of

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vention Hierarchy: Contract, Custom, CISG," as well as p. 79 et seq. See Chapter 3 below on contractual interpretation and Article 35, as well as the review of legal practice and theory in Chapters 4-9.

14. Cf. in Chapter 2 on the basic assumptions of Article 35, as well as Chapters 4, 5 and 6 on the very important decision of the *German Federal Supreme Court* of 8th March 1995 in the *Mussels* case.

obligations. However, these fundamental rules, or principles, are also expressed in the special parts so, for example, the Danish law of sale of goods is regarded as a codification of many of the principles of the law of obligations.[15] In other words, the law of sale of goods partakes both of the special part and the general part.

The same can be assumed to apply to Article 35. The provision lays down a number of rules, which can be regarded as *fundamental* to international sales. However, as will be seen in the review in Chapter 3, the article should also be seen in the context of Article 8 on interpretation and Article 9 on usage. This means that it is relevant to study the content of the principles of each of these provisions. It is also clear that Article 35, taken together with Articles 8 and 9, cannot be assumed to be exhaustive with respect to the fundamental rules and principles which are relevant to assessing the compliance of goods to the contract. Other provisions in the Convention must also be referred to, cf. Article 7(2), which is considered in more detail below in Section 1.1.5. For example, there can be fundamental rules on *bona fides* or on estoppel – under the rule of *venire contra factum proprium* – by which a party cannot contradict his own previous conduct.

If the Convention does not provide all the answers, then help can be sought elsewhere when making a thorough apportionment of liability under the law of obligations. In such circumstances it may be possible to apply both *national rules* and principles, and internationally recognised rules and principles, for example UNIDROIT[16] Principles on International Commercial Contracts or PECL (Principles of European Contract Law) may be helpful in providing a solution.

There are also provisions, which *compete* with Article 35, in particular the rules on validity. Since the Convention clearly states that it is not concerned with the validity of a contract, national laws should apply. However, on certain occasions the rules on validity will overlap with the rules on lack of conformity, for example in cases of mistake. In other words, there can be situations in which there are *conflicts* between the Convention and national law, unless the Con-

15. Cf. Andersen: *Aftaleret*, p. 32 *et seq.*
16. International Institute for the Unification of Private Law.

vention *supersedes* or *absorbs* the competing national rules, cf. CISG Article 4 and Article 7. It is therefore not possible to analyse the concept of lack of conformity in Article 35 without taking account of the fact that the provision should be seen in the context both of general and of special contract law and the law of obligations, under the Convention and outside it, just as Article 35 finds itself *in competition with* such rules, for example national rules on validity. Since there is no general agreement on these questions, due to the differing points of view on the priority of the Convention and its regulatory scope, it is the second proposition of this treatise that *Article 35 cannot be expected to lead to a fully harmonised law before either the general contract law which lies behind it is harmonised, or the provisions of the Convention are amended.* Whether this will happen is, in the final analysis, a question of legal policy.

Finally, the treatise should be seen from the perspective of the national laws on the sale of goods. In recent years, the CISG in general and the provisions on lack of conformity in Article 35 in particular have prompted a number of changes to national sale of goods laws. There are examples of this in the laws of Sweden, Norway and Finland, where provisions have been introduced on lack of conformity which have been influenced by the CISG. More recently there have been changes to the EU law on the sale of goods, following the adoption of a directive on the sale of consumer goods which was also strongly influenced by the CISG rules on lack of conformity,[17] and also the new Chinese[18] and Russian contract law[19] have been influenced by the CISG. The focus of this treatise on the provisions of Article 35 on the conformity of goods to the terms of a sales contract also leads to a focus on the inspiration for changes made to sale of goods laws in a number of legal systems.

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17. Directive 1999/44/EC of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees, OJ 1999 L 171/12. See also Viola Heutger: *Steps towards a European Sales Law* (vol 7.5 EJCL, December 2003), describing the importance of the Sales Directive and the CISG on the work of the Study Group on a European Sales Code (SGECC).
18. See Bing Ling: *Contract Law in China* (Hong Kong, 2002) and Knut Benjamin Pissler: *Das neue chinesische Vertragsrecht im Spiegel des Handbuches von Bing Ling*, RabelsZ Bd. 68 (2004), p. 328-350.
19. See Nina Vilkova: *Harmonisation of Contract Law in Russia: Some Brief Reflections* (Unif. L. Rev. 2003 1/2) p. 119 *et seq.*

1.1.1. Conformity of goods to contractual terms: substance, concept and terminology

International sales law is a part of the law of obligations which deals with liabilities. The duties of the seller[20] in the context of liabilities under sales law consist, briefly, of delivering the *right goods*, to the *right place*, at the *right time* and at the *agreed price*. This treatise focuses on the first of these fundamental elements, in other words, *what requirements the goods which are the subject of the contract shall satisfy in order for the buyer to have had his rights under the contract duly fulfilled.*[21]

The motives for choosing this topic are: first, the importance of the topic, since the majority of conflicts concerning the international sale of goods involve the question of the conformity of goods to the contract[22]; second, there is still almost no comprehensive review of the topic which is accessible in either national or international legal literature and which is focused on Article 35.[23] In particular, the theoretical monographs of German legal writers are either classic comparative treatments, giving general descriptions of the law on the conformity of goods to the terms of a sales contract under the CISG

20. In this treatise the terms *duty* and *liability* are used even though the terminology of duty should not be taken too literally, cf. Krüger: *Norsk Kjøpsrett*, p. 154. Kihlman: *Fel*, p. 37 et seq., attempts to depart from the terminology of duty, in favour of using the concept of *allocation of liability*, while recognising that it is not possible to avoid using the term 'duty' entirely, since legal rules and theories etc. still use this terminology. In the view of the present writer there seem to be no good reasons for abandoning the terminology of duty.
21. As for the content of the fundamental element of the conformity of goods to the contractual terms, see Chapter 2 below. This is a general description, so it should be remembered that the buyer also has certain duties relating to the conformity of goods to the contract, for example the duty to inspect a sample or a model provided by the seller, cf. Chapter 7, and in general Chapter 9 on Article 35(3). This is because the conformity of goods to the contract can then fall within the buyer's sphere of influence.
22. Cf. Gomard & Rechnagel: *International Købelov*, p. 113; Lookofsky: *CISG Scandinavia*, p. 79; Schlechtriem: *UN-Kaufrecht*, p. 79; Honnold: *Uniform Law*, p. 252; Ramberg: *Transactions*, p. 87. See also Jakob S. Ziegel: *Report to the Uniform Law Conference of Canada on the Convention on Contracts for the International Sale of Goods* (http://www.cisg.law.pace.edu:/cisg/text/ziegel35.html), and the comment on Article 35: "From a practical point of view, art. 35 is one of the most important articles in Part III of the Convention."
23. But see Sonja Kruisinga: *(Non-)Conformity in the 1980 UN Convention on Contracts for the Internaitonal Sale of Goods: a uniform concept?* (forthcoming, 2005 (Hart Publishing)).

relating this to the national sales laws of specific countries,[24] or they deal with the conformity of goods to a contract in relation to a specific area, for example, in relation to a buyer's remedies for breach of contract,[25] the giving of sureties and guarantees,[26] validity,[27] burden of proof,[28] the buying of computer hardware or software[29] or subordinate rights.[30]

In the various domestic sales laws, the concept of non-conformity is often described with different terms. As an example, in Danish law[31] the term mainly used in relation to the performance of a contract which does not conform to the terms of the contract is 'defect' (*mangler*).[32] The term 'conformity of goods to the terms of the con-

24. Cf. Kircher: *Sachmängelhaftung* (a comparison between German law, English law and the CISG); Kjelland: *Das neue Kaufrecht* (a comparison between Nordic, in particular Norwegian, sales laws, German law and the CISG); Kötz: *Verkäuferpflichten* (a comparison between Norwegian law and the CISG); Su: *Vergleich* (a comparison between Chinese law, German law and the CISG).
25. Cf. Conrad: *Vertragsaufhebung* (the conformity of goods to the terms of a sales contract and revocation of contract, with special reference to defects arising under public law rules); Heilmann: *Mängelgewährleistung* (the conformity of goods to the terms of a sales contract, giving notice of complaints and the buyer's duty to examine the goods, as well as remedies for breach of contract); Ziegler: *Leistungsstörungsrecht* (the conformity of goods to the terms of a sales contract with special reference to remedies for breach of contract).
26. Cf. Aue: *Mängelgewährleistung* (comparative analysis of implied guarantees in American law and under the CISG) and Schnüll: *Haftung* (comparative analysis of the rules on assurances about the characteristics of goods in European laws).
27. Flesch: *Beschafenheitsirrtum* (mistake concerning the nature of goods).
28. Antweiler: *Beweislastverteilung* (the burden of proof in relation to the seller's breach of contract); Reimers-Zocher: *Beweislastfragen* (questions of burden of proof under ULIS, ULF og CISG).
29. Brandi-Dohrn: *Gewährleistung* (Defects in computer hardware and software according to the BGB [*Bürgerliches Gesetzbuch* – German Civil Code], in leasing agreements and under the CISG).
30. Kock: *Nebenpflichten* (the seller's subordinate obligations).
31. An (unofficial) English translation of the Danish Contract Act and the Danish Sale of Goods Act is available online at: http://www.sprog.asb.dk/sn/cisg/.
32. Cf. for example, Ussing: *Køb*, p. 120 et seq.; Nørager & Theilgaard: *Købeloven*, p. 699 et seq.; Vinding Kruse: *Købsretten*, p. 95 et seq.; Hedegaard Kristensen in Elmelund et al: *Lærebog*, p. 112 et seq.; Andersen & Lookofsky: *Obligationsret*, p. 55 et seq. Note also that certain writers (for example Hedegaard Kristensen: *Ibid.*) use a 'functional' concept of a defect. This refers partly to the fact that the goods supplied do not correspond to the goods referred to in an agreement or to the reasonable expectations of the buyer, and partly to the fact that in such cases the buyer obtains remedies for the breach of contract. What this means is that trivial defects are excluded from consideration, but also that there is not considered to be a defect according to the

tract' (*varens kontraktmæsighed*) is also used. However, *Ussing* suggests that the term 'lack of conformity' only applies to cases where the performance does not correspond to the provisions of the contract itself,[33] implying that it only applies to the written terms of the contract. As opposed to this, Lassen considers the cases referred to by Ussing as effectively non-contractual (*ukontraktmæssig i egentlig forstand*), while others refer to defective performance of a contract as being non-conforming to the contract (*ukontraktmæssig*), in breach of contract (*kontraktstridige*) etc.[34] *Andersen & Lookofsky* thus consider such performance as being not contractual (*ikke-kontraktmæssig*) as long as it fails to satisfy all the requirements of the relevant legal rules, and they treat the concept of a contractual defect as being equivalent to the goods not conforming to the terms of the contract.[35]

With the increasing internationalisation of law, the customary domestic terms comes under pressure from different terminology. Again, we can take the Danish use of the term 'defect' (*mangel*) as an illustration. Thus, the CISG uses the term 'conformity of the goods'.[36] This has created some uncertainty, which in turn has led Danish draftsmen to 'lay it on a bit thick'.[37] In the Danish translation of the CISG Convention published by the Ministry of Justice, the heading of the section containing Article 35 is as follows: *Varens kontraktmæssighed (mangler) og tredjemands krav.* Note the insertion of the word '*mangler*', meaning 'defect'. Also, the Danish implementation of the EU Directive on certain aspects of the sale of consumer goods uses the term '*Overensstemmelse*

functional concept of a defect if, for example, the buyer gives notice of his complaint too late. This seems to conflate remedies for breach of contract, the rules on making complaints and the doctrine on defects, and this is not helpful. The 'functional' concept of a defect has no place in discussions of the CISG, nor under the EU Directive on certain aspects of the sale of consumer goods, so it will not be used in the present treatise, cf. Chapter 4 on Article 35 as an autonomous legal concept.

33. Cf. Ussing: *Køb*, p. 121.
34. Cf. Ussing: *Ibid.* but with reference to Lassen et al.
35. Cf. Andersen & Lookofsky: *Obligationsret*, pp. 55-56. This can also be seen in other statements of Nordic theory, for example Krüger: *Op. cit.*, p. 153.
36. In the English version of the CISG, the heading of Part III, Chapter 3, Section 2 is "Conformity of the goods and third party claims", and in the French version it is «Conformité des marchandises et droits ou prétentions de tiers». There are no parenthetical insertions with "defect", «défect» or suchlike.
37. This is a tendency noted by Krüger: *Op. cit.*, p. 154.

med aftalen' meaning 'conformity with the agreement'. This has led to a change being made to the heading of the section in the rules on the sale of consumer goods dealing with defects, and in accordance with the tradition of the Ministry of Justice, when implementing foreign definitions of defects, a parenthesis has been added, so that the heading now reads: *Salgsgenstandens overensstemmelse med aftalen (mangler)* – the conformity of the goods sold with the agreement (defects). Even though one may question the style of using parenthesis in legislation, the phenomenon does indicate that domestic law is gradually bending to external pressures.

In addition to this, the terms referred to above are often not used by the parties themselves. Instead, cases concerning failure to fulfil contractual terms are often referred to as 'defects', a 'guarantee case', a 'claim' or similar.[38] One can therefore conclude that Ussing's comment, that the terminology used in this area is not securely established, still applies.[39] For good or ill, this insecurity of terminology is continued in this treatise, both for linguistic and jurisprudential reasons. In certain cases it is obvious to refer to goods as being defective, for example if a new machine does not work, while in other cases it will be natural to refer to goods as not conforming to the contract, for example if a machine which works satisfactorily has been delivered in green rather than in red, as stipulated in the contract.[40]

38. Cf. Krüger: *Ibid.* See also the standard terms in Orgalime [the European federation of national industry associations] General Conditions S 2000, where Clause 22 states that: "Pursuant to the provisions of Clauses 23-37 inclusive, the Supplier shall remedy any defect or nonconformity (hereinafter termed defects(s)) resulting from faulty design, materials or workmanship," as well as the commentary to this by Hopmans et al: *Orgalime S 2000 Guide*, p. 101: "Clause 22 equates 'defect' with 'nonconformity', so that the expression 'defect(s)' covers them both. This change from S 92 to S 2000 primarily aims at avoiding problems of interpretation. An example is the painting of the machine. The machine may be functioning perfectly, but should have been painted red instead of green according to the specifications. The wrong colour is a nonconformity that shall be treated as a defect in S 2000. Furthermore the CISG uses the term, 'non conformity' and it was considered appropriate to show that the same concept is intended." However, care should be taken in treating the two concepts of failure to fulfil contractual terms as being equivalent, as there is narrower scope for the use of interpretative material under Orgalime S 2000 (and NLM 94, NL 92 and ECE 188 [which are Nordic industry-based standard terms of supply] than under Article 35 of CISG, cf. Article 8, see Chapter 3 for further discussion of this.
39. Cf. Ussing: *Ibid.*
40. Cf. Footnote 34 on the commentary to Clause 22 in Origalime S 2000.

It should be noted that the CISG Convention does not itself use the term 'defect'. It is also appropriate to distinguish between the terminology of national laws and the terminology of the Convention, so as to make it clear that they deal with independent concepts, cf. Section 1.1.5. on the methodology of this treatise. However, as national terminology becomes more like that of Article 35 of the CISG, this particular argument is somewhat weakened.

The central theme of this treatise can also be defined as being to *define the limits* of the requirements for contractual performance.[41] The requirements for performance must be set out somewhere in the agreement. However, there are wide differences in the degree to which the objects of a contract are specified in it.[42] International sales contracts are by no means homogeneous. There is no *international standard* which fits all international sales. The forms of contracts vary according to their subject matter, for example whether the sale concerns cars, aggregates, standard software or machine tools for making plastic components. At the same time, the requirements for the goods can vary within each category, for example whether the contract is for new cars, used cars or cars for scrap.[43] This means that assessing the conformity of goods to the contract depends to a high degree on the *interpretation of the sales agreement and all its surrounding circumstances*, cf. Chapter 3. This means that *contractual interpretation* is also part of the subject of this treatise. If goods do not conform to the contract, the buyer has a number of remedies for the breach of contract, provided that certain formalities are complied with. The most important questions of remedies are included as part of the area examined in this treatise.

Furthermore, certain key questions concerning Article 79, and the exemption of sellers from liability, are dealt with. Finally, the treatise refrains from dealing with questions of the conformity of goods to a contract in relation to third party claims, cf. Articles 41 and 42 of the CISG, though certain questions of definition between

41. Cf. Krüger: *Ibid.*
42. An example of a minimalist description of the quality and quantity of goods is contained in the case referred to in Chapter 4, from the *Austrian Supreme Court*, decision of 10th November 1994 (see Unilex and Pace Database), which concerned the sale of "... a large quantity of chinchilla pelts of medium to good quality."
43. This example is taken from Honnold: *Uniform Law*, p. 255.

Article 35 and Article 41 are dealt with, just as the treatise does not deal with formalities for making complaints, cf. Article 38 on the obligation of the buyer to examine the goods, and Article 39 on the obligation of the buyer to give notice of lack of conformity of the goods to the contract.[44]

1.1.2. International sales vs. domestic sales

The subject of this treatise is the conformity of goods to contracts in *international sales of goods regulated by the CISG.* The Convention applies to contracts for sales of goods between parties whose places of business are in different Contracting States, or when the rules of private international law lead to the application of the law of a Contracting State, cf. Article 1. According to Article 2, the Convention does not apply to consumer sales nor to certain other forms of sales, including sales by auction, sales of shares and other negotiable instruments, sales of ships or aircraft, nor of electricity. Furthermore, Article 3 excludes sales for which the buyer supplies a substantial part of the materials necessary for the manufacture or production, and contracts in which the majority of the obligations of the party who furnishes the goods consists in the supply of labour or other services.

The topic of *international sales of goods* has been chosen primarily because contracts for the international sale of goods must be considered as being fundamental to the global economy. This kind of contract is an important element in support of international trade, and it cuts across political, economic and cultural differences.[45]

The second reason is that the CISG is to a high degree the *declaratory basis* of contracts for the international sale of goods, since the Convention has so far been ratified by 63 countries which are collectively responsible for more than two-thirds of world trade.[46]

Finally, as already noted, the Convention's rules are a model for

44. On Article 38, see Sanna Kuoppala: *Examination of the goods under the CISG and the Finnish Sale of Goods Act* (Turku, 2000), and on Article 39, see Camilla Baasch Andersen: *Reasonable Time in Art. 39(1) of the CISG: Is Article 39(1) Truly a Uniform Provision? in: Review of the Convention on Contracts for the International Sale of Goods (CISG) 1998,* (1999) pp. 63-176. Both texts are available online on Pace Database.

45. Other factors which support international trade include free trade agreements both at regional and global level, for example, through WTO or the EU. These aspects will not be dealt with in this treatise.

46. Cf. Schlechtriem in Schlechtriem: *Kommentar,* p. 27.

the reform of national laws on the sale of goods, for EU law, and for various model laws and legal projects such as the UNIDROIT Principles and PECL, and it is important to understand the background to these rules. The restriction to *international sale of goods* should thus not be taken too literally. Since its provisions have especially influenced Nordic sale of goods laws and EU law, a systematic analysis of Article 35 is not only relevant for international sales, but also for purely *domestic* sales which are now regulated or may in future be regulated by provisions based on the Convention.[47] However, differences do remain, the most important of which will be analysed in this treatise, cf. below on the aims of this treatise. As stated, Nordic sale of goods laws have been amended on the basis of Directive 1999/44/EC on certain aspects of the sale of consumer goods and associated guarantees, most recently in § 75 a of the Danish Sale of Goods Act, which introduced provisions which are largely identical to Article 35 of the Convention.[48] This means that the topics considered in this treatise are of interest not merely for sales made in international trade, but also for other kinds of sales, whether *business-to-business, consumer sales* or *public procurement*, since the practice of the courts and the theory relating to Article 35 will apply to the interpretation of all kinds of sales agreements.

The fact that the CISG is an expression of the importance which the international community ascribes to international sales contracts is made clear in the Preamble of the Convention:

The States Parties to this Convention,
Bearing in mind the broad objectives in the resolutions adopted by the sixth special session of the General Assembly of the United Nations on the establishment of a New International Economic Order,

Considering that the development of international trade on the basis of equality and mutual benefit is an important element in promoting friendly relations among States,

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47. Cf. Jan Hellner: *CISG i den rättsvetenskapliga litteraturen*, Juridisk Tidskrift 1995-1996, p. 6.
48. Cf. Report 1403, p. 45. Norway, Sweden and Finland have also amended their sale of goods laws so that the concept of lack of conformity is adapted to the systematics of the CISG. These amendments were made on the basis of the joint Nordic Report NU 1984:5.

Being of the opinion that the adoption of uniform rules which govern contracts for the international sale of goods and take into account the different social, economic and legal systems would contribute to the removal of legal barriers in international trade and promote the development of international trade,

Have agreed as follows:

(...)

As is clear from the Preamble, the aim of the CISG is not merely to establish common rules. The overriding aim is to establish a new international economic order as an important element in promoting friendly relations between States. The way to do this is by removing legal barriers to international trade and promoting the development of international trade.[49]

If the conditions for the application of the Convention to international sales of goods are met, cf. Articles 1-3, the rules of the Convention apply as the international sales law of the contracting states. This means that there has been formal adoption of a uniform set of rules by the contracting states for the evaluation of international sales contracts. However, since the contracting parties can exclude, derogate from or vary the rules of the Convention in whole or in part, cf. Article 6, and since the Convention is subordinate to established practice and usage, cf. Article 9, it is important to bear in mind that it is the *agreement between the parties* which is the true basis for establishing the rights and obligations of the parties.

The Convention also allows the contracting states not to ratify the

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49. For a discussion of the UN's attempts to create rules for the promotion of international trade, while increasing welfare and promoting peace, see Mark W. Zacher: *The United Nations and Global Commerce* (Published by the UN, Vienna, 1999), which discusses the CISG on pp. 27-30. For a discussion of globalisation and the development of a common trade law, see Jarrod Wiener: *Globalization and the harmonization of law* (Ontario, 1999) which assesses UNCITRAL's role in this harmonisation on p. 172 et seq., and in particular points out that, according to Article 9 of its constitution, UNCITRAL was established "With particular regard to the interests of developing countries." It is Wiener's conclusion (p. 182) that even though rules may be developed in different international forums and even though there is an increasing number of different regulations, or maybe even because of this, there seems to be a return to the functional, cosmopolitan form of behaviour which is expressed in the concept of the *lex mercatoria*. For a discussion of this concept and the harmonisation of European contract law, see Ana M. López Rodríguez: *Lex mercatoria and Harmonization of Contract Law in the EU* (Copenhagen, 2003).

whole of the Convention, cf. Article 92, just as the Convention can be set aside between contracting states whose rules on the sale of goods are closely related, cf. Article 94. Also, there are special rules for countries which have two or more jurisdictions with differing laws within their territories, cf. Article 93. Finally, the application of the Convention requires its rules to be interpreted by the national courts of the contracting states, which means that there is a possibility that the convention will not be interpreted uniformly in every case. The *reality* is that the CISG does not mean that contracts for the international sale of goods, or the assessment of the conformity of goods to a contract, will always follow the rules of the Convention. The Convention's rules are default rules which apply if the conditions for the application of the Convention are satisfied, and only if the parties have not agreed otherwise in their contract. The interaction between the agreement of the parties, the Convention rules and national law is therefore critical to the assessment of the conformity of goods to the contract, cf. Article 35.

1.1.3. The aim of this treatise

The aim of this treatise is to make a systematic analysis of the content of Article 35, on the basis of the practice of the courts and the writings of legal theorists, including illustrating the thesis of the role of the *sphere of influence* on the assessment of lack of conformity of goods to the contract. It is also the aim of this treatise to illustrate the scope and effect of Article 35 with regard to creating a uniform assessment of the conformity of goods to the contract, cf. the Preamble and Article 7, regardless of the basic applicable law and competing sources of law.

The aim is also to relate Article 35 to various domestic sale of goods law, since this comparison can help illustrate the content of the provision as well as illustrating the effect of the provision on domestic sale of goods laws.

Finally, the aim is to illustrate the principles which apply to Article 35, including the extent to which the UNIDROIT Principles and PECL can contribute to the results of the investigation.

To this end it is first necessary to decide which juridical method to use for interpreting Article 35. Since the CISG is a treaty subject to international law, which includes its own rule of interpretation in

Article 7, and since sources of law or principles of interpretation exist in national laws which compete with or supplement the CISG, it is necessary to make a analysis of the juridical method in order to discover the premises for the conclusions made later in the treatise. This requires answers to be given to a number of questions as to the choice of sources of law and interpretative principles, since the key point in the treatise is that the choice of juridical method depends on the choice between monism and dualism, between a dynamic and a restrictive interpretation of the Convention; for further discussion of this see Section 1.1.5.

In other words, the choice of method is to some extent a matter of legal policy. In extension of the section on methodology, it is the aim of the treatise to discover which provisions in the Convention and in national laws, and to some extent in other regulations, operate or could operate as the *basis law for and in competition with* the assessment of the conformity of goods with the contract under Article 35. This applies particularly to the rules on formation of contract, interpretation and validity, but there will also be discussion of where the lines are to be drawn between liability for lack of conformity of goods, the rules on compensation outside the contract and product liability. In addition to this, as referred to, possible fundamental principles will be discussed.

As stated in the introduction, it is the agreement between the parties which is the starting point for a legal assessment of the conformity of goods to the contract under Article 35. It will therefore be one of the most important aims of this treatise to analyse the *interpretation and elucidation* of the agreement between the parties, and this is done under the critical light of the conclusions about the content of the juridical method and about the competition between national laws and the law of the Convention. Here Article 8, on the interpretation of statements made by the parties to a contract and of their conduct, and Article 9, on the importance of the usage of the parties and any practice established between them, contain important aids to interpretation, so this treatise also aims to illustrate the content of these provisions on the basis of the practice of the courts and theory.

1.1.4. Method

1.1.4.1. Uniform and autonomus interpretation; the battle between a dynamic and a restrictive interpretation

On the basis of Article 7 of the CISG,[50] this section aims to give a brief description of the *legal method* applying to the interpretation of the Convention. It is necessary to describe the method adopted in this dissertation because of the enduring and intense debate among international scholars as to which core elements the legal method should have when applied to the Convention. As the opinions of the method differ in the legal literature and in case law, and as the method may affect the outcome of the interpretation, including the application of competing rules of domestic law, the following discussion also serves as an analysis of the *choice of method* adopted in the dissertation. This analysis does not lay claim to conclusively resolving the methodological discussion.

An examination of the legal literature and case law[51] leads to the conclusion that there is *no* agreement as to which core elements should be present in the legal method. In crude terms, the dispute is between a *dynamic interpretation* (hereinafter the *dynamic doctrine* or the *efficiency doctrine*) of the Convention involving a rather extensive method of interpretation in the light of its general principles, taking into account the overall goal of international unification of the law,[52] on the one hand, and a more *restrictive interpretation* (hereinafter the

50. Article 7 provides: (1) 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. (2) 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.
51. Case law contains only little discussion of the methodological questions resulting from the application of the CISG, and the courts and tribunals do not come close to solving these questions; see Gerhart: *Uniformity*, p. 102 *et seq.*
52. Proponents of this view include Felemegas: *Interpretation*, who proposes to apply a comparative method to discover the general Convention principles and the UNIDROIT Principles to supplement the Convention; Van Alstine: *Dynamic Interpretation*, argues that the role of the principle of good faith in international trade should be extended; and for rather similar observations, see Hillman: *Elusive Goal* and Zeller: *Methodology.*

restrictive *doctrine*),[53] on the other hand, which sees the dynamic interpretation as limited by principles of legitimacy and the concerns about giving up national sovereignty.[54]

The *international character* of the Convention implies (1) a *negative delimitation* of domestic sources and principles, and (2) a *positive prioritization* of the Convention's international history, content and goal.[55] This is the central core of the *autonomous interpretative regime* in that the Convention has to be interpreted *independently* of domestic law and as an *autonomous* legal instrument. This is crucial for the choice of sources of law and for the applicable interpretative rules, see the discussion below, but is at the same time problematic, particularly with respect to the legislative history.

The aim of promoting the *uniform application* of the Convention is a logical result of, and therefore closely associated with, the international character of the Convention; consequently, it is necessary to try to find *uniform* solutions to legal issues governed by the Convention. This means that the way in which the Convention is interpreted in other Convention States should be taken into account as, all other things being equal, uniform application of the Convention will be achieved if the adjudicators are influenced by the understanding of the Convention in other states.[56] In other words, the national courts

53. Some critics refer to this view as a nationalistic method in contrast to an *international* method, though these terms will not be used in this text. In the words of Lookofsky, the internationalists are "Convention hard-liners", see Lookofsky: *CISG Scandinavia*, p. 44.

54. Proponents of this view include Gerhart: *Uniformity*; Gebauer: *Interpretation*; Flechtner: *Challenges*; Witz: *Interpretation*; and to some extent Bailey: *Facing the Truth*, who, in the light of the implementation of CISG in American law, regards the Convention as an impediment to uniform international commercial law, for instance concerning the difficulties in understanding the content of the principles of Article 7, which will inevitably lead to nonuniform interpretation of the Convention.

55. See Bonell in Bianca & Bonell: *Commentary*, p. 72 *et seq.*; Honnold: *Uniform Law*, p. 89 *et seq.*; Ferrari in Schlechtriem: *Kommentar*, p. 124 *et seq.*; Enderlein & Maskow: *International Sales*, p. 55; Kritzer: *Guide*, p. 108 *et seq.*; Lookofsky: *CISG Scandinavia*, p. 35 *et seq.*; Achilles: *Kommentar*, p. 28 *et seq.*; Lando: *Udenrigshandelsret I*, p. 12; Eörsi in Galston & Smitt: *International Sales*, § 2.03; Gomard & Rechnagel: *International Købelov*, p. 47; Van Alstine: *Dynamic Interpretation*, p. 730 *et seq.*; Felemegas: *Interpretation*, p. 57 *et seq.*; Gebauer: *Interpretation*, p. 686. Gerhart: *Uniformity*, p. 81 *et seq.*; Zeller: *Methodology*, p. 86 *et seq.*; Witz: *Interpretation*, p. 254.

56. See Bonell: *Ibid.*; Honnold: *Ibid.*; Ferrari: *Ibid.*; Enderlein & Maskow: *Ibid.*; Kritzer: *Ibid.*; Lookofsky: *Ibid.*; Felemegas: *Interpretation*, p. 64.; Achilles: *Kommentar*, p. 29.

are required to *cooperate* with a view to achieving uniform application of the Convention.[57] As can be seen from the literature cited, the two doctrines agree on the above points. The Convention has to be interpreted *autonomously* and *uniformly*, and these interpretative considerations are widely linked: Autonomous interpretation is expected to promote uniformity, and uniform interpretation is expected to be founded on an autonomous basis.[58] This will generally result in uniformity of law. Process and goal are in harmony. Otherwise, the result will be diversity and legal uncertainty, the possibility of forum shopping and the need for a choice of law, which was exactly what the Convention is designed to prevent.[59]

However, it is not *obvious* that an autonomous interpretation will result in uniformity, nor that uniform interpretation is based on autonomous sources. That the principle of uniform application has to be the *decisive* and *governing* interpretative consideration is by no means logical or correct.[60] That is to say, an autonomous and uniform solution does *not* necessarily have to be found for areas where the Convention does not intend uniform solutions.[61] However, the dynamic doctrine counters this view, in that it gives uniform interpretation precedence over autonomous interpretation.[62] The reason is that the dynamic doctrine reflects *efficiency*, as the Convention should be interpreted so that its provisions are given maximum efficiency.[63] In other words, the controversy centres on the *weight* to be given to the considerations contained in Article 7 by focusing on the overall goals that the Convention seeks to achieve.[64]

57. See Van Alstine: *Op.cit.*, p. 73.
58. See Gebauer: *Op.cit.*, p. 686.
59. See Franco Ferrari: *"Forum shopping" trotz internationaler Einheitssachrechtskonventionen*, Recht der Internationale Wirtschaft, no. 3 (March 2002), p. 169 *et seq.*, with a discussion of different interpretations of Article 6 and Article 39, respectively, by European and American courts.
60. See Gebauer: *Op.cit.*, p. 686, opposing Diedrich: *Lückenfülling*, p. 353 *et seq.*; and for the same opinion Flechtner: *Op.cit.*, 206 *et seq.*; and Gerhart: *Op.cit.*, p. 87 *et seq.* and p. 95 *et seq.*
61. See Flechtner: *Op.cit.*, p. 208; and Gerhart: *Op.cit.* p. 87 *et seq.*
62. See e.g. Zeller: *Op.cit.*, p. 65, in continuation of the criticism of and in opposition to Gebauer: "An autonomous interpretation must always be subordinate to a uniform interpretation".
63. See and compare Espersen et al.: *Folkeret*, p. 79 *et seq.*
64. Further to this, see Espersen et al.: *Ibid.*

However, both the dynamic and the restrictive doctrine agree that the legal method must reflect an autonomous and uniform interpretation of the Convention; otherwise the considerations of Article 7 would be meaningless. Therefore, Article 7 must generally require the application of an *autonomous legal method*.[65] This view is supported by Article 7(2), as this provision accentuates the importance of autonomous solutions: Matters governed by the Convention but which are not expressly settled in it are to be settled in conformity with the general principles on which it is based.

At the same time, Article 7(2) emphasises that there are limits as to which solutions may be applied to the Convention, as certain matters are left to be regulated by domestic law. The final clause of Article 7(2) thus acts as a counterbalance to the principle of gap filling based on the general principles of the Convention. This is one of the issues that go to the very heart of the dispute between proponents of the *dynamic doctrine* and proponents of the *restrictive doctrine*. The *restrictive doctrine* will give maximum consideration to the sovereignty of the Contracting States and, in doing so, the legitimisation of the interpretation,[66] whereas the *dynamic doctrine* will give maximum consideration to the overall goal of uniform rules. Accordingly, the dynamic doctrine regards the principle of "uniform interpretation" as the overriding principle *vis-à-vis* the other interpretative considerations in Article 7; although there is actually no basis for making this general assumption.

Indeed, Article 7 must be regarded as the result of a *compromise* between, on the one hand, the proponents of purely Convention-internal solutions and, on the other hand, proponents of the interpretative regime holding that certain issues should be resolved by domestic law. According to ULIS Article 17 taken together with Ar-

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65. See Eörsi in Galston & Smitt: *International Sales*, § 2.03: "And where should the material for interpretation of the convention be sought? Clearly, this should, unless CISG expressly provides otherwise, be taken from the Convention itself. It should not be taken from external sources such as the law of the forum or the law applicable under a conflict of laws rule. CISG is not a law complementary to national laws but is meant to be en exhaustive regulation". For similar observations, see: Enderlein & Maskow: *International Sales*, p. 55; Honnold: *Uniform Law*, pp. 135-145; Bonell in Bianca & Bonell: *Commentary*, pp. 72-74 and p. 88 *et seq.*; Lookofsky: *CISG Scandinavia*, p. 35 *et seq.*; and Gomard & Rechnagel: *International Købelov*, p. 47, at note 6.
66. See Gerhart: *Ibid.*

ticle 2, a solution was to be found in the light of the principles on which the Convention is based, save for those cases that *explicitly* fell outside the scope of the Convention without the possibility of applying domestic law in conformity with the rules of private international law. This model was abandoned with the CISG; such a solution was regarded as unrealistic because of the lack of sufficiently defined principles.[67]

Article 7 is therefore a golden compromise that requires both autonomous interpretation and leaves certain issues to be regulated by domestic law.[68] According to the *restrictive doctrine* this should be reflected in the interpretation with the result that there are limits as to which issues may be regarded as governed by the Convention. On the other hand, the *dynamic doctrine* posits that this should be toned down in consideration of the overall goal of the Convention: to create effective uniformity of law. The principles of autonomous interpretation combined with Article 7(2) imply some *dynamic* interpretation, despite the difference,[69] as it is necessary to have a dynamic interpretative style if the Convention is to be adapted to social developments and new and changing circumstances.[70] However, the *restrictive doctrine* limits the scope of how dynamic this interpretation can be; the Convention is a compromise based on the goal of obtaining the greatest possible support. Accordingly, only solutions that take the spirit of the compromise into account shall be found.[71]

A dynamic interpretation also requires a dynamic method. This may impact on the selection of the sources of law that are the foundation of the interpretation, for instance whether the UNIDROIT Principles or PECL may be regarded as *sources of law*[72] or should at least

67. See Bonell in Bianca & Bonell: *Commentary*, p. 66 *et seq.*
68. See e.g. Bonell: *Op.cit.*, p. 65 et seq.; Enderlein & Maskow: *International Sales*, p. 53 et seq.; Honnold: *Uniform Law*, p. 102 et seq.; but differently Van Alstine: *Dynamic Interpretation*, p. 728: "The position of the internationalists substantially prevailed in the final draft of the Convention".
69. See Van Alstine: Op.cit, p. 788 and p. 791.
70. See Gerhart: *Op.cit.*, p. 88.
71. See Gerhart: *Ibid.*
72. That the UNIDROIT Principles constitute a *mandatory source of law* means, in this context, that the adjudicator has to take them into account even though they are not mentioned in the contract between the parties, see Christina Hultmark: *Internationaliseringen af svensk avtalsrätt – Unidroit Principles of International Commercial Contracts*, Juridisk Tidsskrift, 1995-1996, no. 3, p. 655 *et seq.*

affect the interpretation of the CISG, and for instance to what extent the interpreter may base his interpretation on the general principles of the Convention.

In my opinion, there is no clear solution to the conflict between the *dynamic* and the *restrictive doctrine* because the different views are founded on a monistic and a dynamic approach, respectively, to public international law and on the extent to which *points of efficiency* should be decisive in interpreting Article 35 and the other substantive CISG provisions. I believe that, in effect, *the choice of method is based on policy considerations and consequently ideological considerations*, and the choice is made according to the public international law tradition prevailing in each state.

1.1.4.2. The significance of case law and scholarly writings

In its suggestions to the interpretation of the Convention and in the light of its international character and uniform application, the Working Group responsible for drafting the Convention intended to promote "recourse to foreign materials, in the form of studies and court decisions, in constructing the law".[73] Even though references to the case law of other countries[74] are rare, there are signs that the courts have changed their position and now extensively cite foreign case law. The most recent example is an Italian decision, which, in its determination of the time limit in Article 39(1), refers to no less than 40 judicial and arbitral decisions.[75] There are similar examples from leading cases in Switzerland[76] and the United States.[77]

73. See Honnold: *Uniform Law*, p. 68. See also Joseph Lookofky: *CISG Case Law: how much regard should we have?* in *UNCITRAL Digest*, p. 216 *et seq.*
74. See Zeller: *Op.cit.*, p. 93, who, on the basis of the reading of 600 decisions, concludes that reference to the case law of other states is rare.
75. See *Tribunale di Vigevano* of 12 July 2000, commented on by Franco Ferrari: *Recent Italian Court Decisions on the CISG*, International Business Law Journal, no. 2 (2001), p. 224 et seq. See also *Tribunale di Pavia* of 29 December 1999 (also commented on by Franco Ferrari, *ibid.*) and *Tribunale Civile di Cunio* of 31 January 1996. These three decisions can be found at Unilex and Pace Database.
76. *Obergericht des Kantons Luzern* of 8 January 1997 (Unilex and Pace Database).
77. *U.S. District Court, E. D. of Louisiana* of 17 May 1999 (*Medical Marketing vs. Internazionale Medico Scientifica* (Unilex and Pace Database). For a critical analysis of the use of CISG in the United States courts, see Jeffrey R. Hartwig: *Schmitz-Werke & Co. v. Rockland Industries Inc. and the United Nations Convention on Contracts for the International Sale of Goods (CISG): Diffidence and developing International Legal Norms* (22 Journal of Law and Commerce (Spring 2003), p. 77 et seq.).

Usually, case law is weighed according to the hierarchical level of the court and the type of court. A decision by a superior court from one country may thus prevail over a decision by an inferior court from another country, although the weight of the arguments, and not the status of the court, should be decisive. Conversely, case law should not be regarded as *direct binding* according to a *stare decisis*[78] principle as this is not a universally accepted doctrine,[79] although certain decisions seems to have gained authority as *ipso facto stare decisis.*[80] A special problem occurs in case of conflicting supreme court decisions from two countries, see e.g. Chapter 4 below on *aliud pro alio.*

International scholarly writings *must* be part of the interpretative process of the CISG; as held, for instance, by the German Supreme Court.[81] The scholars who participated in drafting the CISG are apparently held in particular high regard in Germany and are often quoted, see e.g. the above mentioned German supreme court decision. One quality parameter must be whether *the scholars report the different views* in case of disagreement so that the interpretation is not presented as the only possible solution.[82] Another parameter is whether the writings *are relatively recent* so that it has been possible to include the most recent case law and literature. At the same time the selection of literature and case law is often made on the basis of language, with the result that differences in the interpretation by other Contracting States may escape attention entirely. However, steps are being taken to translate leading case law into English[83] as well as

78. Cf. also Article 59 of the statue of the International Court of Justice, available at www.icj-cij.org.
79. This is confirmed by *Tribunale di Vigevano*; see Ferrari: *Ibid.*
80. See chapter 4 below and René Franz Henschel: *Conformity of Goods Governed by CISG Article 35: Caveat Venditor, Caveat Emptor and Contract Law as background Law and as a Competing Set of Rules*, Nordic Journal of Commercial Law, No. 1, 2004, available at: http://www.njcl.fi/1_2004/article2.htm.
81. See the decision of the German Bundesgerichtshof of 24 March 1999, containing extensive references to legal literature, which may serve as a guide for other courts.
82. See Jan Hellner: *CISG i den rättsvetenskapliga litteraturen*, Juridisk Tidsskrift, 1995-1996, p. 5 *et seq.*
83. See Unilex, which contains more than 600 "abstracts" in English and the original decisions on the CISG in full text. Moreover, this site contains more than 50 abstracts of decisions concerning the UNIDROIT Principles. See also "Queen Mary Case Translation Programme", which is a joint project between the Institute for International Commercial Law at the Pace University School of Law and Centre for Commercial Law Studies, Queen Mary, University of London. So far this joint venture has resulted

legal literature is being translated into a number of languages.[84] It is impossible, however, to embrace the entire international case law and legal literature; the result is that a certain selection – and thereby a general lack of precision – is inevitable when analysing the CISG.[85]

1.1.4.3. Observance of good faith in international trade

According to the wording of Article 7(1) and the legislative history of this provision, the principle of observing good faith in international trade shall only apply when interpreting the Convention and therefore not when interpreting the parties' contract.[86] At the diplomatic conference, Norway suggested that good faith should also be a general principle applying between the parties, but this was rejected by a majority of delegates, who feared that this would be tantamount to introducing a general provision whose specific content would vary considerably from one jurisdiction to another.[87]

However the prevailing view among scholars is that the sphere of application of good faith is wider than merely the interpretation of the Convention. It is also difficult to have regard to this principle when interpreting the Convention without at the same time or to some extent applying it to the parties' contract, which in effect is governed by the provisions of the CISG, for instance Article 35.[88]

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in over 700 decisions being available in English translations and in full text, see Albert Kritzer: *Taming the Dragons of Uniform Law Case Law: Sharing the reasoning of courts and arbitral tribunals*, available online at Pace Database: http://www.cisg.law.pace.edu/cisg/text/schedule.html.

84. This applies to, for instance, Schlechtriem's commentary from 1998, which has been translated from German into English, and to the present treatise.
85. See e.g. Witz, *Op.cit.*, p. 259, who, as a consequence, predicts that the CISG will eventually be interpreted in a uniform manner within well-defined geographical regions, for instance Asia, Europe and the common law countries, but that differences will inevitably arise between these regions. See also Lookofsky: *CISG Scandinavia*, p. 36, note 135.
86. See Ferrari in Schlechtriem: *Kommentar*, p. 128, margin note 25.
87. See Honnold: *Uniform Law*, p. 369 et seq; Ferrari: *Op.cit.*, p. 128, margin note 26; and P.D.V. Marsh: *Comparative Contract Law England, France, Germany* (Hampshire, 1994), p. 38 *et seq.*
88. See Ferrari: *Ibid.*; Gomard & Rechnagel: *Ibid.*; and with similar observations: Rognlien in Bergem & Rognlien: *Op.cit*, p. 450; Lookofsky: *CISG Scandinavia*, p. 39 et seq.; Enderlein & Maskow: *International Sales*, p. 54 with references to the development in the interpretation of party autonomy. In the context of Danish law, this may be confirmed by reference to section 36 of the Danish Contracts Act.

Ferrari argues that the principle of good faith is also an element that affects the relationship between the parties, but only in so far as it reflects the general principles on which the Convention is based, i.e. only pertaining to matters governed by the Convention but not expressly settled by it.[89] As a result, no importance can be attached to domestic standards of good faith, but an internationally accepted standard of good faith has to be applied by using a comparative method, see Article 7(1).[90] I fully endorse this view, and in this context PECL and the UNIDROIT Principles are obviously of interest. In determining any lack of conformity, the principle derived from the observance of good faith prohibiting the abuse of rights and conflicting behaviour, *venire contra factum proprium*, is applied to situations where the buyer has given notice of lack of any conformity which he knew or could not have been unaware of, see Article 35(3), as discussed in Chapter 9 below.[91] In connection with the determination of any lack of conformity, contractual interpretation and competing rules on validity, the principle of maintaining the contract as far as possible, *favour contractus*, may be applied; other general principles are also cited in this context, further see Chapter 3 below.

Whether or not the observance of good faith is to be adopted as a general principle of the CISG when interpreting the parties' contract, this may follow from international legal principles, see the UNIDROIT Principles 2004 Article 1.7[92] and PECL Article 1:201.[93] In addition, the domestic rules on good faith may apply, at least in so far as the

89. See Ferrari in Schlechtriem: *Kommentar*, pp. 128-129, margin note 26.
90. See Ferrari: *Op.cit.*, p. 129, no. 26; and Achilles: *Kommentar*, p. 29, no. 6.
91. See and compare Lookofsky: *CISG Scandinavia*, p. 39, note 160; Ramberg in Ramberg & Herre: *Internationella köp*, p. 111, note 127; Achilles: *Kommentar*, pp. 98-99, no. 17. The principle is also assumed to be contained in Article 40 of the CISG, which provides that the seller is not entitled to rely on the buyer's failure to examine the goods or give notice of lack of conformity, see Articles 38 and 39 of the CISG, if the seller knew or could not have been unaware of the lack of conformity. Concerning Article 35(3), reference is also made to the principle contained in Article 40, which is the same as referring to the principle of *venire contra factum proprium*; see and compare e.g. Schwenzer in Schlechtriem: *Kommentar*, pp. 384-385, margin note 37.
92. Article 1.7 provides: "(1) Each party must act in accordance with good faith and fair dealing in international trade (2) The parties may not exclude or limit this duty". See UNIDROIT: *UNIDROIT Principles*, p. 17 et seq.
93. Article 1:201 provides: "(1) Each party must act in accordance with good faith and fair dealing. (2) The parties may not exclude or limit this duty". See Lando & Beale: *PECL*, p. 113 *et seq.*

invalidity of the contract or any of its provisions is concerned, see Article 4(a).[94]

1.1.4.4. Grammatical, logical and systematic interpretation. Extensive vs. restrictive interpretation

Principles of grammatical, logical and systematic interpretation are almost universal and may be applied in interpreting the CISG.[95] It follows from this that the wording of the Convention has to be interpreted according to its ordinary, logical international meaning and context, and not according to the understanding or the context that the wording has in domestic law. Only when the wording, based on other interpretative data, can *with certainty* be said to imply a specific understanding arising from a particular legal system, will this understanding have to be used.[96] As discussed below, such a method must be used with caution.

Because of its drafting history, the CISG does not reflect a precise and exhaustive regulation, since this would have been practically impossible. At the same time, the Convention was drafted in the spirit of compromises, and the drafters wanted to avoid words and concepts that have special domestic or systemic meanings. Instead they used words and concepts that refer to physical events in international trade as opposed to special concepts, such as "the handing over of the goods" or "take over the goods".[97] It is therefore not correct, taking the goal of the Convention into account, generally to interpret its provisions *restrictively*.[98] On the contrary, the Convention encourages an *extensive* interpretation of many of its provisions. By way of analogy, Article 7 precludes the traditional common law approach from applying a narrow, literal interpretation, and encourages an extensive

94. See Ramberg in Ramberg & Herre: *Internationella köp*, pp. 110-111.
95. Enderlein: *Uniform Law*, p. 331. See also MacCormick & Summers: Interpreting Statutes, p. 462 *et seq.*, who list a common "universal core" of 11 principal interpretative arguments/methods.
96. See Ferrari in Schlechtriem: *Kommentar*, p. 124 *et seq.*, margin note 10.
97. See Honnold: *Uniform Law*, p. 15 and p. 89.
98. See Bonell in Bianco & Bonell: *Commentary*, p. 72; Honnold: *Uniform Law*, p. 114. This is a general principle that has to be modified by special provisions, for instance concerning extensive interpretation of Article 4(a) on issues of validity of contracts not governed by the convention.

interpretation – as accepted by civil law jurisdictions – by having regard to, for instance, the legislative history of the Convention.[99]

However, some common law jurisdictions, e.g. England, Australia, the USA and Canada, also now seems to accept a more liberal interpretative approach.[100] This is important to the interpretation of article 8, se the discussion in Chapter 3 below, but also in particular to the interpretation of article 35(1), Article 35(2)(d) and Article 35(3), see the discussion in Chapters 4, 8 and 9 below. This then implies that the focus is directed towards a *purposive interpretation* (or teleological interpretation), as we shall see in the following section in more detail, by attaching some – albeit limited – importance to the legislative history of the Convention (historical interpretation).

A comparison between the authentic texts to find a linguistic or semantic "subtotal" may lead to the risk that the result will be the lowest common denominator, thereby leading to a restrictive interpretation. This again emphasises that the wording alone shall not be determinative.[101]

1.1.4.5. The historical, teleological and comparative interpretation. Subjective vs. objective interpretation

In order to discover the background to and legislative purpose of the provision (teleological interpretation) the *historical* interpretative method may be used, i.e. recourse is had to the legislative history of the statute.[102] As indicated above, the problem associated with the

99. See Van Alstine: *Op.cit.*, p. 739, who, in relation to the application of the CISG, rejects the increased focus by American courts on the literal meaning of the words and their reduced focus on the legislative history (the so-called "New Textualism"). For similar observations, see Honnold: *Ibid.*; and Bonell in Bianca 6 Bonell: *Commentary*, p. 73.

100. See Honnold: *Ibid.*; Bonell: *Ibid.*; for a more detailed discussion, see Zeller: *Op.cit.*, pp. 68-78; all concerning the English *Fothergill* case.

101. See Schlechtriem: *Unification*, p. 139, note containing a reference to a German Federal court decision of 14 July 1983 in relation to differences between the English and the French texts of the CMR-Convention.

102. The common law countries have, as indicated, had problems with this as they have traditionally given priority to the words of the text and disregarded the legislative history. This position has now softened concerning rules with an international background, see e.g. *Fothergill v. Monarch Airlines*. In its decision the English *House of Lords* held that the provisions of the Warsaw Convention should not generally be interpreted in the usual narrow way prescribed by common law, and that in interpreting the Convention regard should be had to its legislative history and foreign case law; see also Honnold: *Uniform Law*, p. 91 *et seq.*

discovery of the intent of the legislators in relation to the CISG is that the international drafting records often give an inconsistent view of the overall motive behind a provision.[103] But there is no doubt that the *subjective* interpretation plays an important role compared to the objective interpretation. A *comparative* interpretative method based on a comparison of the solutions of different jurisdictions to a particular interpretative issue has a distinct disadvantage: The very purpose of the exercise is that the rules should *not* be accorded national importance, because the legislators wanted to avoid special links to domestic law.[104] In some cases, the comparative method may only be used to, for instance, clarify the understanding of "observance of good faith in international trade" as mentioned above because it is necessary to find a common, international understanding of the concept. In this context, it seems to be consistent with the spirit and purpose of the Convention to include PECL and the UNIDROIT Principles, which is therefore done in this dissertation, though not as binding sources of law. Moreover, the comparative method may also be used due to the fact that foreign case law and scholarly writings on the CISG have to be part of the interpretative process.

Consequently, the interpretation of the CISG often leads to a general, *teleological* interpretative method, whose determinative element is *the overall purpose and intent of the Convention*, i.e. to create uniform rules adapted to international trade: Decisive considerations to the international character of the Convention and the need to promote its uniform application.[105] Here the important point is to try to understand the principles underlying the individual provisions as

103. See Enderlein: *Uniform Law*, p. 335 et seq, who also discusses Articles 31-33 of the treaty dealing with literal interpretation and the use of legislative history and agrees with Honnold that the CISG itself should determine its own interpretative rules as there is a need for more flexible rules for the interpretation of substantive provisions of the CISG than for the interpretation of provisions regulating the relationship between states. See also Troy Keily: *Harmonisation and the United Nations Convention on Contracts for the International Sale of Goods* (Nordic Journal of Commercial Law, No. 1, 2000, p. 1 *et seq*), and Alejandro M. Garro: *Reconciliation of Legal Traditions in the U.N. Convention on Contracts for the International Sale of Goods* (23 International Lawyer (1989) p. 443 *et seq*.

104. See Schlechtreim: *Op.cit.*, p. 140 *et seq*; Enderlein & Maskow: *Op.cit.*, p. 56. Compare Sundberg: *Op.cit.*, p. 234.

105. See Schlechtreim: *Ibid.*; and Gebauer: *Op.cit.*, p. 704, who also emphasises the application of the systematic interpretative principle.

they are specifically intended for international trade, i.e. a *functional* approach.

It is necessary to appreciate the practical reason and intent behind the rule, and for this purpose the legislative history, including the *Secretariat Commentary* – despite the weakness of the legislative history – will be an aid to understanding the purpose and intent.

International trade undergoes a constant development necessitating a dynamic interpretation of the CISG. The *dynamic, teleological interpretative method* will therefore often be an important – if not the most important – interpretative method in applying the CISG.[106]

The theoretical and practical tools are one thing. Another – which should not be overlooked – is that you can never rule out the possibility of finding more than one possible interpretation and that several interpretations may each be equally legitimate;[107] something which occasionally appears to have been overlooked by the *restrictive* as well as the *dynamic doctrine.*

1.1.4.6. Supplementation by general convention principles under Article 7(2)

As mentioned, Article 7(2) refers to the use of general principles concerning matters governed by the CISG but which are not expressly settled by it. The purpose is also to limit the application of domestic rules in relation to the Convention.[108] This provision gives rise to several issues, which are themselves subject to interpretation. The first is to determine which matters can be regarded as "governed by the Convention", which in itself calls for interpretation. If an issue is not governed by the Convention at all, this is referred to as an "open gap".[109] This aspect is closely linked to Articles 4 and 5 of the CISG.

The second issue concerns those matters governed by the Convention but which are not expressly settled in it, the so-called "hidden gaps". This aspect must be dependent on an interpretative solution and reference is made to the discussion of treaty interpretation above. It is a fine line between a situation in which the interpretative out-

106. See Schlechtreim: *Unification*, p. 149.
107. See Enderlein: *Uniform Law*, p. 340.
108. See Hellner: *Gap-filling*, p. 226.
109. For a discussion of "hidden gaps" and "open gaps", see Diedrich: *Lückenfüllung*, pp. 353-355.

come has to be based on Article 7(1) and one in which the general principles underlying the Convention under Article 7(2) have to be applied, and the resolution must also depend on the case at hand.[110]

As already indicated the *observance of good faith* must be regarded as a general principle on which the Convention is based. Furthermore, party autonomy, reasonableness, the duty to cooperate, the duty to mitigate damages, the principle of *venire contra factum proprium* and the principle of full compensation are often mentioned as examples of general principles.[111] In relation to the application of usages the result is clear: They take precedence over the Convention principles and therefore, it is imperative not to confuse this with gap-filling under the provision of Article 7(2).[112] *Lookofsky* appears to propose a solution which is halfway between finding general principles internally in the Convention and applying domestic law exclusively. He argues that the wording of Article 7(2), "in conformity with the *law*" (emphasis added) implies the application of rules that, even though not drafted by a legislator in the strict sense of the word, should be regarded as law within the meaning of Article 7(2).[113] Accordingly, it should be possible to base the interpretative process on the transnational principles prevailing in international trade, for instance *lex mercatoria*, the UNIDROIT Principles and PECL as a sort of *jus cogens.* I can fully endorse this view, see also the discussion above. In this context, it should be appreciated, as indicated above, that this dissertation will also examine which *general principles* follow from Article 35 of the CISG. Furthermore, parallels will be drawn to the UNIDROIT Principles and to PECL in Chapter 3 and the following chapters dealing with Article 35 in case law and scholarly writings.

1.1.4.7. Domestic or convention-autonomous qualification of the operative facts and the functionally adequate solution

The final problem to be discussed here concerns the question whether a qualification of and solution to a legal issue is to be made according

110. See Enderlein: *Uniform Law*, p. 343.
111. See Ferrari in Schlechtriem: *Kommentar*, p. 133 and Albert Kritzer: *Editorial remarks on CISG Article 7*, available online at the Pace Database: http://www.cisg.law.pace.edu/cisg/text/principles7.html
112. See Hellner: *Ibid.*; and Enderlein: *Uniform Law*, p. 346.
113. See Lookofsky: *CISG Scandinavia*, p. 45 and note 197.

to the rules of the Convention, according to domestic law, or a combination of both. If a buyer was mistaken as to the properties of the goods at the conclusion of the contract, the issue may be approached according to domestic rules on validity and according to the provision of Article 35 on the conformity of the goods. The question is whether the existence of a Convention rule and related remedies *excludes* or *exhausts* the domestic rule (*alternative* application), or whether both sets of rules apply concurrently, so that the buyer may rely on the set of rules perceived to be most beneficial to him (*cumulative* application). According to Article 7(1) the starting point must be that a legal reclassification should not lead to the *exclusion* of a Convention rule in favour of a domestic rule of law, as the uniform application of the Convention will be in jeopardy.[114] Conversely, it should not be possible either to *exclude* the application of domestic rules in areas not intended to be governed by the Convention.

In such cases, commentators have suggested as a general rule of interpretation and priority that the CISG provisions should take precedence over domestic law when they represent a *functionally adequate solution* to a particular legal issue.[115] If no such solution is available, domestic law should prevail. Some commentators go even further and suggest that if the operative facts, i.e. the facts that will cause a rule to be subsumed under a particular legal concept, for instance invalidity, are the same as those that may lead to the application of the Convention rule, *then the Convention rule will generally take precedence over domestic law.*[116]

The *Secretariat Commentary* generally suggests that the Convention

114. See Ramberg in Ramberg & Herre: *Internationella köp*, pp. 227-228.

115. See e.g. Ferrari in Schlechtriem: *Kommentar*, p. 97, margin note 4.

116. See Honnold: *Uniform Law*, p. 115 and p. 120 (validity and product liability). This view is also supported by Enderlein & Maskow: *Op.cit.*, p. 41; Kritzer: *Op.cit.*, p. 81; and Drobnig: *Validity*, p. 637. See also Ramberg in Ramberg & Herre: *Op.cit.*, p. 64 (excluding the application of rules on damages and domestic rules on misrepresentation), and p. 111 *et seq.* (misrepresentation by the seller in connection with Article 35, unless the seller acted in bad faith (*medvetet*) and competing rules on product liability); Lookofsky: *CISG Scandinavia*, p. 22 *et seq.* (concerning the difference between contractual and non-contractual damages).

rules take precedence over domestic rules on validity.[117] This statement should be met with some caution as it must be expected that such an extensive interpretation regime would have been expressly stated in the provisions of Article 4, just as was the case with specific provisions in the predecessor to the CISG, ULIS Articles 34 and 54. The fact that this is *not* the case supports the assumption that the drafters of the Convention did not intend such a rule of interpretation and priority. As already indicated, the *Secretariat Commentary* is not binding. Conversely, Article 55 of the CISG confirms that contracts that do not expressly or implicitly include a provision for determining the price may be affected by rules on validity under the law of some countries.[118] The principle of the *functionally adequate solution* will therefore be the solution that will generally be applied as an *interpretative principle* in this dissertation, for the principle may indicate when the Convention rules and when domestic law rules should be applied.

1.1.5. Presentation plan

The treatise is divided into four parts: Part I contains the general introduction; Part II contains the introduction to Article 35 and an analysis of its legal context and competing laws; Part III contains an analysis of the content of Article 35 on the basis of the practice of the courts and of theory; and Part IV contains a summary of the findings and the conclusions.

Chapter 2 gives an introduction to Article 35, including an analysis of its history, its basic principles and its links with other legal rules, including an introduction to the problem of competition. The aim is to give an introduction to the review which follows in Chapter 3, as well as to the review of Article 35's sub-clauses in Chapters 4-9.

In Chapter 3 there is an analysis of the law of contract as background law and as a competing legal regime, as well as the import-

117. See Honnold: *Documentary History*, p. 407: "Although there are no provisions in this convention which expressly govern the validity of the contract or of any usage, some provisions may provide a rule which would contradict the rules on validity of contracts in a national system. In case of conflict the rule in this Convention would apply".

118. See Drobnig: *Validity*, p. 636.

ance of usage and agreement between the parties for the conformity of goods to the contract.

In Chapters 4-9 there are analyses of the sub-clauses of Article 35. In Chapter 4, Article 35(1), on conformity of goods with the contract, is analysed; in Chapter 5, Article 35(2)(a), on the fitness of goods for their ordinary purposes, is discussed; Chapter 6 analyses the fitness of goods for particular purposes, cf. Article 35(2(b); Chapter 7 deals with conformity of goods to samples or models, cf. Article 35(2)(c); Chapter 8 analyses containers and packaging, cf. Article 35(2)(d); and Chapter 9 analyses Article 35(3), on the buyer's awareness of lack of conformity of goods.

Finally Chapter 10 contains an epilogue: Summaries and conclusions concerning Article 35 on the basis of Chapters 1-9 and according to the aims and theses of this treatise.

Part II

Introduction to Article 35 and supplementary and competing rules

Chapter 2

Introduction to Article 35

2.1. Introduction

The aim of this chapter is to give an introduction to Article 35 and to look at the provision in the context of other rules. In Section 2.2 there is a brief review of Article 35's background and history, aimed in particular at showing the development from ULIS Article 33 to CISG Article 35. This will also give a frame of reference for the discussions in Chapters 4-9 below.

In Section 2.3 there is an introductory analysis of the general principles which are expressed in Article 35, as well as its context, particularly the rules on the interpretation of contracts. In Section 2.4 there is a short review of the provision's connection with the rules on breach of contract, and then Section 2.5 deals with a special question relating to breach of contract and the provisions in Article 79 on the seller's exemption from liability where there is a failure to perform an obligation under the contract. Finally, Section 2.6 has a short description of the significance for Article 35 of Articles 23 and 36, and in Section 2.7 there is a summary of the chapter.

2.2. The wording of the provisions and its history

2.2.1. Introduction

Work on the drafting of Article 35 was in three parts, starting from the basis of ULIS Article 33.[1] From 1970 to 1976 a Working Group

1. ULIS Article 33 is as follows:

"1. 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;

appointed by UNCITRAL worked on a draft for a new Article 33. This draft was included by the UNCITRAL Commission as Article 33 of the 1978 Draft Convention, and a *Secretariat Commentary* was prepared for each of the articles in the 1978 Draft Convention prior to the Vienna Conference, at which the provision was finally adopted as Article 35.

2.2.2. The work of the Working Group on the provision

During the work of the Working Group, there was already a feeling that ULIS Article 33 was unacceptable, as it linked the contractual conformity of goods with their delivery.[2] Further, the list of examples given in the provision was too complex, and it was not considered desirable to make an exhaustive list of all conceivable situations in which goods may not conform to the contract. Instead, it was felt that the provision should contain a short statement of a general principle, together with just a few examples.[3] Against this background, a Norwegian representative[4] proposed a simplified version of the provision.[5] Several representatives did not find the Norwegian proposal

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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.

2. No difference in quantity, lack of part of the goods or absence of any quality or characteristic shall be taken into consideration where it is not material."

2. Cf. Honnold: *Documentary History*, p. 103, pt. 48.
3. Cf. Honnold: *Op. Cit.*, p. 103, pt. 49.
4. Cf. Honnold: *Op. Cit.*, p. 103, pt. 50.
5. "The seller shall not have fulfilled his obligation *as regards conformity where the goods are not of the quantity or quality* [*or do not have other* characteristics] expressly or impliedly contemplated by the contract, *in particular*, where the goods:

Are only part of the goods sold *or are* of a larger or smaller quantity than *contemplated in the contract;*

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; or

Do not possess the qualities necessary for their use

The seller shall not be *responsible* for the consequences of a lack of conformity *as regards qualities necessary for their use* [or other qualities contemplated by the contract], if at the time of the conclusion of the contract the buyer knew, or could not have been unaware of, such lack of conformity.

(As ULIS art. 33, paragraph 2 revised.)."

entirely satisfactory, believing it was important to have a more exhaustive list of what constitutes lack of conformity with the contract, so the buyer would be able to determine whether the seller was in breach of contract or not.[6] On this basis the Working Group decided to appoint an *ad hoc* group, consisting of the UK and the USA representatives, to consider a simplification of Article 33(1). With regard to Article 33(2), the Working Group decided that the wording of the English version should be changed from "not material" to "clearly insignificant."[7] The revised proposal for Article 33(1) was put forward at the 4th Session of the Working Group, on the basis of the work of the 3rd Session.[8]

Some representatives regarded Article 33(2) as superfluous, while others thought that Article 33(2) ought properly to be included with the provisions on breach of contract and the rights of the buyer in the event of defective performance of the contract.[9] It was proposed that Article 33(1) *bis* ought to contain a provision on the contractual conformity of goods in relation to brochures, catalogues and other information given out issued by the seller.[10] Most of the representatives agreed that the provisions in Article 33(1) *bis* (a)-(d) were cumulative and not alternative, i.e., that the goods should live up to

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The italics are in the original. The reference to: "(As ULIS art. 33, paragraph 2, revised)" concerns a linguistic amendment to the French version of Article 33, cf. Honnold: *Op. cit.*, p. 97, pt. 10-11. Article 33(2) deals with minor breaches of contract, see Chapter 4.

6. Cf. Honnold: *Op. Cit.*, p. 103, pt. 51.
7. Cf. Honnold: *Op. Cit.*, p. 103, pt. 55.
8. 1. "[The seller shall deliver goods which are of the quantity and quality and description required by the contract and contained and packaged in the manner required by the contract.]
   1. bis. [Unless the terms or circumstances of the contract indicate otherwise, the seller shall deliver goods
   a) Which are fit for the purposes for which goods of the same contract description would ordinarily be used;
   b) Which are fit for any particular purpose expressly or impliedly made known to the seller;
   c) Which possess the qualities of a sample or model which the seller has handed over or sent to the buyer;
   d) Which are contained or packaged in the manner usual for such goods.]
   2. No difference in quantity, lack of part of the goods or absence of any quality or characteristic shall be taken into consideration where it is clearly insignificant."
9. Cf. Honnold: *Op. Cit.*, p. 142, pt. 38.
10. Cf. Honnold: *Op. Cit.*, p. 142, pt. 39.

all the requirements referred to.[11] Also, it was pointed out that Article 33(1) *bis* (b) did not indicate when the buyer should make the seller aware of "the particular purpose" of the goods, and it was also proposed that this provision should apply when the buyer relies on the expertise of the seller.[12] Finally, several of the representatives were of the view that ULIS Article 36 ought to be incorporated in Article 33, given that Article 36 constituted an exception to the provisions in Article 33 on implied warranties.[13]

Thereafter the Working Group decided to delete Article 33(2). It also decided to set up a drafting group, consisting of representatives from Norway and Austria, to put forward a revised text for Article 33 in the light of the comments referred to, incorporating the provisions in ULIS Article 36.[14] After considering this group's proposal, and an alternative proposal from another representative, the Working Group decided to work further on the amended proposal.[15] This proposal, which is very similar to the existing Article 35, was given the unanimous backing of the representatives.[16] As an innovation, the

11. Cf. Honnold: *Op. Cit.*, p. 142, pt. 40.
12. Cf. Honnold: *Op. Cit.*, p. 142, pt. 41.
13. Cf. Honnold: *Op. Cit.*, p. 142, pt. 42. ULIS Article 36 states as follows: "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."
14. Cf. Honnold: *Op. Cit.*, p. 142, pt. 43.
15. "The seller shall deliver goods which are of the quantity and quality and description required by the contract and contained and packaged in the manner required by the contract and which, where not inconsistent with the contract:
    a) are fit for the purposes for which goods of the same description would ordinarily be used;
    b) are fit for any particular expressly or impliedly made known to the seller at the time of contracting, 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.

    The seller shall not be liable under subparagraphs (*a*) to (*d*) of the preceding paragraph for any defect if at the time of contracting the buyer knew, or could not have been unaware of, such defect."
16. Cf. Honnold: *Op. Cit.*, p. 223, pt. 93. However, there were some questions of style for which a solution was attempted in a proposal made by Norway (the proposal is not given here).

proposal contained a *positive* statement as to the characteristics of the goods, rather than the negatively expressed provision of the earlier drafts and ULIS Article 33.

2.2.3. The Commission's work on the provision

The work of the Commission (the United Nations Commission on International Trade Law – UNCITRAL) was based on the draft presented to it by the Working Group. ULIS Article 33 was reworked as Article 33 in the Working Group draft, and this provision was contained as Article 19 in the Commission's 1977 "Sales Draft".[17,18] The provisions contained some minor changes (indicated in italics) but were otherwise identical.[19]

The attention of the Commission was directed in the first instance towards sub-section 1(b), i.e., the rule regarding the "particular purpose" of the goods. A proposal was made that the rule should only apply to particular purposes which had been expressly made known to the seller, and the exemption for the seller's responsibility in the last part of the provision should be deleted.[20] Other proposals for Article 19(1)(b) were considered, but none found favour, so sub-

17. The lower number of the Article was due to the fact that the Working Group's collected proposals were divided in two, consisting separately of a "Sales Draft" and a "Formation Draft".
18. Cf. Honnold: *Op. Cit.*, p. 329, pt. 166.
19. "33(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. *Except were otherwise agreed, 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 of him to rely, on the sellers 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.
    33(2) The seller *is not* liable under subparagraphs (a) to (d) *of paragraph (1) of this article* for any *non-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 non-conformity."
20. Cf. Honnold: *Op. Cit.*, p. 330, pt. 167-170.

section 1(b) remained unchanged.[21] There was also a proposal to add a provision on the burden of proof to Article 19, but this was rejected on the principle that *the Convention ought not to deal with procedural questions.*[22] Finally, a proposal was made to add provisions about situations in which there is a defective performance of the contract due to some defect in the materials which the buyer has supplied to the seller for incorporation in the finished product. Even though there was broad agreement with this principle, the Commission decided not to include such a provision for legal-technical reasons.[23]

The conclusion was that Article 19 remained unchanged.[24] On this basis the Commission wrote a collective draft (1978 UNCITRAL Draft), containing an Article 33 which was identical to the Working Group's Article 33.[25]

2.2.4. The work on the provision at the diplomatic conference

The Commission's draft was then put before the diplomatic conference in Vienna in 1980. The draft was accompanied by the *Secretariat Commentary* for each of the articles. It is important to note that even though the *Secretariat Commentary* is not official documentation, it was nevertheless the background for the work of the conference on the provisions and several amendments to the provisions were debated at the conference, on the basis of the proposals in the Commentary.

The first part of the conference consisted of the *First Committee Proceedings and Proposals.*[26] The Yugoslav delegation noted that it was not clear whether Article 33(1) covered the delivery of both large and small quantities, or whether the article covered the delivery of quite different goods.[27] Portugal proposed the deletion of the words "Ex-

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21. Cf. Honnold: *Op. Cit.*, p. 330, pt. 171-176.
22. Cf. Honnold: *Op. Cit.*, p. 330, pt. 177-178. On this question, see Chapter 3, since the assumptions in Article 35(2) have consequences for the burden of proof, so it is possible to derive a general principle on the burden of proof in Article 35.
23. Cf. Honnold: *Op. Cit.*, pp. 330-331, pt. 179-184.
24. Cf. Honnold: *Op. Cit.*, p. 331, pt. 185.
25. Cf. Honnold: *Op. Cit.*, p. 385, 2nd column.
26. The First Committee dealt with Article 33 at its 14th, 15th, 25th and 37th sessions on 19th, 20th and 27th March and 7th April 1980, respectively.
27. Cf. Honnold: *Op. Cit.*, p. 398. This is the so-called *aliud pro alio* case, cf. below in Chapter 4.

cept where otherwise agreed."[28] The Federal Republic of Germany recommended that Article 33(1)(b) should be changed to "... are fit for any particular purpose expressly or impliedly made part of the contract."[29]

The ICC (International Chamber of Commerce) stated that in its view the provision should be understood as making the seller liable under Article 33(1)(b) only where "the particular purpose" has been made clear to the seller. If this were not the case, the provision should make this clear. Furthermore, the ICC said that the seller should not be liable for the conformity of the goods to the contract with respect to administrative regulations in the buyer's country. In the view of the ICC, such cases did not concern the fitness of goods for ordinary purposes, and the question of the fitness of the goods for the special purposes in the buyer's country should thus fall within the terms of Article 33(1)(b).[30]

WIPO[31] proposed the addition of "or of goods bearing the brand name where the buyer has selected the goods by that brand name."[32] The United Kingdom proposed that the words "or could not have been unaware" should be deleted. Finally, Israel proposed that the words should be replaced by "or ought to have known of."[33]

Canada proposed that the whole of Article 33 should be replaced by a provision with quite different wording.[34,35] The Canadian del-

28. Cf. Honnold: *Ibid.*
29. Cf. Honnold: *Ibid.* Compare this with the wording "made known to the seller."
30. Cf. Honnold: *Ibid.*, p. 398. This view has since been confirmed by court decisions and in theory, cf. Chapters 4, 5 and 6.
31. WIPO is the acronym for the World Intellectual Property Organisation.
32. Cf. Honnold: *Ibid.*
33. Cf. Honnold: *Ibid.*
34. "(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) Unless otherwise agreed, *where the seller is a person who deals in goods of the description supplied under the contract*, the goods do not conform with the contract unless they:
      (a) are *reasonably* 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;

egation[36] justified the addition of "where the seller is a person who deals in goods of the description supplied under the contract" on the grounds that this had long been a presumption in common law jurisdictions, and that any doubt as to whether this also applied to Article 33 would cause serious problems. Furthermore, the additions to Article 33 ("reasonably fit" and Article 33(4)) would make clear the meaning of Article 33(1)(a) as it had been hitherto, which could be compared with the common law concept of "merchantability". In the absence of any more detailed definition, this concept would carry with it a large body of judicial decisions; difficulties could be expected if Article 33(1)(a) were not expressed with greater precision. Finally, the Canadian delegation thought that the existing Article 33(2) was far too favourable towards the buyer. If the buyer had examined the goods or had received a sample, then he should be required to accept

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(c) possess the qualities of goods which the seller has held out to the buyer as a sample or model.

(3) *Paragraph (2) does not apply,*
(a) as regards defects specifically drawn to the buyer's attention before the contract was made;
(b) if the buyer examined the goods before the contract was made, with respect to any defect that a reasonable examination ought to have revealed; or
(c) in the case of a sale by sample or model, with respect to any defect that would have been apparent on reasonable examination of the sample or model.

(4) *For the purposes of paragraph (2) (a), the goods are reasonably fit for the purposes for which goods of the same description would ordinarily be used if,*
(a) they are of such quality and in such condition as it is reasonable to expect having regard to any description applied to them, the price, and all other relevant circumstances; and, without limiting the generality of clause (a),
(b) if the goods,
(i) are such as pass without objection in the trade under the contract description,
(ii) in the case of fungible goods, are of fair average quality within the description,
(iii) within the variations permitted by the agreement, are of even kind, quality and quantity within each unit and among all units involved,
(iv) are adequately contained, packaged and labelled as the nature of the goods or the agreement require,
(v) conform to the representations or promises made on the container or label or other material, if any, accompanying the goods, and
(vi) will remain fit or perform satisfactorily, as the case may be, for a reasonable length of time having regard to all the circumstances."

35. Cf. Honnold: *Op. Cit.*, p. 676.

36. By *Shore*, cf. Honnold: *Op. Cit.*, p. 529.

the goods with such defects as would have been revealed by a reasonable examination of them. The assessment of the buyer's examination should be made on the basis of objective criteria, not subjective.

The American delegation[37] agreed with the distinction in Article 33(1) and (2) between "a seller of goods in general and a seller who regularly sold goods of a particular kind." If a manufacturer sells a machine, and not the goods which are produced by the machine, an American court would not impose on such manufacturer the same obligations as would be imposed on a seller who produces the machine itself. However, the American delegation did not support Article 33(3) and (4) of the amendment. The British delegation likewise supported the proposal, subject to certain textual changes. The debate on the Canadian proposal was then adjourned, as several delegations wanted the opportunity to analyse the proposal in more detail. However, at the following meeting the Canadian delegation said that, after consulting with various delegations from common law jurisdictions, it had decided to withdraw its proposal.[38]

There was then a discussion of a proposal by the Soviet Union to amend Article 33(1) so as to make it clear that the goods would not conform to the contract unless they complied with the specification in the agreement.[39] The following debate revealed that, even though several delegations agreed that the Soviet Union proposal was an improvement of Article 33(1), others were of the opinion that the addition was either superfluous, or raised doubts about whether, for example, sales made on the basis of a catalogue or sample should be included. On this basis, an *ad hoc* working party was appointed to propose a new draft, partly on the basis of Article 33 and partly on the basis of the comments made in the debate.[40] The Federal Republic of Germany proposed a definition for Article 33(1).[41] This proposal

37. By *Farnsworth*, cf. Honnold: *Op. Cit.*, p. 529.
38. As will be clear from the review in Chapters 4-6, the issues which the Canadian delegation drew attention to are still a matter of debate, and are dealt with, among others, by the *German Federal Supreme Court* in its decision of 8th March 1995 (the *Mussels* case) and in the *Netherlands Arbitration Institute*, Case No. 2319, of 15th October 2002.
39. Cf. Honnold: *Op. Cit.*, p. 676.
40. Cf. Honnold: *Op. Cit.*, p. 537. The working party consisted of delegates from Argentina, China, France, Iraq, South Korea, Singapore, the Soviet Union and the United Kingdom.
41. "(b) are fit for any particular purpose expressly or impliedly made part of the contract."

was put forward on the grounds that the existing Article 33(1)(b) was too complicated, and that it should be emphasised that the goods should be regarded as conforming with the contract unless the purpose had explicitly or implicitly been made a part of the contract. Several delegates were opposed to this proposal, since it made it more difficult to determine when the suitability of goods for a specific purpose was a condition of the goods conforming to the contract. Also, the proposed amendment appeared to be more restrictive and less advantageous for buyers than the existing proposal.[42] The proposal of the Federal Republic of Germany was therefore rejected. Singapore also made a proposal to amend Article 33(1)(c).[43] The argument for this proposal was that Article 33 would thereby come to cover all goods in international trade, and the addition of "characteristics" was in accordance with ULIS Article 33. Article 33(1)(c) was accepted by the assembly, on the understanding that its final wording would be settled by the *Drafting Committee* of the diplomatic conference. Article 33(1)(d) was withdrawn as the *ad hoc* working party appointed was already considering the concepts of quality and quantity etc.[44] There was then discussion of an Australian proposal for the addition of a new Article 33(1)(d) as well as the addition of a new Article 33(3).[45] The Australian delegation based its proposal on the grounds that the existing provision would not cover new types of goods where there was not an existing usual manner for packaging the goods.

Several delegates[46] rejected the idea that the seller should deliver goods which were better packaged than customary, since this would

42. Cf. the arguments of the delegates from the United Kingdom, Finland and Belgium, cf. Honnold: *Op. Cit.*, p. 537.
43. Cf. Honnold: *Op. cit.*, p. 676:
"(c) possess the qualities and characteristics of goods which the seller has held out to the buyer as a sample or model.
(d) in general, possess the qualities and characteristics contemplated by the contract."
44. Cf. Honnold: *Op. cit.*, p. 537.
45. "... or 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.
(3) No difference in quantity, quality, description or packaging is to be taken into consideration if it is clearly insignificant."
46. From Finland, Sweden and Hungary, cf. Honnold: *Op. cit.*, p. 538.

either impose additional costs on the seller or on the buyer.[47] These delegates also argued that the decision as to whether new types of goods were adequately packaged must be decided by the contract. The Australian delegation then withdrew its proposal on better packaging, but maintained the second part of its proposal for Article 33(1)(d). This proposal was adopted by the delegates.[48]

The second part of the proposal about "clearly insignificant" differences in quality etc. prompted some discussion. Some delegates referred to the fact that the proposal, which had otherwise been rejected by UNCITRAL, cf. the review above, would give rise to difficulties in deciding precisely when a difference was "clearly insignificant". Furthermore, even an insignificant difference could nevertheless constitute a breach of contract, for which the seller should be liable if the difference causes loss for the buyer.[49] If there were differences, these were either within tolerances which were governed by the contract or by trade usage, or they would give entitlements to the buyer, such as a reduction in price. Other delegates argued that there must be a certain margin within which a good must be said to be in conformity with the contract, even if there were small variances from the contract.[50] The proposal was put to the vote, and was rejected.[51] A Norwegian proposal to replace the wording in Article 33(2): "subparagraphs (a) to (d) of paragraph (1) of this article" with the words "the preceding paragraph," was referred for consideration by the Drafting Committee, since the proposal was regarded as being of a purely formal nature. At the 25th session of the conference the *ad hoc* working party referred to above presented its proposal for amendment of Article 33, based on the proposal of the Soviet Union.[52] The proposal divided Article 33(1) into two independent parts, and modified the wording of Article 33(1).[53] The proposal was accompanied by a com-

47. That goods can be better packaged and still conform to Article 35 is clear from the *Secretariat Commentary* to Article 33, pt. 13.
48. Cf. Honnold: *Op. cit.*, p. 538.
49. Cf., for example, Rognlien from the Norwegian delegation, cf. Honnold: *Op. cit.*, p. 539.
50. Cf. Bonell from the Italian delegation, cf. Honnold: *Op. cit.*, p. 539.
51. As for insignificant defects, see Chapter 4.
52. Cf. Honnold: *Op. cit.*, p. 676-677.
53. "(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.

mentary from the *ad hoc* working party that the text should clarify the distinction between the requirement that the goods should fulfil the explicit conditions in the contract, and the requirement for goods based on other factors, for example the fact that the seller has provided a sample or a model.

Several delegates thought the wording "where the contract does not require otherwise" or "where the contract does not provide otherwise", as proposed by one delegate, were materially different from "except where otherwise agreed". This was because it could be understood as meaning that it was only when it was not otherwise expressly written in the contract that Article 33(2) would be applicable, and because it could be understood as meaning that usage or oral agreements could not derogate from Article 33(1). Therefore these delegates proposed that the wording "except where otherwise agreed" should be kept.

A proposal to delete the words "where the contract does not require otherwise" was not accepted. One delegate proposed that two or three different formulations should be drafted in the different official languages so as to put an end to the discussion. The chairman of the *ad hoc* working party put the proposal to a vote, where it was rejected on a tied vote. After a discussion of what the result of the vote meant, it was agreed that it meant that the original proposal for Article 33 was still in force, that the wording "where the contract does not require otherwise" had been rejected, but that the question of whether to use the Russian proposal to use the word "provide" instead of "require", as a compromise between the different language versions should be referred to the Drafting Committee. Proposals for Article 33 should be prepared in all the official languages.

In the 37th Session, the First Committee briefly considered the Norwegian proposal to amend Article 33(3) so as to refer not only to Article 33(2)(a) to (d), but also to Article 33(1), since exemption from liability for the seller must also apply to what is agreed under Article 33(1). This proposal was opposed by several of the delegates so the chairman sug-

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(2) *Where the contract does not require otherwise*, the goods do not conform with the contract unless they:
... (the rest of the paragraph stays as it is).

(3) The seller is not liable under *paragraph (2)* of this article for any non-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 non-conformity."

gested that the original proposal of the Commission should be recommended to the Drafting Committee, and this was agreed.

Norway[54] started the final meetings of the diplomatic conference by explaining the background to its proposal to amend Article 33(3). The proposal was debated briefly before being rejected.[55]

The Canadian delegation briefly explained the basis for its proposal, especially with regard to the desire to restrict Article 33(2) to apply to sellers dealing within their area of expertise, cf. the review above. As now presented, the delegation explained, Article 33 involved a significant change for common law jurisdictions, as well as for several civil law countries.

Among other things, the Spanish delegate expressed the view that the Australian proposal on clearly insignificant differences should be taken into consideration. The Australian delegate said that his delegation could accept the proposal for Article 33 which was before the meeting, provided that the exclusion of insignificant defects was implicit.[56] Thereafter Article 33 was adopted in its final form, with 45 votes in favour, 1 against, and 1 abstention.

In the following section, the main principles of Article 35 will be described from a dogmatic point of view.

2.3. The principle of the seller's duty to deliver the goods required by the contract

Article 35 is founded on the principle that the seller has a duty to deliver the goods required by the contract. The premises of this argument are exoteric, evident and universal: the characteristics of the goods are presumed to lie within the *sphere of influence* of the seller,[57]

54. The following debate is from Honnold: *Op. cit.*, pp. 742-743.
55. On this, see Chapter 9.
56. There is considerable debate about insignificant defects, but this does not mean that Article 35 should be interpreted according to the meaning of the delegate last referred to, cf. also Chapter 4.8.
57. In the following, the term *sphere of influence* is distinct from the *sphere of control* in Article 79(1) which emphasises the control of one party. However, there is a close connection between the reasoning in Article 35 and in Article 79, which has led to a discussion about the possibility of the seller avoiding liability for defects under Article 79, cf. Section 2.5 below.

and the seller is presumed to know more about the characteristics of the goods than the buyer who has paid for the goods and is therefore entitled to receive his part of the bargain (*quid pro quo*). In this respect the starting position of the Convention is *caveat venditor*, which has been the general tendency in the law on the sale of goods since the end of the 19th century.[58]

This is a natural solution in international sales law, where there are distances and where the buyer often enters into an agreement without having had previous sight of the goods. As distinct from the Roman law of the market, where the prime rule was *caveat emptor*, trading at a distance means that the buyer must rely to a higher degree on the information in the contract and on the seller's information about the goods. The seller becomes the "eyes" of the buyer, so that the nature of the goods is overwhelmingly a matter within the sphere of influence of the seller. The seller must answer for the information he gives and what is agreed.

The conclusion is that the seller must effectively carry the risk of the goods conforming to the contract, and that the buyer can, with justification, expect to receive delivery which conforms to the contract.[59] In assessing lack of conformity of goods to the contract, as a starting point the question is *not* whether the seller is responsible for the lack of conformity, in the sense that he has himself caused the defect, since the liability for non-conformity lies with the seller by virtue of the contractual arrangements, and not through any non-contractual liability.[60]

The principle underlying Article 35 is an ethical-juridical axiom,[61] and constitutes an important element of the guarantee of trade.[62] If

58. Cf. Krüger: *Erfolgshaftung*, p. 25 *et seq.*
59. Compare this with Heilmann: *Mängelgewährleistung*, p. 141.
60. Cf. Heilmann: *Ibid.* Nevertheless, the fact that the seller himself has committed a fault should normally be taken into consideration when assessing the lack of conformity.
61. The principles of the law of obligations are often supported by reference to a multiplicity of considerations, for example, regard for the maintenance of values, good faith, the satisfaction of reasonable expectations, predictability, fairness, operational efficiency, and not least economic effectiveness, cf. Andersen & Lookofsky: *Obligationsret*, p. 34. As for consideration of the consequences on the law of property, see Amund Bjørnager Tørum: *Konsekvens i formueretten*, Jussens Venner, 4/5-2002/37, p. 30 *et seq.*
62. The principle thus has a legal-economic content.

the premises of the argument are changed, for example the buyer supplies materials for the manufacture of the goods, if the buyer plays a role in selecting the goods or materials for them, or if the buyer is aware of the defect, then the validity of the argument is weakened, and the allocation of risk changes, since there are now elements which are *outside the seller's sphere of influence* which can affect the assessment of lack of conformity to the contract.[63] The conformity of the goods to the contract now falls within the buyer's sphere of influence – *caveat emptor.* This alternation between *caveat venditor* and *caveat emptor* will be analysed in detail in Chapters 3-9.

Article 35 has three parts. The first two, Article 35(1) and Article 35(2), consist, though not exhaustively,[64] of the Convention's *positively expressed principles* on the delivery of goods which conform to the contract.[65] These two provisions are a subset of the main principle of delivery in the manner required by the contract, cf. Article 35, and contain certain elements of the main concept, since Article 35(1) and Article 35(2) refer to terms such as *quantity, quality, description, containers, packaging, ordinary use, particular purpose* and *sample and model,* which are included in the assessment of whether goods conform to the contract. The interpretation of these terms is therefore decisive for determining the content of the principle of *the conformity of goods to the contract,* as in this context the *denotations* of these terms are wider than their *connotations,* cf. the review of the practice of the courts and the theory in Chapters 3-9.[66] This means that the extent of the principle is wider than its immediate content, which is natural given the need for extensive and dynamic interpretation of Article 35's broadly expressed provisions. On closer analysis, the third part of Article 35 is in fact an independent application of the principle of *caveat emptor.*[67] This principle is likewise an integral part of the concept of the conformity of goods to the contract, cf.

63. This does not take into account the change to the premisses which can result from the changed considerations.
64. Cf. Ramberg: *Köplagen,* p. 251; Dahl: *Kommentar,* Footnote 89.
65. Though not including defective title or defects in intellectual property rights, cf. Articles 41 and 42.
66. For example, the term "packaging" is also regarded as including requirements as to the *labelling* and *marking* of the goods, cf. Chapters 4 and 8.
67. Article 35(3) is also interpreted as containing the principle of *venire contra factum proprium* (a party cannot contradict his own previous conduct), cf. Chapter 9.

Article 35, *which leads to a lack of consistency when Article 35(3) is restricted to cases which are covered by Article 35(1),* cf. Chapter 9.

Article 35 can thus be said to be juridical pluralistic, since it contains several different principles. However, they all address the central question: *whether the conformity of goods to the contract lies within the seller's sphere of influence or not.* Whether the buyer has rights arising from breach of contract arising from this is decided by the rules on this, see below.

2.4. The rights of the buyer arising from breach of contract

If the goods do not conform to the contract, cf. Article 35, the buyer can make a claim against the seller under the rules on the buyer's rights arising out of breach of contract, provided that the buyer has examined the goods and given notice of any defect within a reasonable period, cf. Articles 38 and 39.

In general, the buyer can exercise his rights upon breach of contract by revoking the contract, reducing payment, etc., cf. the rules in Articles 46-52, or by claiming damages, cf. Articles 74-77, cf. Article 45(1). These rules also cover the seller's failure to comply with obligations which would arise from an objective interpretation of the agreement between the parties or under the Convention, for example the seller's duty to protect the buyer, to seek clarification of misunderstandings, to warn the buyer etc., for example that a weedkiller should not be used together with other kinds of weedkiller.[68]

First, the buyer can require the performance by the seller of his obligations, cf. Article 46(1). If the seller does not deliver the contracted quantity, cf. Article 35(1), the buyer can require subsequent delivery of the missing part, cf. Article 51(1) and Article 46(1). When more than the contracted quantity is delivered, cf. Chapter 4, Article 46(1) and Article 46(2) do not apply, and Article 52(2) applies instead.[69] If the goods otherwise vary from the agreed description or quality, the buyer may require delivery of substitute goods, provided that the lack of conformity constitutes a fundamental breach of con-

68. Cf. Huber in Schlechtriem: *Kommentar,* p. 459.
69. Cf. Huber in Schlechtriem: *Kommentar,* p. 495 and p. 580 *et seq.*

tract and a request for substitute goods is made either in conjunction with notice given under Article 39 or within a reasonable time thereafter, cf. Article 46(2).

If the goods do not conform to the contract, the buyer can require the seller to remedy the defect, unless this would be unreasonable having regard to all the circumstances, cf. Article 46(3). A claim to have a defect remedied must be made either in conjunction with notice given under Article 39 or within a reasonable time thereafter.

The buyer can also avoid the contract if there is a fundamental breach of contract, cf. Article 49. Even minor defects can be significant, for example some fault in the paintwork of a new car, or damage to the packaging of goods which are to be retailed, which cannot be repaired or which in the circumstances it would be unreasonable to require to be repaired.[70]

Where a delivery of goods does not conform to the contract, whether the quantity delivered or otherwise, cf. Article 35, the buyer can claim a proportionate reduction in payment, cf. Article 50, as well as damages, cf. Article 74. There has been considerable theoretical debate about how far the seller can be exempted from liability for non-conformity of goods to the contract under the provisions of Article 79. The fear is that Article 35 may become devoid of meaning. This problem will be analyzed in section 2.5.

Finally, the question of competing or conflicting national laws will be introduced briefly, cf. below section 2.6 on *culpa in contrahendo* and product liability. The question of the role of contract law as the background law to the Convention and as a competing legal regime, and the question of agreed rights in the event of breach of contract are of considerable significance to the application of Article 35, and are the subject of more detailed analysis in Chapter 3.

2.5. Article 35 and exemption from liability under Article 79

According to Article 79(1), under certain circumstances a party is not liable for a failure to perform any of his obligations under a contract if he can show that the failure was due to an impediment outside his

70. Cf. Schwenzer in Schlechtriem: *Kommentar*, p. 387.

control and that, at the time of entering into the contract, he could not reasonably have been expected to have taken the impediment into account nor to have avoided or overcome it or its consequences.

According to Article 79(2), this exemption also applies if a third person, whom the party has engaged to perform the whole or a part of the contract, fails to fulfil his obligations. However, this exemption only applies if both the party concerned and the third person would be exempted under Article 79(1). According to Article 79(5), the parties are not prevented from claiming rights other than claims to damages under the Convention. Thus, the buyer may still be able to claim a proportionate reduction in payment, re-delivery or to avoid the contract.

The question then arises as to whether a seller who has delivered goods which do not conform to the contract will be able to claim rights under Article 79. This question arises particularly because of doubts based on American law and on the predecessor to the provision, ULIS Article 74, as to the application of Article 79 in such cases.[71] Honnold argues that if Article 79 were applicable, this would undermine the seller's obligation to deliver goods which conform to the contract, cf. Article 35, since the courts would have to enter into complicated considerations of the seller's and the third party's possibilities for taking into account any structural failure in the planning or production process, etc.[72] In contrast to this, the prevailing view in continental European doctrine is that Article 79 can be relied on in cases of defective delivery of goods.[73] There is thus nothing in the rules of the Convention, whether taken individually or collectively, which supports the view that the seller will not be able to rely on

71. Cf. Honnold: *Uniform Law*, p. 477 et seq. Thus the word "obstacle" is replaced by the word "circumstances" in ULIS Article 74, which in turn was replaced by the word "impediment" in CISG Article 79. In Honnold's view, the word "impediment" excludes the idea that defective deliveries are covered, and this is supported by the wording in Article 79(4) which requires the seller in such a case to give the buyer notice of the cause of the impediment to his ability to perform, which seems absurd in the case of defective performance. Honnold further supports his reasoning on the basis of the discussions at the diplomatic conference. Compare with Krüger: *Erfolgshaftung*, pp. 81-98.
72. Cf. Honnold: *Uniform Law*, p. 479. See similarly Tallon in Bianca & Bonell: *Commentary*, pt. 2.6.1 and 2.6.2.
73. Cf. Krüger: *Erfolgshaftung*, p. 14, Footnote 5; Stoll in Schlechtriem: *Kommentar*, p. 760 et seq., with further references to the literature in Footnote 44.

Article 79 in cases of defective delivery.[74] This view is confirmed by the practice of the European courts, even though the German Federal Supreme Court has not given its final word on the subject:

See the *German Federal Supreme Court* decision of 24th March 1999, which concerned the sale of a special wax for the protection of vines against fungal infection. The seller had not himself manufactured or tested the wax, but had delegated this to an independent subcontractor who had delivered the goods direct to the buyer. Due to some defect in its production, the wax caused considerable damage to the vines which had been treated, and resulted in a claim for damages which was many times the purchase price of the wax. The seller claimed exemption from liability under Article 79, since he had not himself had any influence on the production process.

The *German Federal Supreme Court* refrained from expressing a view as to whether all cases of defective deliveries could be covered by Article 79, or whether there are some cases, including the conformity of goods to the contract, cf. Article 35, which are not covered by Article 79. In the actual case this was not relevant, since the seller could not, in any case, claim exemption under Article 79, since there was not an impediment which was outside his control. The seller had bound himself contractually to supply goods of an appropriate quality, cf. Article 35. The fact that the subcontractor had used a substance which did not have the stipulated characteristics and which caused the product to be defective could not exempt the subcontractor from liability and therefore could not exempt the seller from his contractual obligations. As a result, the seller was liable to pay compensation.[75]

74. Cf. Krüger: *Erfolgshaftung*, p. 68, after a review and refutation especially of Honnold's arguments.
75. Cf. Section II(2)(a) of the German Federal Supreme Court judgment (source – the CISG Database at Pace Law School Law Library): "It may remain undecided whether CISG Art. 79 encompasses all conceivable cases and forms of non-performance of contractual obligations creating a liability and is not limited to certain types of contractual violations and, therefore, includes the delivery of goods not in conformity with the contract because of their defectiveness ...

An exemption pursuant to Art. 79 CISG, upon which the Court of Appeals correctly based its decision, is not applicable because, in any case, the defectiveness of the vine wax was not outside defendant's control. It is, therefore, responsible for the consequences of a delivery of goods not in conformity with the contract.

The possibility of exemption under CISG Art. 79 does not change the allocation of the contractual risk. According to the [CISG], the reason for the seller's liability is that he has agreed to provide the purchaser with goods that are in conformity with the contract. If the supplier's (or suppliers') breach of the contract is a general impediment within the meaning of CISG Art. 79 at all, it is generally an impediment that the seller must avoid or overcome according to the content of the contract of sale. This follows the typical meaning of such a contract (Magnus in: Honsell [publisher], Kommentar

See also the case of *Rechtbank's-Hertogenbosch*, decision of 2nd October 1998, which concerned an agreement between a buyer in Singapore and a seller in the Netherlands for the sale of milk formula. The milk formula was subject to an import prohibition because it contained traces of radioactivity which exceeded the legal limits in Singapore. It was argued that the goods did not conform to the requirements of the contract, and that the seller could not be exempt from liability for damages under the terms of Article 79, since the seller knew of the public laws at the time of entering into the contract.[76]

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zum UN-Kaufrecht, 1997, Art. 79 ¶ 10; but see Schlechtriem/Stoll, supra, Art. 79 ¶ 47 et seq. with further citations). From the buyer's point of view, it makes no difference whether the seller produces the goods himself – with the consequence that the non-performance is generally in his actual control so that, as a rule, a dispensation pursuant to CISG Art. 79(1) is generally excluded – or whether the seller obtains the goods from suppliers. Just as in the case of unspecified obligations, where the seller is liable for the timely delivery by his supplier (compare, e.g., Staudinger/Magnus, supra, Art. 79 ¶ 22; Schlechtriem/Stoll, supra, Art. 79 ¶ 30 et seq.), he is also responsible to see that his supplier delivers defect-free goods. In this respect, the [CISG] does not distinguish between an untimely delivery and a delivery of goods not in conformity with the contract. For both breaches of contract the same standard of liability applies. The appeal does not indicate that the parties agreed to a different allocation of risk at the formation of the contract, nor is this otherwise apparent.

Pursuant to CISG Art. 79, the seller's exemption from consequences of goods not in conformity with the contract can only be considered – if at all (see above) – when the non-conformity cannot be deemed to be within the seller's control. Because the seller has the risk of acquisition (as shown), he can only be exempted under CISG Art. 79 (1) or (2) (even when the reasons for the defectiveness of the goods are – as here – within the control of his supplier or his sub-supplier) if the defectiveness is due to circumstances out of his own control or out of each of his suppliers' control. The appeal cannot show this. Insofar as the appeal points out that the manufacturer, in 1994, used an inappropriate raw material possibly imported from Hungary during the production of the delivered vine wax, this is not relevant with respect to CISG Art. 79 because the manufacturer would be liable – and thus also plaintiff vis-à-vis defendant – for those product defects within its control."

This case is also commented on by Peter Schlechtriem in: Review of the Convention on Contracts for the International Sale of Goods, 2000-2001, p. 383 *et seq.* (London, 2002).

76. Cf. Section 4.13 of the judgment (source – the CISG Database at Pace Law School Law Library):

"The possibility to apply the defence of force majeure is to be rejected both under the Vienna Sales Convention (Art. 79) and under Dutch Law (Art. 75). Leaving aside the fact that it is to be accepted that [the seller] knew of the existence of the Singaporean measure concerned at the time of concluding the (revised) agreements (see following point), there was no factual obstacle (beyond its control) for [the seller] to fulfil its obligations arising from the agreements. The existence of the Singaporean measure cannot be deemed to be such an obstacle. On the basis of that measure, there was at worst a risk for the parties that the milk powder would be destroyed, which was not a force majeure for [the seller]."

See also the decision of *Tribunale de Commerce de Besançon*, given on 19th January 1998, which concerned the sale of judo costumes which shrank in the wash. The buyer was allowed to revoke the contract, but the seller was exempted from liability to pay compensation because he had acted without culpability, as the defect in the goods was due to defects in the material which had been supplied by an independent subcontractor.[77]

In the last case referred to the court did not explain its reasons for applying Article 79, which seems to confirm the fears about the possible erosion of the concept of lack of conformity of goods to the contract in Article 35 through the operation of Article 79. There was no assessment of the independent subcontractor's conditions for exemption from liability, cf. Article 79(2).

Altogether it must be concluded that, regardless of the lack of agreement about the doctrine, there are cases in which Article 79 is applied in connection with the delivery of defective goods, but that this provision ought to be used infrequently and under strict conditions for exemption from liability, cf. the *German Federal Supreme* decision of 24th March 1999.[78]

2.6. Article 35 and an introduction to competing rules

As referred to in the introduction, there are rules which compete with the provisions in Article 35. In Chapter 3 there is a review of the rules on formation of contract, interpretation and invalidity, as well as in relation to the parties' own agreement, cf. Article 6 and in relation to usage established between the parties, cf. Article 9. In this section there will merely be mention of two types of rules which can

77. Cf. the following quotation from the judgment (source – the CISG Database at Pace Law School Law Library):

"Whereas nonetheless, on the one hand, [the buyer] does not produce proof that the entire quantity of the goods had posed a problem, and that he also derived a profit from part of the delivered goods; on the other hand, that [the seller] finding itself in the position of a seller of a product whose manufacture and notably whose elaboration of the fabrics are beyond [the seller]'s control, it is proper, in the absence of a showing of bad faith on [the seller]'s part, to allow [the seller] the benefit of Article 79 CISG."

78. Cf. Krüger: *Erfolgshaftung*, p. 202, which also lists a number of examples of possible grounds for exemption from liability, pp. 166-199 (including so-called "development faults").

compete with Article 35, and these are the rules on non-contractual (tortious) liability and the rules on product liability.

2.6.1. Non-contractual compensation – culpa in contrahendo

Under Article 4, the Convention only applies to the formation of a contract of sale and the rights and obligations of the seller and the buyer arising from such a contract. The article is considered in more detail below in Chapter 3, but here the implications of Article will be briefly considered in relation to requirements based on the rules of non-contractual compensation – tortious liability.

If, fraudulently or in bad faith, a seller gives incorrect information about goods or their characteristics etc., cf. Chapter 3, the goods will not conform to the contract and the buyer will have a claim against the seller based on the *contract* between the parties. In addition to this, it is also probable that the buyer will have a claim based on an independent cause that the seller has committed some wrong against the buyer, under the doctrine of non-contractual damage or *culpa in contrahendo*; this is similar to tortious liability in English law.[79] Below, in Chapter 3, there is a review of contract law as the background law to the Convention and as a competing set of rules, and in this connection there is also consideration of the question of the invalidity of agreements on the grounds of fraud etc. On the question of contractual and non-contractual compensation, and *culpa in contrahendo*, the problem is the same in principle, which is the extent to which national rules which compete with CISG rules apply in parallel with the Convention rules. For example, this will be relevant to periods of notice for making claims, since the buyer might thereby be able to get round the rules in Article 39 of the Convention, as well as the rules on compensation, in the case of a non-contractual claim, cf. Article 79.

In the view of Schwenzer and Huber, except in cases of fraud, bad faith and death or personal injury caused by the goods, cf. Article 5, there is no doubt that there is *no* room for claims based outside contract law and the rules of the Convention in cases of *culpa in contrahendo* or competing rules on non-contractual compensation in general. They argue that in this respect the rules in Article 35 and

79. Cf. Schwenzer in Schlechtriem: *Kommentar*, p. 388, pt. 47; Huber in Schlechtriem: *Kommentar*, p. 480, pt. 56.

Article 45 are exhaustive.[80] However, in the view of Lookofsky there is not a clear answer to this question. The fact that a state has ratified the Convention does not mean that the state has automatically accepted a merger of the doctrines of contractual and non-contractual liability, particularly so when the Convention is designed to deal merely with the contractual relations between the parties. In the final analysis this question must be decided by the courts and arbitration tribunals in the relevant jurisdictions.[81] Even though this last point is undoubtedly reasonable, in cases where there is doubt about whether the seller has acted in bad faith or not, it can be decisive whether the Convention rules are interpreted as being exhaustive, or whether national rules can apply in competition with the Convention, cf. Chapter 3. An effective dynamic interpretation of the Convention would suggest that in such cases of doubt the Convention rules would be exhaustive, while a restrictive interpretation would favour the competing application of national rules in cases of non-contractual compensation and *culpa in contrahendo.*[82]

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80. Cf. Schwenzer: *Ibid.*; and Huber: *Ibid.*
81. Cf. Lookofsky: *CISG Scandinavia*, p. 87 and Lookofsky: *In dubio pro Conventione? Some thoughts about opt-outs, computer programs and pre-emption under the 1980 Vienna Sales Convention* (CISG)(13 Duke J. of Comp. & Int'l L. 263).
82. In Case C-334/00, decision of 17th September 2002, *Fonderie Officine Meccaniche Tacconi SpA v Heinrich Wagner Sinto Maschinenfabrik GmbH (HWS)*, the European Court of Justice considered the doctrine of culpa in contrahendo in relation to negotiations broken off in bad faith, and the extent to which this falls inside or outside the scope of contract law. By reference to the UNIDROIT Principles Article 2.215(2), the Advocate General had subsumed the question under Article 5(3) of the Brussels Convention, which deals with torts and quasi-torts, and not under Article 5(1) on contractual liability. This approach was followed by the Court of Justice though without reference to the UNIDROIT Principles. The case is also reported by UNILEX. Article 2.215 of the UNIDROIT Principles, states as follows:
   "(1) A party is free to negotiate and is not liable for failure to reach an agreement.
   (2) However, a party who negotiates or breaks off negotiations in bad faith is liable for the losses caused to the other party.
   (3) It is bad faith, in particular, for a party to enter into or continue negotiations when intending not to reach an agreement with the other party."
   Compare this with PECL Article 2:301:
   "(1) A party is free to negotiate and is not liable for failure to reach an agreement.
   (2) However, a party who has negotiated or broken off negotiations contrary to good faith and fair dealing is liable for the losses caused to the other party.
   (3) It is contrary to good faith and fair dealing, in particular, for a party to enter into or continue negotiations with no real intention of reaching an agreement with the other party."

2.6.2. The rules on product liability

In parallel with the above review of contractual and non-contractual compensation, a claim made in connection with some product defect could also be based on the rules on product liability, for example, if goods delivered by the seller cause damage to the buyer's property and possibly loss of earnings etc.[83] While some commentators argue, that the rules of the Convention makes domestic rules on product liability ineffective, others find that domestic rules on product liability are *not* made ineffective by the rules of the Convention since the Convention does not present a functionally adequate solution.[84] Furthermore, the parties to the Convention may exclude its application or derogate from or vary its effects, cf. Article 6,[85] thereby also making it possible to exclude product liability claims from being made because of the short period allowed for making a (contract-based) claim under Article 39, relative to the period allowed under the rules on product liability.[86] Nevertheless, Honnold stresses the problems of "maintaining uniformity of the international rules once a breach has been opened in the line ser by the Convention's own rules on its sphere of applicability. The appeal of familiar domestic law to domestic judges is strong and should not be given further encouragement".[87]

2.7. Links to other significant provisions

In assessing lack of conformity to the contract, two dates are relevant; these are the date when the requirements as to the goods are laid down, and the date on which conformity of the goods to the contract

83. See the example in Lookofsky: *CISG Scandinavia*, p. 86.
84. See Ferrari in Schlechtriem: *Kommentar*, p. 107 *et seq.*
85. Cf. Ferrari in Schlechtriem: *Kommentar*, p. 107 *et seq.*, pt. 11-12; Huber in Schlechtriem: *Kommentar*, p. 480 pt. 56. Here there is also discussion at p. 480, pt. 58-59, of the situation which is less significant in practice where the seller delivers goods which, with regard to their quality, are an expression for an »*Unerlaubte Handlung*«, for example the delivery of scrap which contains explosive materials. In relation to product liability, see also Lookofsky: *CISG Scandinavia*, pp. 86-87.
86. Cf. Lookofsky: *Ibid.*; Gomard & Rechnagel: *International Købelov*, p. 42.
87. Honnold: *Uniform Law*, p. 76.

shall be measured according to the norms established by the parties, or by the default rules in Article 35(2) of the Convention.[88]

The date for determining what requirements the goods shall satisfy is the date on which the contract is entered into, cf. Article 35(2)(b) ("... fit for any particular purpose expressly or impliedly made known to the seller *at the time of the conclusion of the contract* ..."), and Article 35(3) ("... if *at the time of the conclusion of the contract* the buyer knew ..."), and these principles apply in general to the whole of Article 35. In this connection the Convention's rule on the formation of contracts in Article 23 is relevant, since it states that a contract is concluded at the moment when an acceptance of an offer becomes effective in accordance with the provisions of the Convention.[89] But the time of conclusion of the contract is not always decisive when assessing the lack of conformity. Article 8(3) states that also *subsequent* conduct of the parties have to be taken into consideration when determining the intent of a party or the understanding a reasonable person would have had, and Article 11 states that a contract may be modified or terminated by the mere agreement of the parties. Therefore, the decisive factors for determining the conformity of the goods might very well be connected to the time after – or before[90] – the conclusion of the contract.

Article 35 should also be seen in conjunction with the rule in Article 36(1), according to which the seller is liable for any lack of conformity with the contract which exists at the time when the risk passes to the buyer, even though the lack of conformity only becomes apparent later. Furthermore, under Article 36(2), the seller is also liable for any lack of conformity with the contract which occurs subsequently and which is due to a breach of any of his obligations, including a breach of any guarantee that the goods will remain fit for their ordinary purpose or for some particular purpose or will retain specified qualities or characteristics for a given period of time.

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88. For further details on this, see Kihlman: *Fel*, Chapters 3 and 4.
89. Under a reservation made under the provisions of Article 92, it can be relevant to observe when a contract is concluded under the rules of the Convention, and when a contract is concluded under the otherwise applicable domestic contract law, cf. chapter 3.
90. See Article 8(3), where the negotiations and practice have to be taken into consideration, and Article 9(1) which also refer to the practice of the parties.

The more detailed rules on the passing of risk are in Articles 66-70 of the Convention, and the question will not discussed further in the present context.[91]

2.8. Summary

Article 35 was drafted on the basis of ULIS Article 33, but it differs from it in a number of respects. As distinct from ULIS Article 33, Article 35 contains a number of *positively expressed* requirements as to the goods. The agreement between the parties is now the point of departure for assessing the lack of conformity of goods to the contract. If the contractual terms cannot be determined on the basis of the agreement between the parties, then there are a number of *assumptions* concerning the contractual requirements for the goods. *Caveat venditor* is the primary assumption of the Convention, which has characterised the law of sale of goods since the end of the 19th century. This is confirmed in Article 35(3) where it is expressed as an exception to the seller's liability.

Article 35 expresses that the general rule is that the conformity of goods to the contract is assumed to be within the *seller's sphere of influence.* This seems to be a well chosen assumption for international sales. The seller thereby becomes the "eyes of the buyer", and the seller must give information about the goods and must answer for the information which is given to the buyer.

This assumption can be rebutted if circumstances which are significant to the contractual conformity of the goods lie outside the seller's sphere of influence and inside the buyer's sphere of influence. This applies, for example, to the buyer's awareness of the defect in the goods, the buyer's expert knowledge compared with the seller's lack of expert knowledge, the submission of a sample or a model and other similar elements which are relevant to the assessment of lack of conformity, since the risk is thereby passed from the seller's to the buyer's sphere of influence. In particular, Articles 35(2)(b), 35(2)(c) and 35(3) can be seen as an expression of this.

91. In the treatise: *Rischio e vendita internazionale* (Rome, 2002) Salvatore Orlando reviews the significance of the concept of risk in international sales, and the reader is referred to this.

The principle of spheres of influence is also a starting point which can be used in cases which do not directly fall within the scope of Article 35. This refers in particular to the question of how far the seller is obliged to deliver goods which satisfy the special rules in the buyer's country, and whether the starting point for assessing the suitability of goods for ordinary purposes, particular purposes, ordinary or special packaging etc. is the norm in the seller's or the buyer's country.

It should also be noted that there could be elements in the agreement which could trigger the application of competing national laws, for example rules on *culpa in contrahendo* or rules on product liability. If the Convention does not give an exhaustive functionally adequate solution, then national rules ought to apply. In relation to Article 35, Article 79 has been referred to as a competing provision granting exemption from liability which could undermine the seller's liability to pay compensation for defects in the goods. It can be concluded that there is disagreement in theory about the extent to which Article 79 applies, but in the practice of the courts, Article 79 is nevertheless applied in cases of lack of conformity of goods to the contract. However, some aspects of the practice of the courts can be criticised for the use made of the provision, as Article 79 ought, in general, to be applied infrequently in connection with the delivery of defective goods.

Chapter 3

Contract law as background law and as a competing legal regime, and the importance of usage

3.1. Introduction

As referred to above, the interpretation of the agreement between the parties is of great importance for assessing the lack of conformity of goods with the contract. This brings into focus the question of contract law as background law to the Convention and as a competing legal regime, since a party will be able to address the question of conformity of goods from a number of different angles:[1]

- the *formation* of the contract (that the conditions concerning a specific characteristic of the goods is not in the contract),
- the *interpretation* of the contract (that the conditions concerning the characteristics of the goods of the goods means "X" rather than "Y"), and
- the *validity* of the contract (the party was misled, as he thought the quality was "X" when in fact it was "Y").

In this context it is likely that a party will rely on the rules of the Convention to support their arguments but, as mentioned in Chapters 1 and 2, it is also possible that national rules will compete with the Convention rules and a party will be able to rely on these in the alternative, unless the Convention rules are considered to have priority over national rules, cf. the principle stated in Article 7.

An analysis is given below of the importance of contract law as background law and its significance as a competing set of rules for assessing the conformity of goods to the contract according to Article 35. There is also a review of the scope for the parties to establish their own rules on the conformity of goods to the contract, cf. Article 6.

1. See also Krüger: *Norsk Kjøpsrett*, p. 36 et *seq*.

In Section 3.2 there is an introductory review of the division of contract law into formation of contract, interpretation and validity. In Section 3.3. there is discussion of formation of contract, in Section 3.4 there is discussion of the interpretation of contracts and legal presumptions, in Section 3.5 there is discussion of the rules on validity, and in Section 3.6 there is a discussion of the scope for the parties to derogate from the terms of Article 35 and other rules relating to Article 35, including disclaimer of liability. There is a reference to the UNIDROIT Principles and PECL,[2] to illustrate whether there is an international consensus which supports the findings of the research. The chapter ends with a summary.

3.2. The tripartite division of contract law into formation, validity and interpretation

With a systematic approach, contract law is usually divided into questions about the formation of contracts, validity and interpretation, even though these three elements have a certain amount of overlap.

The CISG uses this classification, since it contains general rules of interpretation, and Part II contains rules on the formation of contracts. Denmark and the other Scandinavian countries and Finland have not ratified Part II of the Convention, so the general contract law rules on the formation of contract apply, unless the contract for the sale of goods is governed by the laws of a country which has

2. On the UNIDROIT Principles and PECL in relation to the interpretation of the CISG, see René Franz Henschel: *Interpreting or supplementing Article 35 of the CISG by using the UNIDROIT Principles and the Principles of European Contract Law.* Pace Database (2004); Johnny Herre: *Utfyllnad av CISG med Unidroit og European Principles*, in Festskrift til Birger Stuevold Lassen (Oslo, 1997), p. 439 et seq.; Lars Marius Heggberget & Espen Nyland: *Formuleringen af internasjonale kontraktsrettslige grunnprincipper og betydningen for norsk rett*, 1 Tidsskrift for Retsvitenskap (2000) pp. 250-323; on PECL in relation to the interpretation of agreements and Article 35 see Ole Lando: *International Trends: Requirements concerning the quality of movable goods and remedies for defects under the Principles of European Contract Law*, in Grundmann, S., Medicus, D., & Rolland, W.: *Europäisches Kaufgewährleistungsrecht. Reform und Internationaliserung des deutschen Schuldrechts* (Munich, 2000), pp. 61-68. See also Matthias E. Storme: *Schuldnerpflichten, Vertragsstörung und Verantwortung (PECL, PICC, Wiener Kaufrecht, Gandolfi-Code, BGB-Entwurf)* in Schlechtriem, Peter: *Wandlungen des Schuldrechts* (Baden-Baden 2002), pp. 11-36.

ratified the whole of the CISG.[3] In such a case the courts should also apply the Convention rules on formation of contract.[4] Under the provisions of Article 4(a), the validity of the contract or of any of its provisions or of any usage is excluded from the scope of the Convention, unless otherwise expressly provided for in the Convention. The implications of this provision are considered below in Section 3.5. This means that if questions arise on the formation of the contract or its validity, then the rules of the law of contract will apply where the law of Denmark, Norway, Sweden or Finland is the applicable law. It is therefore of great importance to classify the contract law issues correctly. As referred to in the introduction, it can often be difficult, if not impossible, to distinguish between the various contract law elements of formation, validity and interpretation. This means that it will often not be possible to decide whether the CISG rules apply or whether the national rules apply.[5] This point was overlooked by the legislature when justifying the right of reservation under Article 92 of the Convention.[6]

In other words, the juridical qualification discussed above in Chapter 2 is decisive. The assumption is that the qualification should be made on the basis of an autonomous Convention interpretation and not on the basis of national law, cf. Article 7. However, there is also no agreement about the precise limits for this qualification, cf. the difference between the dynamic and the restrictive doctrines of interpretation. The parties should take that into consideration, when drafting their contract.

3.3. Formation of contract

For an example of a situation where it can be difficult to distinguish between the formation of contract and the interpretation of contract, or more correctly, where one would be justified in classifying some circumstances under both headings, see a Danish case concerning

3. Cf. Lookofsky: *CISG Scandinavia*, pp. 19, 52 and 181 *et seq.*
4. Cf. Lookofsky: *CISG Scandinavia*, p. 181 *et seq.*
5. However, compare Lookofsky: *CISG Scandinavia*, p. 68, § 3-10 in relation to the distinction between validity and formation of contract.
6. Cf. the Ministry of Justice commentary on the legislative proposal L 35, p. 74 *et seq.*

Article 35, the judgment of the *Western High Court* given on 10th November 1999:[7]

An agreement was entered into, by telephone, between a buyer with a place of business in France and a Danish seller for the sale of Christmas trees. The *buyer* thereupon sent an order confirmation, where the height of the trees was given as being "from 1.70-2.20 metres", at a price of DKr 100 per tree.[8] The seller then issued an invoice and sent the trees to France. After the trees had been delivered, the buyer complained that the trees did not conform to the agreed height and quality. The seller rejected the buyer's complaint but offered an *ex gratia* reduction in price. The buyer rejected this offer, and revoked the contract one week later.

Before the County Court[9] the seller argued that the trees were not defective since the agreement had not been for the seller to supply trees of the height referred to in the order confirmation, cf. Article 35.[10] Furthermore, the buyer had given notice of his complaint too late, and in any case the defect to the goods was not significant enough to allow the buyer to revoke the contract.

The buyer argued that the agreement made by telephone was that the trees should be from 1.70-2.20 metres, as shown in the order confirmation. What happened thereafter was irrelevant to the requirements for the goods.[11] The buyer maintained that he was entitled to revoke the contract.

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7. See English translation on CISG Denmark (www.cisg.dk).
8. The price could also have been an indication of the height of the trees, though this did not seem to have been taken into account by the court, since it clearly based its decision on the order confirmation.
9. Randers County Court, decision of 4th November 1998, see CISG Denmark.
10. Cf. the following citation from the seller's pleading: "The concept of lack of conformity of goods to the contract is governed by Article 35 of the Convention on Contracts for the International Sale of Goods [CISG], and what was agreed in the telephone conversation of 28th November 1996 is clear from the evidence of the plaintiff. The defendant sent an order confirmation on 29th November 1996, which the plaintiff has not relied on, and the plaintiff gave a different version in writing on 5th December 1996. It was agreed that a mixed batch of trees varying in size from 1.6 to 2.2 metres should be sent, and that there could be imperfect trees but not seriously imperfect trees. Both parties had had the opportunity to clarify the substance of the agreement, but this had not happened. One should therefore use the grading guidelines, and if these could not be used, then one must fall back on the ordinary rules of interpretation in the CISG." And a little later it was argued: "One must conclude that the matter cannot be decided, and that the defendant has thus not proved that the trees did not conform to the contract, so that the requirements as to the materiality of breach of contract required by Article 25 CISG has not been met."
11. "In support of his claim to have the case dismissed, the defendant argued that the trees delivered by the plaintiff did not conform to the contract both because of the failure to meet the conditions as to their height, and because of their poor quality. It had been agreed that the average height of the trees should be at least 1.85 metres, and that they should be between 1.7 and 2.2 metres in height. As for their quality, it

On the question of lack of conformity of the goods with the contract, the County Court stated: "According to the evidence, the parties entered into an oral agreement on 28th November 1996 for the delivery of Christmas trees by the plaintiff to the defendant. On 29th November 1996 the defendant sent confirmation of what he understood had been agreed about the delivery, and it had not been shown that the plaintiff made any immediate objection to the content of this order confirmation. The Court therefore finds it proved that the agreement of the parties was that the plaintiff should deliver 1,000 to 1,200 Normann trees, of which 40% should be Grade One and 60% Grade Two, bushy trees without serious defects, and with a height of between 1.70 and 2.20 metres, at a price of DKr 100 per tree." Further, the court found that the buyer had not succeeded in his claim to revoke the contract, but that he was entitled to a proportionate reduction in price.

The parties repeated their arguments before the *Western High Court.* The High Court confirmed the finding of the County Court, though with a minor change to the justification for the lack of entitlement to revoke the contract.

This decision is discussed by Morten M. Fogt in an article in *Ugeskrift for Retsvæsen.*[12] As for the relationship of this decision to the Article 92 reservation and the interpretation of the order confirmation in international sales law, the Fogt says: "A consequence of this reservation is that the Nordic rules on the effect of an order confirmation between traders is effective as a part of national law."[13]

As will be seen from the review below, the premises for this conclusion can be questioned and the extent of the Article 92 reservation may be modified, as the conclusion does not take account of the complex question of defining the boundaries between formation of contracts and interpretation of contracts. Danish law applied to this case, and on this Fogt wrote: "Under Article 1(1)(a) of the CISG, international sales law was applicable, but only in respect of Part III because of the Nordic reservation in respect of Part II. Therefore, the

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is argued that it was agreed that 40% should be Grade One and 60% should be Grade Two, and that all trees should be bushy and without serious defects. The agreement had been entered into by telephone and confirmed in writing by the defendant on 29th November 1996. The order confirmation clearly stated the requirements as to size and quality, and the plaintiff did not object to the details which were in the order confirmation. The subsequent correspondence was not relevant in determining what had been agreed."

12. Morten M. Fogt: *Rettidig reklamation og ophævelse af købeaftale efter CISG* (VLD 10.11.1999, 9. afdeling, B 2919.98 utrykt), UfR 2002 B 129 *et seq.*
13. Fogt: *Op. Cit.*, p. 129.

CISG only applied to the relationship between the buyer and the seller on the sale of goods aspects. The formation of the contract should thus the judged according to the law of contract, which was Danish law. This means that the Danish law of contracts applies to the interpretation of the statements and conduct of the parties. However, neither the County Court nor the High Court ruled on this, as the parties in the case agreed on the legal basis for it. It would have been highly desirable if a general ruling had been made on this question."[14]

This comment must be understood as meaning that if the formation of the contract is to be judged according to Danish law, then the interpretation of the statements and conduct of the parties ought also to be judged according to Danish law. However, this view is only sustainable in relation to the interpretation of the statements and conduct of the parties in connection with judging whether a contract has been formed,[15] but not in relation to the interpretation of the content of a contract which has been formed, including the interpretation of the conformity of the goods to the contract, cf. Article 35.[16]

14. Fogt: *Op. Cit.*, p. 130 *et seq.*
15. This also ignores the fact that a contract can have been entered into as a consequence of a practice established between the parties or in accordance with trade custom of tacit acceptance with the dispatch of an order confirmation or of the goods, cf. Articles 8 and 9 of the Convention. Compare this with Junge in Schlechtriem: *Kommentar*, on Article 8, p. 145, pt. 10; Schlechtriem in Schlechtriem: *Kommentar* p. 223 et seq., as well as the decision of the *Cantonal District Court of Basel* (Switzerland) of 21st December 1992, see Unilex. This also applies to the question of incorporating standard terms, see the decision of the *Hertogenbosch District Appeal Court* (Netherlands) of 24th April 1996 (see Unilex). See also the decision from the German *Bundesgerichtshof*, referred to below.
16. Compare with Lookofsky: *CISG Scandinavia*, p. 170: "the question of whether an offeror's standard forms conditions have become part of the offer should be resolved by application of the rules in Article 14 and Article 8." This can also apply under Article 9. See also Joseph Lookofsky: Case note on the decision of the *Maritime and Commercial Court* of 31st January 2002 on the CISG Database at Pace Law School Law Library (http://cisgw3.law.pace.edu/cases/020131d1. html), which is discussed below in Section 3.4.2.3. and in Chapter 4, cf. note 4 and note 5: "Although the opinion of the Court does not provide any indication of which rules it used as the basis of its decision on this particular point (3), CISG Articles 8, 9 and 35(1) all clearly support the holding (whereas the allegation by S – that the conformity issue as between these Danish and German parties should be governed by Danish domestic law (4) – seems wholly out of place)." Note 4 states: "The defendant argued (incorrectly) that the question of 'which agreement the parties had made' should be governed by Danish domestic law, since Denmark has ratified the CISG subject to an Article 92-reservation with respect

In such a case the Convention rules apply, and not the Nordic rules of the law of contract. First, this is because the Nordic reservation only applies to Part II of the Convention on the formation of contract, since the reservation is primarily based on the difference between the principle in Nordic law that a promise is binding even when not accepted by the person to whom it is made, and the principle of contracts used in the CISG,[17] especially on the rules on offers and the possibility for withdrawing offers.[18] Second, the reservation does not mean, as stated by Fogt, that only Part III of the CISG applies, since the whole of the Convention applies, with the exception of Part II. Part I, including the rules on the interpretation of the agreement between the parties, cf. Article 8, and on the significance of usage and practice, cf. Article 9, therefore applies. In other words, Part I should be applied to the interpretation of the rules in Part III, even though the Nordic countries have made reservations under Article 92.[19]

The decision of the Western High Court of 10th November 1999 upheld the decision of the County Court, including the contract law questions. It appears, from the judgment of the District Court, that the parties were considered to have entered into a sales agreement already *before* the buyer sent the order confirmation. On this basis it seems that the key question of interpretation, about the significance of the order confirmation, did not concern the formation of the contract, but determined the content of a contract which had already been entered into. This also seems apparent from the pleadings of the parties quoted above, in particular the seller's pleadings, since

to CISG Part II (...)." Note 5 states: "Although it is true that the rules in CISG Part II usually do not apply when, as in the case, the seller is in Denmark (...), the rules relevant for the resolution of the conformity question (Articles 8, 9 and 35) are found in other parts of the Convention which Denmark has ratified: i.e., CISG Parts I and III."

17. Cf. Ramberg in Ramberg & Herre: *Internationella köplagen*, p. 615.
18. Cf. the Danish Ministry of Justice commentary on the legislative proposal L 35, p. 76.
19. Cf. the Danish Ministry of Justice commentary on the legislative proposal L 35, the individual provisions of the Convention, Part I, p. 70 *et seq.*, as well as Lookofsky: *CISG Scandinavia*, *ibid.*, and p. 52: "It should be emphasized that the content of a CISG contract, if made, will nearly *always* be determined on the basis of the Convention (Parts I and III) and *not* on the basis of the otherwise applicable domestic law." (the emphasis is in the original). See also Achilles: *Kommentar*, p. 264, and Ferrari in Schlechtriem: *Kommentar*, pp. 854-855, pt. 3.

they refer to CISG Article 35 as being decisive for determining whether the trees did or did not conform to the contract. The seller referred to the fact that he had not reacted to the buyer's "order confirmation", but had first reacted later when the buyer claimed that the goods did not conform to the contract. As a starting point, this is irrelevant for the question of conformity with the contract, since the decisive date is the date when the agreement is made, cf. Article 35, cf. Article 23, although Article 8, Article 9 and Article 11 should also be taken into consideration, as mentioned above.

The seller also referred to the fact that both parties had had cause to clarify what the agreement consisted of, and that if necessary the grading guidelines should be used (the industry standard for assessing the quality of trees), or if this could not be used, then they should fall back on the ordinary rules of interpretation in the CISG. In the opinion of the present writer, these quotations show that the seller had not considered that the question concerned the formation of the contract, but concerned the interpretation of the contract, which was covered by Article 35 and the Convention rules on interpretation, i.e., Article 8 and 9. If this is so, then the key question is whether the goods conformed to the contract or not, cf. Article 35. According to Article 35(1), the seller must deliver goods which are of the quantity, quality and description required by the contract. In determining the content of the contract, cf. Article 35(1), Articles 8 and 9 apply, cf. the further discussion below. This means that in this specific case, the Nordic rules on the effect of order confirmations do not apply,[20] but rather the Convention's own rules for the interpretation of the statements and conduct of the parties. In this case the *Western High Court* and the *Randers County Court* ought not to have referred to the rules of Danish contract law, but should instead have referred to CISG Article 8(2), since the seller knew of the intentions of the buyer by means of the order confirmation, and since the subsequent conduct of the seller made the content of the order confirmation the standard by which the conformity of the goods to the contract should be judged, cf. Article 8(3). These provisions are discussed in more detail below.

If the opposite approach were taken, as with Fogt, this would only

20. Cf. Fogt: *Ibid.*

deal with the effect of the buyer's order confirmation on the formation of the contract, since one would then judge whether the content of the order confirmation had been agreed between the parties. This would lead to a mass of problems, since one party would always be able to qualify certain elements of a contract as relating to the formation of the contract rather than its interpretation.

As for court decisions on reservations made under CISG Article 92, see:

> The decision of the *Munich Provincial Court of Appeal*[21] of 8th March 1995, which concerned a contract for the sale of cathodes between a Finnish seller and a German buyer. A contract entered into by the parties had only been signed by the buyer. The seller had asked a Russian producer to deliver direct to the buyer. After receiving and signing the bills of lading, the buyer refused to pay the purchase price, claiming that no contract had been entered into between the parties, since the Finnish seller had not signed the contract.
>
> The court started by establishing that Finnish law applied under the choice of law rules. Even though Finland had not ratified Part II of the Convention, the court did not find itself bound by this, as the Convention rules on formation of contract could still apply. On this basis, the parties had entered into a contract and the buyer was required to pay the purchase price, which was also the case under the Finnish rules on the formation of contract.[22]

The court's application of Part II of the Convention is incorrect since the case only concerned the formation of the contract which was not covered by the CISG rules, cf. the reservation under Article 92, since Finland had derogated from these. See the decision of the *Rostock*

21. See the Unilex and the Pace Databases.
22. See the following taken from the case abstract on the Unilex and Pace Databases: "Even though Finland had declared that it would not be bound by Part II of the CISG concerning the 'Formation of the Contract', an effective contract could still have been concluded. According to the CISG other forms of consent are possible as long as they can be regarded as a mutual binding arrangement and the subject-matter of the contract is comparable to articles 14-24 CISG. In an *obiter dictum*, the court explicitly excluded recourse to the governing contract law. The [buyer] signed a contractual document thus showing its approval of the contract and also accepted the goods upon arrival. The [seller] indicated assent to the contract by its conduct, namely through the delivery of the goods. A written contractual agreement is not necessary to evidence the parties' consent (Article 11 CISG)." Cf. Juha Püyhünen: *An Introduction To Finnish Law*, p. 66 et seq.; Jaakko Motila: *The Finnish Legal System*, Helsinki, p. 140 *et seq.*

Provincial Court of Appeal[23] of 27th July 1995, where the rules were correctly applied:[24]

A Danish seller had sold flowers to a German buyer. As a starting point, the court held that the Danish law of contract applied to the formation of the contract, since Denmark had made a reservation under Article 92.[25] Since the seller sent an invoice, and since it was shown that the buyer had received it and had received the goods, it was held that an agreement had been made.

However, this treatment of the case seems to be superfluous, since there was no dispute between the parties as to whether a contract had been entered into or not. Something indicates that the court wanted to establish that the statement of the purchase price in the invoice had been the basis for the seller's claim, i.e., that the invoice was part of the basis of the contract.

In this respect, see the decision of the *Laufen District Court, Canton Berne* (Switzerland)[26] of 7th May 1993, which concerned an agreement between a Finnish seller and a Swiss buyer for the sale of automatic storage systems. On the question of the applicable law, the court argued that since neither of the parties claimed that there was not a valid contract, it was irrelevant that

23. See the Unilex and the Pace Databases.
24. Cf. Lookofsky: *CISG Scandinavia*, p. 183, note 28.
25. Cf. the following citation (source – the CISG Database at Pace Law School Law Library):

"According to Art. 28(1), (2) EGBGB, the law of Denmark would apply, as the [seller] who has to perform the characteristic contractual obligation has its place of business there. But Denmark has declared in the course of the ratification of the Convention, according to Art. 92(2) CISG, that Part II of the Convention is not binding on Denmark. Part II of the Convention, which consists of Arts. 14-24 CISG, regulates the formation of the sales contract. As these provisions do not apply here, according to Arts. 31(1); 28(1), (2) EGBGB, Danish law is to be applied.

b. According to §§ 1-9 Aftl. (Aftaleloven [Law on Agreements and Other Legal Transactions on the Sector of Property Law]), a sales contract comes into existence by offer and acceptance (Handbuch des Kaufvertragsrechts in den EG-Staaten [Manual of the Sales Law in the EU-States], Graf-von-Westphalen-Steinrücke, Dänemark [Denmark], Annotation 1-6).

The [seller] has stated its case sufficiently by presenting the invoices that the [buyer] has ordered goods from the [seller] and that the [buyer] accepted the order."
26. See the Unilex and the Pace Databases.

Finland had made a reservation under Article 92. Also, Part I of the Convention, on the interpretation of the statements of the parties, applied.[27]

Other cases[28] in which reservations made under Article 92 have been relevant, so Part II of the Convention did not apply include: *Metropolitan Court of Budapest*,[29] decision of 21st May 1996; the *Eastern High Court of Denmark*, decision of 23rd April 1998; the *Milan District Court of Appeal*, decision of 23rd January 2001; and the *U.S. District Court, N.D. Illinois*, decision of 27th October 1998 (*Mitchell Aircraft Spares v. European Aircraft Services*). This last concerned a case which had remarkable parallels with the case before the *Western High Court of Denmark*, decision of 10th November 1999:

An agreement was entered into between a Swedish seller and an American buyer, for the sale of used aircraft parts. Among the questions before the court was whether some of the seller's information, given orally prior to the formation of the contract, could be used to support the argument that the description of the goods in the written contract should not apply. The buyer argued that the court should disregard the oral information, since the written contract was clear and unambiguous, cf. the Illinois rules on parol evidence.

To start with, the court noted that Sweden had made a reservation under

27. See Paragraph bb.ccc of the judgment (source – the CISG Database at Pace Law School Law Library):

"Even though the present case lies within the scope of application of the CISG as regards the subject matter and the time of the contract, there still remains room for the pure national law of the proper law of the contract under certain circumstances. According to Art. 4 CISG, the Convention governs the formation of the contract of sale and the rights and obligations of the parties arising from such a contract. In that respect, Finland has, however, made a reservation in accordance with Art. 92 CISG, under which Part II of the Convention, which governs the formation of the contract, shall not be binding for Finland. Presently, the conclusion of the contract is not disputed by either party, so that the applicability of Part II of the Convention, or instead the national Finnish law, is not a matter of dispute. Furthermore, Art. 4(a) CISG excludes from the Convention questions of the validity of the contract. But even those questions are not at issue. As far as questions regarding the construction of the content of the contract should be concerned, however, the CISG provides rules of construction for that (Arts. 8-13 CISG, which are fully applicable for Finland). Particularly, the Convention governs the effects of the contract, the provisions regarding the breach of contract and their consequences."

28. All these are on the Unilex and the Pace Databases.

29. Commented on by Herre in Ramberg & Herre: *Internationella köplagen*, p. 616, note 15, in particular with regard to the court's somewhat inelegant application of the Swedish law of contract which, in the view of the court, required a contract to be in writing in order to be valid. This is incorrect.

Article 92. Since Sweden was thus a non-contracting state, the parties agreed that it was the law of Illinois which should govern questions concerning the formation of the contract.[30]

The court held that the parol evidence rule did not have an independent status, outside Article 8(3) of the Convention which states that pre-contractual negotiations are to be considered. This applied even though, as in Illinois, the parol evidence rule was regarded as a rule on the formation of contracts, since Article 8(3) is in Part I of the Convention, which neither Sweden nor the USA had derogated from. As a result, the court held that the Convention, and not Illinois law, should regulate questions about the significance of oral pre-contractual negotiations.

If the premises and conclusions of the US District Court in Illinois were to be followed, then in a case like that decided by the *Western High Court of Denmark* on 10th November 1999, the Convention rules of interpretation should apply where a question can be governed both by the rules on formation of contracts and the rules on the interpretation of contracts. This solution would be in line with the recognised principles of international law for the interpretation of reservations, since the presumption is that a reservation must be interpreted *narrowly*, so that other Convention provisions which are not covered by the reservation are not undermined.[31] Since the restrictive rule of interpretation referred to appears neither in the Convention on the Law of Treaties, nor does it appear to be supported by later decisions of the courts, there is a strong argument that the doctrine of dynamic effectiveness should be applied, since the inter-

30. Cf. Paragraph II.A, of the judgment:

"Next the court addresses the choice-of-law issues presented in this case. As previously discussed, the CISG governs most of the issues in this case because the United States, where [buyer] has its place of business, and Sweden, where [seller] has its place of business, are both States Party to the CISG. CISG art. 1. As the parties agree, the CISG does not govern issues which are addressed in Part II (Formation of the Contract) of the CISG because Sweden declared in its instrument of ratification that it would not be bound by Part II. CISG Parties to the Convention n.16. Rather, as the parties also agreed, Illinois law governs the contract formation issues in this case."

31. Cf. Linderfalk: *Traktater*, p. 319 et seq.: Rule of Interpretation No. 29; "If it can be shown, (i) that the interpretation of the text of a treaty, which is in accordance with Rule of Interpretation No. 1, leads to more than one conclusion, (ii) that the treaty text contains an exception to a right or an obligation which is laid down within the framework of that same treaty, and (iii) that the scope of the exception would be less according to first conclusion than the second, then the text shall be interpreted so as to accord with first conclusion."

national law reservation should also be interpreted narrowly where there is competition between sets of rules. Furthermore, such a solution would, in principle, be in accordance with the prevailing view in the doctrine of competition between national rules on contractual validity where a party has been misled and Article 35, cf. Ferrari.[32]

However, the case does illustrate that the borderline between the formation of the contract and the interpretation of the contract and Article 92 reservations, create confusion and doubt about which rules courts should apply when judging the conformity of goods to the contract under Article 35. The case can therefore be seen as a further legal policy argument in favour of the earliest possible repeal of the reservations made by the Nordic countries under Article 92.

The above review relates to the problematic distinction between the formation of contracts and the interpretation of contracts, given the Article 92 reservation of the Nordic countries. Of course, the problem of a lack of a clear distinction also applies within the Convention. According to Article 19(3), an acceptance containing additional or different terms about the price, payment, quality and quantity of the goods, or the place and date of delivery is considered to alter the terms of the offer materially.[33] According to Article 19(1), an acceptance with variations constitutes a counter-offer. In many cases the parties themselves will not be aware that there are differences between them, but merely start to implement the contract. In such cases it can be impractical to maintain that no contract has been formed, and this would not be what the parties want. In particular, such problems are likely to arise when conflicting standard terms are used, so-called 'battle of forms' conflicts. There is no unanimous view as to how to solve such problems. It is outside the scope of this book to consider further the wide-ranging arguments on this topic.[34] However, the prevailing view seems to be that it is possible to solve

32. Cf. Ferrari in Schlechtriem: *Kommentar*, p. 94, discussing Article 4 in relation to formation of contract, pt. 9.2.
33. The provisions in Article 19 correspond to the Danish Contracts Act § 6.1, cf. Gomard & Rechnagel: *International Købelov*, p. 76.
34. For a comparative analysis of the battle of forms problem, see Francois Vergne: *The Battle of Forms in the 1980 United Nations Convention on Contracts for the International Sale of Goods*, 33 The American Journal of Comparative Law, 233-258 (1985), available on Pace Database with further references to other articles.

such problems under the rules of the Convention.[35] This is also the practice of the courts, see the German Supreme Court in its decision from 9th January 2002, which also highlights the importance of the principle of good faith in international trade, cf. Article 7:[36]

> "A German seller and a Dutch buyer entered into several contracts for the sale of powdered milk. The contracts were concluded by telephone and subsequently confirmed in writing by both parties. The letters of confirmation sent by the buyer contained a standard term stating that, notwithstanding any duty of the seller to pay back the purchase price, the liability of the seller for damages suffered (or to be suffered) should be at all times limited to the invoiced amount for the delivered goods.
>
> The seller's letters of confirmation contained a term according to which the sale was to be governed exclusively pursuant to the seller's standard terms and contrary statutory conditions or standard terms of the buyer were expressly excluded. Moreover, a warranty clause contained in the seller's standard terms stated that the buyer should inspect the goods immediately upon delivery and note any complaints on the delivery note; defects that were not noticeable at the time of delivery could only be claimed before the printed expiration date.
>
> (Parts of the abstract are omitted). The Supreme Court stated that the partial conflict of the parties' standard terms (battle of the forms) could not lead to a failure of the entire contract, since the parties, in performing the contract, had shown that such a conflict was not to be considered a material modification of their agreement (Art. 19(1) and (3) CISG).
>
> As to the battle of the forms, the Court furthermore confirmed that in application of the "knock out" doctrine, generally accepted in scholarly opinions, conflicting standard terms only do not become part of the contract; the evaluation of such a conflict must proceed, however, from a systematic interpretation of all the rules involved. Thus, the liability of the seller for lack of conformity was governed by CISG, being both buyer's and seller's standard terms not applicable to the contract as far as non conformity was concerned.
>
> The Court pointed out that in the case at hand, the result would not change even applying the minority doctrine of the "last shot", since it would be contrary to the principle of good faith (Art. 7(1) CISG) for the seller, whose

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35. Cf. Schlechtriem in Schlechtriem: *Kommentar*, p. 223 *et seq.*, and Lookofsky: *CISG Scandinavia*, p. 62 et *seq.*, in particular p. 65. Schlechtriem states at p. 225: "Dab es keine einfache, glatt subsumtionsfähige lösungsformel gibt, liegt in der Natur der Sache, d.h. der Schwierigkeit der Sachfrage."
36. Abstract taken from Unilex.

> standard terms were sent after the buyer's, to assume that only those terms of the buyer's standard conditions more favorable to the seller would apply."[37]

It is therefore important to consider not only the rules on formation of the contract, but also general principles of good faith, cf. Article 7, when determining the conformity of the goods to the contract, cf. Article 35.[38]

3.4. The interpretation of the contract

3.4.1. Introduction

The interpretation of the contract is of the greatest importance in relation to Article 35, since the requirements for the goods are determined on the basis of the interpretation, cf. the whole of Article 35. In this section there is a review of the links between Article 35 and Articles 8 and 9.

3.4.2. Article 8 – Interpretation of the statements and conduct of the parties

Article 8, which does not have precedent provisions in ULIS or ULF, lays down the basic principles for the interpretation of the agreement between the parties, without these being exhaustive.[39] The aim of the provision is to create a tool for use in resolving conflicts, where the parties have differing views as to what they have agreed, which is

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37. The decision is commented on by : Mª del Pilar Perales Viscasillas: *Battle of the Forms and the Burden of Proof: An Analysis of BGH 9 January 2002*, in: 6 VJ (2002), No. 2, 217-228, and by Peter Schlechtriem in the Pace Database Translation of *Kollidierende Geschäftsbedingungen im internationalen Vertragsrecht*, in: Karl-Heinz Thume ed., Festschrift für Rolf Herber zum 70. Geburtstag, Newied: Luchterhand (1999) 36-49, with an updated reference to the ruling by the Supreme Court added thereto.
38. For a comparative analysis of good faith in relation to Art. 7, see Troy Keily: *Good Faith and the Vienna Convention on Contracts for the International Sale of Goods (CISG)*, VJ No. 1 (1999) 15-40, available on Pace Database. There are important differences between the concepts of good faith in civil law and common law, in particular in relation to the principle of good faith during formation of the contract, interpretation of the contract and during the performance and termination of the contract.
39. Cf. Lookofsky: *CISG Scandinavia*, p. 46, at note 206, and p. 172. For the background to the provisions, see Honnold: *Uniform Law*, p. 117.

not least relevant in cases about lack of conformity of goods to the contract.[40]

Article 8 concerns *interpretation* and, as with the doctrine in many legal systems, a distinction is made between *interpretation* and *construction* of contracts,[41] meaning that there is a presumption that only what the parties must be regarded as having wanted to express will be accepted. The provision's emphasis on the *objective method* of interpretation, as well as the reference to usages in Article 8(3), are seen as expressing that one ought, as far as possible, to construe the content of the contract on the basis of the interpretation of all the circumstances of the case including subsequent conduct of the parties, cf. also the following, though there is not complete unanimity about this theory.[42]

It should be noted that the provision not only applies to the statements or conduct of one of the parties, for example an order confirmation, but also to joint statements and conduct, for example a sales contract prepared jointly.[43] The provision corresponds largely to the non-statutory principles of interpretation which apply in the Nordic countries,[44] as well as to the commercial law principles of interpretation which apply to international trade,[45] including the principles of

40. Cf. Lookofsky: *CISG Scandinavia*, p. 45 and p. 172.

41. For Danish law, see Madsen: *Aftaler og mellemmænd*, p. 357 *et seq.*, where it is also pointed out that the boundaries between interpretation and construction are fluid.

42. Cf. Ramberg in Ramberg & Herre: *Internationella köplagen*, p. 118 et seq., pt. 6, with reference to the UNIDROIT Principles Article 4(8) (on "supplying an omitted term"); Gomard & Rechnagel: *International Købelov*, p. 50 and p. 232, pt. 2, but cf. Junge in Schlechtriem: *Kommentar*, p. 141, pt. 3: "Nicht berücksichtigt wird der 'hypotetische Parteiwille', weil es sich dabei nicht mehr um eine Auslegung, sondern um eine Lückenfüllung im Vertrag handelt ..." However, Junge admits that one would construct such a hypothetical intention of the parties on the basis of usage and practice. See also Junge in Schlechtriem: *Kommentar*, p. 142, pt. 4a. See similarly Heilmann: *Mängelgewährleistung*, p. 103.

43. Cf. Junge in Schlechtriem: *Kommentar*, p. 142, pt. 4; Lookofsky: *CISG Scandinavia*, p. 45, note 199 with further references; Rognlien in Bergem & Rognlien: *Kjøpsloven*, p. 469; Honnold: *Uniform Law*, pp. 115-116, although Honnold states that Article 8(2) is not applicable when both parties participate fully in preparing the contract.

44. Cf. Rognlien in Bergem & Rognlien: *Kjøpsloven*, p. 469; Lookofsky: *CISG Scandinavia*, p. 46 and p. 172; Madsen: *Aftaler og mellemmænd*, p. 358, note 4.

45. Cf. Hopmans et. al.: *Orgalime S 2000 Guide*, pp. 25-26: "... Apart from this, most countries have rules of interpretation which are laid down in the national law of contract or in jurisprudence. Although there may be differences in accent, it all boils

the major continental European legal systems,[46] and also to a large extent the principles in common law,[47] although there is still a difference between the literal or formal interpretation as usually seen in common law jurisdictions and a more liberal or substantive interpretation usual seen in civil law jurisdictions. However, common law now seems to move towards of a more liberal approach to contract interpretation.[48]

However, this does not mean that the principles for the interpretation of contracts which have been developed in national laws, for example the *contra proferentum* rule, can *per se* be said to be contained in Article 8 of the Convention. This is examined in more detail in Section 3.4.2.4. In the following, the rules of interpretation in Article 8 will be examined, and there will be an assessment of how far Article 8 accords with various domestic rules on interpretation of contracts, how the provision has been understood in theory and in practice, and the extent to which other rules and principles can be used in association with it, cf. also the UNIDROIT Principles and PECL.

3.4.2.1. The significance of the subjective intention of the parties, Article 8(1)

Article 8(1) of the Convention states that the interpretation of an agreement shall start from the basis of the intention of the parties to the agreement:

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down roughly to the same general principles. These general principles are also laid down in the Vienna Convention ... of 1980. Article 8 of the Vienna Convention reads as follows ..."

46. Cf. Junge in Schlechtriem: *Kommentar*, p. 140 et seq., pt. 1 and 3, with note 7; Gomard & Rechnagel: *International Købelov*, p. 51. However, compare the American "parol evidence rules" below.
47. Cf. Joseph M. Perillo: *Editorial remarks to CISG Article 8*, Pace Database.
48. Cf. Lookofsky: *CISG Scandinavia*, p. 46, note 201; Avery Wiener Katz: *The Economics of form and substance in contract interpretation* (Columbia Law Review, Vol. 104:496 2004); Gerard McMeel: *Prior Negotiations and Subsequent Conduct* ((2003) 119 L.Q.R) p. 273 et seq, and Adam Kramer: *Common Sence Principles of Contract (and how we've been using them all along)* (Oxford Journal of Legal Studies, Vol. 23, No. 2 (2003)), p. 173 et seq. See also the decision from *New Zealand Court of Appeal*, 27th November 2000 (Unilex), where the court due to the Privy Council opted for a literal interpretation.

> 8(1) 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.

The intention which is shown by the statements of one of the parties, or by his other conduct, is his *subjective* intention.[49] The assessment of this must therefore start from the basis of what the party explains was in fact his intention, and it is not the *actual* statement or conduct which is decisive, but the *intention* which lies behind it.[50]

When making an assessment in accordance with Article 8(1), the subjective intention of the first party is compared with the intention which the second party knew of, or could not have been unaware of. This assessment of the perception of the second party is not subjective, so as to make what the second party perceives as the intention decisive. The assessment of the perception by the second party of the statements or conduct of the first party is made on an *objective* basis, as the standard applied is what a reasonable person,[51] experienced in the same trade, could not have been unaware of in the same circumstances, cf. also the principle in Article 8(2) which is considered in more detail below.[52]

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49. Cf. Junge in Schlechtriem: *Kommentar*, p. 141, pt. 2.
50. Compare this with the problem of form versus substance in American contract law, and the battle between the substantive interpreters (represented by, amongst others, Corbin and Traynor) versus the more formalistic interpreters (represented by Williston and Hand), cf. Avery Wiener Katz, *Op.cit.*, p. 501.
51. For a analysis of "Reasonableness" in international trade, see: Guilluame Weitzberg: *Le "Raisonnable" en Droit du Commerciale International* (Paris, 2003), available on Pace Database.
52. Cf. Junge in Schlechtriem: *Kommentar, Op. cit.*; Achilles: *Kommentar*, p. 32, pt. 3: "Im internationalen Warenhandel ist dies der Horizont eines unter ähnlichen Voraussetzungen tätigen Kaufmannes, der mit den branchenplogenheiten vertraut ist und über die notwendigen Kenntnisse und Erfahrungen in der Abwicklung vergleichbare Geschäfte verfügt." See also Ramberg in Ramberg & Herre: *Internationella köplagen*, p. 115; and Honnold: *Uniform Law*, p. 118. Compare Articles 8(1) and 8(2) with the corresponding principles in the UNIDROIT Principles Article 4.1 states:
    "(1) A contract shall be interpreted according to the common intention of the parties.
    (2) If such an intention cannot be established, the contract shall be interpreted according to the meaning that reasonable persons of the same kind as the parties would give to it in the same circumstances."
    Article 4.2.states:
    "(1) The statements and other conduct of a party shall be interpreted according to that party's intention if the other party knew or could not have been unaware of that intention.

See, for example, the decision of the *Grenoble Court of Appeal*[53] of 13th September 1995, where, on the basis of the negotiations between the parties etc., the seller of parmesan cheese could not have been unaware that the goods should be capable of being sold in France, and therefore had to satisfy the French requirements as to product declarations and 'best before' dating.

This means that certain obligations are imposed on the second party (the party to whom the statements or conduct are addressed). Thus, if the second party is in doubt about the intentions of the first party, he has a duty to obtain clarification of those intentions. If he fails to do so, he will be bound by the intentions of the first party.[54] This also applies under the general principle of good faith in international trade, cf. Article 7(1), and from the principles in UNIDROIT Principles Articles 1.7 and 1.8, which are referred to in Section 3.4.2.4.[55] Since the party is subject to certain obligations to act, the failure to do so will give rise to liability. Achilles says this means that a party must at least have behaved in a manner which could be characterised as *grossly negligent* in order for it to be held that he could not have been unaware of the intentions of the other party, cf. Article 35(3).[56] However, Junge does not believe that standards of negligence are applicable.[57] In the view of the present writer, an assessment of negli-

(2) If the preceding paragraph is not applicable, such statements and other conduct shall be interpreted according to the meaning that a reasonable person of the same kind as the other party would give to it in the same circumstances."

See also PECL Article 5:101:

"(1) A contract is to be interpreted according to the common intention of the parties even if this differs from the literal meaning of the words.

(2) If it is established that one party intended the contract to have a particular meaning, and at the time of the conclusion of the contract the other party could not have been unaware of the first party's intention, the contract is to be interpreted in the way intended by the first party.

(3) If an intention cannot be established according to (1) or (2), the contract is to be interpreted according to the meaning that reasonable persons of the same kind as the parties would give to it in the same circumstances."

53. Unilex and Pace databases.
54. Cf. Ramberg in Ramberg & Herre: *Internationella köplagen*, p. 115; and Junge in Schlechtriem: *Kommentar*. *Ibid.* Ramberg: *Ibid.*, refers to the rule in Article 8(1) as the "Ondtrosregeln" – the bad faith rule.
55. Cf. Ramberg in Ramberg & Herre: *Op. cit.*, p. 114; Junge in Schlechtriem: *Kommentar*, p. 142, pt. 4.
56. Cf. Achilles: *Kommentar*, p. 32, pt. 2.
57. Cf. Junge in Schlechtriem: *Kommentar*, p. 143, note 14.

gence could well be used as, at least in the area of lack of conformity of goods to the contract, as it is well known that standards of negligence are applied. There is a comparability of the assessment of knowledge under Article 8(1) and under Article 35(3); this is considered in more detail in the discussion of Article 35(3) in Chapter 9 under the heading of the significance of standards of negligence. As stated, the content of Article 8(1) should be seen in relation to Article 8(2) and 8(3), and these provisions are discussed below.

3.4.2.2. Objective interpretation of the statements of a party, cf. Article 8(2)

If it is not possible to determine the intention of one of the parties according to Article 8(1), or if the second party did not know or could not have been aware of the intention of the first party, which will seldom be the case,[58] Article 8(2) of the Convention provides:

> 8(2) 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 such a case, the question should be judged objectively, from the perception of a reasonable person in the same situation as the second party.[59] The standard of the reasonable man is considered by many to be one of the general principles of the Convention, cf. Article 7(2).[60]

This coincides with the view adopted in practice, i.e., the view of the trade or profession concerned.[61] This is the same as the assessment of whether a party knew or could not have been unaware of the intentions of the other party, cf. above.

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58. Cf. Junge in Schlechtriem: *Kommentar*, p. 143, pt. 7.
59. Compare, with respect to Danish contract law, Madsen: *Aftaler og mellemmænd*, p. 371, which effectively expresses a view corresponding to the content of Article 8(2) in respect of the applicable general principles of interpretation in Danish contract law. These principles are repeated in Article 35(2)(b), Article 35(3) and Article 40, cf. the more detailed discussion in Chapters 6 and 9.
60. Cf. Achilles: *Kommentar*, p. 30.
61. Cf. Junge: *Ibid.*

See the decision of the *Oldenburg District Court* of 28th February 1996,[62] which concerned an agreement between a German seller and a Dutch buyer for the sale of three truckloads of eggs. The buyer had to arrange for the transport of the eggs from the seller's place of business in Germany. On the arrival of the eggs at the premises of the Dutch buyer it appeared that the trucks had not been completely filled with eggs, as there could have been at least 150,000 more eggs in the trucks. The buyer therefore complained about the incomplete performance of the contract, cf. Article 35(1), since the agreed quantity had not been delivered (on this, see in greater detail in Chapter 4).

The court started by noting that the parties had not agreed on a precise quantity of eggs. However, the seller had loaded 280,000 eggs in the first truck, 230,000 in the second, and 180,000 in the third. The seller claimed that this was because it had been agreed that the buyer should take an undefined quantity of surplus eggs. However, the court found that no reasonable trader would send three empty trucks without knowing precisely how many eggs were to be collected. Consequently the agreement should be understood as meaning that the agreement related to three full truckloads of eggs, i.e., the 280,000 eggs per load which the seller had loaded on the first truck.

In the light of the review given above on the interpretation of contracts as opposed the formation of contracts, it is interesting that the court only referred to Articles 14-18 of the Convention, and not Article 8(2) or 8(1). Nevertheless, on the UNILEX website the case is – correctly – classified under Article 8(2).

See also the decision of the *Swiss Federal Supreme Court* of 22nd December 2000,[63] which concerned an agreement between a German seller and a Swiss buyer for the sale of a second-hand rotary press printing machine. Prior to making the contract, the buyer had the opportunity to examine the machine, but did not do so, at least in detail. In the written contract, the length of the units which the machine could handle was given as being "from 641 to 1018 mm". The contract also contained a provision under which the goods were bought "complete and operational, as seen." However, it became apparent that the machine's equipment did not enable it to handle units of the length indicated, but only up to 641 mm. As a result, the buyer complained to the seller, who rejected the claim, since the buyer could have inspected the machine thoroughly and could have seen that the machine only had equipment corresponding to 641 mm. Moreover, said the seller, the statement in the contract was only an indication of what apparatus the machine *could* be equipped with and print, and not what it was in fact equipped with.

62. See the Unilex and Pace databases, discussed by Ramberg in Ramberg & Herre: *Op. cit.*, p. 17, note 132.
63. See the Unilex and Pace databases.

The buyer argued that the seller had given assurances that the machine was equipped as indicated in the contract. The buyer also claimed that he had been misled about the machine's equipment, so that the contract was invalid.

The *Swiss Federal Supreme Court* rejected the buyer's argument that the contract was invalid, and applied the Swiss rules, cf. Section 3.5 below. Furthermore, the court rejected the argument that the assurances were relevant in relation to Article 35, cf. Chapter 4 below, since the contract should be construed on the basis of the rules in Article 8, under which due consideration is to be given to all relevant circumstances. The buyer, who was himself experienced in the trade, ought to have known that a 14 year-old machine is not necessarily equipped as indicated, and ought therefore to have taken the initiative to check *this* when inspecting the machine. A reasonable person would expect the buyer to have recognised this, cf. Article 8(2), so the machine was not considered to lack conformity with the contract, cf. Article 35.[64]

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64. Cf. Paragraph a) 4 of the judgment (source – the CISG Database at Pace Law School Law Library):

"The [buyer] further submits that the Court of First Instance failed to understand the matter in regard to the remedy for breach of contract, in particular the fact that the [seller] assured a "rapport equipment 641 mm-1018 mm" and, therefore, [seller] was liable under OR Art. 197. [Buyer] asserts that the Court of First Instance erred in failing to clarify how things stood with the assured characteristics of the machine. The Court of First Instance did not allow the [buyer] to prove under expert opinion that the description of the rapport length of a "Stork" machine conformed to the [buyer's] comprehension of that term.

However, as the Court of First Instance correctly held, the prerequisites and the remedies for breach of contract result not from OR Art. 197, but from CISG Art. 35 (cf. Staudinger/Magnus, Kommentar zum Bürgerlichen Gesetzbuch, Wiener UN-Kaufrecht, Berlin 1999, Art. 35 n. 2). According to CISG Art. 35, 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. Which characteristics of the goods were agreed upon and are part of the contract needs to be established – if necessary – by interpretation of the parties' statements under CISG Art. 8. In contrast to OR [*] Art. 197, CISG Art. 35 does not contain a specific rule for warranted characteristics. Instead, the seller generally vouches for all qualities which the buyer is entitled to expect from the goods under the contract (cf. Schwenzer in Caemmerer/Schlechtriem, Kommentar zum einheitlichen UN-Kaufrecht, 2d ed., Munich 1995, Art. 35 n. 37; Staudinger/Magnus, op. cit., Art. 35 n. 16; Conrad, Die Lieferung mangelhafter Ware als Grund für eine Vertragsaufhebung im einheitlichen UN-Kaufrecht (CISG) unter Berücksichtigung des öffentlichrechtlich bedingten Sachmangels [Delivery of Defective Goods as a Condition for Contract Avoidance under the CISG with Special Regard to Defects Caused by Administrative Law], [Thesis] Zurich 1999, p. 17). The Court of First Instance adopted this – objective – interpretation in deciding that the [buyer] was not entitled to expect that she would be able to print rapport length of 1018 mm on the acquired machine without installing additional holders. The Court of First Instance held that the [seller] was entitled to assume that the [buyer] realized that the remark regarding the rapport equipment was meant to

A particular problem can arise if there is a difference between the views which a reasonable person experienced in the trade would take of the same circumstances in the buyer's and the seller's countries respectively.

An example would be a situation in which a seller offers to deliver 100 tons of wheat to the buyer. In the seller's country the delivery will normally conform to the contract if 100 tons $\pm 5\%$ is delivered, whereas in the buyer's country the delivery will normally conform to the contract if 100 tons $\pm 1\%$ is delivered. If the parties have previously traded with each other, and 95 tons have previously been delivered without the buyer objecting, then Article 8(1) applies, cf. Article 8(3), since the buyer will have known or could not have been unaware that there could variation in the quantity delivered by up to 5% from the quantity agreed, without this constituting a failure to perform the contract.

Let us now assume that the parties have not previously traded with each other and there is no existing international practice in that sector of trade nor any binding usage on permissible variances in quantity, cf. Article 9. The question then is whether the norm in the seller's country or in the buyer's country should prevail when assessing whether the goods comply with the contract.

If the principle of the seller's sphere of influence is applied, the assumption must be that the seller has no obligation to know about the norms which apply in the buyer's country. However, the situation

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refer to the bounds of possible rapport length, which could be printed if the necessary equipment existed. The [buyer] does not submit, nor is it apparent, how the Court of First Instance violated the provisions of the CISG, in particular CISG Art. 8(2), according to which statements made by 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. The [buyer] is an expert and knew that she was not offered a new machine, but one which was built fourteen years ago and consequently did not conform to the latest technical expectations. It was therefore up to [buyer] to inform herself about the operation and equipment of the machinery, an act that the [buyer] apparently embarked on only after the contract had been concluded. In view of these facts, it is without doubt compatible with CISG Art. 8(2) if the Court of First Instance finds that the [seller] was entitled to expect that the [buyer] concluded the contract in full knowledge of the technical possibilities of the machinery and its equipment. For these reasons, the Supreme Court concurs with the Court of First Instance that the sold machine was offered to the [buyer] in conformity with the specifications of the contract. The [buyer's] claim for remedy for breach of contract is, therefore, unfounded."

will be different if the seller knew or could not have been unaware of the practice in the buyer's country, for example if the seller has previously sold goods to the buyer in the buyer's country, or exported goods to that country, has a place of business in that country, or if there are other similar circumstances.[65]

The reader is referred to the arguments reviewed below in Chapters 4, 5 and 6 in relation to the decision of the *German Federal Supreme Court* of 8th March 1995 (the *Mussels* case).

Conversely, Article 8(2) emphasises what a reasonable person would have believed, if they were in the same position as the person to whom a statement is made. This suggests that, in the example given above, the applicable norm will be the norm in the buyer's country as the buyer is the recipient of the statement.[66] However, in such a case the seller may perhaps claim that the contract is *invalid*, cf. Section 3.5 below.[67]

Alternatively, the decision could be made according to the law of the country by which the contract is governed.[68] However, this is a

65. Compare this with Article 42(1)(a), according to which the seller must deliver goods which are free from any conflict with intellectual property rights of third parties "... under the law of the State where the goods will be resold or otherwise used, if it was contemplated by the parties at the time of the conclusion of the contract that the goods would be resold or otherwise used in that State." However, this rule on intellectual property rights is not directly comparable with the countless rules which can influence the conformity of goods to the contract. But compare this with Sono in: *Transcript of a Workshop on the Sales Convention: Leading CISG scholars discuss Contract Formation, Validity, Excuse for Hardship, Avoidance, Nachfrist, Contract Interpretation, Parol Evidence, Analogical Application, and much more.* Transcribed and edited by Harry M. Flechtner, 18 Journal of Law & Commerce (1999, pp. 191-258), p. 243.
66. This is the solution preferred by Schlechtriem, cf. Schlechtriem in: *Transcript of a Workshop on the Sales Convention: Leading CISG scholars discuss Contract Formation, Validity, Excuse for Hardship, Avoidance, Nachfrist, Contract Interpretation, Parol Evidence, Analogical Application, and much more.* Transcribed and edited by Harry M. Flechtner, *op. cit.*, p. 248.
67. Compare the discussion on misleading statements in connection with the packaging of goods in cardboard or plastic: *Transcript of a Workshop on the Sales Convention: Leading CISG scholars discuss Contract Formation, Validity, Excuse for Hardship, Avoidance, Nachfrist, Contract Interpretation, Parol Evidence, Analogical Application, and much more.* Transcribed and edited by Harry M. Flechtner, *op. cit.*, pp. 238-250.
68. Tending to this view, see Rognlien in Bergem & Rognlien: *Kjøpsloven*, p. 469 where it is pointed out that under Norwegian law the assumption is that the most reasonable interpretation will be used. If it is not possible to find a solution on this basis, the statements are not binding, and it will be found that no binding contract will have

traditional rule of private international law which does not lead to a harmonised solution.

In the view of the present writer, the principle of the seller's sphere of influence under Article 35 should be given priority as a *lex specialis*, so that it also applies when Article 8 is applied in conjunction with Article 35. If this were not the case, the principle would be eroded, cf. the decision of the *German Federal Supreme Court* of 8th March 1995, which is discussed in detail below in Chapters 4, 5 and 6.

Nevertheless, where both parties to the contract come from legal cultures with the same approach to contract interpretation, this might lead to different results than if the rules of the convention has to be applied.[69]

3.4.2.3. Tools of interpretation, cf. Article 8(3)

Article 8(3) states what tools of interpretation should be used in applying Articles 8(1) and 8(2):

> 8(3) 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.

It follows from this that all relevant circumstances must be included,[70] so the list of examples given is not exhaustive.[71] Conversely,

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been entered into. Finally, the question of validity is decided under national law, cf. Article 4(a) of the Convention. On the distinction between interpretation of contracts and validity, see Section 3.5 below.

69. See for this, the decision from the Appellate Court Hof 'S-Hertogenbosch (Netherlands), 16th October 2002 (Unilex).
70. This principle also applies under Article 11, according to which the formation of a contract may be proved *by any means*, including witnesses.
71. Compare this with the rule in the UNIDROIT Principles, Article 4.3:
    "In applying Articles 4.1 and 4.2, regard shall be had to all the circumstances, including
    (a) preliminary negotiations between the parties;
    (b) practices which the parties have established between themselves;
    (c) the conduct of the parties subsequent to the conclusion of the contract;
    (d) the nature and purpose of the contract;
    (e) the meaning commonly given to terms and expressions in the trade concerned;
    (f) usages."
    See also PECL Article 5:102:

it is clear that the interpretation *must* include the usages and subsequent conduct of the parties etc., which, according to the prevailing view in practice and in theory, *excludes* the use of some special national rules for interpreting the content of contracts, e.g., the common law "parol evidence rule" or the like.[72] Article 8 addresses the question of what the content was of the *original* agreement of the parties. Subsequent conduct or statements can be included in assessing what the original agreement is assumed to have been, cf. Article 8(3). However, it is another matter if, by their subsequent conduct etc., the parties have *altered* the agreement. In this case Article 29 applies. However, the borderline between Article 8 and Article 29 is not always clear.[73]

As stated above, the provisions in the CISG Convention are default provisions, cf. Article 6. Sometimes the parties agree that the content of the contract, and any amendments to it, must be *in writing* in order to be valid.[74] This raises the question of whether a condition that the contractual terms shall be in writing excludes the application of Article 8(3).[75]

"In interpreting the contract, regard shall be had, in particular, to:

(a) the circumstances in which it was concluded, including the preliminary negotiations;
(b) the conduct of the parties, even subsequent to the conclusion of the contract;
(c) the nature and purpose of the contract;
(d) the interpretation which has already been given to similar clauses by the parties and the practices they have established between themselves;
(e) the meaning commonly given to terms and expressions in the branch of activity concerned and the interpretation similar clauses may already have received;
(f) usages; and
(g) good faith and fair dealing."

72. Cf. Lookofsky: *CISG Scandinavia*, pp. 46-47, at note 207; Dalhuisen: *International Sale*, p. 286; and for an interesting analysis of this in relationship to English common law and contract interpretation, see: Gerard McMeel: *Op.cit.*, p. 273 et seq, and Adam Kramer: *Op.cit.*, p. 173 *et seq.*
73. This can be seen from the problem in the Elevenh Annual Willem C. Vis Commercial Arbitration Moot, which involved problems of non-conformity, contract interpretation and Article 35.
74. A so-called "merger clause."
75. See, for example, the UNIDROIT Principles, Article 2.17:

    "A contract in writing which contains a clause indicating that the writing completely embodies the terms on which the parties have agreed cannot be contradicted or supplemented by evidence of prior statements or agreements. However, such statements or agreements may be used to interpret the writing."

In the view of Ramberg[76] this question cannot be answered unambiguously, but must be answered on the basis of an interpretation of the actual case, involving consideration of what experience and usage the parties have normally had with the written form of contract. Thus, if it were usual for the parties to include conditions which exclude the use of methods of interpretation other than written materials, it would be natural to construe this as meaning that the parties do not want to use the complimentary criteria in Article 8(3). On the other hand, a condition that the terms shall be in writing in a contract between parties from countries where such procedural rules do not apply, would not carry an assumption that the application of Article 8(3) should be excluded.[77]

As discussed above, the practice established between the parties will be included in the interpretation of an agreement between them. The interpretation of an agreement must otherwise start from the accepted principles of contractual interpretation. These principles are virtually identical in most legal systems. The starting point must be the natural and customary meaning of the words and terms used in the agreement, and there should be consideration of the context of the individual conditions and of the systematic structure of the contract. This is in line with the internationally recognised principles.[78]

See also PECL Article 2:105:

"(1) If a written contract contains an individually negotiated clause stating that the writing embodies all the terms of the contract (a merger clause), any prior statements, undertakings or agreements which are not embodied in the writing do not form part of the contract.

(2) If the merger clause is not individually negotiated it will only establish a presumption that the parties intended that their prior statements, undertakings or agreements were not to form part of the contract. This rule may not be excluded or restricted.

(3) The parties' prior statements may be used to interpret the contract. This rule may not be excluded or restricted except by an individually negotiated clause.

(4) A party may by its statements or conduct be precluded from asserting a merger clause to the extent that the other party has reasonably relied on them."

76. Cf. Ramberg in Ramberg & Herre: *Internationella köplagen*, p. 117; and in agreement with this, Lookofsky: *CISG Scandinavia*, p. 174, at note 43.

77. Cf. Ramberg in Ramberg & Herre: *Op. Cit.*, p. 118; Avery Wiener Katz: *Op.cit.*, p. 506-512, primarily in relation to American law of contracts; but compare this with Dalhuisen: *International Sale*, p. 286, with reference to Article 6.

78. Cf. Madsen: *Aftaler og mellemmænd*, p. 372 *et seq.* See also the UNIDROIT Principles, Article 4.4: "Terms and expressions shall be interpreted in the light of the whole contract or statement in which they appear."

The starting point for understanding the meaning of words and terms is the way in which they are understood in the trade or industry concerned.[79] If one of the parties is not familiar with the branch of activity concerned, the customary use of language of the trade or industry will be used, if that party either knew or ought to have known about it.[80] Considering that in both Article 8 and Article 35 the Convention puts emphasis on whether a party *knew or could not have been unaware of* given circumstances, there is a question whether the standard used in some domestic laws, e.g. in Danish domestic contract law, that a party "ought to have known of", which is in practice a stricter obligation, must give way for the standard in the Convention. However, the most usual situation will be that the parties will by bound by the customary meaning in the trade or industry concerned.[81]

If the parties usually use different languages, a party who agrees to negotiate in a language other than his own must understand that it is the meanings of the language of negotiation which will apply. If the party is in doubt, he must either ask or seek expert advice.[82]

See the decision of the *Danish Maritime and Commercial Court* of 31st January 2002,[83] which concerned an agreement for the sale of mackerel. After oral negotiations, the seller sent written specifications in German to the buyer, using the German term "*Bastardmakrele*" and giving the Latin name for the fish. The buyer then placed an order. A subsequent order confirmation did not refer to the Latin name, but merely used the English term "mackerel". The buyer complained about the quality of the goods, cf. Article 35, since the term "mackerel" which appeared on the order confirmation referred to ordinary mackerel for human consumption, whereas the term "*Bastardmakrele*" and the corresponding Latin term referred to fish which are of lower quality and which are customarily used for animal feed.

It was argued that it was customary in the trade to use the Latin name for different kinds of fish, and as such a procedure had been used in the earlier

79. Cf. Ramberg in Ramberg & Herre: *Internationella köplagen*, p. 323, pt. 2. See also PECL Article 5:102(e): "the meaning commonly given to terms and expressions in the branch of activity concerned and the interpretation similar clauses may already have received."
80. Cf. Madsen: *Aftaler og mellemmænd*, p. 373 and p. 410.
81. Cf. Junge in Schlechtriem: *Kommentar*, p. 142 *et seq.*, pt. 5.
82. Cf. Junge in Schlechtriem: *Kommentar*, p. 142 *et seq.*, pt. 4a.
83. See CISG Denmark, Unilex and the Pace Databases. On the Pace Database there is a case note by Joseph Lookofsky on the link between Articles 8, 9 and 35(1), see http://cisgw3.law.pace. edu/cases/020131d1.html.

contract between the parties, the kind of fish specified should be determined on the basis of the specification given by the seller, which the buyer was aware of and had not protested against. The content of the subsequent documents did not allow of any different interpretation.

This means that the buyer had a duty to take care, as was the custom in the trade concerned.[84] However parties to a contract cannot be subject to the same obligation if non-customary language or unusual terminology is used.[85]

Established practice for contracts in a given area and accepted usage will normally be applied when assessing the content of a contract.[86] For example, this applies to some extent to the Nordic Standard terms and conditions of sale (NL 92, NLM 94, NLT 95, NLS 95 and NLG 95). Even though these are not strictly "agreed documents" they are close to being accepted as such and could be accepted as established practice or usage in some branches of trade or industry.[87]

NL 92 and NLM 94 contain provisions on contracts which deviate from the Nordic laws on sale of goods, since product information and price lists are only binding if they are *expressly* referred to in the agreement (NL 92 and NLM 94, pt.3), cf. below in connection with the so-called marketing liability.[88] Therefore, if NL 92 or NLM 94 are used by the parties, Article 8 of the Convention could be said to be derogated from by established practice or usage so that emphasis will not be put on product information and price lists when assessing the conformity of goods to the contract, cf. Article 35, unless they are expressly referred to in the contract.

84. Cf. Junge in Schlechtriem: *Kommentar*, p. 142, pt. 4a. However, according to Junge, this does not mean that a standard of negligence has been established.
85. Cf. Junge in Schlechtriem: Kommentar, p. 142, pt. 4 a. If there is an open or a latent disagreement then, according to Junge, the problem should be solved under the provisions of CISG Article 19. German national law (BGB §§ 154 and 155) cannot be used since the solution must be found within the Convention, and since it is not possible to construct a hypothetical intention. However, this only applies if Junge's argument that Article 8 does not govern hypothetical intentions is accepted.
86. Cf. Madsen: *Aftaler og mellemmænd*, p. 374.
87. However, compare with Lookofsky: *CISG Scandinavia*, p. 173, note 33. The Nordic standard terms tend to give more protection to the seller.
88. However, it is doubtful whether the adoption of NL 92 or NLM 94 will, in themselves, imply a derogation from § 18 of the Nordic laws on sale of goods, cf. Kolrud et al: *Kommentar til NLM 94*, p. 43 et seq.

Similar comments can apply to Orgalime S 2000 which, in Section 2, contains a provision corresponding to NLM 94 and NL 92, pt. 3, and to ECE 188 (General Conditions for the Supply for Plant and Machinery for Export, Economic Commission for Europe), Section 3.1, though this is a little narrower than the provisions in NLM 94, NL 92 and Orgalime S 2000.[89]

Besides this, the provisions on lack of conformity with the contract in the standard terms referred to here are so broad that Article 35 will effectively govern the assessment of lack of conformity if those terms are applicable,[90] subject to the reservations given.

For a decision of a court which expressly admits evidence from a brochure and an article in a periodical in assessing conformity of goods to the contract, see the decision of the *Austrian Supreme Court* of 11th March 1999, discussed in Chapter 7 below. Furthermore, in many cases, Incoterms (the official rules of the International Chamber of Commerce for the interpretation of trade terms) can be an expression of established practice and usage for international contracts, and thus be applicable, cf. Articles 8 or 9.[91] Usually the practice of the parties themselves will be taken into account, above the customs of the trade, since the practice of the parties is a more direct expression of their intentions, cf. Article 6.[92] The professional status of the parties and their negotiating status are also relevant, as is the purpose of the contract.[93] This follows from Article 35(2)(b), cf. Chapter 6, which pays attention to whether the buyer relied on, or whether it was unreasonable for him to rely on, the seller's skill and judgement.[94] Previous business connections between the parties can be relevant, cf. Article 8(3) and Article 9(1). See the decision of the *Danish Maritime and Commercial Court* of 31st January 2002, referred to above, where the parties had previously used the Latin names for specifying the goods concerned.

89. Cf. Hopmans et al.: *Guide to Orgalime S 2000*, p. 32.
90. Cf. Lookofsky: *CISG Scandinavia*, p. 167, note 2.
91. Cf. Junge in Schlechtriem: *Kommentar*, p. 144, pt. 8, with reference to both ECE 188 and Incoterms. However, the less the rules have the character of agreed documents, the weaker is the argument, cf. Junge *Op. Cit.*, p. 144, pt. 8a.
92. Cf. Junge: *Op. Cit.*, p. 143, pt. 6.
93. Cf. Madsen: *Op. Cit.*, p. 75 and p. 404 *et seq.* (on standards of interpretation).
94. Compare with Junge: *Op. Cit.*, p. 143, pt. 7.

As for advertisements and other marketing materials, under Danish and Nordic laws there is no doubt that such materials are relevant, though refer also to NL 92, NLM 94, Orgalime S 2000, and ECE 188.[95] Ramberg is of the view that such materials must be admissible since Article 8(3) does not restrict the materials which can be taken into account in interpretation, cf. the wording "all relevant circumstances of the case".[96] This view seems right. However, since the CISG only concerns agreements between sellers and buyers, cf. Article 4, the assumption must be that materials which do not originate from the seller cannot be included, unless the seller knew or could not have been unaware that the buyer took such material into account in his understanding of the contract. Thus, there cannot be a "marketing liability" as it exists in § 18 of the Nordic sale of goods law.[97]

If the parties have drafted a comprehensive written contract, the assumption will be that previous reservations or conditions which are not referred to in the contract will not apply.[98]

3.4.2.4. Principles of interpretation – legal presumptions – rules on the evidential burden

Article 8 lays down the basic principles on the interpretation of the agreement between the parties, though not exhaustively. National contract law also uses a number of rules of interpretation which, in the case of Danish law, have been developed in the practice of the courts and in legal doctrines, and which are regarded as being an expression of *naturalia negotii*.[99] The question is, how far these principles can be said to be a part of Article 8.

Where the rules of interpretation can be said to be a *construction*

95. Cf. Madsen: *Op. Cit.*, p. 378.
96. Cf. Ramberg in Ramberg & Herre: *Op. Cit.*, p. 232, pt. 2.
97. Cf. Hagstrøm: *Op. cit.*, p. 565; and Lookofsky: *CISG Scandinavia*, p. 82.
98. Cf. Madsen: *Op. cit.*, p. 380. However, compare Junge: *Op. cit.*, p. 143, pt. 6. If there is a contradiction between the content of the contract and the previous statements and conduct of the parties (their practice), the actual circumstances may be given higher priority than the wording of the contract, cf. the principle of *protestatio facto contrario non valet*, cf. also the principle of good faith in international trade, Article 7(1).
99. Cf. Madsen: *Op. cit.*, pp. 358-359. There is also a *contra proferentum* rule in § 38b of the Contracts Act, though it only applies to consumer agreements, and only to terms or conditions which have not been the subject of individual negotiation, cf. Madsen: *Op. cit.*, p. 391 *et seq.*

of the contract,[100] then according to the argument referred to above, they will be regarded as falling outside the scope of Article 8.[101] However, there does not seem to be any basis in national law for even a vague distinction to be drawn between interpretation and construction, so as to exclude the use of principles which would appear to fall within the scope of Article 8 or other provisions of the Convention.

Rules of interpretation which are rules of construction are effectively legal presumptions leading to a specific outcome, and if one of the parties argues for a different outcome, then that party must overturn the presumption. This shows that rules of interpretation are also an expression of *rules of evidence*.[102] It is a natural extension of this to state the principle that if an agreement is unclear, so there are two or more possible interpretations, then the party who has had the better opportunity and the greater incentive to secure evidence to support his view will have the evidential burden of showing that his interpretation is the right one. This will particularly be so if the other party argues in favour of an interpretation which is more in line with customary interpretations.[103] This suggests what is in effect a normative assessment of conduct, which recognises the requirements of ordinary expectations, the harmony of the legal system, and procedural practicability.[104] From here it is a short step to laying down what are effectively norms of culpability for the parties, in relation to business obligations.[105] This can be seen, particularly in German practice and theory on Article 35, cf. Chapters 4-9 below, since here norms of culpability and negligence are applied.

Those who argue that the CISG is *not* concerned with the evidential burden must confront the fact that Article 35 lays down a number of presumptions for the requirements which the goods must satisfy if they are to conform to the contract. This effectively means that rules on the burden of proof are also laid down, since a person who claims a different outcome than that provided by the legal presumptions

100. Cf. Madsen: *Op. cit.*, pp. 359-360, at note 9: "The so-called rules of interpretation (the clarification rule, minimum rule etc.) ... are, properly speaking, rules of construction."
101. Cf. also Najork: *Treu und Glauben*, p. 50.
102. Cf. Madsen: *Op. cit.*, pp. 361-364.
103. Cf. Madsen: *Op. cit.*, p 369.
104. Cf. Madsen: *Op. cit.*, p 370.
105. Cf. Madsen: *Op. cit.*, p 370, note 26.

must show evidence to justify their argument. This rule of evidence is considered by some to be one of the general principles of the Convention, cf. Article 7(2), cf. also the principle in Article 79(1), for example. From this it follows that it is the buyer who must show that the goods do not conform to the contract.[106] It can also be relevant whether the buyer has himself contributed to the goods not conforming to the contract, for example because of poor maintenance, carelessness etc.

On the other hand, the more detailed rules of evidence, for example the degree of certainty required in order for the burden of proof to be satisfied, the rules on matters of proof or matters of judgement etc., must be assumed to fall outside the scope of the Convention, at least where this does not involve significant changes to the Convention provisions.[107]

Here there is a brief review of the general rules of interpretation which apply in many – if not most – domestic contract laws.[108] At the same time, in the view of some writers, these rules are also probably a part of the Convention, cf. Article 8 or other provisions. It seems that the following principles will generally be applied by most courts in cases dealing with the lack of conformity of goods to the contract under the CISG, cf. also the solutions in the UNIDROIT Principles and PECL.

3.4.2.4.1. Quod minimum est, redigenda summa est

This rule, which also is referred to as the "minimum rule", means that where there is doubt, a promise will be interpreted in a way

106. Cf. Ferrari in Schlechtriem: *Kommentar*, p. 135, pt. 56; Franco Ferrari: *Burden of proof under the CISG* in: Review of the Convention on Contracts for the International Sale of Goods, 2000-2001, pp. 1-8 (London 2002); Antweiler: *Beweislastverteilung*, p. 152 et seq.; Reimers-Zocher: *Beweislastfragen*, p. 128 *et seq.*; Achilles: *Kommentar*, p. 31; Veneziano: *Non Conformity*, p. 48. The same principle applies in Danish national law, cf. Lookofsky: *Køb*, p. 64, according to which the buyer bears the evidential burden under the general principles of the law of obligations. Compare this with Rognlien in Bergem & Rognlien: *Kjøpsloven*, p. 462: "The question of the burden of proof and the evidential burden which has a significance on the substantive law, however, does not immediately fall outside the scope of the Convention."
107. This is in line the German Supreme Court's decision of 9th January 2002, see Unilex and Pace databases.
108. Cf. Erwin Scön: *Allgemines Vertragsrecht und Kaufvertragsrecht – ein Rechtsvergleich Österreich. USA, Spanien und UN-Kaufrecht* (Frankfurt am Main, 2003), p. 211 *et seq.*

which is least onerous for the person giving the promise. The rule can be considered as a rule on the burden of proof, since a party who claims to have a right under an agreement must prove it.[109] However, in contracts where the burden falls equally on each party, as against one-sided agreements such as the giving of gifts, this rule has limited application.[110]

This rule has not been referred to in connection with Article 8 or in cases on the conformity of goods with the contract, cf. Article 35,[111] but it is connected with the general principle of *quid pro quo*, i.e., mutuality and equivalence, and is thus part of interpretation on the basis of reasonableness, cf. in more detail below.[112] If there is ambiguity in a contract, it is construed against the person making the statement, cf. below, and this can be seen as an expression of the principle that the other party's undertaking shall be interpreted in a way, which is least onerous for them.

3.4.2.4.2. Contra proferentum/in dubio contra stipulatorem

This rule, which is also known as the ambiguity rule or the draftsman rule,[113] is regarded by Lookofsky,[114] Junge,[115] Honnold,[116] and Hyland,[117] as a rule which is probably applicable under Article 8, since it is in line with the letter and the spirit of the article.[118] The rule's primary application is in one-sided contracts where there are two or more conflicting possible interpretations. Here, the interpretation

109. Cf. Madsen: *Op. cit.*, p 383 *et seq.*
110. Cf. Madsen: *Op. cit.*, p 384.
111. National provisions which deprive certain contractual conditions of validity or effect, and which are known to or ought to have been known to the person to whom such conditions apply, are not covered by Article 8, since this is not a matter of contractual interpretation but of contractual validity, cf. Honnold: *Uniform Law*, p. 119. As for Nordic contract law, see Article 36 of the Danish (and other Nordic) Contracts Act, which can deprive certain conditions of their effect, in whole or in part, as discussed in the review given below.
112. On the question of interpretation on the basis of reasonableness, see Madsen: *Op. Cit.*, p. 397.
113. Cf. Madsen: *Op. cit.*, p. 385 *et seq.*
114. Cf. Lookofsky: *CISG Scandinavia*, pp 172-173.
115. Cf. Junge in Schlechtriem: *Kommentar*, p. 144, pt. 9, with reference to the AGBG and UNIDROIT Principles Articles 2.20 and 4.6.
116. Cf. Honnold: *Uniform Law*, p. 118 et seq.
117. Cf. Hyland in Schlechtriem: *Einheitliches Kaufrecht*, p. 332 *et seq.*
118. But cf. Farnsworth in Bianca & Bonell: *Commentary*, p. 99 *et seq.*

which is construed against the draftsman of the provision and in favour of the other party must be chosen. The rule is seen as an instance of a rule on the evidential burden, since it will be to the disadvantage of the party who has failed to secure evidence for his interpretation of the ambiguous text when that party has himself drafted the contract or has been better placed to clarify the point.[119] This rule enjoys international acceptance, cf. UNIDROIT Principles, Article 4.6,[120] and PECL, Article 5:103.[121]

A derived principle is that ambiguity in a contract will sometimes be interpreted against an expert, as an expert's superior experience or professional knowledge carries with it an obligation to ensure the clarity of the contract.[122] Compare this with Article 35(2)(b), discussed in Chapter 6.

3.4.2.4.3. Favor contractus

One of the general principles of the Convention, cf. Article 7(2), is that, as far as possible, an attempt should be made to uphold a binding agreement, where a choice lies between possible interpretations which would either lead to upholding the agreement or voiding it.[123]

The principle in favour of the validity of contracts, or *favor contractus*, applies for example to "battle of forms" conflicts, where, if an agreement is fully or partially satisfied, every effort should be made to apply an interpretation which does not deprive the contract of its binding effect.[124] This also seems to be recognized by the Ger-

119. Cf. Madsen: *Op. cit.*, p. 387.

120. "If contract terms supplied by one party are unclear, an interpretation against that party is preferred." This rule has been applied by a national court, cf. the decision of the *Grenoble Court of Appeal* of 24th January 1996, on the interpretation of two different conditions for exemption from liability. The court chose to apply the term which was least disadvantageous to the other party and referred to UNIDROIT Article 4.6. The case is reported on the Unilex website, and there is a commentary on it by Fabian Burkart: *Interpretatives Zusammenwirken von CISG und UNDROIT Principles* (Basel, 2000), p. 76. However, Burkart does not otherwise discuss the provisions in relation to the interpretation of contracts.

121. "Where there is doubt about the meaning of a contract term not individually negotiated, an interpretation of the term against the party who supplied it is to be preferred."

122. Cf. Madsen: *Op. cit.*, p. 386.

123. Cf. Achilles: *Kommentar*, pp. 30-31; Rognlien in Bergem & Rognlien: *Kjøpsloven*, p. 451. See Madsen: *Op. cit.*, p. 395, with reference to this rule in Danish law.

124. Cf. Madsen: *Op. cit.*, p. 395.

man Supreme Court in its decision of 9.th January 2002, see above section 3.4.2.

According to the UNIDROIT Principles, Article 4.5, the terms of a contract must be interpreted so that they are all given effect, rather than depriving any of them of effect.[125] There are similar provisions under PECL, Article 5:106.[126]

The principle of *favor contractus* can also support the argument that a party ought not to object to the validity of a contract if he can get satisfaction via the rules on non-performance of the contract, cf. Section 3.5 below on validity and the principle of exhaustion of rights.

3.4.2.4.4. Rules of priority

If there is a conflict between particular terms or parts of a contract, the rules of priority attempt to establish a presumptive ranking of the terms of the contract.[127]

Thus, corrections and additions usually take priority over other parts of the text, just as more recent documents take priority over older documents.[128] Printed conditions must give way to hand-written conditions.[129] The main provisions take priority over other provisions, while special provisions take priority over other provisions, including main provisions.[130]

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125. "Contract terms shall be interpreted so as to give effect to all the terms rather than to deprive some of them of effect."
126. "An interpretation which renders the terms of the contract lawful, or effective, is to be preferred to one which would not."
127. Cf. Madsen: *Op. cit.*, p. 393.
128. Cf. Madsen: *Op. cit.*, p. 393.
129. Cf. Madsen: *Op. cit.*, p. 339.
130. Cf. Madsen: *Op. cit.*, p. 394. Compare this with the following extract from the Commentary to the UNIDROIT Principles, Article 4.4, p. 85: "In principle there is no hierarchy among contract terms, in the sense that their respective importance for the interpretation of the remaining part of the contract is the same regardless of the order in which they appear. There are, how-ever, exceptions to this rule. First, declarations of intent made in the preamble may or may not be of the relevance for the interpretation of the operative provisions of the contract. Secondly, it goes without saying that, in cases of conflict, provisions of a specific character prevail over provisions laying down more general rules." Also compare this with PECL Article 5.105: "Terms are to be interpreted in the light of the whole contract in which they appear."

Conditions which have been individually negotiated usually take priority over standard terms which have not been negotiated.[131]

In general headings are not assumed to have priority over the body text of an agreement, while recitals in the preamble and statements of purpose have priority over other detailed provisions, unless these are considered as exceptions to or adding detail to headings or recitals in the preamble.[132]

> An example of this is the decision of the *Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce* of 22nd January 1996.[133] An agreement was entered into between a German seller and a Russian buyer for the sale of 300 tons of butter, or that at least was the impression of the buyer. In the preliminaries to the contract the butter had been described as "table butter – 82% fat", and in the seller's invoice as "animal fat butter." However, as the seller could not get hold of Belgian butter, he wrote to the buyer saying that he would supply "absolutely equivalent English butter". In an accompanying specification, the goods were stated to be "Para sub butter, 80% fat content, 05-07 salt content." The buyer then accepted this offer. It appeared that "Pura sub butter, 80%" was in fact margarine and it could not, therefore, be sold as butter. It was argued that, as the content of the goods had been specified, the buyer should have objected if he did not want the goods specified.

This award is relevant in relation to Article 36(1), and is also discussed in connection with Article 35(3), see chapter 9 below.

3.4.2.4.5. The test of reasonableness

The test of reasonableness is seen in discussions about *customary and reasonable results* and *reciprocity* and *equivalence* in the consideration given by each of the parties, cf. also the principle of *quid pro quo.*[134] It is questionable how much of a test of reasonableness there is in Article 8, though it does refer to the standard of the understanding of a reasonable person, which is also seen as a basic principle of the Convention, and does give some guidance to interpretation.[135] The

131. Cf. PECL Article 5:104: "Terms which have been individually negotiated take preference over those which are not."
132. Cf. Madsen: *Op. cit.*, pp. 394-395, as well as Commentary to the UNIDROIT Principles, Article 4.4.
133. See the Unilex and Pace Databases.
134. Cf. Madsen: *Op. Cit.*, p. 396 *et seq.*
135. Cf. Najork: *Treu und Glauben*, p. 48 *et seq.*

decision of the *Oldenburg District Court* of 28th February 1996, referred to above, on the sale of three truckloads of eggs, can also be seen as an expression of such a test of reasonableness. The test of reasonableness is also associated with the requirement for good faith, which follows from the contractual *naturalia negotii*, cf. Section 3.5.2.2.4 below.[136] In the UNIDROIT Principles the requirement of reasonableness can be seen in, among other things, Article 1.7 (good faith and fair dealing in international trade ...), Article 1.8 (not bound by unreasonable usages ...), Article 4.1 (contract shall be interpreted according to the meaning that reasonable persons ...), Article 4.8(d) (reasonableness ...) and Article 5.2(d) (reasonableness ...).[137] To a certain extent, the requirement for reasonableness follows from the requirement for good faith in international trade, stated in Article 7(1) of the Convention.[138]

3.4.2.4.6. The assumptions of the parties

Lack of conformity of goods to the contract, and Article 35, are naturally linked to the assumptions made by the parties. For example,

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136. Cf. also morality and contract in: Daniel Markovits: *Contract and Collaboration* (The Yale Law Journal [Vol. 113:1417 2004] p. 1417 et seq. For a critical view the role of reasonableness in (common law) contract law, see: Cathrine Mitchell: *Leading a Life of its Own? The Roles of Reasonable Expectation in Contract Law* (Oxford Journal of Legal Studies, Vol. 23, No. 4 (2003), pp. 630 *et seq.*
137. It is interesting to look at Article 5.2(d) in relation to Article 35. Article 5.2, which should be construed with Article 5.1 ("The contractual obligations of the parties may be express or implied."), is as follows:
    "Implied obligations stem from
    (a) the nature and purpose of the contract
    (b) practices established between the parties
    (c) good faith and fair dealing
    (d) reasonableness."
    In the Commentary on Article 5.2, p. 102, an illustration is given of the application of Article 5.2.(b): "A rents a full computer network to B and installs it. The contract says nothing as to A's possible obligation to give B at least some basic information concerning the operation of the system. This may however be considered to be an implied obligation since it is obvious, and necessary for the accomplishment of the purpose of such a contract, that the provider of sophisticated goods should supply the other party with a minimum of information." However, this can also be seen as being a consequence of Article 5.2.(d). This can be compared with the seller's obligation to provide such information, cf. CISG Article 35, as discussed in Chapters 4, 5 and 8.
138. But cf. Najork: *Ibid.*

Article 35(2)(a) provides that the buyer can justifiably expect, or assume, that the goods are fit for the purposes for which goods of the same description would ordinarily be used.[139] If the seller knew of, or could not have been unaware of, the buyer's particular purpose, then the assumption is that the goods should live up to these requirements, cf. Article 35(2)(b). Apart from these assumptions which are, in this respect, also part of the *interpretation of purposes*,[140] the use of assumptions in connection with the doctrine of validity can be thought of as competing with the rules on lack of conformity, cf. Section 3.5. The role of assumptions can be a suitable model for thinking about lack of conformity of goods to the contract, but it does not have any independent significance in relation to Article 35, since the assessment of conformity of goods must be made on the basis of the rules set out in Article 8 and 9 of the Convention.

3.4.2.4.7. The requirement for good faith

The requirement for good faith is well known as a contractual *naturalia negotii* and the basic principle of *bona fides*.[141] It involves an obligation for each of the parties to have reasonable consideration for the interests of the other party.[142]

This can be seen, for example, in the seller's obligations to give fair information about the character and quality of the goods, to make the other party aware of any especially onerous conditions in a standard contract, and to avoid or to clarify misunderstandings.[143]

It is also possible to derive a rule on the abuse of rights from the requirement for good faith, since to some extent it means that one party is not bound by his undertakings if the other party shows malice or abuse of rights.[144] In legal practice and in theory about the CISG, this rule is seen as an expression of the principle of *venire contra factum proprium* (a party cannot contradict his own previous conduct), in other words, there is a prohibition against the exercise

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139. See Madsen: *Op. Cit.*, p. 418 *et seq.*, especially at p. 422.
140. Cf. Madsen: *Ibid.*
141. See the requirement for good faith in international trade, in Article 7(1).
142. Cf. Madsen: *Op. Cit.*, p. 424 *et seq.*
143. Cf. Madsen: *Op. Cit.*, p. 425.
144. See UfR 1981.300 H, cf. Madsen: *Op. Cit.*, p. 427. On abuse of law see also Jens Ewald: *Retsmisbrug i formueretten* (Copenhagen, 2001).

of a right which is contrary to the party's knowledge about certain actual circumstances, cf. below chapter 9 on Article 35(3) in relation to Article 35(1) and the buyer's knowledge of defects. The duty to act in good faith also implies a duty to co-operate.[145]

3.4.2.5. The formation, interpretation and validity of the contract – the competing rules

As stated at the start of this chapter, the boundaries between *formation* of the contract, *interpretation* of the contract, and *validity* of the contract are rather fluid. Thus the rules on formation and interpretation largely follow the rules on validity, especially the rules as to misleading statements.[146] The relation between the rules will be illustrated below with reference to the rules on invalid contracts under the Nordic Contracts Act.

If a statement has an appearance which is both known and intended, but where the person making the statement is mistaken about some words or expressions etc., the case will be covered by § 32.1 of the Contracts Act. If the person to whom the statement is made has either recognised or ought to have recognised that the person making the statement was mistaken, for example if the statement is unclear or ambiguous, then this will be covered by the requirement for good faith in § 32, and the contract will be invalid. From here there is gradual transition to other cases of lack of clarity, which do not fall within the scope of § 32, but fall within the scope of the rules on interpretation.[147]

From this, it is possible to derive a general duty to clarify what the other party intended, cf. the principle of fair business conduct and good faith.[148] To a large extent this also relevant to the assessment of cases under § 36 of the Contracts Act.

It is therefore clear that it is not always possible to distinguish between matters which concern the formation, interpretation or validity of contracts. As stated, this can be relevant to the application

145. Compare this with UNIDROIT Principles, Article 5.3: "Each party shall co-operate with the other party when such co-operation may reasonably be expected for the performance of that party's obligations."
146. Cf. Madsen: *Op. Cit.*, p. 398 *et seq.*
147. Cf. Madsen: *Ibid.*
148. Cf. Madsen: *Ibid.*

of the Convention, since a given case may be covered by more than one competing sets of rules, both under the Convention and outside the Convention. As for the competition between the rules on the formation and the interpretation of contracts, the reader is referred to the discussion in Section 3.3 above. On the competition between the rules on the validity of contracts and the rules of interpretation, the reader is referred to Section 3.5 below.[149]

3.4.3. The significance of the usage and practice of the parties, cf. Article 9

3.4.3.1. Introduction and Article 9(1)

Article 9 is relevant to establishing the content of the agreement, since it lays down the significance of the usage and practice established between the parties:[150]

> 9(1) The parties are bound by any usage to which they have agreed and by any practices which they have established between themselves.
>
> 9(2) 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.

The rule in Article 9(1) states that the legal effect of the practice established between the parties is that it is binding in respect of the terms of the contract. This is already the consequence of the provisions in Article 8(3), cf. Articles 8(1) and 8(2), and it means that the parties do not need a written contract in order to justify a claim, since previous practice can be binding for the purposes of determining the content of the contract. Also, a written contract will be interpreted, or constructed, on the basis of previous practice. Where there is divergence between previous practice and the current contract, this

149. The problems relating to the competition between the rules on the validity of contracts and the rules of interpretation are sometimes the same, for example, on the question of the application of § 36 of the Contracts Act. The question of formation of contract and validity will not be considered in more detail here.

150. The term "usage" also covers the concept of "custom", cf. Gomard & Rechnagel: *Internationale Købelov*, p. 53, at. note 1. Cf. also Madsen: *Op. Cit.*, p 435, where the two terms are used synonymously.

should be clarified on the basis of contractual interpretation, cf. the discussion of Article 8 above, and the rules of interpretation associated with it.

> See the decision of the *Grenoble Court of Appeal* of 13th September 1995, where, on the basis of the negotiations between the parties, a seller of parmesan cheese could not have been unaware that the goods should satisfy the French labelling rules, and the decision of the *Danish Maritime and Commercial Court* of 31st January 2002, where the parties had previously used Latin names to specify goods, and where this had been the custom in the trade.

The parties are bound by the usages they have adopted, which is in line with the normal interpretation of contracts. However, the usages which are covered by Article 9(1) need not be generally known and regularly adhered to, or be internationally used in the relevant trade, to be binding between the parties according to Article 9(1).[151] Their binding effect is based on the interpretation of the agreement, cf. Article 8, so there is no requirement that the usage should be *explicitly* agreed.[152] The rule in Article 9 has inspired the rule in the UNIDROIT Principles Article 1.8,[153] and PECL Article 1:105.[154] However, these latter rules allow greater scope for relying on usage, since they do not require that the parties either knew of or ought to have known of the usage. However, this is mitigated by the requirement that the

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151. Cf. Rognlien in Bergem & Rognlien: *Kjøpsloven*, p. 471
152. Compare with Rognlien: *Ibid.*; and Honnold: *Uniform Law*, p. 125: "References that are less explicit might well invoke usages if the court concludes that such was the intent of the parties, in accordance with the Convention's rules of interpretation in Article 8 ..." The difference from ULIS Article 9(1), under which the parties were bound by the usages which they had expressly or tacitly agreed, seems to be minimal, see Honnold: *Ibid.*
153. "(1) The parties are bound by any usage to which they have agreed and by any practices which they have established between themselves.
    (2) The parties are bound by a usage that is widely known to and regularly observed in international trade by parties in the particular trade concerned except where the application of such a usage would be unreasonable."
154. "(1) The parties are bound by any usage to which they have agreed and by any practice they have established between themselves.
    (2) The parties are bound by a usage which would be considered generally applicable by persons in the same situation as the parties, except where the application of such usage would be unreasonable."

usage must not be "unreasonable", though it is not clear when this will be the case.[155]

3.4.3.2. *Article 9(2)*

The usages which, according to Article 9(2), are binding are those which the parties *knew* or *ought to have known* and which are widely known in international trade and regularly observed in contracts of the same kind and in the particular trade concerned.

There will not usually be a high standard for establishing that a party knew or *ought* to have known about the usage. In relation to Article 8, it is worth noting that the standard "could not have been unaware" is not the same standard as "ought to have known", so a party will usually be regarded as having known about the usage where he deals in the particular trade where the usage applies.[156]

> An example of this is the decision of the *US District Court, S.D., New York*, of the 26th March 2002 (*St. Paul Insurance v. Neuromed medical Systems*)[157] where the ICC Incoterms were used as the basis for interpreting the transport clauses of the contract, even though they had not been expressly referred to in the contract. This was because it was generally known in the trade concerned that transport clauses should be interpreted in this way.

"Local" usage also applies, as long as both parties either knew or ought to have known about them.[158]

> See the decision of the *Austrian Supreme Court*[159] of 21st March 2000, which concerned the sale of timber from a German seller to an Austrian buyer. When the buyer complained about some defects in the timber, the seller rejected the buyer's claims by reference to the usage of the German timber trade, according to which complaints should be made within 14 days of delivery, with an exact specification of the complaint. The buyer disputed this usage, since it was not widely known in international trade, cf. Article 9. The *Austrian Supreme Court* found that a usage does not need to be internationally accepted. First, in order to be widely known and regularly observed by parties to contracts of the type

155. For a criticism of these rules and the differences between them, see Dalhuisen: *International Sales*, p. 285 *et seq.*
156. See Rognlien: *Ibid.*
157. See Unilex and Pace Databases.
158. Cf. also Gomard & Rechnagel: *International Købelov*, p. 54, note 6, with reference to an earlier edition of Honnold: *Uniform Law.*
159. See Unilex and Pace Databases.

involved in the particular trade, it is necessary for the usage to be accepted by a *majority* of those involved in that trade. Second, it may be held that a party knew or ought to have known about the usage, if that party has a place of business in the locality where the usage applies, or if the party regularly trades with parties from that locality. Since the parties had previously entered into agreements for the sale of timber, and as the seller had referred to the usage in his order confirmation, the buyer either knew of or ought to have known of the usage. As a result, the complaint was not made within the terms of the agreement, as the usage derogated from Article 39.[160]

Often, in its reasoning, a court will attach importance to whether the parties have previously traded with each other and whether the seller has referred to the usage in his order confirmation, so that Article 9(1) and Article 8 have also played an important part in the decision.

If there are different usages in the respective countries, and if it is not possible to decide, on the basis of the interpretation referred to above, which usage shall apply, then it has been suggested that the rules and usage which govern the performance of the contract should apply.[161] Thus, if there is a custom relating to the quality of the goods or their packaging etc., then the custom which applies will be that which applies where these aspects of the performance of the contract take place, i.e., typically in the seller's country, since it is usually there that the goods are packed. This is in line with the principles of the mussels case, see chapter 4.5 below.

160. Cf. the UNCITRAL Case abstract available on the Pace database: "The Supreme Court found that article 9 CISG is a provision on the applicability of a usage but not on its validity. While article 9(2) assumes that the parties wish to be bound by usages of international trade, under article 9(1) the usages the parties have agreed upon expressly or impliedly need not be international usages. In the sense of article 9(2) a usage is widely known and regularly observed when it is recognized by the majority of persons doing business in the same field. To be applicable such usages must be known or at least should have been known by the parties having their place of business in the area of the usages. The Supreme Court affirmed the findings of the court of first instance, noting that since the plaintiff in its acceptance of the order expressly stated the applicability of the "Tegernseer Gebräuche" and had delivered wood to the defendant before, the defendant must have known these usages.

The Supreme Court further stated that pursuant to article 39(1) CISG the goods are presumed to be accepted if the buyer does not give notice of a lack of conformity within a reasonable period of time, specifying the nature of the lack of conformity; this rule does not only apply in cases where the goods are deficient but also where the seller delivers goods other than those ordered by the buyer."

161. Cf. Nørager & Theilgaard: *Købeloven*, p. 33; and Gomard & Rechnagel: *International Købelov*, p. 55.

3.4.3.3. Usage's binding effect ex proprio vigore

In Danish law, usage and custom are categorised as belonging to the *facts* of a case and not as part of the *law* applicable to the case, so a court does not have a duty, ex officio, to take them into account.[162] The same applies to Article 9, since usage does not apply merely by virtue of its existence, *ex proprio vigore*. Therefore, the court has neither a duty nor a right to take usage into consideration, unless one of the parties makes a claim based on usage.[163]

For a court to take usage into account, it must be claimed by one of the parties, and evidence must be given to support its existence, if the existence, content or extent of the usage is disputed by the other party.[164] However, under Article 9(2), there is not a higher standard of proof than is required in respect of the elements referred to in Article 9(2), at least in order to regard the usage as having been impliedly made applicable to the contract.[165]

3.5. The validity of the contract

3.5.1. Introduction

As described above, in certain situations the rules on the formation, validity and interpretation of contracts compete with each other. In this section there will be a review of the competition between the rules on contractual validity and the rules on the conformity of the goods to the contract. As basis of the analysis, the Danish rules on validity is taken as an example, and the principles of international contract law, the UNIDROIT Principles and PECL will be included where relevant.

3.5.2. The connection between Articles 35 and 4 on the validity of the contract, and other areas of law which are excluded from the Convention

While Articles 1-3 of the Convention lay down which sales transactions the Convention covers, Articles 4 and 5, and in certain cir-

162. Cf. Madsen: *Op. Cit.*, p. 436.
163. Cf. Ramberg in Ramberg & Herre: *Internationelle köplagen*, p. 121, pt. 3.
164. Cf. Madsen: *Ibid.*; Ramberg: *Ibid.*; Gomard & Rechnagel: *Op. cit.*, p. 54.
165. Cf. Gomard & Rechnagel: *International Købelov*, pp. 54, at note 4.

cumstances Article 7(2), describes which areas of law are covered by the Convention.[166] Article 4 states:

> This Convention governs only the formation of the contract of sale and the rights and obligations of the seller and the buyer arising from such a contract. In particular, except as otherwise expressly provided in this Convention, it is not concerned with:
> (a) the validity of the contract or of any of its provisions or of any usage;
> (b) the effect which the contract may have on the property in the goods sold.

The main rule is thus that it is only the formation of the contract, and the rights and obligations which arise *from the contract* that are regulated by the Convention. Article 4 then lists some examples of what the CISG does not regulate. However, this list is not exhaustive, cf. the use of the words "in particular."[167] A simple conclusion from Article 4 would therefore be that the Convention does not cover non-contractual requirements, questions of validity, questions concerning the law of property[168] as well as other questions which do not concern the terms of the contract between the parties, unless otherwise expressly provided in the Convention.[169]

However, the problem is that there is no universal definition of what issues are considered to be about the validity of a contract. It is possible that a court in one country may regard a given circumstance to concern the rights of the buyer and the seller under an agreement, i.e., subject to the Convention, but not directly regulated by it, and will therefore find a solution in conformity with the general principles of the Convention, cf. Article 7(2), while a court in another country will consider the same circumstance to be a matter of the validity of the contract, and therefore not subject to the Convention. An example of such double qualification is the question of misleading

166. Cf. Ferrari in Schlechtriem: *Kommentar*, p. 92, pt. 3.
167. Cf. Ferrari: *Op. cit.*, p. 94, pt. 12; Lookofsky: *CISG Scandinavia*, p. 27, at note 78.
168. Questions relating to the law of property are not the subject of such great problems of interpretation as questions of validity, see Diedrich: *Op. Cit.*, p. 359 *et seq.*
169. Cf. Ferrari: *Op. cit.*, p. 93, pt. 8 and pt. 13, where it is pointed out that the word "expressly" should not be taken literally. See also Lookofsky: *CISG Scandinavia*, p. 27 *et seq.*

statements and the conformity of the goods to the contract.[170] Drobnig argues, in this connection, that there are four main areas which can form the basis for objections on the grounds of invalidity:[171]

1) grounds for invalidity which compete with provisions on breach of contract
2) grounds for invalidity which are based on general contract law, and which do not compete with provisions on breach of contract
3) grounds for invalidity which are based on general civil law, outside contract law
4) grounds for invalidity based on public policy or mandatory public law rules.

An attempt was made to include the first two areas in the CISG, but this had to be abandoned because of the complexity of the issues, the great differences between national laws, and because they fell outside the core area of the Convention.[172] It can be argued that these issues are so closely connected with contract law that they ought to be *explicitly* included in the CISG regime.[173] However, there is disagreement about whether they are currently covered.[174] The question is whether Convention law or national law should have primacy, or whether the two sets of rules can exist side by side, so that the party making a claim can choose.[175] The answer to this depends on whether the person asked is an adherent of the functionally adequate solution model (the dynamic interpretation with the aim of *effective-*

170. Cf. Drobnig: *Validity*, p. 637, where the following example is given: A buyer has a wrong impression about the quality of the goods. In German theory and practice, this is regarded as being covered by the CISG rules on conformity of the goods with the contract, which supersede national rules, while the Austrian rules would give the buyer the choice between making a claim under the CISG rules on non-conformity and national rules on contractual validity. This is discussed in more detail below.
171. Cf. Drobnig: *Op. Cit.* p. 637 *et seq.*
172. Cf. Drobnig: *Op. Cit.* p. 637; and Ferrari: *Op. Cit.* 00.92-93, pt. 4.
173. Cf. Drobnig: *Op. Cit.* p. 643 *et seq.*
174. Cf. Lookofsky: *CISG Scandinavia*, p. 27 *et seq.*, at note 102.
175. As has been pointed out by Lookofsky: *CISG Scandinavia*, p. 31, at note 104, there was previously a rule in ULIS Article 34 that, in cases on the lack of conformity of goods to the contract, the buyer could not rely on national rules of contractual validity. The fact that this was not included in the CISG is perhaps a sign that the authors of the Convention did not want to exclude this possibility.

ness) or of the restrictive doctrine (concerned with *legitimacy* and *sovereignty*).[176] The answer will also depend on the tradition in the legal system in question for allowing a party to use rules on contractual validity in parallel with rules on lack of conformity of the goods, cf. below on the principle of exhaustion of rights. There is a clear assumption that a party or a court applying the law should not be allowed to re-classify a fact as one which is not covered by the Convention, so as to avoid the positive provisions of the Convention. Conversely, it cannot be right that a matter which the authors of the Convention did not intend to be governed by the Convention should nevertheless be drawn into the scope of the CISG.[177]

In the following sections, there is a review of the rights arising from a contract. Then there will be consideration of individual cases of objections to validity, including a review of the practice and theory which is relevant to conformity of goods to the contract, so as to illustrate whether the dynamic doctrine or the restrictive doctrine is, or ought to be, applicable.

3.5.2.1. Claims that are not based on the sales agreement between the parties

It follows from the text "This Convention governs only the formation of the contract of sale and the rights and obligations of the seller and the buyer arising from such a contract," that the Convention is solely concerned with the legal relations between the parties to a sales agree-

176. Cf. in this respect Ferrari in Schlechtriem: *Kommentar*, p. 97, pt. 4, which does not, however, divide theory and practice into dynamic and restrictive interpretations, but into proponents and opponents of the functionally adequate solution model. At the same time, Ferrari says that in his view the functionally adequate solution model is most in accordance with an autonomous contractual interpretation, since it focuses on the actual circumstances rather than on legal formality.

177. Cf. Enderlein & Maskow: Op. cit. p. 39. See also Diedrich: Op. cit., p. 353 *et seq.*, referring to the general rules of private international law which require that, as far as possible, splitting the applicable contract law (depeçage) should be avoided; this means that the CISG's own rules should be applied as far as possible. Thus, under the rules of private international law, Article 7(2) of the Convention effectively refers back to the Convention itself. This means that great pains must be taken to ensure that the CISG does regulate the question, which is why Diedrich argues that the principle in Article 7(2) can be extended to express principles on questions of validity. Diedrich justifies this interpretation by reference to the fact that neither the wording of Article 7(2) nor the preparatory documentation prevent this. This point of view is open to question.

ment. This means that the Convention does not govern the rights of third parties to make direct claims against the parties to the agreement, or vice versa.[178] The question can arise when a buyer or a third party, for example, a person who has suffered some injury, not only wants to take action against the seller, but also against the seller's suppliers or sub-contractors, whether the claim is based on a contract or on other grounds of liability.

This was the question before of the *French Supreme Court* in the decision of 5th January 1999.[179] An American manufacturer of compressors for refrigerators sold compressors to a French sole agent, who in turn sold them to a French manufacturer of refrigerated lorries. When one of the compressors failed, the French transport company, which had bought a refrigerated lorry, sued the American manufacturer because of the defective compressor, since it had given a written manufacturer's guarantee which accompanied every compressor sold.

The lower court reasoned that, since the American manufacturer had given a written guarantee, there was a contractual relationship comparable to a sales contract between the manufacturer and the transport company, which was governed by the CISG.

The Supreme Court overturned the decision of the lower court, by reference to Articles 1 and 4, since there was no contract between the American manufacturer and the French transport company.

However, as Honnold has pointed out, one cannot be certain that the same decision would apply if the manufacturer of the defective goods had been actively involved in selling the goods to the buyer, even if he had not formally been a party to the contract.[180] So far, there have been no judicial decisions to support this argument.

If there is no contractual relationship governed by the CISG, then the issue must be decided according to the law of the country indicated by the rules of private international law, cf. the decision of the *German Federal Supreme Court* of 12th February 1998.[181]

178. Cf. Ferrari: *Op. cit.*, p. 94, pt. 10-11; Ramberg: *Op. cit.*, p. 97.

179. See the Unilex and Pace Databases.

180. Cf. Honnold: *Uniform Law*, pp. 64-66, with further references to the *Düsseldorf District Court* decision of 23rd June 1994 (Unilex and Pace Databases).

181. The case concerned the transfer of credit claims. See Unilex and Pace Databases. The case has been commented on by Peter Schlechtriem: *Uniform Sales Law in the Decisions of the Bundesgerichtshof* (http://www.cisg.law.pace.edu/cisg/biblio/schlechtriem3.html).

It does not seem that an effective dynamic interpretation of Article 4 has been applied by the courts, at least not insofar as the higher courts are concerned, but there is a hint that this could be possible in theory.

3.5.2.2. The question of validity

According to Article 4(a), the rules of the Convention do not apply to questions about the validity of a contract or of any of its provisions or usage. This is relevant in relation to Article 35 where the assessment, or elements of the assessment, of the conformity of goods to the contract include concerns about the validity of the contract.

In Danish law, the general view is that a promise is valid either when it has legal effect in accordance with its content, so the person to whom the promise is made has a right to specific performance, or when a breach of the promise means that the person making the promise must compensate the promisee for any loss resulting from the failure to fulfil the promise in accordance with its terms, i.e., to pay damages for the breach of contract (the positive fulfilment interests).[182] An invalid promise means that the promisor's liability to pay damages is limited to the expenses associated with the contract being null (the negative contractual interests). The positive fulfilment interests include loss of profits and extraordinary trading costs, i.e., the expenses incurred due to the contract not being performed in accordance with the contract.[183]

Since the Convention exhaustively governs contractual conditions between the parties, the concept of "positive fulfilment interests", as understood in Danish law, will not be significant, where the concept has a different content than the Convention's rules on compensation etc.[184] In the following discussion, the definition and systematics of Danish law will be used as the starting point for a review of the question of contractual validity, though without intending to suggest that the qualification of questions of validity should be based on national law.

182. Cf. Madsen: *Op. Cit.*, p. 110.
183. Cf. Madsen: *Op. Cit.*, pp. 110-113 and p. 125 et seq.
184. Cf. Huber in Schlechtriem: *Kommentar*, p. 480, pt. 57. Compare this with the discussion in Chapter 2 on contractual and non-contractual compensation.

3.5.2.2.1. Fraud, unjust enrichment, contracts for immoral purposes and pro forma contracts

Under § 42.1 and § 43.2 of the Danish Sale of Goods Act, a buyer is entitled to revoke a contract if a seller acts fraudulently.[185] At the same time, the buyer has the right to have the agreement set aside on the grounds that it is invalid if the fraud has been committed in connection with the formation of the contract and the fraud was material to the formation of the contract.[186] Fraud is dealt with in § 30 of the Danish Contracts Act and it includes express statements, as well as omissions and silent deception.[187]

A buyer who has entered into a disadvantageous contract will be better off by claiming that the contract is invalid rather than by revoking it, if the buyer is unable to revoke the contract, for example, because he has not made a claim within the period allowed,[188] or because the defect of the goods is not significant. In other cases it will be best to claim revocation of the contract, for example, in cases where there is a guaranteed minimum turnover or suchlike.[189]

A seller will also be able to take advantage of the provisions on invalidity if he is unable to have the contract voided, if the goods have been delivered to the buyer, cf. § 28.2 of the Sale of Goods Act, so it can be an advantage for the seller to claim that the contract is invalid.[190]

When a sales agreement is covered by the CISG, the seller is not prevented from avoiding the contract after the goods have been delivered to the buyer, cf. Article 84(2)(a), so the seller does not have the same interest in claiming that there has been fraud, in order to claim restitution of the goods.[191]

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185. Compare this with Nordic sale of goods law, where the independent right to revoke a contract on the ground of fraud has now been repealed: Kihlman: *Fel*, p. 369 *et seq.*
186. Cf. Madsen: *Op. Cit.*, p. 113 together with p. 115 et seq. This applies equally to cases where the seller has behaved in a manner which borders on the fraudulent, cf. Madsen: *Ibid.*, note 7.
187. In respect of fraud, see Madsen: *Op. Cit.*, p. 153 *et seq.*
188. Under § 54 of the Sales of Goods Act, this also applies in addition to the 2 year period of notice, cf. below in the discussion of the principle of the exhaustion of rights.
189. Cf. Madsen: *Op. Cit.*, p 113.
190. Cf. Madsen: *Op. Cit.*, p 114 (note that here 'seller' has been mistakenly changed with 'buyer') with reference to NDS 1985.112 SvH (NJA 1985.178).
191. Cf. Gomard & Rechnagel: *Op. cit.*, p. 182 and p. 230.

If the seller has fraudulently given the buyer misleading or incorrect information about the characteristics of the goods or of other matters in an international sale which is regulated by the CISG, it is agreed, both in practice[192] and in theory,[193] that the case should be decided according to national rules on the validity of contracts. This is also the solution provided for in the UNIDROIT Principles, Article 3.8.[194]

However, this requires the buyer to claim that there are fraudulent circumstances, and this can be futile if the goods have already been sold on.

> In this connection, see the decision of the *Cologne Provincial Court of Appeal* of 21st May 1996, in a case which concerned the sale of a car from an Italian seller to a German buyer. The court reasoned that the seller knew, without doubt, that the car was older and had a higher mileage than appeared in the written contract, and that he had therefore acted fraudulently. The buyer had sold the car on, and therefore claimed compensation from the seller, corresponding to the amount of compensation which the buyer had had to pay to his customer, cf. Article 35 and Article 74.
>
> The seller claimed a defence under Article 35(3), on the basis that the buyer knew or could not have been unaware of the lack of conformity.
>
> The court decided in favour of the buyer, and rejected the applicability of Article 35(3), since even a grossly negligent buyer is more entitled to protection than a fraudulent seller. This part of the judgment is considered in more detail in Chapter 9.

It is well recognised, that there is a gradual transition from direct fraud to giving information or failing to give information which may influence the buyer's evaluation of the goods.[195] An example of this is the seller's imaginative commendation of the goods or his failure

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192. Cf. The *Hamburg Provincial Court of Appeal* decision of 5th October 1998 (on the question of the invalidity of an agreement for a price reduction, because of fraud), see Unilex and the Pace Databases.
193. Cf. Ferrari in Schlechtriem: *Kommentar*, p. 98, pt. 25, with further references in note 99; Honnold: *Uniform Law*, p. 66; Achilles: *Kommentar*, p. 19, pt. 4; Heilmann: *Mängelgewährleistung*, p. 145 (also with reference to ULIS Article 89); Gomard & Rechnagel: *International Købelov*, p. 38; Schwartze: *Sachmängelgewährleistung*, p. 53 *et seq.*
194. "A party may avoid the contract when it has been led to conclude the contract by the other party's fraudulent representation, including language or practices, or fraudulent non-disclosure of circumstances which, according to reasonable commercial standards of fair dealing, the latter party should have disclosed."
195. Cf. Madsen: *Op. Cit.*, pp. 155 and 158.

to mention that he believes that the goods will not work with the buyer's own machinery or suchlike.[196]

This, combined with a certain reticence of the courts in applying § 30 of the Contracts Act[197] ought to mean that cases which are not clearly contrary to § 30, and not clearly covered by § 33 of the Contracts Act, cf. below, ought to be covered by the rules on lack of conformity of goods in the CISG, cf. the rule of interpretation of the functionally adequate solution and the priority of the dynamic approach to interpretation in Danish international law.

However, this also means that the rule in § 54 of the Danish Sale of Goods Act, according to which the buyer can claim to avoid the contract because of fraud even after the expiry of the period allowed for making a complaint, is restricted by the rule in Article 39(2) of the Convention that notice of a complaint must be made within 2 years, cf. the further discussion on the principle of exhaustion of rights below.[198] Unjust enrichment, cf. § 31 of the Danish Contracts Act, is not covered by the rules of the Convention nor, it is assumed, are contracts for immoral purposes, cf. § 33 of the Contracts Act.[199] However, as stated above, where there is doubt about cases covered by § 30 or § 33, these ought to be covered by the Convention rules. The same solution should be reached in other domestic laws.[200]

3.5.2.2.2. Duress, deceit, forgery, lack of authority, lack of capacity and misstatements and misrepresentation

Invalidity on the grounds of duress, deceit, forgery, lack of authority, lack of capacity and misstatements and misrepresentation is not cov-

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196. Compare this with the Commentary to the UNIDROIT Principles, Article 3.8, p. 105: "A mere 'puff' in advertising or negotiations does not suffice."
197. Cf. Madsen: *Op. Cit.*, p 159 *et seq.*, and Kihlman: *Fel*, p. 336 *et seq.*, on the increased use of § 33 as a function of modern trade and the increased duty to provide information, with a comparison at p. 349 *et seq.*
198. The protective rule in § 54 of the Sales of Goods Act only applies to fraud, and not to dishonourable conduct under § 33 of the Contracts Act, however, see § 83.1 of the Sale of Goods Act with regard to consumer purchases, which covers contracts for immoral purposes, and thus also covers fraud, cf. Andersen & Lookofsky: *Obligationsret*, p. 185.
199. Cf. Gomard & Rechnagel: *International Købelov*, p. 38; Achilles: *Kommentar*, p. 19. As for § 31 and § 33, see Madsen: *Op. cit.*, pp. 161-165 and p. 177 *et seq.*
200. But see Israely Supreme Court 2 November 1988 on ULIS, criticized by Peter Schlechtriem, available online at http://cisgw3.law.pace.edu/cases/881102i5.html.

ered by the Convention rules, and therefore, in relation to cases of lack of conformity of goods, will be dealt with under national law.[201]

If, for example, a seller makes an offer to a buyer which is misunderstood so that the characteristics of the goods are represented as being more advantageous for the buyer, for example that a machine has a higher productive capacity than it has in fact, the buyer will not be able to make a claim on this basis, even if the buyer was acting in good faith. With mistaken statements a distinction is made between the buyer's good or bad faith.

As for special cases of mistaken statements, *error in motivis* (false premises), where the boundaries between contractual interpretation and § 32.1 of the Contracts Act overlap, the functionally adequate solution would favour the solution being found within the Convention, unless it is quite clear that the matter falls within the scope of § 32.1.[202]

The validity of pro forma agreements, or shell agreements, must be decided according to the respective national laws. However, this also depends on the pleadings of the parties:

> The decision of the *Arbitration Institute of the Stockholm Chamber of Commerce*, given in January 1998,[203] concerned the sale of steel bars between a Russian seller and a German buyer. The required specifications for the steel

201. Cf. Ferrari in Schlechtriem: *Kommentar*, pp. 97-98, pt. 24-25; Lookofsky: *CISG Scandinavia*, p. 27 et seq.; Heilmann: *Mängelgewährleistung*, p. 148; Achilles: *Kommentar*, p. 18 et seq. On the question of invalidity on the grounds referred to in Danish law, see Madsen: *Op. cit.*, pp. 133-153 and pp. 165-176. Refer also to the UNIDROIT Principles, Article 3.9:

    "A party may avoid the contract when it has been led to conclude the contract by the other party's unjustified threat which, having regard to the circumstances, is so imminent and serious as to leave the first party no reasonable alternative. In particular, a threat is unjustified if the act or omission with which a party has been threatened is wrongful in itself, or it is wrongful to use it as a means to obtain the conclusion of the contract."

    Reference should also be made to PECL, Article 4:108:

    "A party may avoid a contract when it has been led to conclude it by the other party's imminent and serious threat of an act:
    (a) which is wrongful in itself, or
    (b) which it is wrongful to use as a means to obtain the conclusion of the contract, unless in the circumstances the first party had a reasonable alternative."

202. On the relationship of these issues to the Contracts Act, see Madsen: *Op. cit.*, pp. 168-173.
203. See the Unilex and Pace Databases.

bars were stated in a contract. It was further stated in an appendix to the contract that the steel should comply with the European standard "h 11", and this also appeared on the invoice. However, the steel supplied did not fulfil this standard, so the buyer complained. The seller argued that the agreed quality of the goods should not be determined by the wording of the contract, since this had merely been worded so as to enable the goods to be exported to Germany without the intervention of the customs authorities, since steel must meet the "h 11" standard in order to be allowed into the EU.

The arbitrator found that the goods did not comply with the specification in the contract and therefore awarded compensation to the buyer, cf. Article 74 of the Convention.

However, this decision, which applied the CISG rules in accordance with Russian choice of law rules, did not decide questions of validity in relation to pro forma contracts, since the seller did not argue this.[204]

3.5.2.2.3. Mistake, assumptions – the principle of exhaustion of rights

The question of mistake and of mistaken assumptions is closely linked to the issue of conformity of goods to the contract. According to ULIS Article 34, a buyer could not make claims on the basis of other legal remedies in connection with the conformity of goods, which was primarily directed against objections to validity on the basis of mistake.

The prevailing view on Article 35, in theory, is that it ought to displace or exhaust national rules on validity, cf. also the principle of the functionally adequate solution.[205] This means that the buyer will

204. This would naturally also require Russian contract law to regulate the question of validity in relation to pro forma contracts. This will not be subject to further examination here.

205. Cf. Ferrari in Schlechtriem: *Kommentar*, p. 97, pt. 4; Honnold: *Uniform Law*, p. 261 *et seq.*; Ramberg in Ramberg & Herre: *Internationella köplagen*, p. 112; Achilles: *Kommentar*, p. 19; Flesch: *Beschaffenheitsirrtum*, p. 140 et seq., especially at pp. 156-159; seemingly Elmelund in Elmelund et al: *Lærebog*, p. 238; Heilmann: *Mängelgewährleistung*, p. 146, though here the view is that only the buyer's mistake is covered, not the seller's; Zeller: *Methodology* p. 194 *et seq.*; but opposed to this, see Gomard & Rechnagel: *International Købelov*, p. 38, where it is argued that national law should apply, and correspondingly Martin Gstoehl: *Das Verhältnis von Gewährleistung nach UN-Kaufrecht und Irrtumsanfechtung nach nationalem Recht* (Zeitschrift für Rechtsvergleichung, Internationales Privatrecht und Europarecht, 1998/1, p. 1 *et seq.*). See also Lookofsky: *CISG Scandinavia*, p. 31, concerning the competition between contractual and non-contractual compensation, where it is uncertain whether national rules must give way to Convention rules.

not be able to get round Article 39 and the rules on making complaints.[206] However, this does not apply if there is a mistake on matters other than the conformity of the goods to the contract, since then the matter will be dealt with under national law.[207]

However, this effective dynamic view is resisted in some jurisdictions, where a buyer is not regarded as being prevented from relying on the rules on validity when there is a mistake as to the characteristics of the goods etc. This is the prevailing view in France, Belgium, Italy, Spain, Austria and Switzerland.[208] For example, in France and in Austria the same period is allowed for making complaints about lack of conformity of goods to the contract under sale of goods law as for objections under the rules on validity of contracts, which is an attempt to avoid a buyer making objections to the validity of the contract after several years, when some mistake is identified.[209] In Portugal, each case of complaint about lack of conformity of the goods is treated as a complaint about a mistake, so the doctrine of lack of conformity is wholly subordinate to the doctrine of contractual validity.[210]

In other jurisdictions the rules on lack of conformity must be regarded as exhaustive special regulations, so that claims of invalidity due to mistake must be considered as excluded. This is the prevailing view in Germany, Greece, England and Ireland,[211] while in Denmark there is *de facto* disagreement,[212] and the new European Directive on consumer sales does not take a view on the question.[213]

206. Compare with Flesch: *Beschaffenheitsirrtum*, p. 151 *et seq.*, where, by referring to the 2 year rule in Article 39 as a general principle, cf. Article 7(2), it is argued that there is no scope for national rules on validity of contracts which obviate this Convention principle. This is indeed a dynamic interpretation of the Convention which not everybody (including the present writer) will support.

207. Cf. the decision of the *St Gallen Cantonal Commercial Court* of 24th August 1995, where a buyer was unsure whether the agreement concerned the purchase of samples to a value of DM 500 or a full delivery to a value of SFr 90,000 (see Unilex).

208. Cf. Schwartze: *Sachmängelgewährleistung*, p. 47 *et seq.*; Gstoehl: *Op. cit.*, p. 1 *et seq.*; Flesch: *Beschaffenheitsirrtum*, p. 23 *et seq.*

209. Cf. Schwartze: *Sachmängelgewährleistung*, p. 50.

210. Cf. Schwartze: *Sachmängelgewährleistung*, p. 51 *et seq.*

211. With certain qualifications, cf. Schwartze: *Sachmängelgewährleistung*, p. 50 *et seq.*

212. Cf. Andersen & Lookofsky: *Obligationsret*, p. 185 et seq.; see also Erik Werlauff: Review of *Lærebog i Obligationsret* by Mads Bryde Andersen & Joseph Lookofsky, (Juristen, October 2002, p. 307 et seq.) with reference to the decision of the Supreme Court in the Eternit case (U 2002, p. 249 e*t seq*), but refer also to Gomard: *Obligationsret*, p. 133.

213. Cf. Schwartze: *Sachmängelgewährleistung*, p. 53 *et seq.*

The practice of the courts seems to be split, depending on which tradition is followed in national law:[214]

See the decision of the *Aachen District Court* of 14th May 1993, about an agreement for the sale of hearing aids between an Italian buyer and a German seller. The court held that national rules on validity, on the grounds of mistake about the character of the goods or wrong assumptions, took priority over the Convention rules on lack of conformity of the goods.

Compare this with the decision of the *Austrian Supreme Court* of 20th March 1997, which concerned an agreement for the sale of a chemical product between a Russian seller and an Austrian buyer. The seller offered goods to the buyer which, due to a misunderstanding, he believed were the goods which the buyer wanted. The buyer did not react to the seller's statement, because he believed the goods were of the agreed quality. It was argued that the CISG Convention did not govern cases of mistake.

In the decision of the *Metropolitan Court of Budapest*, of 1st July 1997, it was argued that the rules on unreasonable agreements as well as on mistakes are not covered by the Convention. Nevertheless, reference was made to CISG Article 36.

In the decision of the *St Gallen Cantonal Commercial Court* of 24th August 1995, a buyer misunderstood the quantity of the goods to be delivered, since the buyer believed the transaction related to the purchase of a sample, while the seller intended to supply a large consignment. It was argued that the Convention does not govern invalidity on the grounds of mistake.

In the decision of the *Swiss Federal Supreme Court* of 11th December 2000, a Swiss married couple agreed to the purchase of a particular brand of kitchen. However, the seller delivered a kitchen of a different brand. It was argued that this concerned a mistake which should be governed by national rules on the validity of the contract.[215] See also the decision, referred to above, of the *Swiss Federal Supreme Court* of 22nd December 2000.

214. The following cases are all to be found on the UNILEX and Pace databases.

215. "According to Art. 3 of the Hague Convention, the contestation of a statement of intent is governed by the domestic law of the country where the seller has his place of business at the time of the receipt of the order. [Art. 3: "In default of a law declared applicable by the parties ..., a sale shall be governed by the domestic law of the country in which the vendor has his habitual residence at the time when he receives the order.

By applying the relevant provisions of the CISG, the [Court of Second Instance] reached the conclusion that a sales contract had not been formed regarding the delivered fitted kitchen. The [Court of Second Instance] held that the parties were in disagreement and that the [seller's] claim was, therefore, unjustified."

> In contrast to this, the decision of the *Austrian Supreme Court* of the 13th April 2000, concerned the sale of second hand machinery which, in the view of the buyer, should have carried the CE mark. The buyer claimed that, in addition to the goods not conforming to the contract, he had been mistaken as to the quality of the goods. This argument was rejected by both the Appeal Court and the Supreme Court, since it was held that Article 35 of the Convention dealt with the matter exhaustively.[216]

Altogether, the conclusion must be that courts may be expected to judge differently, depending on the legal tradition of the jurisdiction in question, and the extent to which a dynamic or a restrictive approach is used. However, there seems to be a development towards acknowledging the primacy of Article 35, even in jurisdictions which have traditionally used a restrictive interpretation, cf. the decision of the *Austrian Supreme Court* of the 13th April 2000 referred to above.

This development could be supported by a reference to the UNIDROIT Principles Article 3.7, which maintains the principle of the exhaustion of rights: "A party is not entitled to avoid the contract on the ground of mistake if the circumstances on which that party relies afford, or could have afforded, a remedy for non-performance." In the Commentary on this article,[217] the following example (mutual mistake)[218] is given of the application of this rule: "A, a farmer, who finds a rusty cup on the land sells it to B, an art dealer, for 100,000

216. "The Court of Appeals first dealt with the notification of the defect and stated further that until now it was not noticed that the UN Convention on Contracts for the International Sale of Goods (hereinafter referred to as "CISG") is applicable. Article 45 CISG lays down the claims of a seller against a buyer in a comprehensive and final way. Recourse to national rules is ruled out. Further claims which are not regulated by the Convention but at national law cannot be claimed under national law. Despite Art. 4(a) CISG, this applies also to the avoidance on grounds of error." The court continues:

    "According to Art. 35 CISG, it is of exclusive importance whether the products are according to the contract or not. The legal consequences result from the quality of the [seller's] breach of the contract. Because of the clear differences between Austrian and German law and the CISG, and because the allegations of the parties were made according to the ABGB, BGB and HGB [Austrian Civil Code, German Civil Code, and Austrian Commercial Code], the following procedure of the factual and legal position and the necessary ascertainment of facts will be made on the basis of the CISG. The parties should not be surprised by the different legal position of the CISG."

217. Cf. p. 103 *et seq.*

218. Compare this with the decision from the Swiss Federal Supreme Court of 22. December 2000, referred to above.

Austrian schillings. The high price is based on the assumption of both parties that the cup is made of silver (other silver objects had previously been found on the land). It subsequently turns out that that the object in question is an ordinary iron cup worth only 1,000 schillings. B refuses to accept and to pay for it on the ground that it lacks the assumed quality. B also avoids the contract on the ground of mistake as to the quality of the cup. B is entitled only to the remedies for non-performance."

However, according to PECL Article 4:119, a party which is entitled to a remedy under the validity chapter in circumstances which afford that party a remedy for non-performance may pursue either remedy. This reveals a striking difference between the solutions given in the UNIDROIT Principles and the PECL.

It would seem to be most in line with a dynamic treaty interpretation to apply the principle of exhaustion of rights, since it can be argued that the parties have entered into an agreement, trusting in the existence of a balanced legal system of rights and duties, and since the CISG appears to play the role of a *lex specialis* in relation to national contract law.[219]

3.5.2.2.4. Unreasonable agreements, contracts contrary to law or morality, and agreement which are contrary to mandatory rules of public law

National rules on the validity of contracts which are regarded as being unreasonable, contrary to law or morality, or contrary to mandatory rules of public law, are assumed not to be affected by the provisions of Article 35, cf. also the decision of the *Metropolitan Court of Budapest*, of 1st July 1997, referred to above.[220] However, the situation can be different if the parties have made compliance with special rules part of the contract.

> See the decision of the *Hertogenbosch District Court* of 2nd October 1998, which concerned an agreement for the sale of milk formula between a Dutch seller and a buyer from Singapore. According to mandatory public law rules in Singapore, there was a prohibition against the import into Singapore of goods with more than 10 BQ of radioactivity. This was included in the con-

219. Cf. Andersen & Lookofsky: *Obligationsret*, p. 185 *et seq.*
220. Cf. Lookofsky: *CISG Scandinavia*, p. 27 et seq., at note 90, and p. 175 *et seq.*

tract between the parties. However the seller was unable to meet this standard. The seller then claimed that the contract was invalid, and that he was exempt from liability under the terms of Articles 71 and 79 of the Convention.

The court decided the question of validity under Dutch law, and found that the contract was valid. As a result of this the seller had a duty to supply goods in accordance with the contract, and could not be exempt from liability either under Articles 71 or 79.

See also the decision of the German Federal Supreme Court of 23rd July 1997, which concerned the sale of fashionwear from an Italian seller to a German buyer, as part of a larger franchise arrangement. In the case, the seller claimed, among other things, that the agreement was invalid, because the franchise arrangement contravened European competition law rules. The court held that the question of validity, because of conflict with EU law, should be decided according to German law, cf. Article 4(a).[221]

Reference should also be made to the UNIDROIT Principles, Article 3.10 (on gross disparity),[222] and PECL, Article 4:109 (on excessive benefit or unfair advantage).[223] In particular, aspects of § 36 of the

221. Cf. Honnold: *Uniform Law*, p. 67.

222. "(1) A party may avoid the contract or an individual term of it if, at the time of the conclusion of the contract, the contract or term unjustifiably gave the other party an excessive advantage. Regard is to be had, among other factors, to (a) the fact that the other party has taken unfair advantage of the first party's dependence, economic distress or urgent needs, or of its improvidence, ignorance, inexperience or lack of bargaining skill; and (b) the nature and purpose of the contract.

(2) Upon the request of the party entitled to avoidance, a court may adapt the contract or term in order to make it accord with reasonable commercial standards of fair dealing.

(3) A court may also adapt the contract or term upon the request of the party receiving notice of avoidance, provided that that party informs the other party of its request promptly after receiving such notice and before the other party has acted in reliance on it. The provisions of Article 3.13(2) apply accordingly."

223. "Excessive Benefit or Unfair Advantage.

(1) A party may avoid a contract if, at the time of the conclusion of the contract:

(a) it was dependent on or had a relationship of trust with the other party, was in economic distress or had urgent needs, was improvident, ignorant, inexperienced or lacking in bar-gaining skill, and

(b) the other party knew or ought to have known of this and, given the circumstances and purpose of the contract, took advantage of the first party's situation in a way which was grossly unfair or took an excessive benefit.

(2) Upon the request of the party entitled to avoidance, a court may if it is appropriate adapt the contract in order to bring it into accordance with what might have been agreed had the requirements of good faith and fair dealing been followed.

Danish Contracts Act are linked to the parties' scope for derogating from Article 35, as considered below.

3.6. The scope for the parties to an agreement to derogate from Article 35 and related articles, exemption from liability etc.

According to Article 6 of the Convention, the parties may exclude the application of this Convention or, apart from the provisions in Article 12, they may derogate from or vary the effect of any of its provisions.[224] This means that the parties can derogate from Article 35, which means, in practice, Article 35(2) and Article 35(3), but also from Article 8 and Article 9, as mentioned above.

In practice, the parties often agree special rules on rights in the event of *breach of contract*, including clauses giving *exemption from liability*.[225] Clauses giving exemption from liability can be framed so as to affect even the obligation to make delivery in accordance with the contract, for example, if the goods are sold "as seen", or if the seller's liability to pay compensation is excluded in given circumstances.[226] For example, a clause on rights in the event of breach of the contract can state that the seller is entitled to repair or exchange the goods, before the buyer can revoke the contract, even if there are significant defects.[227] Terms giving exemption from liability and terms concerning rights in the event of breach of contract must be *agreed* between the parties, and they must be *valid*.[228] Furthermore,

(3) A court may similarly adapt the contract upon the request of a party receiving notice of avoidance for excessive benefit or unfair advantage, provided that this party informs the party who gave the notice promptly after receiving it and before that party has acted in reliance on it."

224. Compare this with UNIDROIT Principles, Article 1.1: "The parties are free to enter into an agreement and to decide its content," and Article 1.5: "The parties may exclude the application of these Principles or derogate from or vary the effect of any of their provisions, except as otherwise provided in the Principles."

225. See Lookofsky: *CISG Scandinavia*, p. 167 *et seq.*

226. See Lookofsky: *CISG Scandinavia*, p. 168, at note 4.

227. The so called "machine clauses", cf. for example Lookofsky: *CISG Scandinavia*, Ibid.

228. See Hyland in Schlechtriem: *Einheiliches Kaufrecht*, p. 312 *et seq.*

they must be *interpreted* so as to determine their effect.[229] The reader is referred to the discussions above on these questions.

In general, it can be assumed that courts and arbitration tribunals will apply a restrictive interpretation of a seller's exemption from liability in relation to the requirements of Article 35(2). There must thus be clear agreement before the requirements of Article 35(2) can be considered to have been derogated from.[230] Furthermore, the buyer cannot give exemption from the fundamental rights which he has under the Convention in respect lack of conformity of the goods, cf. the decision of the *Austrian Supreme Court* of 7th September 2000:[231]

> An agreement had been made between an Austrian buyer and a German seller for the sale of two gravestones of dark marble. Some weeks after they had been delivered some white streaks appeared in the dark marble, which is something which is not unusual but which, in this case, the buyer thought occurred to an unusual extent. The buyer complained about the defect, and refused to pay for the goods, since the defect of the goods justified the avoidance of the contract. The seller referred to the sales conditions in his order confirmation, according to which minor flaws in the marble were not to be treated as lack of conformity of the goods to the contract, the seller had a right to try to repair any defects or to re-supply the goods, and that the buyer was not entitled to withhold payment for the goods until this was done. The buyer then avoided the contract.
>
> The court held that the parties could derogate from the provisions of the Convention, including Article 49, in part or in whole, cf. Article 6. However, the validity of the seller's terms should be decided according to national law, cf. Article 4(a), and under the applicable German law the terms were valid. However, there was a condition that the terms should not contravene the general principles of the Convention. Among the general principles of the Convention is the provision that the buyer should be able to avoid the contract if, despite the efforts of the seller, the goods remain fundamentally unusable. If the agreement between the parties restricts this right, then the buyer is at least entitled to obtain compensation.

In this case, the border between domestic rules on validity and general principles of the convention seems to disappear or more precisely

229. Cf. Lookofsky: *Op. Cit.*, p. 170 *et seq.*
230. Cf. Lookofsky: *Op. Cit.*, p. 176, agreeing with this view cf. the review of Article 35(2) in Chapters 5-8.
231. Lookofsky: *Op. Cit.*, p. 177, note 64.

the court uses principles of invalidity according to Article 7(2) CISG. This is indeed not an unproblematic approach.

> Similarly, see the decision of the *Arbitration Institute of the Stockholm Chamber of Commerce* of 5th June 1998,[232] where a seller could not rely on clauses giving exemption from liability and the period of notice in Article 39, since the seller had knowingly equipped the machine with a part which did not have the same lifetime as specified in the contract.[233]
>
> See also *Appelate Court of Köln* of 21st May 1996, where a disclaimer was held to be invalid according to German law based on the fact, that the seller had acted fraudulently.

The same principles on limits to exemptions from liability etc. apply, cf. PECL, Article 4:118[234] and Article 8:109.[235]

A seller who has a much stronger negotiating position or professional knowledge cannot expect that unreasonable contractual terms will be accepted has having agreed to, are valid or will be interpreted in favour of the seller. From this position, the terms of the CISG can be treated as default rules, and the seller can very well find himself worse off than if more reasonably balanced terms had been included in the contract from the start.[236]

3.7. Summary

The conformity of goods to the contract in accordance with Article 35 of the Convention must be seen against the background both of general and special contract law. In this respect both Convention rules, such as Article 8 and 9, and rules outside the Convention, such

232. Unilex and the Pace databases.
233. See Lookofsky: *Op. Cit.*, p. 177.
234. "(1) Remedies for fraud, threats and excessive benefit or unfair advantage-taking, and the right to avoid an unfair term which has not been individually negotiated, cannot be excluded or restricted.
(2) Remedies for mistake and incorrect information may be excluded or restricted unless the exclusion or restriction is contrary to good faith and fair dealing."
235. "Remedies for non-performance may be excluded or restricted unless it would be contrary to good faith and fair dealing to invoke the exclusion or restriction."
236. Cf. Lookofsky: *Op. Cit.*, p. 178.

as national rules on the interpretation of contracts and on contractual validity, can come into play. This fact should be compared with the need for an independent and uniform application of Article 35, cf. Article 7, but the Convention's limitations should also be taken into account, cf. Article 7(2), cf. Articles 4 and 5.

Article 35's assumptions contain general principles which should take into account the principles of national law and of extra-national law, for example the UNIDROIT Principles and PECL.[237] To a great extent the rule of interpretation in Article 8 is an expression of principles which are internationally acknowledged. The principles of interpretation which are recognised in Danish law as well as in many other domestic contracts law, apply in connection with Article 8 and Article 35, since these solutions are expressions of universally recognised principles, cf. PECL and the UNIDROIT Principles. However, Article 9 differs somewhat from the corresponding provisions in PECL and the UNIDROIT Principles.

At the same time, contract law is a competing set of rules, since the rules on formation of contract, interpretation and validity can each be claimed as a reason why one of the parties should not fulfil given undertakings. If the Convention can be said to govern a question exhaustively, or if Article 35 applies as a *lex specialis*, then it cannot be assumed that there is scope for competing rules, though this is not recognised by everyone. In jurisdiction in which there is a principle of exhaustion of rights, the contract law rules on lack of conformity of goods will have priority over certain rules on validity, but this is not recognised in all jurisdictions. There does not seem to be a prospect for solving this conflict before the underlying contract law is harmonised or the Convention rules are amended.[238] This means that the parties still need to make a choice of law in order to avoid unpleasant surprises.

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237. See Andersen: *Aftaleret*, p. 322: "One should be aware that, the more one distances oneself from simple statements of the wishes of the parties, and their basis in the desires and expectations of the parties, the further one moves from the basic law of contract, and the more one approaches the general law of obligations."
238. Cf. Bridge: *International Sales*, p. 82 *et seq.*

Part III

Article 35 in theory and practice

Chapter 4

The conformity of goods to the contract, cf. Article 35(1)

4.1. Introduction

According to Article 35(1) of the Convention:

> "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."

This provision is the primary rule on the assessment of the conformity of goods to the contract,[1] and it covers all kinds of defects except defects of title which are dealt with under Article 41, and defects in intellectual property rights, cf. Article 42. The rule establishes that the assessment of conformity depends primarily on what the parties have *agreed*. This is also emphasised by the *Commentary* prepared by the UNCITRAL Secretariat, which states that the agreement between the parties is the *primary* source for assessing conformity,[2] which is

1. As stated in Chapter 2, under Article 33 of ULIS, the principle of the conformity of goods to the contract was a *subsidiary* rule.
2. Secretariat Commentary to Article 35(1) (Section 33(1) of the Commentary) is as follows:

   "*Seller's obligations as to conformity of the goods, paragraph (1)*

   4. Paragraph (1) states the standards by which the seller's obligation to deliver goods which conform to the contract is measured. The first sentence emphasizes that the goods must conform to the quantity, quality and description required by the contract and must be contained or packaged in the manner required by the contract. This provision recognizes that the overriding source for the standard of conformity is the contract between the parties. The remainder of paragraph (1) describes specific aspects of the seller's obligations as to conformity which apply except where otherwise agreed."

the view in several legal systems, e.g. the new Chinese contract law art. 153:[3] and the new German civil code (BGB) § 434(1).[4,5]

As discussed in more detail in Chapter 3, the establishment of the specific content of a contract is based on the interpretation of the agreement between the parties, cf. Article 8 and Article 9, on the assumption that a valid and binding agreement has been entered into. In this chapter Article 35(1) will be analysed on this basis, by reference both to theory and the practice of the courts. There will also be a discussion of what is meant by "quantity, quality and description" and "contained or packaged", and there will be a description of how the provision is linked to Article 35(2) and Article 35(3), though the more detailed analyses of these provisions will be found in Chapter 5-9.

By way of introduction, there is a discussion of how the requirements of the Convention exclude the application of national concepts and systematics, at least to the extent that this leads to a different result than would be arrived at under the provisions of the Convention.[6] This applies to Article 35(1), Article 35(2) and to Article 35(3), so these comments are also applicable to Chapters 5-9. Next, there is a review of the individual elements of Article 35(1), and the chapter ends with a summary of conclusions.

3. Article 153 state as follows: "Quality Specifications. The seller shall deliver the subject matter in compliance with the prescribed quality requirements. Where the seller gave quality specifications for the subject matter, the subject matter delivered shall comply with the quality requirements set forth therein."
4. § 434(1) states as follows: Sachmangel. 1) Die Sache ist frei von Sachmängeln, wenn sie bei Gefahrübergang die vereinbarte Beschaffenheit hat. (...)"
5. This also applies in Denmark, where it is referred to as the "*konkrete mangelsbegreb*" [the concept of specific conformity], cf. Gomard & Rechnagel: *International Købelov*, p. 114, note 5; see also Lando: *Udenrigshandelsret I*, pp. 324-338, which (on p. 338, pt. 5) concludes that the differences between the rules on conformity of goods to the contract in different countries are more questions of emphasis than of substantive content. Compare this with the UNIDROIT Principles, Article 7.1.1: "Non-performance is failure by a party to perform any of its obligations under the contract, including defective performance or late performance."
6. Cf. Ramberg in Ramberg & Herre: *Internationella köplagen*, p. 229.

4.2. Article 35 as an autonomous concept

Article 35 is based on a homogeneous concept of the conformity of goods to the contract, since the provision encompasses variations in quantity and quality and even the supply of some totally different goods, as well as the containers for and packaging of the goods.[7] Thus the provision differs from similar provisions in other legal systems which, for example, categorise variations in quantity as delays, or containers or packaging as subordinate obligations which are not considered in connection with the assessment of conformity of the goods to the contract, cf. below.

This means that concepts and distinctions which are relevant to the assessment of conformity to the contract and which are rooted in national sales laws, such as the distinction between conditions and warranties, express and implied warranties, general information about the product and assurances and guarantees,[8] *peius* (non-conforming goods) and *aliud* (totally different goods), latent or patent defects etc., are not relevant to the assessment of conformity of goods to the contract under Article 35,[9] but they can be significant for rights

7. Cf. Schwenzer in Schlechtriem: *Kommentar*, p. 374, pt. 4; Veneziano: *Non Conformity*, p. 41 *et seq.*
8. The fact that the seller has given a guarantee, and used the term "guarantee", for example that the goods are appropriate for some particular use, could be included as a relevant factor in relation to whether the information given should be considered in relation to Article 35(1) or Article 35(2)(b), and thus whether the goods can be said to conform to the contract or not, but the decision itself, whether the goods conform to the contract, may not be based solely on whether a guarantee has been given or not.
9. Cf. Bianca in Bianca & Bonell: *Commentary*, p. 270: "In Article 35 all cases of non-conformity of the goods are regarded as defective performances of the delivery obligation. Thus, the Convention has avoided the various distinctions still acknowledged in domestic laws between conditions and warranties, and specially the difficult distinction between delivery of goods of a different kind (aliud pro alio) and defects or lack of quality." See correspondingly Schwenzer in Schlechtriem: *Kommentar* p. 374, pt. 4; Ramberg in Ramberg & Herre: *Internationella köplagen*, pp. 226-229; Achilles: *Kommentar*, p. 93; as well as the decision of the *German Supreme Court* of 3rd April 1996, dealt with in more detail in Section 4.4 below, where it is stated that: "The CISG is different from German domestic law, whose provisions and special principles are, as a matter of principle, inapplicable for the interpretation of the CISG (Art. 7 CISG)." As for the distinction in French law between *vice caché* (latent defect) and *vice apparent* (patent defect), refer to the decision of the *French Supreme Court* of 17th December 1996, which is discussed in more detail below.

in the event of a breach of contract.[10] However, this does not mean that there is a difference in nature between the concepts of the different national legal systems in relation to the conformity of the goods to the contract, nor that the concepts and systematics of national laws are in general inapplicable to the interpretation of Article 35. There are indeed, as the review below will show, differences in certain areas between some national legal systems and Article 35, but generally there are clearly more similarities than differences.[11] As stated above in Chapters 2 and 3, the application of national concepts and rules under a dynamic doctrine of interpretation is excluded where the Convention governs a question, and this is especially relevant if the national concepts or rules would lead to a different conclusion than under the rules of the Convention. However, under the restrictive doctrine of interpretation, certain national rules can be applicable cumulatively, together with the Convention rules. The question is whether the use of national concepts is generally excluded, even under the dynamic doctrine, or whether some of these can be considered as a subset of or supplement to the international autonomous concept of the "conformity of the goods" in Article 35. If this is the case, then these national concepts and rules must be applicable to the extent that they are internationally accepted, and that they do not lead to a different result than that which would be reached under the Convention rules. At the same time, it would seem unnecessary to use such national concepts and rules if it is possible to find a satisfactory solution under the provisions of Article 35.[12]

10. For example, the distinction between latent and patent defects can be relevant to the buyer's examination of the goods upon delivery, cf. Article 38, and for the duty to give notice of any complaint, cf. Article 39, and in respect of guarantees, cf. Article 36.
11. Cf. Bianca in Bianca & Bonell: *Ibid.*: "But perhaps it is more correct to say that the Convention has adopted a solution which responds properly to the needs of international trade and which in substance does not bring about a dramatic contrast with any national rule."
12. Cf. Ramberg in Ramberg & Herre: *Internationella köplagen*, p. 229.

4.3. Variations in quantity

4.3.1. The seller shall deliver the agreed quantity – neither more nor less

According to the first point in Article 35(1), the seller must deliver goods in the quantity, required by the contract.[13] "Quantity" is usually understood to mean the number, volume or weight of the goods, but the quantity can be given in any comprehensible way.[14] Any variation from the contracted quantity, whether too much is delivered or too little, can constitute a failure to conform to the contract.[15] In the decision of the *Austrian Supreme Court* of 10th November 1994, the buyer had ordered "... a large quantity of chinchilla pelts." The seller had delivered 249 pelts, which the buyer accepted as being in accordance with the contract. See also the decision of the *Dusseldorf Provincial Court of Appeal*, of 8th January 1993, concerning the sale of 1,000 tones of cucumbers. The buyer complained that there had been under-delivery, but the complaint was rejected by reference to Article 38 and Article 39. Lastly, see the decision of the *Landshut District Court*, of 5th April 1995, where the seller had not delivered the agreed quantity of sports clothes and the decision of the *Frankfurt am Main Provincial Court of Appeal* of 23rd May 1995, where the seller had delivered too few shoes.[16]

The quantity which has been agreed is established on the basis of interpretation of the contract, cf. Article 8 and Article 9. Regardless of any express statement of quantity in the contract, there may be cases in which variances are acceptable, for example if there is a trade custom which is binding on the parties with regard to variances, or

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13. For variations in quantity under Danish law, see § 50 of the Danish Sales of Goods Act; Elmelund et al: *Lærebog*, p. 81 *et seq.*
14. Cf. Gomard & Rechnagel: *International Købelov*, p. 114, note 6; Achilles: *Kommentar*, p. 93.
15. Cf. Schwenzer in Schlechtriem: *Kommentar*, p. 375, pt. 8; Heilmann: *Mängelgewährleistung*, p. 172, pt. 1. The delivery of more than the contracted quantity is specially regulated under the heading of remedies for breach of contract, in Article 52, according to which the buyer may take delivery or refuse to take delivery of the excess quantity. However, it must be possible to derogate from this in situations where the buyer can only reject the whole delivery, for example, where delivery is made under a single Bill of Lading, cf. Will in Bianca & Bonell: *Commentary*, p. 381. See Article 73 on delivery by instalments.
16. All these decisions are available on the UNILEX and Pace databases.

if it can be assumed that quantity variances are part of the usage between the parties.[17] In such cases a delivery can conform to the contract, even though the quantity delivered does not conform to the wording of the contract. The buyer can also lose the right to complain about the quantity supplied if he does not complain in due time in accordance with Article 39, or in relation to an excess quantity, cf. Article 52:

> See, for example the decision of the *Zürich Cantonal Commercial Court* of 10th July 1996,[18] which concerned an agreement for the sale of 60,000 microchips between a German seller and a Swiss buyer. The chips were to be delivered direct to a third party. After the agreement had been entered into, the seller sent further material to the buyer, according to which it was stated that, among other things, the production costs would be higher and that the seller reserved the right to supply the quantity agreed, plus or minus 10%.
>
> 62,000 chips were then delivered to the third party. The buyer refused to pay the higher price and refused to pay for the excess quantity.
>
> The court held that the buyer had not accepted the seller's amended price, cf. Article 18(1) as well as Articles 19(2) and (3). Moreover, the buyer's acceptance of the goods through a third party could not be regarded as being acceptance of the price, cf. Article 18(1), since there was no practice or usage to support this.
>
> However, since the buyer had not instructed the third party to reject the excess quantity, the buyer was bound to accept it and to pay the originally agreed price in respect of it.
>
> For another case on the delivery of a greater quantity than agreed, see the decision of the *French Supreme Court* of 14th January 1995.[19]

The decision of the *Zürich Cantonal Commercial Court* has been rightly criticised, as a buyer has no duty to return the goods if an excess quantity is delivered. In such cases, Article 52 is subordinate to Article 35 and the case should instead be dealt with under Articles 38 and 39.[20] This means that if the buyer wants to reject the excess quantity he must first give notice to the seller according to Article 39,[21] specifying the lack of nonformity. Then the buyer must make

17. Cf. Schwenzer in Schlechtriem: *Kommentar*, p. 375, pt. 8, note 22 and 23.
18. See the Unilex and Pace databases.
19. See the Unilex and Pace databases.
20. Cf. Veneziano: *Non Conformity*, p. 43.
21. Unless the seller knew or could not have been unaware of this and which he has not disclosed to the buyer according to Article 40.

the practical arrangements in order to have the excess quantity separated from the agreed quantity and then to send back the excess quantity or have it placed at the sellers disposal.[22] The buyers expenses in connection with the rejection must be reimbursed according to Articles 74-77.

The buyer does not have a duty to reject the goods by the time of delivery but if he chooses not to do so, he has a duty to preserve the goods, according to Article 86.[23] The buyer may also deposit the excess quantity in a warehouse of a third person, Article 87. The expenses advanced by the buyer in connection with this must be reimbursed, and he has a right to retain the goods until he has been reimbursed, Article 86.

If it is impossible for the buyer to accept the goods without having to pay, e.g. if the goods are shipped under a single negotiable bill of lading,[24] the buyer may have a right to reject the entire delivery. In these situations the seller has committed a fundamental breach, Article 25, and therefore the buyer may avoid the contract by rejecting the entire delivery, Article 49(1)(a), unless this would be contrary to good faith, or if this is contrary to practices established between the parties or contrary to usages (Articles 8 and 9).[25]

If the buyer does not notice the seller in due time according to Article 39, or if he decides to accept the excess quantity, he must pay for it at the contract rate, according to Article 52(2).

4.3.2. Variances of quantity and quality

Variances in quantity can sometimes be difficult to distinguish from variances from the quality and description of the goods, so a certain overlap of the elements of Article 35(1) is to be expected:

> Thus, in *ICC arbitration case No. 6653* of 26th March 1993,[26] a German seller had sold steel bars to a Syrian buyer. It was agreed that the individual steel bars should have a specified weight, which could vary by plus or minus 5%.

22. The buyer has a duty to cooperate and to act in good faith, Article 7.
23. Cf. Achilles: Kommentar, p. 166, at no. 4; Herre in Ramberg & Herre: *Internationella köplagen*, at p. 361 ff.
24. Cf. Honnold: *Uniform Law*, p. 348 and Herre in: Ramberg and Herre: *Ibid.*
25. Cf. Honnold: Ibid.
26. See the Unilex and Pace databases.

In fact, 20% of the steel bars fell outside these tolerances, so the delivery was regarded as not conforming to the contract.

The case report does not indicate whether the total weight of the bars conformed to the agreement. If this were not the case, then a simple reference to this fact would have been sufficient to establish that the goods did not conform to the contract, since the goods were not of the specified quantity. If the total weight of the goods did match the quantity agreed in the contract, then, as the arbitration tribunal decided, there was still a lack of conformity to the contract, since the individual elements of the delivery deviated from the agreed weight. In this case it would be more correct to classify this as a variance from the description of the goods, or even their quality.

4.3.3. Variances of quantity and late delivery

According to the first point of Article 35 (1), a seller must deliver goods in the agreed quantity. On the basis of this provision, the assumption must be that, however material or immaterial, variances of quantity must be regarded as being covered by it.

In certain legal systems some cases of under-delivery are classified as late delivery, while in other legal systems, corresponding cases are dealt with as lack of conformity to the contract. This is significant for the obligation to make a complaint, since, under Article 39, the buyer should give notice of all cases of lack of conformity, which means that the obligation to give notice is expanded in legal systems which regard under-deliveries as lack of conformity.[27]

There is no agreement in theory about whether cases in which the quantity delivered does not correspond to the agreement, but which otherwise correspond to documents issued by the seller, should be dealt with under provisions of Article 35. There are those who think that such cases should be dealt with under the rules on late delivery or variances of quantity.[28] Others, and this appears to be the prevail-

27. Cf. Schwenzer in Schlechtriem: *Kommentar*, p. 375, pt. 8; Enderlein & Maskow: *International Sales*, p. 141. See also Lando: *De uniforme købelove*, p. 60, in relation to ULIS Article 33.
28. Cf. Enderlein & Maskow: *International Sales*, p. 141: "If the documents correspond with the actually delivered quantity, the result is an incomplete performance or probably late delivery."

ing view, believe that such cases should be treated as lack of conformity to the contract, since Article 35 can be interpreted as referring to *all* forms of variation of quantity.[29]

Although the majority of scholars agree with the principle that all forms of quantity variances are covered by Article 35, it would be reasonable to set a lower limit of cases where no quantity at all has been delivered, i.e., where the variance is minus 100%. The application of Article 35 must assume that some goods have been delivered, however little. However the question is where such a lower limit should be, if there is either late delivery or lack of conformity to the contract. Should it be a variance of minus 50%, minus 75% or minus 95%? Or does it depend on the actual case?[30] The decision of the *Dusseldorf Provincial Court of Appeal* of 10th February 1994 concerned a case in which about ¼ of the goods did not conform to the contract under Article 35(2)(b), but the court nevertheless gave judgment under Article 47(2), on the period within which notice of a complaint must be given, and the court referred to the principle of *aliud pro alio* (substitution). This judgment has been criticised partly for having ignored Article 35(1), and partly for emphasising the doctrine of *aliud pro alio*, which is discussed below.[31]

In parallel with the question of *aliud pro alio*, there is a difficult question of where to draw the line. This point in the direction of a solution by making all cases subject to Article 35, provided there has been *some* delivery of goods, however small. Where there are large variances from the agreed quantity, it will hardly be possible for the seller to rely on the provisions of Articles 38 and 39, cf. Article 40, so the buyer seems to be protected in such cases.[32] Only cases where nothing at all has been delivered will be covered by the rules on late delivery.

29. Cf. Schwenzer in Schlechtriem: *Kommentar*, p. 375 at note 25 with reference to further writers who share this view; as well as Heilmann: *Mängelgewährleistung*, p. 171 et seq. On the Danish position, see Elmelund et al: *Lærebog*, p. 82, at note 13.
30. The German case referred to above concerned a quantity variance of no more than about 15%, so it is not possible to obtain guidance from this case.
31. Cf. Veneziano: *Non Conformity*, p. 42.
32. Cf. Schwenzer in Schlechtriem: *Kommentar*, p. 375, pt. 8.

4.4. Variances in quality

Under Article 35(1), consideration of variances in quality, which is the second criterion mentioned in the Article, must start with the understanding that this refers to variations from agreed character, nature or qualities of the goods, including factual and legal factors which are relevant to the goods and their circumstances.[33]

An example of this is the decision of the *Munich District Court* of 25th January 1996,[34] about the sale of vodka which had not been completely processed and so was not of satisfactory quality. The complaint was rejected because it was not made in due time, cf. Article 39.

See also the decision of the *Saarbrücken District Court* of 23rd March 1996,[35] about an agreement between an Italian seller and a German buyer for the sale and installation of tables, chairs, freezers etc. for an ice cream parlour. The buyer complained that the tables and chairs delivered were not satisfactorily made, and that some of the compressors in the freezers did not work properly. This claim was also rejected by reference to Article 39.

Consider the arbitration case decided by the *ICC Court of Arbitration*, No. 8247, in June 1996,[36] where chemical raw materials which should probably have been delivered in crystalline form were stuck together because of damp. The goods could easily be reconstituted in crystalline form. This case was also decided by reference to Article 39.[37]

Refer also to the following extracts of court decisions which illustrate how the provisions have been applied to different categories of goods and different variances of quality:[38] *Stuttgart District Court*, decision of 31st August 1989, and *Berlin District Court*, decision of 16th September 1992 (poor stitching in shoes); *China International*

33. Cf. Schwenzer in Schlechtriem: *Ibid.* However, this understanding is subject to more detailed consideration in relation to the seller's duty to supply goods which satisfy the special requirements of the buyer's national law, cf. the discussion in Chapters 5 and 6.
34. See the Unilex and Pace databases.
35. See the Unilex and Pace databases.
36. See the Unilex and Pace databases.
37. See the Unilex and Pace databases.
38. All these cases are reported on the Unilex and Pace databases.

Economic and Trade Arbitration Commission (CIETAC), 19th April 1991 (the quality of aluminium was not as agreed); *China International Economic and Trade Arbitration Commission (CIETAC), Shenzhen Commission*, 6th June 1991 (the quality of chemical materials was not as agreed); *Dusseldorf Provincial Court of Appeal*, 12th March 1993 (poor quality of tailoring); *Riedlingen Petty District Court*, 21st October 1994 (insufficient additives in ham making it of lower quality); *Innsbruck Provincial Court of Appeal*, 1st July 1994 (marguerites which did not flower satisfactorily); *Austrian Supreme Court*, 10th November 1994 (chinchilla pelts of "middle to good quality" – quality variance according to the complaint of the buyer's customer, but this could not be validly claimed against the seller); *Munich District Court*, 20th March 1995 (frozen bacon which tasted rancid when defrosted); *Landshut District Court*, 5th April 1995 (sports clothing which shrunk 2 sizes in the wash); *Trier District Court* 12th October 1995 (wine diluted with water); *Paris Court of Appeal*, 13th December 1995 (plastic packaging of biscuits which affected their taste); *French Supreme Court*, 23rd January 1996 (wine with too high a sugar content); *Bulgarian Chamber of Commerce and Industry*, 24th April 1996 (quality of coal not as agreed); *Karlsruhe Provincial Court of Appeal*, 25th June 1997 (protective film of steel units left a limescale residue when removed); *Kortrjik District Court*, 27th June 1997 (quality of yarn too poor for weaving); *Kortrjik District Court*, 6th October 1997 (quality of yarn too poor for weaving); *Vienna Arbitral Tribunal for Agricultural Products*, 10th December 1997 (unsatisfactory quality of barley); *District Court de Besançon*, 19th January 1998 (judo costumes shrunk in the wash); *München Provincial Court of Appeal*, 11th March 1998 (cashmere sweaters were not as soft as they should be, in the view of the buyer); *Thüringer Provincial Court of Appeal*, 26th May 1998 (sale of live fish infected with a virus which also infected other fish of the buyer); *Helsinki Court of Appeal*, 30th June 1998 (a skincare product did have the promised content of vitamin A); *Ontario Court (General Division)*, 16th December 1998 (moulds for casting plastic elements for car interiors were not of a satisfactory quality as they did not give the right finish, as agreed in the contract); *Austrian Supreme Court*, 27th August 1999 (walking boots with loose heels); *Danish Western High Court*, 10th November 1999 (quality of Christmas trees); *Koblenz Provincial Court of Appeal*, 18th November

1999 (glass fibre materials of unsatisfactory quality); *Hamburg Provincial Court of Appeal*, 26th November 1999 (poor quality of jeans, where the labelling of their sizes was also wrong); *Vigevano District Court*, 12th July 2000 (vulcanised rubber for making soles for shoes – the soles crumbled); *Austrian Supreme Court*, 7th September 2000 (black marble gravestones which had white streaks after being exposed for some time to wind and rain – a normal occurrence, but one of unusual extent in this case); *Mons Court of Appeal*, 8th March 2001 (blistered plastic lamination of signboards); *German Supreme Court*, 9th January 2002 (milk powder had a rancid taste when mixed with water); *Danish Maritime and Commercial Court*, 31st January 2002 (quality of mackerel).

On the question of the conformity of goods to the contract under Article 35(1), it is not a condition that a variation in quality should be manifested in the fact that the goods do not have the same durability, keeping qualities or value as other goods of the same description,[39] but these are naturally elements which may have an independent significance for whether or not the goods conform to the contract, cf. also Article 35(2)(a).[40] This can be seen in the examples given above about yarn for weaving, where the poor quality meant that the yarn could not be put to its intended use, as well as the case referred to above about soles for shoes which disintegrated, which naturally concerned the normal use of soles. Therefore, if there is any doubt about whether the quality has been agreed, cf. Article 35(1), then the application of Article 35(2) (goods that are fit for the purposes for which goods of the same description would ordinarily be

39. Cf. Schwenzer in Schlechtriem: *Kommentar*, p. 376, pt. 9.

40. However, Schwenzer: *Op. cit.*, p. 375 et seq., pt. 9, states here opinion that: "Ob sie wegen ihrer Art und Dauer die **Braucbarkeit** oder den **Wert** der Sache beeinflussen, ist in Rahmen der Vertragsmäbigkeit nach Abs. 1 nicht relevant." (emphasis in the original). This seems to overlook the fact that these elements are in themselves significant to the evaluation of the conformity of the goods to the contract, even under Article 35(1). For example, this will be the case where a buyer orders a machine which may well conform to the description and quality agreed, but which is not able to produce finished products of the promised quality, which means that the goods delivered do not conform to the contract because the machine does not have the qualities intended in the contract, cf. the decision of the *Ontario Court (General Division)*, 16th December 1998 (moulds for casting plastic elements for car interiors were not of a satisfactory quality as they did not give the right finish, as agreed in the contract).

used) will frequently mean that the goods must be regarded as defective, cf. Chapters 5-8.

Since any variance from the agreed quality is significant, the supply of goods of a better quality than agreed must be assumed not to conform to the contract, cf. Article 35(1).[41] However, it probable that this point is seldom argued.

Variances in quality can be distinguished from variances in quantity, cf. the *ICC Arbitration* Case No. 6653 of 26th March 1993 (the sale of steel bars), but it can often be more difficult to distinguish variances in quality from disputes about the description of goods. This means that there will often be similarities in the terminology used about descriptions of goods and the lack of conformity to the contract. For example, if it is agreed to deliver Class I berries but Class II berries are delivered, this could be considered both as a quality variance and a variance from the agreed description of the goods.

A particular example of this variance in quality is the decision of the *German Federal Supreme Court*, 3rd April 1996, referred to above in connection with the autonomous interpretation of Article 35:[42]

> Through its agent, a Dutch buyer, whose company name referred to the manufacture of pharmaceuticals, gave two orders at four days interval to a German seller for the purchase of cobalt sulphate 21%. The cobalt sulphate was bought with a view to selling it on. In the first order the agent had stipulated in writing that the goods should be of English origin. Furthermore, the seller was required to supply a certificate of origin and a certificate of analysis. In connection with the part delivery of the first order, the agent had put "feed grade" after "cobalt sulphate 21%". As distinct from "technical quality", which is the usual commercial quality, "feed grade" contains certain additives which cannot be separated out again, so this quality is not suitable for the production of pharmaceuticals.
>
> As agreed, upon delivery the buyer received the certificate of origin, from which it appeared that the goods had been produced in the EU, together with the certificate of analysis. Since it appeared from the certificate of analysis that the cobalt sulphate did not have the same zinc content as appeared in a certificate which had been given to the buyer in connection with previous deliveries, the buyer declared that it was not confident that the goods conformed to the agreement. It later appeared that there was not in fact a difference of the zinc content, and the difference appeared because of a mistake in

41. Cf. Schwenzer: *Ibid.*
42. See the Unilex and Pace databases.

writing the certificate. The seller sent a new certificate to the buyer who still did not have confidence in it, and therefore avoided the contract. Meanwhile it had been agreed that another expert should undertake a fresh analysis. On the basis of this new analysis, the buyer maintained his decision to avoid the contract, now with reference to the fact that feed grade had been delivered, and not technical quality. The buyer later explained his decision on the basis that 2% of the cobalt sulphate was non-soluble and was therefore not in accordance with the usual commercial quality and that, furthermore, the cobalt sulphate had not been produced in England, or even in the EU, as stated in the certificate of origin, which effectively meant that the goods contracted for had not been delivered at all, but that a substitution had been made (*aliud*).

For the court, the most important question was whether the buyer was entitled to avoid the contract, cf. Article 49. To start with, the court denied that there was a defective delivery because of lack of conformity of the goods to the contract, cf. Article 30 and Article 35, or because of the substitution. Thereafter, the court found, first, that the parties had not expressly agreed the quality of the cobalt sulphate, cf. Article 35(1). But the court did find that there had been lack of conformity of the goods to the contract, since the goods did not fulfil the agreement with respect to their origin and characteristics, and on the basis of the evidence, the court found that the parties had agreed on goods of technical quality, cf. Article 35(2)(a).[43] At the same time,

43. In the case report (source – the CISG Database at Pace Law School Law Library) in the introduction it is stated at pt. 2.c) bb): "The [buyer] bought cobalt sulfate 21%; this has been delivered by the [seller]. According to the [buyer's] submissions in the final appeal proceedings, the Court must assume that the [buyer] did not order the delivered fodder quality, but technical quality; i.e., goods without the flow auxiliaries. This divergence is certainly not severe enough to regard the delivery not only as non-conforming, but as not having been made at all." Further on in the judgment at pt. 2.c) bb) it is stated: "bb) For the final appeal proceedings, it has to be assumed that the goods delivered by [seller] did not conform with the contractual agreement pertaining to their origin and condition. However, as the Court of Appeals correctly stated, the [buyer] – who is insofar burdened with the obligation to submit and prove the facts – did not substantially submit that she was substantially deprived of what she was entitled to expect under the contract as a result of the [seller's] breaches." Finally, at pt. 2.c) dd) bbb) it is emphasised that "bbb) Not even the [buyer] submits that a certain quality was **expressly** agreed upon (Art. 35(1) CISG). But the [buyer] pleaded and offered corresponding proof that, failing the specification of a certain condition, technical quality was agreed upon (Art. 35(2)(a) CISG). However, under the present circumstances it cannot be concluded that the – allegedly non-conforming – delivery of cobalt sulfate with auxiliary flow (fodder quality) constitutes a fundamental breach in the meaning of Art. 49(1)(a) CISG. A major indication to the contrary is the fact that the [broker's] final remark on the contract of 10 January 1992 (concerning the delivery of 2,000 kg cobalt sulfate 21%) regarding the description of goods contains the addendum "feed grade". The [buyer] did not object to this specification." (Emphasis in the original)

the court held that there had not been a fundamental breach of contract so the buyer was not entitled to avoid the contract under Article 49(1)(b).

Thus it appears that the specific quality has not been *expressly* agreed, cf. Article 35(1), but it could be regarded as having been agreed, cf. Article 35(2)(a). This wording of the judgment is problematic, since Article 35(1) contains no requirement that the quantity, quality or description of the goods should be expressly agreed. A particular quality can certainly be implicitly agreed, cf. Article 8, for example if the parties have previously traded in goods of that quality or if it is the practice of the particular trade concerned, cf. Article 9.

The relevant quality was determined according to Article 35(2)(a) because the goods had to be fit for the purposes for which goods of the same description would ordinarily be used (pharmaceutical manufactures), so they had to be of technical quality. The court appears to have preferred using Article 35(2)(a) rather than Article 35(1), since it did not feel able to decide what had been agreed, whether explicitly or implicitly.

If the quality of the goods is neither agreed explicitly nor implicitly, Article 35(2) applies. In relation to this, Article 35(32)(a) is of interest, since it involves considering whether the goods are suitable for the purpose, what goods of the same description would ordinarily be used, and whether the goods should be of average quality, cf. Chapter 5, Section 5.5.3.4.

4.5. Variance from the goods described

If the goods vary from those described in the agreement, then the goods are assumed not to conform to the contract. The detailed description of the goods is established on the basis of all the circumstances of the agreement, cf. Article 35(1), cf. Article 8 and 9, and can be agreed either explicitly or implicitly.

As for express requirements for the goods, see the decision of the *Cologne Provincial Court of Appeal*, 21st May 1996 (referred to in Chapter 3), which held that there was lack of conformity to the contract when a car had in fact driven 65,000 kilometres and not the 15,000 kilometres shown on the clock, and the car had in fact been initially registered 2 years earlier than was shown in the contract.

This judgment also stated that assurances and guarantees do not have any independent significance for evaluating the conformity of goods to the contract, cf. Section 4.7 below.

See also the *ICC Arbitration Case* No. 6653 of 26th March 1993,[44] where a German seller had sold steel bars to a Syrian buyer. It was agreed that the individual steel bars should have a specified weight, which could vary by plus or minus 5%. In fact, 20% of the steel bars fell outside these tolerances, so the delivery was regarded as not conforming to the contract.

In the decision of the *Düsseldorf District Court*, 23rd June 1994,[45] a press did not comply with the tolerances stated in the contract. However, the buyer had not complained in due time.

A further example is the decision of the *US Court of Appeals, 2nd Circuit*, of 6th December 1995 (*Delchi Carrier v. Rotorex*)[46] The case concerned the sale of 10,800 compressors for use in air conditioning equipment. The compressors did not satisfy the terms of the contract either with respect to the energy consumption, cooling effect, or capacity which they appeared to have according to a sample which had been supplied. For these reasons, the goods did not conform to the contract.

See also the decision of the *ICC Court of Arbitration*, No. 8740, October 1996,[47] which concerned the sale of coal. Since the coal in fact contained only 20% dry matter, rather than the 32% dry matter specified in the contract, it was found that the goods did not conform to the contract, cf. Article 35(1).

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 materials should be recyclable, 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, cf. Article 6. Legal requirements which concern the specific quality and characteristics of goods etc. are therefore covered by Article 35, and not by

44. See the Unilex and Pace databases.
45. See the Unilex and Pace databases.
46. See the Unilex and Pace databases.
47. See the Unilex and Pace databases.

Article 41,[48] cf. below in connection with the reviews of the decisions of the *German Supreme Court*, 8th March 1995, the *Ellwangen District Court*, 25th August 1995, the *US District Court, Eastern District of Louisiana*, 17th May 1999 (*Medical Mareting v. Internazionale Medico Scientifica*), and the *Grenoble Court of Appeal*, 13th September 1995.[49]

The fact that the documentation stipulates certain specifications does not necessarily mean that the goods must satisfy these requirements, as discussed in Chapter 3. Other circumstances, such as usage established in trade between the parties, or subsequent factors, can mean that the performance need not be entirely as set out in the contract, cf. Articles 8 and 9.

To illustrate this, it is interesting to look at the decision of the *US District Court, N.D. Illinois*, 28th October 1998 (*Mitchell Aircraft Spares v. European Aircraft Service*), which is also referred to in Chapter 3 in connection with the parol evidence rule. A Swedish seller offered, on an international database, certain second-hand spare parts for aeroplanes; these were offered with specification numbers. The buyer's impression was that the parts were offered with a single specification number, while the seller intended them to be offered with different specification numbers. In his order, the buyer gave the specification number 729640. In his order confirmation, the seller gave the same number but did not think it was decisive as he had previously sent a fax in which he had stated that he could not guarantee that the spare parts had the specification number. Therefore, the seller sent a fax indicating the numbers of the spare parts and encouraging the buyer to check whether they matched the required specification numbers. Furthermore, the seller pointed out that the buyer was a specialist in the trade in spare parts of that type, whereas the seller was not. It was therefore at the buyer's risk that he had not investigated the parts in more detail before buying them. In refusing to give interim judgment, the court emphasised that when deciding whether goods conform to the contract or not, attention should be paid not merely to the statements in the order and the order confirmation, but also to the intentions of the parties, cf. Article 8(1). In this respect, all the relevant circumstances of the transaction should be taken into account, including the negotiations between the parties, cf. Article 8(3).

This case illustrates the close connection between Article 35 and the rules on the interpretation and construction of contracts, cf. Article 8.

48. Cf. Piltz: *Internationales Kaufrecht*, p. 186, pt. 30.

49. This last case is dealt with in Section 4.8, as it concerns containers and packaging.

It is not necessary for the goods to be described in detail, either in writing or orally, in relation to a specific sales agreement in order to determine whether the goods conform to the contract or not. For example, an order for goods can be placed as part of an ongoing trading relationship, in which the requirements for the goods are understood. In such cases the requirements for the goods will typically be established by reference to previous transactions, usage or trade custom, and by the fact that the seller either knew or could not have been unaware of the requirements, cf. Articles 8 and 9.

See, for example, the decision of the *Paderborn District Court*, 25th June 1996,[50] which concerned the sale of PVC granules for the manufacture of window blinds. When the German buyer received complaints from his customers that the blinds did not absorb enough light, he complained to the French seller, from whom the buyer had previously received supplies without problems. An expert examination showed that the PVC granules, which came from a different sub-contractor than previously, contained less titanium dioxide than the standard which the seller believed was sufficient, which meant that there was less light absorption. At the same time, the buyer's extrusions of the elements were to thin, as they were 1.3 mm thick compared with the usual standard of 1.6 mm. However, the expert stated that even where the elements were 1.6 mm thick, the light penetration was too great with the PVC granules in question.

The court reasoned that if the seller had supplied the buyer with the same kind of granules as previously, the light absorption would have been sufficient, even though the elements were only 1.3 mm thick, since there had not previously been problems with light penetration. On this basis, the PVC granules could not be regarded as conforming to the contract, cf. Article 35.[51]

50. See the Unilex and Pace databases.
51. Cf. the following extract from the judgment (source – the CISG Database at Pace Law School Law Library): "The Court must conclude that despite the less than customary strength of the rods, [buyer's] customers would not have issued complaints if the titanium dioxide content had been sufficient. This follows from the fact that in the course of using the granules delivered by Firm L (her former supplier), the [buyer] had not experienced this problem, as [buyer's] manager testified in the oral hearing.

Whether the insufficient strength of the rods contributed to the damage is furthermore irrelevant under the law. Contrary to German sales law, under the CISG the [seller] guarantees the conformity of the goods (Arts. 35, 45(1), 74) in a way that the seller is liable for damages that the buyer suffers as a result of non-conformity of the goods. The [buyer's] damages mainly consist of compensation for her customers, caused by the [seller's] delivery of granules with an insufficient percentage of titanium dioxide. Therefore, the [seller] has to pay damages irrespective of the fact that the rods would have been less likely to have light shine through had the [buyer] manufactured them at a strength of 1.6 mm and above." The last part of this, on the buyer's contribu-

The judgment must be interpreted as saying that, in order to conform to the contract, the PVC granules should have contained a higher level of titanium dioxide, which should at least have corresponded to the levels in previous deliveries. This means that decisive importance was attached to the justifiable expectations of the buyer on the basis of previous deliveries by the seller, and to the fact that the seller either knew or could not have been unaware of these expectations, cf. Article 8(1), cf. Article 8(3). However the judgment does not make any specific reference to Article 35(1), merely referring to Article 35 in general.

While this case falls within the scope of Article 35(1), it can also be argued that the goods supplied were not fit for the purposes for which goods of the same description would ordinarily be used, cf. Article 35(2)(a). The buyer also argued that the previously supplied goods should be regarded as samples, and that the PVC granules supplied should be of the same quality, cf. Article 35(2)(c). These provisions are considered further in Chapters 5 and 7.

The same result was reached in the decision of the *Ellwangen District Court*, 21st August 1995, though without reference to the provisions of Articles 8 or 9.[52] In this case a German buyer and a Spanish seller entered into an agreement on 2nd August 1994, through the seller's German agent, for the delivery by instalments of paprika for sale on the German market. The seller frequently exported to Germany, and the parties had previously traded with each other.

In March 1994 the buyer had complained to the seller about a delivery which contained salmonella. In connection with this, the buyer informed the seller than in future an analytical laboratory licensed by the TÜV[53] would examine whether the deliveries complied with the German food safety laws, in particular with regard to whether they contained salmonella, aflatoxins and pesticides, and the seller accepted this. In the agreement made in August the seller was required to provide certificates showing that the paprika was free from salmonella and aflatoxins. This too was accepted by the seller.

Paprika was then delivered on 23rd November 1994. On 7th December the

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tory liability due to the extrusions being too thin, shows that the courts will go far to interpret the Convention uniformly, but the use of the term "guarantee" is more confusing than helpful, and is not in accordance with an autonomous interpretation of the provision. Attention must, of course, be paid to the actions of the buyer when assessing whether the goods conform to the contract or not, such as whether they have been correctly used, etc.

52. Reported in the Unilex and Pace databases.

53. The initials TÜV stand for the Technischer ÜberwachungsVerein.

German Spice Industry Association gave notice that there was a risk that paprika could contain levels of ethylene oxide exceeding the level permitted in Germany. The buyer informed the agent of this on the same day, and on 13th December contacted the analytical laboratory with a view to having an analysis made of the ethylene oxide of the paprika. Thereafter, the buyer began to re-pack and distribute smaller quantities of the spice to warehouses around Germany.

On the 27th December the buyer was informed by the analytical laboratory that the paprika had higher than the permitted levels of ethylene oxide. On the same day the buyer demanded of the seller's agent that the goods should be taken back, and claimed compensation.

In a letter of 13th January 1995 the seller agreed to accept the return of the goods. It was agreed that the seller should supply replacement goods, but this was not done within the deadline set by the buyer as, because of the resale of some of the goods, the buyer could not return the goods in substantially the same condition in which he received them, cf. Article 82. Thereafter the buyer avoided the contract and demanded compensation.

The seller rejected the avoidance of the contract and claimed payment for the goods delivered, on the basis that there had not been a fundamental breach of contract according to Article 35, cf. Articles 49 and 25, as well as referring to Article 82.

As for the lack of conformity of the goods to the contract, the seller referred to the fact that the parties had changed the terms of the agreement between March 1994 and August 1994, since the seller should not thereafter supply goods which complied with the German food safety rules, which were in any case not known to the seller (in particular with regard to salmonella, aflatoxins and pesticides), but should now merely supply goods with a certificate showing that the paprika was free from salmonella and aflatoxins. As a result, the seller could not be required to deliver goods which complied with German food safety rules in general, including paprika free from ethylene oxide. Furthermore, the seller stated that the offer to accept the return of the goods was not given under any legal obligation to do so, but merely as a gesture of goodwill.

The Ellwangen District court found that the buyer was not obliged to pay for the goods, on the basis that the goods did not correspond to the quality agreed, cf. Article 35(1). This should be seen in the context that the parties had previously traded with each other and that the seller frequently exported to the German market, as well as the fact that the buyer had required analyses to be made of the goods and subsequently certification. There was therefore an agreement that future deliveries should satisfy the requirements of the German food safety rules.

The seller's claim that he did not know the German food safety rules was rejected, as the seller was identified with his German agent who knew or ought to have known about the German rules. The seller thereafter agreed to take the goods back, without reservation, cf. the written evidence, so the acceptance of the return of the goods did not appear to the buyer to be merely a gesture of goodwill.

Since ethylene oxide had not previously been found in paprika from the seller, the buyer had not been obliged to take measures to discover this substance immediately upon receipt of the goods, cf. Article 38. There was thus a latent defect.[54] On this basis, the District Court found for the buyer.

The judgment must be interpreted as meaning that, on the basis of the buyer's statements, the seller knew or could not have been unaware that the buyer's intention was that the paprika should satisfy the requirements of German food safety rules, cf. Article 35(1), cf. Article 8. This judgment is in line with the decision of the *Grenoble Court of Appeal*, 13th September 1995, which is dealt with in Section 4.8 below, in relation to containers and packaging, cf. Article 35(1), since the seller does not *per se* have a duty to supply goods which comply with the laws in the buyer's country.

A leading case in this area is the decision of the *German Federal Supreme Court*, 8th March 1995 (the *Mussels* case), which established that, under Article 35(1), the seller is not assumed to be required to deliver goods which comply with the laws in the buyer's country:

The case concerned the purchase by a German buyer of New Zealand mussels from a Swiss seller. According to the agreement, the goods were to be delivered to a refrigerated warehouse in Germany. Samples of the mussels showed that their cadmium levels were higher than the German recommended limit (known as the ZEBS standard), though this did not lead to a prohibition on the sale of the mussels, as was possible under other regulations. The buyer then complained to the seller; the goods did not conform to the contract and their packaging was not suitable for deep freeze storage. The seller rejected the complaint since the mussels were still edible and did not conflict with any mandatory rules. Furthermore the complaint was made too late. The buyer maintained his claim and required the contract to be avoided. The court stated that the evaluation of conformity of the goods to the contract should start from the basis of the agreement between the parties, cf. Article 35(1). It was not even *implicit* in the agreement that the goods should meet the German ZEBS standards. The fact that the goods should be delivered to a warehouse in Germany did not necessarily mean that the goods were to be resold in Germany, nor that the goods should comply with the German food

54. See the following statement in the judgment (source – the CISG Database at Pace Law School Law Library): "The contamination with ethylene oxide represents a hidden non-conformity."

safety rules, which were only relevant to their resale in Germany. The court then proceeded to the analysis of the conformity of the goods to the contract on the basis of Article 35(2)(a) and (b), this is discussed in Chapter 5, Section 5.3.

The principles for interpreting Article 35(1) have been further recognised in a more recent case from an American court:

The decision of the *US District Court, E.D. of Louisiana*, 17th May 1999 (*Medical Marketing v. Internazionale Medico Scientifica*)[55] concerned an American company with a place of business in Louisiana which entered into a contract in 1993 for the sole distribution rights for mammography equipment from an Italian seller. In 1996 the American health authorities confiscated the equipment, since it did not satisfy American safety requirements. After failing to reach a compromise, the buyer referred the matter to arbitration.

In the arbitration proceedings the Italian company argued that a seller is not assumed to be required to supply goods which comply with American safety requirements. In support of this argument the buyer referred to the general principle recognised in the *Mussels* case referred to above. The arbitration tribunal expressly accepted the principles stated in that case, and at the same time found that in this case the general rule should be derogated from, since the seller either knew or ought to have known about the American safety requirements. The seller then appealed the arbitration award to the District Court, claiming that the tribunal had clearly disregarded the content of international sales law, and in particular the CISG and the decision of the *German Federal Supreme Court*, 8th March 1995.

The District Court dismissed the seller's appeal, and confirmed the decision of the arbitration tribunal. In it's reasoning, the court reviewed the decision in the *Mussels* case and referred to Article 35 of the Convention.

This case can be seen as an important expression of the recognition by the American courts of foreign practice in the interpretation of the CISG, and as a recognition of the principles expressed in the decision of the *German Federal Supreme Court*, 8th March 1995.[56]

55. See the Unilex and Pace databases.
56. Cf. Albert H. Kritzer's editorial remarks on the case at http://www.cisg.law.pace.edu/cisg/wais/db/cases2/990517u1.html: "... the significance of the case lies in the U.S. judicial reference to an interpretation of the CISG by a court of a sister signatory," as well as Peter Schlechtriem's commentary on the case in *Praxis des Internationalen Privat- und Verfahrenrechts* (1999), pp. 388-390.

4.6. The delivery of totally different goods – aliud pro alio

The term *aliud pro alio* is used to refer to cases in which the buyer is supplied with a totally different good than that which has been agreed, for example, salt instead of sugar, or a different second-hand machine than the one agreed.[57] In some legal systems this is regarded as a question of the conformity of the goods to the contract, while in other legal systems it is treated as equivalent to a failure to deliver.[58]

In Danish law *aliud pro alio* is treated as the delivery of defective goods,[59] and the same applies in other Nordic countries.[60] Even though the term does not have the authority of law in Nordic law, it has nevertheless attracted attention.

Kihlman[61] refers to an example of what, in his view, can be referred to as *aliud*; the Norwegian case RT 1966 p. 996. The case concerned the sale of a boat which sank four days after it had been sold. The sinking of the boat was due to a split in the hull below the waterline to which the seller had himself made an inadequate repair. The split had been hidden from the buyer when he inspected the boat while it was afloat. Kihlman argues that the term "boat" must be assumed to give the buyer an expectation that the vessel was capable of floating. Kihlman then categorised the case as one of *aliud* since, four days after it had been bought, the vessel could no longer be categorised as a "boat" as it could not float.

Against this it can be argued, first, that a boat that cannot float can still be described as a "boat", even though it may be a very poor quality of boat, just as a motor car which, four days after its purchase, suddenly cannot be driven further because of a hidden split in the cylinder block can still reasonably be called a car. Second, the date which is relevant to the assessment of the conformity of the goods to the contract is the date on which the risk for the goods is transferred, i.e., when the goods are delivered, and in this case the boat (if one may use the term) was still afloat on this date. It is suggested that Kihlman is wrong to divide goods (and implicitly also buyers and sellers, cf. below) into categories, and then dissect the agreement and its circumstances in order to see if the standard of the category has been departed from.

57. For a discussion of *aliud pro alio*, see for example Gomard: *Obligationsret*, pp. 127-128 and p. 207.
58. This applies, for example, to Austrian law and, up until 2001, to German law, but the situation in Germany has since been changed by the *Schuldrechtsreform*.
59. Cf. Gomard: *Ibid.*; and Lookofsky: *Køb*, p. 59.
60. Cf. for example, Kihlman: *Fel*, p. 189 *et seq.*
61. Cf. Kihlman: *Op. Cit.*, p. 199 *et seq.*

However, there is no rational basis for working with such standards,[62] since there are neither dogmatic nor pedagogic advantages in doing so. Boats, cars, and all kinds of goods are traded as new, used or scrap, and the quality of goods therefore depend on the circumstances of the agreement and the parties to it. It cannot be assumed that a scrap dealer will have an expectation that a car sold for scrap will be capable of being driven. From Krüger's[63] discussion of case RT 1966 p. 996, under the heading of "The concept of lack of conformity of goods", it also appeared that the case concerned a sales agreement between two private individuals, that the split in the hull was due to an earlier accident, and that the boat had been sold with an "as seen" clause. According to Krüger, such "as seen" clauses usually prevent buyers from basing a claim either on defects which ought to have been discovered upon inspection or latent defects, and furthermore, the professional buyer's risk in such circumstances will normally be stricter than the risk of the ordinary consumer. On this basis it seems quite clear that in this case the seller disregarded any obligation to act in good faith by giving information, and that the "as seen" clause could therefore not be relied upon by the seller.

In the CISG Convention, it is possible that this dogmatic distinction could affect the application of Article 35, since legal systems which categorise *aliud pro alio* as lack of conformity of goods to the contract will apply to Article 35(1), since the goods are not of the description required by the contract, while other legal systems will apply the rules on delay, cf. Article 30, cf. Article 31 (right place) and Article 33 (right time).

The categorisation of *aliud pro alio* is relevant to which obligations are imposed on the buyer and the seller, and under which provisions these obligations are imposed. If *aliud pro alio* is considered as a matter of the conformity of the goods to the contract, then the buyer must examine the goods and give notice of a complaint in order to assert his rights. Thereafter, the buyer can claim a proportionate reduction in the price, the delivery of replacement goods, or the avoidance of the contract. However, if the matter is treated as one of delay, the buyer does not have an obligation to examine the goods, and the requirements relating to the making of a complaint are not so strict. In such cases, *aliud pro alio* is treated in part as the failure

62. Cf. Honnold: *Uniform Law*, p. 255.
63. Cf. Krüger: *Norsk Kjøpsrett*, p. 193 and p. 253 *et seq.*

to deliver the goods in the agreement (delay) and in part as the delivery of goods which have not ordered at all.[64]

As referred to in Chapter 2, ULIS Article 33, which was the predecessor to Article 35, linked the lack of conformity of goods to the contract with the failure to deliver, but this was not carried forward in Article 35. At the same time, ULIS Article 33(1)(b) contained a provision which specifically referred to situations in which the buyer is supplied with a totally different good than that which has been contracted for.[65]

Article 35 does not reproduce the provision in ULIS Article 33(1)(b) on the supply of totally different goods. This raises the question whether the law with regard to *aliud pro alio* under ULIS Article 33 has been carried forward or not, and how this relates to delivery. Is *aliud pro alio*, as in ULIS Article 33, covered by CISG Article 35, while disregarding the fact that some delivery is made under *aliud pro alio*, or are such cases excluded from Article 35, in whole or in part, and treated as cases of delay?[66]

On a simple interpretation of the wording of Article 35, all cases of *aliud pro alio*, must be assumed to be covered, since the goods do not conform to the agreed description or quality. Taken together with the changes to Article 35 on delivery, this must mean that there is an assumption that Article 35 covers all cases of failure of goods to conform to the contract, including cases of *aliud pro alio*.

In the practice of the courts, the question of *aliud pro alio* and the extent of Article 35 have been considered in the following cases:

> The decision of the *Austrian Supreme Court*, 21st March 2000,[67] which concerned the sale of timber between a German seller and an Austrian buyer. The court was not persuaded by the buyer's argument that there had not been delivery, because of *aliud*, since the Convention did not distinguish between the delivery of non-contractual goods and *aliud*.[68]

64. Cf. Enderlein & Maskow: *International Sales*, p. 143 with references.
65. ULIS Article 33(1)(b) states as follows: "... goods which are not those to which the contract relates or goods of a different kind."
66. Both Schwenzer in Schlechtriem: *Kommentar*, p. 376, pt. 10; and Enderlein & Maskow: *International Sales*, p. 142, think that there was no intention to change the law between ULIS Article 33(1)(b) and CISG Article 35, even though Article 35 no longer specifically refers to cases of *aliud pro alio*.
67. See the Unilex and Pace databases.
68. Cf. the following extract from the abstract of the case (translation source: the CISG Database at Pace Law School Law Library):

See also the decision of the *Austrian Supreme Court*, 29th June 1999,[69] where an Austrian buyer had ordered treated timber from a German buyer. The timber which was supplied was untreated. In the later case, the buyer argued that there had not been delivery, since there was *aliud*, and that the timber did not conform to the contract. The Supreme Court rejected the seller's arguments with regard to *aliud* with reference to the fact that the CISG does not distinguish between the delivery of *aliud* (substitute goods) and the delivery of goods which do not conform to the contract, regardless of how great the degree of difference may be.[70]

This practice of the courts has established a uniform and autonomous interpretation, as *aliud* is not included as a factor in applying Article 35. There is also an extensive interpretation of the wording of Article 35, so that all cases of deviation from an agreement, whether involving the supply of another type of goods or another specific article, are covered by the concept of conformity to the contract in Article 35. However, these two decisions of the *Austrian Supreme Court* must be compared with a decision of the *German Federal Supreme Court*:

In Section 4.4 above there is reference to the decision of the *German Federal Supreme Court* of 3rd April 1996, on the sale of a quantity of cobalt sulphate which, according to the agreement, should have been produced in England. However, the cobalt sulphate was imported from South Africa, and a certificate of origin which stated that the goods had been produced in England was wrong. Furthermore, the quality of the cobalt sulphate did not, in the

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"The Supreme Court further stated that pursuant to article 39(1) CISG the goods are presumed to be accepted if the buyer does not give notice of a lack of conformity within a reasonable period of time, specifying the nature of the lack of conformity; this rule does not only apply in cases where the goods are deficient but also where the seller delivers goods other than those ordered by the buyer."

69. See the Unilex and Pace databases.

70. Cf. the following quote from the judgment (translation source: the CISG Database at Pace Law School Law Library):

"The CISG broadly interprets the concept of defective goods (lack of conformity to the contract) and understands by this also the delivery of goods different from those owed. Therefore, a false/incorrect delivery (Falschlieferung) is to be judged according to Art. 35 et seq. CISG and is not a case of non-delivery (Nichtlieferung). This equally applies to the deviation in quality of generic goods ("Qualitäts-aliud"), as well as deviation in description ("Identitäts-aliud") for the sale of specific, ascertained goods. In contrast to § 378 HGB, it does not matter whether the incorrect delivery is subject to approval, nor does it depend on the degree of the deviation (Karollus, in Honsell, Kommentar zum UN-Kaufrecht, Art. 30, Annotation 9 with further references; ibid., UN-Kaufrecht 105, Wilhelm, UN-Kaufrecht 12 *et seq.*, 21)."

view of the buyer, conform to the contract since the goods delivered were of "feed grade" as distinct from "technical quality."

The *German Federal Supreme Court* denied that the claim was covered by Article 49(1)(b) on failure to perform the contract. The basis for this was that the CISG does not distinguish, as German law does, between "*schlechtlieferung*" (defective delivery) and "*falschlieferung*" (wrong delivery). Therefore, as a rule, the supply of wholly different goods will be covered by Article 35.[71] The *Federal Supreme Court* did not find it necessary to decide on the question of whether the delivery of totally different goods could be considered as a defective delivery, as the goods did not differ so radically from the terms of the contract for this question to be relevant in the actual case.[72]

In contrast to the decisions of the *Austrian Supreme Court* given on 21st March 2000 and 29th June 1999, the view of the *German Federal Supreme Court* in this case is that it cannot be denied that certain flagrant cases of *aliud pro alio* can be treated as constituting a lack of conformity of the goods to the contract where the goods have a marked lack of conformity. If the court had found that all cases of *aliud pro alio* were covered by Article 35, then it would have been possible to disregard questions about the nature of the variance from the contract.

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71. Cf. the following quote from the judgment, Section II.2.(b) (translation source: the CISG Database at Pace Law School Law Library):

"The CISG does not differentiate between delivery of different goods and delivery of goods that do not conform to the contract. Under the CISG, an *aliud* delivery does therefore, at least generally, not constitute a non-delivery, but constitutes a delivery of non-conforming goods."

72. Cf. the following quote from the judgment (translation source: the CISG Database at Pace Law School Law Library):

"The Court does not need to resolve whether, in the event of a blatant divergence from the contractual condition, a non-delivery in the meaning of Art. 49(1)(b) CISG can arise (see the references at Schlechtriem/Schwenzer, Art. 35 CISG, n. 10, fn. 32, and at Soergel/Lüderitz, 12th ed., UN-Kaufabkommen, Art. 35, n. 5 fn. 5). Such a violation of contract did not occur in the present case. The [buyer] bought cobalt sulfate 21%; this has been delivered by the [seller]. According to the [buyer's] submissions in the final appeal proceedings, the Court must assume that the [buyer] did not order the delivered fodder quality, but technical quality; i.e., goods without the flow auxiliaries. This divergence is certainly not severe enough to regard the delivery not only as non-conforming, but as not having been made at all (cf. Herber/Czerwenka, Internationales Kaufrecht, Art. 49, n. 8; Schlechtriem/Schwenzer, op. cit., n. 9 and 10; Art 49, n. 19; Soergel/Lüderitz, op. cit., Art 35, n. 5; Staudinger/Magnus, BGB, 13th edition. Art. 35 CISG, n. 7 seq., Hothause, RIW 1990 (101, 106); Kappus, NJW 1994 (984))."

The view of the German court can be compared with the UNCITRAL *Secretariat Commentary* on Article 35, which also seems to suggest that an evaluation should be made of how much the goods vary from the contract:

> "This article differs from ULIS in one important respect. Under ULIS the seller had not fulfilled his obligation to 'deliver the goods' where he handed over goods which failed to conform to the requirements of the contract in respect of quality, quantity or description. However, under this Convention, if the seller has handed over or placed at the buyer's disposal goods which meet the general description of the contract, he has 'delivered the goods' even though those goods do not conform in respect of quantity or quality." (Author's emphasis)

As it appears from the commentary, there is considered to be delivery when the goods conform to "the *general description* of the contract". This can also be compared with the *Secretariat Commentary* on Article 30 (extract):[73]

> "In order for the seller to deliver "the goods", in the case of specific goods, he must deliver the exact goods called for in the contract. In the case of unidentified goods, he must deliver goods which *generally conform to the description of the type of goods called for by the contract.* Therefore, if the contract calls for the delivery of corn, the seller has not delivered if he provides potatoes." (Author's emphasis)

If the *Secretariat Commentary* on Articles 30 and on Article 35 is taken together with the decision of the *German Federal Supreme Court*, the legal situation could be that delivery will not have taken place where unspecified (fungible) goods do not conform to the general description in the contract, or where a different good is delivered to that specified. Accordingly Article 35, and its associated provisions, should not be used. However, see the decision of the *Dusseldorf Provincial Court of Appeal* of 10th February 1994, referred to above, in a case which concerned the sale of textiles where about $\frac{1}{4}$ of the goods were delivered with the wrong pattern. The decision was wrong, and

73. Article 30 states as follows: "The seller must deliver the goods, hand over any documents relating to them and transfer the property in the goods, as required by the contract and this Convention"

is not relevant to the subsequent decisions of the *Federal Supreme Court.*

In contrast to the decision of the *German Federal Supreme Court* and the *Secretariat Commentary*, and in accordance with the practice of the *Austrian Supreme Court*, which did not appear to take the *Secretariat Commentary* into account in its considerations, the majority view is in no doubt that all cases of *aliud* are covered by Article 35, regardless of the degree of variance of the goods supplied from those agreed in the contract.[74] Thus, even if the seller supplies salt instead of sugar, or refrigerators instead of ovens, the matter should still be dealt with under Article 35, so the buyer must make a complaint in accordance with Article 39. However, such cases can make the rules on misleading statements more relevant, cf. Chapter 3, Section 3.5.

The discussion of *aliud pro alio* in relation to Article 35 is one of principle, as it is primarily relevant for the legal categorisation, and thus the treatment if such cases. The discussion is also relevant to the view of Article 35 as a uniform concept, independent of national laws. Can concepts from national laws, such as *aliud pro alio*, and other restrictions, be used for interpreting the CISG, or should they

74. Cf. Schwenzer in Schlechtriem: *Kommentar*, p. 374, pt. 4, and p. 376, pt. 10 with note 29: "Ist Zucker verkauft und wird Salz geliefert, so liegt eine Vertragswidrihkeit vor, die der Käufer nach Art. 39 rügen muß." See also Will in Bianca & Bonell: *Commentary*, p. 334; Piltz: *Kaufrecht*, p. 185.; Heilmann: *Mängelgewährleistung*, p. 171: "Egal, wie kraß eine abweichung der Ware von der vertraglich vereinbarten Beschaffenheit ist, ist eine Falschlieferung gleich jeder anderen vertragswidrigen Leistung des verkäufers zu behandeln."; Enderlein & Maskow: *International Sales*, p. 142; Brandi-Dohrn: *Gewährleistung*, p. 50. But in opposition to this, see Elmelund et al: *Lærebog*, p. 254, pt. 1.2: "If a seller is obliged to deliver tea, he has not made a delivery if he delivers coffee; but if he does deliver tea, even if it is of a poorer quality than agreed, then a delivery will have been made ...", as well as p. 260, pt. 3.2.1.; Bianca in Bianca & Bonell: *Commentary*, p. 273, expresses a similar view – and contrary to the view expressed by Will cf. above: "The Secretariat's remark does not involve the old dispute concerning the distinction between delivery of defective goods and delivery of goods of a different kind (*aliud pro alio*). It rather stresses the 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 needs 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 ..." Bianca still holds this opinion, cf. a lecture attended by the author at SECOLA's founding general meeting in Rome in April 2001.

be rejected on the basis of the requirement for broad textual interpretation, and a uniform and autonomous interpretation of the provision? And should the views expressed in the *Secretariat Commentary* be likewise rejected by reference to the clear wording of Article 35, the overwhelming meaning of the doctrine and the latest decisions of the courts?

In fact, there is a limit to the consequences of the categorisation of cases of *aliud pro alio*. Thus, the buyer has an obligation to make a complaint in those cases where he either knew or ought to have known that the seller had, in good faith, delivered an entirely different good to that agreed, in the same way as there is a duty to give notice of a complaint about a lack of conformity of goods to the contract, cf. Article 35. It is irrelevant whether the supply of totally different goods is categorised as a late delivery, since there is a duty on the buyer to make a claim with reference to wrongly supplied goods, as long as the buyer is not bound by his passivity. If the seller acts in bad faith, there is naturally no obligation on the buyer to make a claim, but this is so regardless of whether the matter is categorised as a late delivery or as a lack of conformity to the contract, cf. Article 40.[75]

Since, in cases of the delivery of a wholly different good than that agreed in the contract, the buyer is entitled to accept the goods, it is incompatible with this to say that the goods have not been delivered,[76] and as the buyer has an obligation to make a claim in cases of *aliud pro alio*, the practical effect of different categories is often meaningless. Furthermore, it would lead to difficult questions of definition about when a good may be said to vary so *significantly* from the agreed description of them that no delivery would be considered as having been made.

Even though it may seem somewhat artificial to categorise cases of the supply of salt instead of sugar, or refrigerators instead of ovens

75. Cf. Schwenzer in Schlechtriem: *Kommentar*, p. 376, pt. 10.
76. Cf. Enderlein & Maskow: *International Sales*, p. 142, where it is stated: "The solution according to which the delivery of an *aliud* constitutes non-conformity under the CISG is supported by the fact, that any deviation from the description of the goods as given under the contract can be remedied by not giving notice (Schlechtriem, 54). The Secretariat's commentary, which draws a distinction between bad delivery and false delivery (O.R., 29), is therefore inconsistent."

as lack of conformity of goods, both a broad textual interpretation and a dynamic and autonomous interpretation of Article 35 would favour treating all variances as lack of conformity to the contract according to Article 35.[77]

4.7. Assurances and guarantees

In several legal systems a distinction is made between whether information given by the seller about the characteristics of the goods is in the nature of general information (representations or conditions), or whether such information has particular consequences which can form the basis of special legal claims. If the information is interpreted as containing an understanding, guarantee or assurance (warranties and promises)[78] about the qualities of the goods, any variance from such a promise would be assumed to constitute a breach of the agreement, giving rise to certain rights.[79] In principle, the buyer need not use the rules on the conformity of goods to the contract as a basis for his claim, but where this is the case, the variance from what has been guaranteed or promised will be regarded as a lack of conformity to the contract.

The difference between general information and assurances, guarantees etc. is reflected in particular in the rights of the buyer, since the seller is assumed to be liable if a guarantee, undertaking or assurance is not satisfied.[80] Other effects can be derived from the fact that information is categorised as an assurance or a guarantee, for

77. Cf. also Josef Aicher: *Leistungsstörungen aus der Verkaüfershäre – Ein Beitrag zur wesentlichen Vertragsverletzung und zur aliud-Lieferung im UN- Kaufrechtsübereinkommen* in: Hoyer, Hans & Posch, Willibald: *Das Einheitliche Wiener Kaufrecht* (Vienna, 1992).
78. Regardless of the different words "understanding", "guarantee" or "assurance", what they have in common is that under the law of obligations they cover the situation in which the seller has given some promise that a certain situation either exists or will come to exist within a given period.
79. For the situation in Danish law, see Elmelund et al: *Lærebog*, p. 115.
80. Cf. in Danish law Købeloven § 42.2 (and § 80.1.4) on consumer purchases) as well as Gomard: *Obligationsret*, p. 181 et seq.; Elmelund et al: *Lærebog*, pp. 114-116 and pp. 134-135.

example in respect of the burden of proof,[81] the significance of good or bad faith,[82] as well as the deadlines for making claims.[83] The question of assurances and guarantees in relation to Article 35 has been considered by the courts in a number of cases:

See, for example, the decision of the Cologne *Provincial Court of Appeal*, 21st May 1996, which concerned the sale of a second-hand car between an Italian seller and a German buyer. According to the contract, the car had first been registered in Italy in 1992, and the car's odometer showed 15,000 kilometres. However, it subsequently appeared that the car had been registered in Germany in 1990 and that it had been driven 65,000 kilometres. As a consequence the buyer claimed compensation (the buyer had sold on the car and had paid compensation to the next buyer who had carried out the investigation of its origins and status), claiming that the buyer had given assurance that the car was first registered in 1992, and had, partly via the odometer, given assurance that the car had not been driven further. The seller denied that he knew that the car had been previously registered, and had merely given information that the car had first been registered *in Italy* in 1992, which was in fact correct. Furthermore, the seller claimed that he had not known that the car had been driven further than was shown on the odometer.

The court argued that the German rules on assurances about product characteristics in the BGB were not applicable, and that it was in any case doubtful whether assurances had been given, since making a statement about the date of the car's registration in Italy was not necessarily the same as giving assurances about the date of manufacture of the car. Article 35 should apply instead. In the view of the court, Article 35(1) should be broadly interpreted, so that any variance from the agreement should be considered as a lack of conformity to the contract. In view of this, the car was considered not to conform to the contract, so the seller had a liability towards the buyer.[84]

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81. Thus, in Danish law, a guarantee is normally assumed to mean that the seller has the burden of proof to show that any variance between the goods and the contract did not exist at the date when custody of the goods passed.
82. Whether the seller gives information in good or in bad faith is usually relevant to the liability to pay compensation.
83. Under Danish law, the deadline for making claims under Købeloven § 54 is sometimes assumed to be derogated from if the seller has given a guarantee etc.
84. Compare this decision with Danish law, as reflected in the case reported at U 2002.2534 V, where the car was manufactured 2 years prior to its first registration in Denmark. It was argued that the seller's failure to give full information was not contrary to ordinary good faith, and that it was not customary to give information about the year of production when selling second-hand cars. The seller had not given a guarantee, so the buyer could not claim that the circumstances constituted a contractual defect, cf. Article 83.

This decision is in line with the decisions of the *Austrian Supreme Court* referred to above on the issue of *aliud pro alio*, according to which Article 35 should be given a broad and extensive interpretation, so as to cover cases of *aliud pro alio*, as well as cases in which assurances, understandings and guarantees are relevant.

The finding of the court is significant, since the court refused to go into more details about the nature of the information and the seller's knowledge or lack of knowledge as factors in assessing the conformity of the goods to the contract, the extent of liability to pay any compensation etc. Instead, the Convention rules on the conformity of goods to the contract were applied, and thus the Convention rules on liability to pay compensation.

However, the decision does not exclude the possibility of a seller giving a specific guarantee or assurance. This does not affect the fact that there may still be a question of lack of conformity to the contract, but in addition to this, it can be assumed that the buyer can claim some special rights. The extent to which a guarantee or assurance may be considered to have been given must depend on the interpretation of the agreement, cf. Articles 8 and 9. The same view of Article 35, as a uniform concept, can be seen in the following arbitration decision (referred to above in connection with the discussion of variations of quantity):

> *ICC Court of Arbitration*, Case No. 6653, of 26th March 1993.[85] The arbitration tribunal stated that the concept of the conformity of the goods to the contract in Article 35 should be understood uniformly so that Article 35 replaces the concepts in French law of *garantie de conformité* and *garantie des vices*.[86]

The overwhelming opinion of the theory is thus that a distinction should not be made between general information about goods and

85. See the Unilex and Pace databases.
86. See this extract of the judgment: "Concerning the terms used, it must be mentioned that, in the context of the obligations of the seller, the French internal law of the sale of goods distinguishes between a warranty of conformity and a warranty against deficiencies, whereas the French international law of the sale of goods – the Vienna Convention – sticks to a uniform term, which is that of an obligation of conformity covering both warranties of the French internal law. Therefore, the obligations of the respondent [seller] have to be considered in the light of Articles 35 and 36 of the Convention."

assurances etc., when considering whether the goods conform to the contract or not.[87] This view is supported by the fact that Article 8 of the Convention does not distinguish between different statements made by the seller, but rather emphasises that due consideration is should be given to all relevant circumstances for the interpretation of the agreement between the parties.[88]

This is conformed by the decision of the *Arbitration Institute of the Stockholm Chamber of Commerce*[89] of 5th June 1998, where an American seller had sold a rail press to a Chinese buyer. The decision is considered in more detail below, in relation to Article 35(2)(a). It was argued that the seller's 18 months guarantee did not mean that Article 35(2) was not applicable nor that Articles 38 and 39 could be regarded as having been derogated from, so that Article 40 could apply. This aspect is dealt with below in Chapter 9.

At the same time, it is important to bear in mind that an agreement can, of course, be interpreted as containing a guarantee or assurance, in which case it gives rise to certain legal rights, as a supplement to, but not in contradiction to, the rules of Article 35, for example in relation to Article 36. It is also assumed, for example, that a seller "guarantees" that the goods are fit for the purposes for which goods are intended to be used, so that the goods will be considered defective if they do not fulfil the seller's implied promise, cf. Article 35.

4.8. Insignificant defects

As referred to in Chapter 2, under ULIS Article 33(2), a buyer could not base a claim on a defect if the defect was not material.[90] When the UNCITRAL Working Group was considering the provision, several representatives expressed the opinion that Article 33(2) appeared to

87. Cf. Schwenzer in Schlechtriem: *Kommentar*, p. 374, pt. 4; Bianca in Bianca & Bonell: *Commentary* p. 270; Honnold: *Uniform Law*, pp. 254-255; Ramberg in Ramberg & Herrre: *Internationella köplagen*, p. 233; Achilles: *Kommentar*, p. 93; Piltz: *Kaufrecht*, p. 185; Schnüll: *Haftung*, p. 155 *et seq.*
88. Cf. Honnold: *Uniform Law*, p. 254; Enderlein & Maskow: *International Sales*, p. 141.
89. See the Unilex and Pace databases.
90. Article 33(2) of ULIS states as follows: "No difference in quantity, lack of part of the goods or absence of any quality or characteristic shall be taken into consideration where it is not material."

be unnecessary, while others argued that the provisions of Article 33(2) ought more properly to be included in the provisions on the rights of the buyer in the event of breach of contract due to lack of conformity of the goods to the contract. However, at the Diplomatic Conference, Article 33(2) was revived by Canada, which triggered a lively debate. Some delegates argued that the proposal would create difficulties in assessing precisely when a variance of the goods from the contract should be considered "clearly insignificant". Even an insignificant variance is a breach of the contract, for which the seller ought to be liable, if the variance leads to a loss for the buyer. Other delegates argued that there must be a certain margin of error, where goods can be said to conform to the contract, even if there is some slight variation from it. The Canadian proposal was then put to the vote, and was rejected.

On this basis, there it is clear that insignificant variances from the contract are defects within the meaning of Article 35.[91] However, it is another question, whether the buyer has rights arising from this.[92]

> See the decision of the *Zurich Cantonal Commercial Court*[93] of 21'st September 1998, which concerned an agreement for the sale of books and exhibition catalogues between an Italian printer and a Swiss publisher. The exhibition catalogue had small misprints on a single page, which did not affect either the legibility or comprehensibility of the text.
>
> The court held that even though any defect was assumed to be covered by Article 35, the misprints in question could not justify either a reduction in price or the payment of compensation, so the buyer's claim was rejected.

However, in Danish national sales law, and in the sales law of most of the other European countries, the distinction between significant and insignificant defects is still relevant when assessing the conformity of goods to the contract.[94] It would seem better not to have a general rule on insignificant defects, since the rights for breach of contract can be adjusted according to whether the defect is insigni-

91. Cf. Schwenzer in Schlechtriem: *Kommentar*, p. 383, pt. 3; Heilmann: *Mängelgewährleistung*, p. 202 *et seq.*
92. See Schwenzer in Schlechtriem: *Kommentar*, p. 383, pt. 3; Ramberg in Ramberg & Herre: *Internationella köplagen*, p. 239, pt. 11.
93. See the Unilex and Pace databases and Burghard Pilz: *Neue Entwicklungen im UN-Kaufrecht*, Neue Juristische Wochenschrift, Heft 8 (2000) p. 558.
94. Cf. Schwartze: *Sachmängelgewährleistung*, p. 105 *et seq.*

ficant or not, and the parties to an agreement generally have the freedom to agree otherwise, for example if the seller gives an undertaking or a guarantee.[95] Furthermore, the rule leads to legal uncertainty, since there is no certainty about when a defect may be judged insignificant. Consideration for litigation costs would argue in favour of such a rule, since trivial cases could more often be ruled out.[96]

However, it is likely that the European legal systems which still make such a distinction when assessing conformity of goods to the contract, and which do not reserve such a distinction to assessing the rights of the buyer in the event of a breach of contract, will in future re-assess whether the distinction is still relevant to the concept of conformity of goods to the contract. In this connection the European Directive 1999/44/EC on certain aspects of the sale of consumer goods and associated guarantees (OJ 1999 L 171/12) does not attach legal significance to the distinction, and Germany, for example, has now amended the BGB, and the English law on the sale of goods was amended in 1994, so the distinction no longer applies to the assessment of conformity of goods to the contract.[97]

4.9. Contained or packaged as agreed

If the parties have agreed how the goods are to be contained or packaged, a variance from such an agreement will be assumed to mean that the goods do not conform to the contract, cf. Article 35(1), second point.

Containers and packaging are regarded in Article 35 as being one of the contractual aspects of the goods. This differs from the situation in some legal systems where the requirements for packaging the goods are not regarded as being part of the duty to deliver goods which comply with the contract, but as supplementary to the main duty to

95. Cf. Schwartze: *Op. Cit.*, pp. 108-109.
96. Cf. Schwartze: *Op. Cit.*, p. 105 and p. 108.
97. Cf. the amendment to BGB § 459.1.2), according to which the provisions on insignificant defects is repealed and not reintroduced in the new collective provisions on the conformity of goods to the contract in BGB § 434, cf. Schimmel & Buhlmann: *Schuldrecht*, p. 445, as well as the amendment to the British Sale of Goods Act Section 14 II B c, cf. Schwartze: *Op. cit.*, p. 105 *et seq.*

supply the goods, and this supplementary duty is assessed separately in claims for breach of contract.[98]

The legal distinction between the main obligation and subordinate obligations has a pedagogic and practical benefit, but is questionable, since the failure to fulfil a subordinate obligation can have the same effect as the failure to fulfil the main obligation.[99] The question whether the evaluation of the conformity of the goods to the contract in general should be separated from the assessment of the way the goods are contained or packaged is therefore irrelevant, since what matters is what contractual obligations the seller undertaken in relation to containers and packaging, and how important these are in relation to the contract as a whole.[100] A consolidation of the contractual requirements for the goods, and the containers and packaging is also justified from the point of view that the packaging is often seen as an integral part of the goods as a merchantable product, for example, perfume sold in bottles and boxes, or tinned tomatoes. In such cases there is no point in separating the assessment of the conformity of the goods to the contract from the assessment of the packaging. It is not clear, either from the wording of Article 35 or from the preparatory documentation, what is meant by "contained or packaged". The use of two separate terms suggests that they do not refer to identical concepts. At the same time, the use of the conjunction "or" between the two words indicates that there are not two different concepts, but synonyms. Neither in Danish nor in English can they be clearly distinguished, and they have pretty much the same meaning, which is containing or packaging something to protect it from its surroundings. Many discussions of the topic treat the two words as synonymous.

For practical and pedagogic purposes, the word "contained" will be understood here as referring to the materials with which the goods

98. This is the case in Danish law, cf. Nørager & Theilgaard: *Købeloven*, which deals with the question of packaging on p. 133 in relation to Købeloven § 10 on the obligations of the seller in mail order sales, as well as in German, Austrian, French and Swiss laws, cf. Schwenzer in Schlechtriem: *Kommentar*, p. 376, note 36; and Achilles: *Kommentar*, p. 94. In American law, the obligation to pack and label goods is part of the "implied warranty of merchantability", cf. Honnold: *Uniform Law*, p. 259.

99. In the case of Danish law, see Andersen and Lookofsky: *Obligationsret*, pp. 41-43.

100. Cf. Honnold: *Uniform Law*, p. 259.

are *directly* enclosed and protected, for example a tin can for food, a bottle for olive oil, or a box for chocolates. "*Packaged*" will be understood as referring to the enclosures for goods which have already been placed in containers or of goods which do not need separate containers for the purposes of transport, for example the packaging of multiples of tins or bottles in cardboard boxes, or when a larger piece of machinery is sent in a wooden crate.[101] From the cases which are concerned with containers and packaging, the following can be noted:

The decision of *COMPROMEX* (Mexico),[102] of 29th April 1996. Through an Argentine seller, a Mexican buyer ordered tinned fruit for delivery FOB in a Chilean harbour by a Chilean subcontractor. The seller had presented samples of tins and labels, and the buyer had presented samples of the cardboard boxes which the tins should be transported in and delivered in. When the goods were delivered, the buyer complained about the lack of conformity of the goods to the contract. A notary, appointed by the buyer, made an inspection report, from which it appeared that a number of the cardboard boxes were damp and damaged. As a resulted of this, and as a result of the poor quality of the tin cans, some of the tins had rusted. Furthermore, the contents of some of the tins were rotten because of failures in the canning process, which led to a number of tins exploding. Finally, the buyer claimed that neither the tins nor the labels corresponded to the samples which had been supplied, that less than the agreed quantity had been supplied, and that the contents of the tins did not correspond to the agreed mix of different types of fruit. The seller rejected the claims, among other things on the grounds that the seller had not been present during the inspection which had been undertaken by the notary appointed by only one of the parties.

On the basis of the documentation laid before it, *COMPROMEX* found that a quantity of the goods had been spoiled because of the poor quality of the tin cans and cardboard boxes, particularly given that the goods were to be transported by sea, which the seller was aware of. The seller had a duty to contain and pack the goods in a manner which ensured that the goods were protected, and as this had not happened, the seller was liable, cf. Article 35.[103]

101. See Gomard & Rechnagel: *International Købelov*, p. 114, note 10, though here the use of the term "packaging" is reserved to the "packing of goods in larger units, such as on pallets or in transport containers."

102. COMPROMEX (*Comisión para la Protección del Comercio Exterior de Mexico*) is a government commission consisting of independent experts who give binding decisions in cases which involve disputes between Mexican and foreign undertakings.

103. See the following extract from the judgment: "It is this Commission's opinion that LANIN is liable for not supervising the canning, packing and baling used by the company it subcontracted with, and for having caused damage to the goods as a

The *COMPROMEX* finding illustrates how not just the goods themselves (the preserved fruit), but the containers (the tin cans) and the packaging (the cardboard boxes) must satisfy the terms of the agreement in order for the goods to be considered as conforming to the contract, cf. Article 35(1). This decision is also referred to in the following chapters in relation to Article 35(2)(c) (samples and models) and Article 35(2)(d) (adequate containers and packaging).

The boundary between the containers and packaging of goods and the goods themselves cannot always be clearly delineated. It is therefore not necessary that the goods themselves should have been ruined or damaged as a result of inadequate containers or packaging. Consider bottles of perfume, for example. The bottles are packed in boxes, and damage to the boxes will normally be considered as meaning that the goods do not conform to the contract, even though the bottles themselves may not be damaged.

The following decision of the court concerned the labelling of the goods:

> The decision of the *Grenoble Court of Appeal*, 13th September 1995,[104] concerned an agreement for the sale of parmesan cheese in bags between an Italian seller and a French buyer. The bags of cheese were not marked with a declaration of their contents, nor an expiry date. Because of this, the cheese could not immediately be sold in France, because the French labelling rules were not satisfied. The buyer therefore complained to the seller, claiming that the goods were defective, as the seller should have labelled them. The seller rejected the claim, among other things, on the grounds that it had been agreed that goods should not be labelled.
>
> The court reasoned, first, that the seller had not proved his claim that the parties had agreed that the cheese should not be labelled. Therefore it was necessary to establish the intentions of the parties. On the basis that the parties had traded together for several months, and that the seller therefore

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result of the inadequate canning and failure to use the baling required to preserve or protect the goods," and "Because of those circumstances, LANIN, or the company with which it subcontracted, should have forwarded the goods that were the object of the transaction in the amount, quality, and of the type as agreed in the terms; as provided under articles 35 and 36 of the Vienna Convention, the containers and baling should have also conformed to the agreed terms. In the absence of a specific agreement between the parties regarding these issues, this Commission considers these legal provisions applicable."

104. See the Unilex and Pace databases. The case is discussed by Honnold: *Uniform Law*, p. 118.

> knew that the cheese was to be sold in France, the court reasoned that the seller, cf. Article 8(1), ought to have understood the order as meaning that the goods should satisfy the French rules. Consequently, it was found that the labelling of the goods did not conform to the agreement.[105]

The court thus treated the labelling of the goods as a question of its container or packaging, cf. Article 35(1). As for the substantive decision of the court, this must first be interpreted as saying that there is no requirement, *per se*, for the seller to deliver goods which satisfy the rules on labelling etc. in the buyer's country. If the opposite were the case, the court could have decided that the goods did not conform to the contract merely by reference to such a requirement, and would have not have needed to consider the intentions of the parties. This is a recognition of the same principle as that relating to spheres of influence, as expressed in the decision of the German Federal Supreme Court of 8th March 1998.

However, the court also chose to impose a burden of proof on the seller to show that there was an agreement that the cheese should *not* be labelled. Thus, it was not for the buyer to prove that that the goods should be labelled, so there was an assumption that the cheese

105. Cf. the following extract from the judgment (translation source: the CISG Database at Pace Law School Law Library):

"THAT, concerning the [buyer's] alleged claim of 8,400 *f* on the grated parmesan cheese, which had not been labeled in accordance with French Law on the composition and expiry date of food products, it is clear from an exchange of correspondence of 25 November 1992 between the [buyer] and the [seller], that the latter claims an agreement that the grated parmesan be packaged in "unmarked sachets"; But that, given the complaint of the [buyer], this agreement is not established; That it is thus appropriate to ascertain what the intent of the contracting parties was from the indications which they have been able to provide.

THAT it is indisputable, by virtue of the relations pursued by the parties for at least several months, that the [seller] knew that the parmesan sachets ordered by the [buyer] would be marketed in France; That 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;

THAT in omitting to place labels on the sachets as to the composition and expiry date, the [seller] had delivered non-conforming goods in the meaning of Article 35 of the Vienna Convention which particularly regulates packaging; That the buyer issued the written complaint the month following delivery; That this had thus been done within a reasonable time period in the sense of Article 39 of the Vienna Convention."

should satisfy the French labelling requirements on expiry dates and declarations of contents etc. However this assumption is based on the fact that the seller had himself claimed that there was an agreement that the goods should not be marked, thus "shooting himself in the foot", as this implicitly acknowledged that that goods ought to have been marked. The fact that the court chose this argument, but went further to analyse the intentions of the parties shows that it did not think that there was a general assumption that there should be labelling of goods.

The fact that the court chose to consider the intentions of the parties, cf. Article 8(1), seems inevitably to be connected with Article 35(1), since Article 35(2) concerns precisely those situations in which the agreement between the parties does not give guidance as to the requirements for the goods, but where goods should be fit for their ordinary use etc.[106] In the judgment there is a reference to Article 35 of the CISG, which specifically regulates the requirements for how goods are contained or packaged. Even though the buyer did not complain about the quality of the cheese, the labelling was not in accordance with the agreement, cf. Article 35(1). It could also be argued that the goods did not conform to their agreed description. Since the labelling of foods is customary on the packaging, it would be natural to consider the labelling as a question of correct packaging. As said, the judgment is in line with the German cases discussed, about goods which do not comply with public recommendations or mandatory requirements. What was decisive in the decision of the *Grenoble Court of Appeal* was that the seller knew or could not have been unaware of the buyer's intention, which was to buy cheese which was labelled in accordance with the French labelling requirements.

4.10. Conclusions

The above review has shown that the courts have generally regarded favourably attempts to interpret Article 35(1) as an independent con-

106. Against this background, UNCITRAL's classification of this question under topic 35B (the UNCITRAL Thesaurus), i.e., "Requirements implied by law", cf. Article 35(2), seems unimpeachable.

cept which covers variances of quantity and quality, and the supply of totally different goods than those agreed, as well as the way the goods are contained or packaged.

Thus, concepts and distinctions which are rooted in national laws and which are relevant to evaluating the conformity of goods to the contract are rejected. In assessing the conformity of goods to the contract in accordance with Article 35, the theory rejects impractical distinctions between delays and short deliveries, and both theory and the practice of the courts reject the idea of giving independent significance to special distinctions in national law between ordinary information and assurances and guarantees, as well as the delivery of totally different goods (*aliud pro alio*), even though the existence of assurances or guarantees can be included in an assessment under Article 35. In relation to *aliud pro alio*, there is some difference between the decisions of the *German Federal Supreme Court* and the *Austrian Supreme Court*, as the German court left the door slightly ajar in particularly gross cases of *aliud*.

The relevance of the concept of insignificant defects has been rejected both in theory and in practice, since any variance at all from the agreed description of the goods is assumed to mean that the goods do not conform to the contract. The significance of the defect for the buyer is then decided according to the rights of the buyer in the event of lack of conformity of the goods, and this will typically involve compensation or a reduction in the price.

Furthermore, it is not relevant to distinguish between the container or packaging of goods and the conformity of the goods to the contract, since the requirements for the containment and packaging of the goods can be an integral part of the conformity of the goods to the contract under Article 35. Finally, the review of practice and theory shows that the interpretation of what requirements can be made of the goods, cf. Article 35(1), is decided on the basis of an interpretation of the agreement between the parties, so that Articles 8 and 9 are actively considered. National rules which compete with Article 35, cf. Articles 8 and 9, give way to the Convention where the Convention rules give guidance as to how a particular problem of law should be solved, cf. the ruling of the American courts to disregard the parol evidence rule in favour of Article 8(3) in cases of lack of conformity covered by Article 35(1).

Taken overall, it therefore seems that Article 35(1) is interpreted in accordance with the requirement of Article 7 that in the interpretation of the Convention, regard is to be had to its international character and to the need to promote uniformity in its application. The interpretation can also be said to be dynamic, since its provisions are given priority over national rules which compete with it. In other words, the effectiveness of the Convention provisions is ensured.

Chapter 5

The fitness for purpose of goods, cf. Article 35(2)(a)

5.1. Introduction

According to Article 35(2)(a) of the Convention, cf. Article 35(2), except where otherwise agreed, goods do not conform with the contract unless they:

> "are fit for the purposes for which goods of the same description would ordinarily be used."

This rule is considered the most important rule in practice in Article 35(2),[1] expressing one of the clearest and most fundamental rules about the seller's obligation to provide goods which conform to the contract.[2] The background to this provision is that the parties to an agreement often do not specify the intended purpose of the goods, particularly when the goods are sold by reference to their type or in a routine transaction, as this will not seem necessary.[3] With these default rules, the parties do not need to specify the purpose, as long as the goods are to be used for their ordinary purposes. For example, it can justifiably be expected that a raincoat will protect against rain, that a watch will keep time, and that a chair will be capable of supporting a usual load,[4] food should be edible and so should have certain keeping qualities, etc.[5] This rule is so widely accepted,[6] e.g. in

1. Cf. Lookofsky: *CISG Scandinavia*, p. 88.
2. Cf. Honnold: *Uniform Law*, p. 255.
3. Cf. Ferrari in Schlechtriem: *Kommentar*, p. 80, and Honnold: *Uniform Law*, p. 255.
4. The examples are from NU 1984:5, pp. 224-225.
5. Cf. the 'Mussels' case before the *German Federal Supreme Court*, decision of 8th March 1995, discussed below.
6. Cf. Schwenzer in Schlechtriem: *Kommentar*, p 377, note 38.

UCC art. 2-314,[7] BGB § 434(I)(2),[8] in the new Chinese Contract Law Article 154 in connection with Article 62,[9] that Article 35(2)(a) can probably be considered as a codification of a basic principle of international sales law.[10]

This provision is based on ULIS Article 33(d), which provides that goods do not conform to the contract if they do not have the characteristics necessary for their normal or commercial use.[11] The difference in the wording of the two provisions does not reflect a desire to

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7. § 2-314 states as follows: "Implied Warranty: Merchantability; Usage of Trade.
   (1) Unless excluded or modified (Section 2-316), a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind. Under this section the serving for value of food or drink to be consumed either on the premises or elsewhere is a sale.
   (2) Goods to be merchantable must be at least such as
      (a) pass without objection in the trade under the contract description; and
      (b) in the case of fungible goods, are of fair average quality within the description; and
      (c) are fit for the ordinary purposes for which such goods are used; and
      (d) run, within the variations permitted by the agreement, of even kind, quality and quantity within each unit and among all units involved; (...)"
8. § 434 states: "Die Sache ist frei von Sachmängeln, wenn sie bei Gefahrübergang die vereinbarte Beschaffenheit hat. Soweit die Beschaffenheit nicht vereinbart ist, ist die Sache frei von Sachmängeln,
   1. (omitted)
   2. wenn sie sich für die gewöhnliche Verwendung eignet und eine Beschaffenheit aufweist, die bei Sachen der gleichen Art üblich ist und die der Käufer nach der Art der Sache erwarten kann." § 434 replaces § 459(I), which stated: "Haftung für Sachmängel. Der Verkäufer einer Sache haftet dem Käufer dafür, daß sie zu der Zeit, zu welcher die Gefahr auf den Käufer übergeht, nicht mit Fehlern behaftet ist, die den Wert oder die Tauglichkeit zu dem gewöhnlichen oder dem nach dem Vertrage vorausgesetzten Gebrauch aufheben oder mindern."
9. Article 62 states as follows: "Gap Filling
   Where a relevant term of the contract was not clearly prescribed, and cannot be determined in accordance with Article 61 hereof, one of the following provisions applies:
   (i) If quality requirement was not clearly prescribed, performance shall be in accordance with the state standard or industry standard; absent any state or industry standard, performance shall be in accordance with the customary standard or any particular standard consistent with the purpose of the contract; (...)"
10. Compare this with Danish sale of goods law: Lookofsky: *Køb*, p. 80: "As a part of the more general requirement for the standard quality of goods, there can be a requirement that the goods sold should have a general suitability for their purpose since this is a general principle which applies to the all contractual performance ..."
11. The provision was as follows: "... goods which do not possess the qualities necessary for their ordinary or commercial use."

the change the content of the provisions, as will become clear in the following, since a good should still be fit for ordinary purposes, including commercial purposes.[12] The preparatory documentation for Article 35(2)(a) should be taken into account in this connection since, as referred to in Chapter 2, prior to the adoption of the provision, there was discussion about what requirements should be satisfied for goods which were intended for retail, cf. Section 5.5.3.4. below.

In Danish domestic sales law, the assumption is that goods should be suitable for their customary purposes. This rule has been considered partly as a relevant presumption,[13] and partly as a general rule on the abstract concept of lack of conformity of goods.[14] In an amendment to the Danish Sale of Goods Act on 1st January 2002, this rule has been codified in § 75a.2.a), which is identical to Article 35(2)(a), at least in respect of consumer purchases.

Even though the central content of the rule is generally recognised, it is not uniformly interpreted in the different legal systems,[15] and it can sometimes be difficult, in international trade law, to find a uniform view of the meaning of the "ordinary purpose" of goods in different markets, cf. Section 5.5.3. In what follows the provision is reviewed in the light of theory and practice, starting with a discussion of what is meant by "except where otherwise agreed" and "the fitness for purpose of the goods." Then there is a discussion of what is meant by "goods of the same description" and "ordinarily used." The chapter ends with a summary of its conclusions.

12. Cf. Bianca in Bianca & Bonell: *Commentary*, p. 274: "The Convention has suppressed as superfluous this reference to commercial use, which is covered by the reference to ordinary use." See also Ziegler: *Leistungsstörungsrecht*, p. 70 at note 9.
13. Cf. Ussing: *Køb*, p. 123.
14. Cf. Kristensen in: *Lærebog*, p. 113 and Bruun Nielsen: *Lærebog*, p. 209, who both refer to this rule as the first under the heading of the abstract concept of lack of conformity, immediately following the concrete discussion of the concept of lack of conformity of goods to the contract.
15. An example of this is the differing views as to whether the goods should be of average quality or merely of merchantable quality, as discussed below.

5.2. Except where otherwise agreed

According to the introduction to Article 35(2), Article 35(2)(a)-(d) apply, "Except where the parties have agreed otherwise." If the seller does not intend to supply goods which are fit for the purpose for which goods of the same description are ordinarily used, he has a duty to make the buyer aware of this before the contract is agreed. Whether something else is to be regarded as having been agreed is determined on the basis of the interpretation of the contract, cf. Articles 8 and 9, which are discussed in Chapter 3. Some writers suggest that there should be clear agreement about this before such interpretation can be allowed.[16]

However, if the buyer knew or could not have been unaware that the goods were not fit for their ordinary purposes, the seller is not liable, cf. Article 35(3), which is discussed in Chapter 9.

5.3. Fitness for purpose

5.3.1. Fitness

Goods can be more or less fit for the purpose for which goods of the same description would ordinarily be used. A coat can be more or less rainproof, a watch can be more or less accurate, etc. The starting point is that the seller has a duty to supply goods which have an *average* or at least *reasonable* fitness for their ordinary purpose, but this is connected to discussion in section 5.5 below.[17] Here, there will typically be other influences, such as the description of the goods, the price, age and class of goods etc. There is often a close connection between the description of the goods, their fitness for their ordinary purposes, and the Article 35(1) requirement that goods should conform to the description in the contract.

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16. Cf. Achilles: *Kommentar*, p. 94, who would require "eines deutlichen Aufklärungshinweises."
17. Cf. Enderlein & Maskow: *International Sales Law*, p. 144, but compare this with the discussion below about goods which are to be retailed, and average or merchantable quality.

5.3.2. Purpose

The goods must be fit for the *purpose* for which goods of the given description are ordinarily used for. This purpose covers both the immediate use of the goods by the buyer, for example the sale of a machine or of raw materials for use in the buyer's own manufacture, and the purpose of the goods which are sold on, as well as use by third parties, for example through hiring out or leasing, etc.[18]

The assumption is that the goods shall be fit for *all* the purposes for which goods of the same description are ordinarily used.[19] If the goods cannot be used for all these purposes, but only some of them, the seller has a duty to make the buyer aware of this.[20]

It is not generally possible to treat *purpose*, on the one hand, as being equal to *quality, quantity, durability* etc. on the other hand, since these parameters do not necessarily reflect the fitness of goods for their ordinary purposes.[21] For example, watches are made in many different qualities, though all have a common ordinary purpose, to tell the time.[22] Here, other elements of interpretation will be decisive, for example the description of the goods and the price, cf. Section 5.4 below. On the other hand, there will be situations where the fitness of goods for their ordinary purposes will be closely connected with their quality and durability, for example when goods are intended for retail, cf. Section 5.5.3.4. below.

The seller does not have a duty to supply goods which are fit for purposes for which goods of the same description are only occasionally or seldom used.[23] If a seller has previously supplied goods which

18. Cf. Achilles: *Ibid.*
19. Cf. The *Secretariat's Commentary* on Article 35, pt. 5: "Goods are often ordered by general description without any indication to the seller as to the purpose for which those goods will be used. In such a situation the seller must furnish goods which are fit for *all the purposes* for which goods of the same description are ordinarily used" (author's emphasis). See also Schwenzer in Schlechtriem: *Kommentar*, p. 377, pt. 13. Compare this also with the Swedish sale of goods law: KöpL § 17. 2.1), which, regardless of the provision's use of the word "purpose" in the singular, must be regarded as covering all ordinary purposes, cf. Kihlman: *Fel*, pp. 128-129, at note 97.
20. Cf. the *Secretariat's Commentary* on Article 35, pt. 5; Heilmann: *Mängelgewährleistung*, p. 186; Gomard & Rechnagel: *International Købelov*, p. 115, note 14. Naturally, different rules will apply if the buyer either knew or could not have been unaware that the goods were not fit for all their ordinary purposes, cf. Article 35(3).
21. Cf. Ramberg in Ramberg & Herre: *Internationella köplagen*, p. 233.
22. The examples is taken from NU 1984:5, pp. 224-225.
23. Cf. Schwenzer in Schlechtriem: *Kommentar*, p. 377, pt. 13, at note 40.

the buyer has in fact been able to use for such occasional or seldom use, even if goods of the same description are not ordinarily used for such purposes, this does not mean that the seller is thereafter obliged to supply goods which are fit for such occasional or seldom purposes, unless the seller is aware that the buyer expects this. If the purposes for which the buyer wants to use the goods are out of the ordinary, then within the meaning of Article 35(2)(a) the purpose must be considered as particular, so the question must be settled by reference to Article 35(2)(b).[24] From this it follows that what constitutes a particular purpose depends on an assessment of what constitutes an ordinary purpose, since a particular purpose exists when the purpose lies outside the definition of an ordinary purpose, cf. Article 35(2)(a).[25]

If it is clear from the agreement that the buyer only intends to use the goods for some of the purposes for which goods of the same description are ordinarily be used, it is nevertheless assumed that the goods should be fit for all the ordinary purposes of goods of that description.[26] Of course, it can be stated in the agreement that the goods are only fit for some of their ordinary purposes.

As stated, the scope of the ordinary purposes of the goods is determined by their description in the agreement. The description of the goods is therefore of decisive importance.

5.4. Goods of the same description

Establishing the purpose for which the goods are ordinarily used depends first and foremost on what the goods in question are, i.e., how the goods are described in the agreement. At the same time, this description determines whether it is appropriate to apply Article 35(2)(a), or whether Article 35(1), or even Article 35(2)(b) should be applied instead.

For example, if a watch is described as a "chronometer" there will

24. Cf. Schwenzer in Schlechtriem: *Kommentar. Op. Cit.* p. 377, pt 13.
25. It therefore seems inappropriate to deal with the question of particular purposes before the question of the ordinary purposes, as in Heilmann: *Mängelgewährleistung*, p. 179 et *seq*.
26. Cf. NU 1984:5, p. 225.

be different expectations as to its ordinary use than if it were merely described as a "watch". Compared with a watch, a chronometer is used for purposes where precision is very important, for example navigation or official timekeeping. If a watch is described as a diver's watch or merely as watertight, this will also make a difference to the judgment. If a product is described as made from "steel", its ordinary use will be assumed to differ from one which is described as made from "hardened steel". A buyer cannot assume that he can use steel for the same purposes as those for which hardened steel is necessary, for example the manufacture of drilling bits which are to be used for very hard materials.

However, if the buyer makes the seller aware of the intended use of the goods, then according to Article 35(1) this purpose becomes part of the contract, cf. Chapter 4. For example, if a buyer orders "a watch for official timekeeping" or "steel for the manufacture of drilling bits for concrete", the seller is assumed to be obliged to supply goods which can be used for such purposes, even though this means a chronometer or hardened steel, cf. Article 35(1). The agreement can also be held to refer to a chronometer or hardened steel, even if the goods are described as a watch or as steel, if for example the description is accompanied by specifications which indicate that a chronometer or hardened steel is required.[27]

Compare this with the decision of the *Helsinki Court of Appeal* of 29th January 1998,[28] where, on the basis of the detailed description, the seller must have understood the purpose of the goods. However, it is not clear whether this concerned ordinary use or particular use.[29]

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27. Problems can also arise if a specification classifies the goods according to one description in one country, while classifying the goods differently in another country, for example if the goods are regarded as 1st class goods in the first country and 2nd class goods in the second.
28. See the UNILEX and Pace databases.
29. "In connection with the sale, E Oy [seller] has delivered a certificate of quality concerning the composition of the steel plates. The certificate has been drafted at a company named RE in Tallinn. N has also signed the certificate on behalf of E Oy [seller]. Consequently, E Oy [seller] has bound itself to liability for the quality of the steel plates sold. Because E Oy [seller] has committed itself to delivering steel that meets certain quality requirements to A Est. [buyer], E Oy [seller] must have been aware of the purpose of the steel sold."

If a buyer orders a watch or steel for a purpose which would be unusual even for a chronometer or hardened steel, for use in the aircraft or space industry for example, then Article 35(1) or Article 35(2)(b) apply, cf. Chapter 6.

If the parties agree about the meaning of the description of the goods, but disagree about the ordinary purpose implied by the description, this is not a problem in relation to the description of the goods. On the other hand, if the parties do not agree about the description of the goods, this must first be established by interpretation of the agreement, cf. Articles 8 and 9,[30] and see the review of these provisions in Chapter 3. Here it is assumed that the description of the goods is such that Article 35(2)(a) applies.

5.5. The purposes for which the goods are ordinarily used

5.5.1. Introduction

Once the description of the goods is established, the norm of their *ordinary* use must be determined. The starting point for assessing ordinary use is objective, in other words, it should not be made on the basis of what the individual buyer or seller believes about it, since that would be arbitrary.[31] However, if the buyer and the seller agree about the ordinary purpose of the goods, this view naturally prevails, even though objectively the situation might be seen differently, cf. the freedom of contract in Article 6, and Article 8(1) on the subjective intentions of the parties.

If the buyer and seller disagree, then an objective assessment must be made of the ordinary use of goods of the same description in the

30. Cf. Honnold: *Uniform Law*, pp. 256-257: "The standard of quality which is implied from the contract must be ascertained in the light of the normal expectations of persons buying goods of this contract description. The scope of the seller's obligation under this subparagraph is not determined by whether the seller could expect the buyer himself to use the goods in one of the ways in which such goods are ordinarily used. In particular, the obligation to furnish goods which are fit for all the purposes for which goods of the contract description are ordinarily used also covers a buyer who has purchased the goods for resale rather than use. For goods to be fit for ordinary purposes, they must be honestly resaleable in the ordinary course of business."

31. Cf. Heilmann: *Op. Cit.*, p. 183.

commercial sector concerned.[32] If one of the parties is not familiar with the sector of trade or industry concerned, his lack of experience must be assumed to be at his own risk.

However, there is lack of unanimity about how to make an objective assessment of what constitutes an ordinary purpose, cf. below, which depends among other things on how Article 35(2)(a) is perceived, including differences in the perception of spheres of influence.

5.5.2. Article 35(2)(a) as an objective legal guarantee or as a subjective presumption

As has been pointed out by Schlechtriem, Article 35(2)(a) can either be considered as a general objective legal guarantee which is independent of the actual (including subjective) circumstances, or as a rule which must, in principle, be interpreted on the basis of the actual (including subjective) circumstances.[33]

If Article 35(2)(a) is considered as a legal guarantee, certain objective minimum standards must be established as to the fitness of goods for their ordinary purposes, and these will, in principle, be independent of subjective factors such as the knowledge of the parties (and thus their spheres of influence), unless these subjective factors collectively amount to a tacit agreement between the parties about the nature of the goods, cf. Article 35(1).[34]

For example, it is possible to imagine an objective understanding of what "steel" indicates about suitability for ordinary purposes in a given business sector. But the problem is that there is often no basis for an internationally accepted standard of suitability for ordinary purposes, and there can be differing rules about the required standards of the goods in the seller's and the buyer's countries in terms of public law regulations on safety, public health, the environment and so on.[35]

Therefore, unless, as some writers do, one lays down a fixed and invariable rule that the opinion in the seller's or the buyer's state shall

32. Cf. Schlechtriem: *UN-Kaufrecht*, p. 82: "Der "Gewöhnliche Gebrauch von Waren der gleichen Art" bestimmt sich nach der Verkehrsauffassung."
33. Cf. Schlechtriem: *Op. Cit.*, p. 80 *et seq.*
34. Cf. Schlechtriem: *Op. Cit.*, p. 81.
35. Cf. Schlechtriem: *Ibid.*, with reference to the "*Mussels*" case, in the decision of the *German Federal Supreme Court*, of 8th March 1995.

apply as a reference standard for assessing the ordinary purpose of goods,[36] such a view will probably have limited value for international sales agreements, as rules on the "ordinary use" are primarily intended for use in national, or at least more or less homogeneous markets.[37] In other words, there are often no fixed standards for the characteristics of goods in international trade,[38] and thus for the fitness of goods for their ordinary purposes.[39] This means that it does not seem appropriate to consider Article 35(2)(a) as an expression of a "legal guarantee" or of fixed standards in international trade. On the other hand, it seems more appropriate to view Article 35(2)(a) as an established rule about the presumed intentions of the parties which should be interpreted on the basis of all the relevant circumstances, including subjective factors.[40]

However this does not mean that there cannot be universal standards where a description of a good signifies a precisely defined area of its ordinary purposes. This is particularly so in limited areas in specific trade sectors, where there are globally recognised standards for the goods in question.

Against the background of these comments, there follows an analysis of which norms apply in individual cases as reference points for "ordinary use".

5.5.3. Market-based norms for ordinary purposes

5.5.3.1. The main rule: the seller's state is the reference norm

An international sale is characterised by being between parties whose places of business are in different states, cf. Article 1 of the Conven-

36. Cf. for example Gomard & Rechnagel: *Op. cit.*, p. 115, note 15: "A good will normally be considered as defective if it does not satisfy the public law requirements for quality which apply where the good is to be used." Seen in isolation, from the view of the buyer, and on the basis of the domestic law on sale of goods, this is correct, but this is not the case when international sales agreements are taken into account, cf. the more detailed review below.
37. Cf. Schlechtriem: *Op. Cit.*, p. 82.
38. Cf. Honnold: *Uniform Law*, p. 225: "Commercial law does not impose standards of quality: it accommodates sales of cars for scrap as well as sales of new cars for resale to consumers," and in this connection see Enderlein & Maskow: *International Sales*, p. 144. However, the situation can be different in special homogeneous areas of trade, for example within the EU, cf. below.
39. However, the fitness of goods for their ordinary purposes is not necessarily a function of their quality, or vice versa, cf. below.
40. Cf. Schlechtriem: *Op. Cit.*, pp. 81-82. See also Conrad: *Vertragsaufhebung*, p. 95.

tion. This immediately gives rise to the problem that there can be differences between the market norms in the respective states.[41] The question is then, which norm should be the starting point for an objective assessment of ordinary purposes, since, as discussed above, it is not possible to lay down absolute norms. It is possible the goods may be required to conform to the norm in the seller's state, the buyer's state, the state where the goods are produced, the state where the goods are to be used, or the state where, at the date of the agreement, the goods were in transit.

If the same norm applies in all the countries involved, there will be no problem. The goods must comply with the common norm for the ordinary purposes of the goods. This can be the case where the countries have harmonised legal requirements, as in the EU, cf. Section 5.5.5.3. On the other hand, if there different rules and opinions in the various states involved, there will not be a uniform international view of the ordinary purposes, cf. also Article 7.

Some writers think that, in such cases, the principle should be that the norms in the seller's state should apply.[42] Others think that such cases should be assessed according to the norms in the buyer's state.[43] Yet others think that such general guidelines cannot be given, and that it depends on the actual circumstances of each case as to whether the norms of the seller's, buyer's, or some entirely different state should apply.[44]

If it is assumed, as referred to in the introduction, that norms for

41. However, the same problem can also arise with a purely domestic sales agreement, for example in a state which has great differences of climate.
42. Cf. Bianca in Bianca & Bonell: *Commentary*, p. 274; Enderlein & Maskow: *International Sales*, p. 144; Kircher: *Sachmängelhaftung*, p. 52; Piltz: *Kaufrecht*, p. 187.
43. Cf. Gomard & Rechnagel: *Op. cit.*, p. 115, note 15.
44. Cf. Schwenzer in Schlechtriem: *Kommentar*, p. 378: "Letzlich ist jedoch auch die Frage der Standards ein Problem der Auslegung des Vertrages," and at p. 379: "Im übrigen verbietet sich jede generelle Regel, und es ist auf die **Umstände des Einzelfalles** abzustellen" (emphasis in the original). See also Honnold: *Uniform Law*, p. 256: "Some writers have felt that it was necessary to give a general answer to the following question: Does subparagraph (2)(a) refer to the understanding of the contract description of the goods that prevails at the seller's place of business or at the place where the buyer intends to use the goods? Writers have disagreed over the choice between these two places. It should not be necessary to answer this question if one accepts the view, suggested above (§ 222), that the role of Article 35(2) is to aid in construing the agreement of the parties." Compare with Conrad: *Vertragsaufhebung*, p. 95; Su: *Vergleich*, p. 29 et seq.

the ordinary purposes of goods are often not defined in international trade, it must right to refrain from laying down absolute rules about which norms should be used.

There can be situations in which it is not possible, on the basis of the interpretation of the agreement between the parties, to determine which norms the parties can be assumed to have agreed upon for assessing the fitness of the goods for their ordinary purposes. In such cases, the decision will depend on which party ought to bear the risk, if the goods cannot be used for what that party considers to be their ordinary use.

In other words, in such cases there will be a presumptive rule to decide whether the starting point is that the norm in the seller's or the buyer's state, or some other state, should be decisive, since there should in any case be full apportioning of all the risks of the obligations arising out of the transaction between the buyer and the seller.

Here, the prevailing view, both in theory and in practice, is that the seller cannot be assumed to know of the norms in the buyer's state.[45] This is in line with the principle that it is not assumed that it is within the seller's sphere of influence to know about the norms in the buyer's state. This can also be justified on economic grounds, since the buyer can obtain the relevant information more effectively and cheaply than the seller can.[46]

This principle was laid down by the *German Federal Supreme Court* in its decision of 8th March 1995 (the *Mussels* case), where a Swiss seller and a German buyer had entered into an agreement for the sale of New Zealand mussels, which should be delivered to Germany for onward sale. It was found that the mussels had such cadmium levels that the local German public health authorities could not declare that the mussels were safe to eat, since they possibly exceeded the recommended, but not binding, legal thresholds for *meat* products (the so-called ZEBS standard). Because of this, the authorities requested further samples of the goods, in addition to the routine samples which had been taken when the goods arrived in Germany.

Even though the sale and consumption of the mussels had nor been prohibited, so the mussels were still considered to be edible, the buyer demanded

45. Cf. Bianca in Bianca & Bonell: *Commentary*, p. 274; and in connection with this Enderlein & Maskow: *International Sales*, p. 144; Achilles: *Kommentar*, p. 95; but see also Gomard & Rechnagel: *Ibid.*
46. Cf. Veneziano: *Non Conformity*, p. 46.

that the contract should be declared void, as there were now no German retailers or consumers who would buy the mussels.

The *German Federal Supreme Court* stated that, as a starting point, the conformity of the goods to the contract should be assessed on the basis of the agreement between the parties, cf. Article 35(1). Nothing had been agreed about the need for the goods to comply with the German standards.[47] Even though the goods had been delivered to Germany, and the seller knew that the goods should be sold there, this did not mean it was implicitly agreed that the goods should be capable of being retailed, still less that they should comply with special German rules.[48] In the absence of agreement, the conformity of the goods to the contract must be judged according to Article 35(2)(a) and Article 35(2)(b).

By way of introduction, the court stated that it was not necessary to decide whether the ordinary use of the goods required them to be of average quality or merely of merchantable quality, since it had not been shown that the mussels delivered had a higher cadmium level than the average for mussels in New Zealand.[49]

The court then stated that, even on the basis that the goods should be merchantable, meaning that they should be capable of being sold on, there

47. Compare this with the decision of the *Hertogenbosch District Court* of 2nd October 1998, which concerned an agreement for the sale of milk formula, where it was agreed between the parties that the milk formula should live up to the public health regulations in Singapore with respect to the level of radioactive traces.
48. Cf. the following citation from the judgment (translation source: the CISG Database at Pace Law School Law Library): "In this respect, an agreement between the parties is primarily relevant (CISG Art. 35(1)). The Court of Appeals did not even find an implied agreement as to the consideration of the ZEBS-standards. [Buyer] did not argue against this finding, and it is not legally objectionable. The mere fact that the mussels should be delivered to the storage facility in G.G. does not necessarily constitute an agreement regarding the resalability of the goods, especially in Germany, and it definitely does not constitute an agreement regarding the compliance with certain public law provisions on which the resaleability may depend."
49. Cf. Paragraph II.1.b) aa) of the judgment (translation source: the CISG Database at Pace Law School Law Library): "In the examination of whether the goods were suitable for ordinary use, the Court of Appeals rightly left open the question – controversial in the legal literature – whether this requires generic goods of average quality or whether merely "marketable" goods are sufficient (*see, e.g.*, Schwenzer *in* von Caemmerer/Schlechtriem, *supra*, Art. 35 6 15 (with further citations)). Even if on appeal, goods of average quality were found to be required, [buyer] has still not argued that the delivered mussels contain a higher cadmium contamination than New Zealand mussels of average quality. It is true that, according to the report from the examination laboratory of Dr. B., submitted by [buyer] to the trial court, and the contents of which is thereby alleged, "there are also other imported New Zealand mussels on the market ... that do not show a comparable cadmium contamination." It does not follow, however, that average New Zealand mussels on the market contain a smaller amount of cadmium than the mussels delivered to [buyer]."

was not a lack of conformity to the contract, since the seller could not be expected to know of the public health regulations in the buyer's or consumers' state.[50]

In the view of the court, it was not necessary to decide how far the compliance of the goods to the requirements of public law was, in principle, governed either by Article 35(2)(a) or by Article 35(2)(b). It was thus not necessary to express a view on the debate between legal writers about whether the standard in the seller's state will *always* be decisive, so the conformity of the goods to public law requirements is not a question of the goods' fitness for ordinary purposes, cf. Article 35(2)(a), but should, where relevant, be decided under the provisions of Article 35(2)(b) on particular purposes.

In any case, the goods need only satisfy the requirements in the buyer's state, where corresponding rules apply in the seller's state, if the buyer has made the seller aware of such rules, in which case the matter would probably be decided under Article 35(2)(b), or if, due to special circumstances, the seller knew or ought to have known of the rules in the buyer's state. However, the court found that none of these circumstances applied in this case:[51]

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50. Cf. Paragraph II.1.b) bb) of the judgment (translation source: the CISG Database at Pace Law School Law Library): "According to the absolutely prevailing opinion in the legal literature, which this Court follows, the compliance with specialized public law provisions of the buyer's country or the country of use cannot be expected." The lower court avoided making this assessment, partly by emphasising that the mussels were in any case edible, and partly by emphasising the fact that the guidelines of the German authorities were not binding.

51. Cf. the judgment (translation source: the CISG Database at Pace Law School Law Library): "Some uncertainties, noticeable in the discussions in the legal literature and probably partly caused by the not very precise distinction between subsections (a) and (b) of CISG Art. 35(2), do not require clarification in the evaluation of whether this question must be integrated into the examination of the ordinary use of the goods or the examination of the fitness for a particular purpose. There is, therefore, no need to finally decide whether, within the scope of CISG Art. 35(2)(a), as most argue, the standards of the seller's country always have to be taken into account (*see, e.g.*, Bianca, *supra*, 6 2.5.1; Piltz, *supra*, 6 41; Enderlein *in* Enderlein/Maskow/ Strohbach, *supra*; Aue, *Mängelgewährleistung im UN-Kaufrecht unter besonderer Berücksichtigung stillschweigender Zusicherungen* (Guaranty with Respect to Non-conformity with a Contract pursuant to the U.N. Law of Sales under Special Consideration of Implied Promises), at 75 (doctoral thesis 1989); *probably different* Schlechtriem, *supra*; Hutter, *supra*, at 40), so that it is not important for the purposes of subsection (a) whether the use of the goods conflicts with public law provisions of the import country (*see, e.g.*, Herber/Czerwenka, *supra*, 6 4). In any event, certain standards in the buyer's country can only be taken into account if they exist in the seller's country as well (*see, e.g.*, Stumpf *in* von Caemmerer/Schlechtriem, *supra*, 6 26; Schwenzer, *supra*, 6 16; Bianca, *supra*, 6 3.2) or if, and this should possibly be examined within the scope of CISG Art. 35(2)(b), the buyer has pointed them out to the seller (*see, e.g.*, Schwenzer, *supra*, 66 16, 17; Enderlein, *supra*) and, thereby, relied on and was allowed to rely on the seller's expertise or, maybe, if the relevant provisions in the anticipated export country are known or should be known to the seller due to the particular circumstances of the

Thus, it was not shown that corresponding public health provisions applied in the seller's state, Switzerland. Nor was the agreement about where the goods should be delivered and the final destination of the goods a sufficient condition under Article 35(2)(a) or Article 35(2)(b), even if it could be considered an indication that the buyer wanted to retail the goods in Germany, since the seller could not be expected to know the frequently opaque public regulations or administrative practice in the buyer's state, any more than the buyer should be expected to have the seller's professional knowledge on matters which concerned him. It was most natural for the buyer to know the regulations in his own state, so the buyer should have made the seller aware of these regulations. This applied not least to the case before the court, which concerned not so much the cadmium levels for mussels, but the fact that the local German public health authorities applied the regulations for meat analogously to fish,[52] which was not a widespread practice even in Germany, just as there was doubt about what sanctions the authorities were authorised to impose.

Whether the decision would have been different if, for example, the seller knew of the public health regulations in the buyer's state, or if the buyer could have assumed that the seller either knew or ought to have known of these regulations, perhaps because

- the seller had a branch in the buyer's state,
- the parties had had a long-term trading arrangement,
- the seller had regularly exported to the buyer's state, or
- the seller had marketed his goods in the buyer's state,

was irrelevant in this case, as the buyer had not asserted any of these circumstances.[53]

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case (*see, e.g.*, Piltz, *supra*, 6 35; Bianca, *supra*). None of these possibilities can be assumed in this case."

52. It had also been argued by the seller, that consumers would not normally be expected to eat the same quantities of mussels as of meat, so the threshold levels for meat are not necessarily suitable for assessing fish products.

53. Cf. Paragraph II.1.b) bb) ccc) of the judgment (translation source: the CISG Database at Pace Law School Law Library): "This Court need not decide whether the situation changes if the seller knows the public law provisions in the country of destination or if the purchaser can assume that the seller knows these provisions because, for instance, he has a branch in that country (*see, e.g.*, Neumayer/Ming, *supra*), because he has already had a business connection with the buyer for some time (*see, e.g.*, Schwenzer, *supra*, 6 17), because he often exports into the buyer's country (*see, e.g.*, Hutter, *supra*, at 47) or because he has promoted his products in that country (*see, e.g.*, Otto MDR 1992, 533, 534). [Buyer] did not allege any such facts." Compare this with Bonell in Bianca & Bonell: *Commentary*, p. 283, which substantially lists all the arguments which were used by the *German Federal Supreme Court* in the present case. The book was published in 1987.

Finally, it was not at the seller's risk that the goods were confiscated, since the confiscation was made under the German public law rules which, as argued above, were a matter for which the buyer bore the risk.

This seminal decision of the *German Federal Supreme Court*, established first, that public law regulations can affect the fitness of goods for their ordinary purposes, cf. Article 35(2)(a), and so should be considered as affecting the conformity of the goods to the contract, cf. Article 25, and not as being covered by the provisions of Article 41.

Second, the *German Federal Supreme Court* made an assessment of whether the norms of the buyer's state or of the destination state should be the starting point for assessing lack of conformity, and it found that they should not. There is a logic in this, as knowledge of these norms is assumed to be outside the seller's sphere of influence.[54] This has been followed up by corresponding decisions from the *United States Federal District Court, E.D., Louisiana* 17th May 1999 (*Medical Marketing v. Internazionale Medico Scientifica*), *Audiencia Provincial* [Appellate Court] *Granada* (Spain) 2nd March 2000, Austrian *Oberster Gerichtshof* [Supreme Court] 13 April 2000 (see below); *Audiencia Provincial Pontevedra* (Spain), 3rd October 2002, *Supreme Court of Western Australia*, 17th January 2003 (*Ginza Pte Ltd v Vista Corporation Pty Ltd*) and finally *Oberlandesgericht* [Appellate Court] *Frankfurt am Main* (Germany), 29 January 2004.[55]

Furthermore, the UNIDROIT Principles Article 6.2.14(a) seems to support this view. It follows from the said article, that where the law of a State requires a public permission affecting the validity of the contract or its performance and neither that law nor the circumstances indicate otherwise, if only one party has its place of business in that State, that party shall take the measures necessary to obtain

54. Cf. however Martin Karollus: *Judicial Interpretation and Application of the CISG in Germany 1988-1994*, Cornell Review of the Convention on Contracts for the International Sale of Goods (1995) pp. 51-94, pt. 6, who does not agree with the decision of the court, arguing that the seller ought to have been presumed to have a duty to supply goods which are capable of being sold on, cf. Section 5.5.3.4. This argument does not seem persuasive.

55. All cases can be found on Unilex and Pace Databases.

the permission. In the comment to this article it is said, that the term "public permission" should be given a broad interpretation, and it includes all permission requirements established pursuant to a concern of a public nature, such as health, safety, or particular trade policies. Thus, the findings of the German Supreme Court and later decisions could be supported by a reference to the principle in the UNIDROIT Principles Article 6.2.14(a), too.

However, the German Supreme Court also laid down a number of exceptions to this presumption, and these are considered below.

5.5.3.2. Exception: the standards of the destination state as the norm

In the *Mussels* case the *German Federal Supreme Court* laid down a number of exceptions to the rule that the seller is not presumed to have a duty to know about the rules in the buyer's state or the destination state.

First, it is clear that the goods must satisfy the special regulations in the buyer's state, or the state to which the goods are to be exported (the "destination state"), if the seller has *knowledge* of these regulations. Here the *German Federal Supreme Court* stated that the fact that the seller knew where the goods were to be delivered or used was not in itself sufficient to constitute such knowledge either under Article 35(2)(a) or Article 35(2)(b).[56]

Second, the court assumed that the norms of the destination state should be taken into account if the buyer makes the seller aware of these norms. In the view of the court, this should probably be decided on the basis of Article 35(2)(b).[57] Article 35(1) would probably be equally applicable in such cases, cf. Article 8.

Third, the *Federal Supreme Court* assumed that the exception applies if, in the circumstances, the seller knew or ought to have known of the regulations.

These circumstances are assumed to exist if the seller has a subsidiary or a branch in the destination state. This rule is an expression of

56. Cf. Paragraph II.1.b) bb) bbb) of the judgment. As stated above, nor was this sufficient to establish that an agreement had been made that the goods should satisfy these regulations or could be sold on, cf. Section II.1.a) of the judgment. Also, compare these arguments with Chapter 8 on containers and packaging of goods.

57. For this, see *Audiencia Provinsial de Pontevedra* (Spain), 3rd October 2002.

an identifying status, since the knowledge is now within the seller's sphere of influence. As the CISG Convention does not have any rules about when a seller can be said to have a subsidiary or a branch in the destination state, this must be decided in accordance with the applicable law under the rules of private international law, cf. Article 7(2).[58]

These circumstances are also assumed to exist if the parties have traded with each other for a longer period, so that the seller knows the buyer's expectation that the goods should meet the special public law requirements of the destination state. This view can be seen as a rule of interpretation of contract law, which reflects the thinking behind Article 35(1), cf. Articles 8 and 9(1), and it is also an expression of the idea of spheres of influence (or spheres of knowledge).

In this respect, see the decision of the *Ellwangen District Court*, 25th August 1995, referred to in Chapter 4, Section 4.5, about the sale of a consignment of paprika which did not comply with the German food laws. In this case, what was decisive was that the seller knew that the buyer considered it important that the goods should satisfy all relevant German food regulations. This approaches the status of a guarantee.

See also the decision of the *US District Court, Eastern District of Louisiana*, of 17th May 1999 (*Medical Marketing v. Internazionale Medico Scientifica*),[59] about an American company with a place of business in Louisiana which, in 1993, entered into an agreement with an Italian seller to become the sole distributor of mammography equipment. In 1996 the American health authorities confiscated the equipment, since it did not meet the American safety requirements. After a failed attempt to reach a compromise, the buyer referred the matter to arbitration.

In the proceedings before the arbitration tribunal, the Italian company argued that there was no assumption that the seller was obliged to supply goods which complied with the American safety rules. In support of this argument, they referred to the principles laid down in the *Mussels* case. The arbitration tribunal expressly recognised these principles and found that in this case the main rule should be derogated from since the seller either knew or ought to have known about the American safety requirements. The seller then appealed against the arbitration finding to the District Court, among other things on the grounds that the arbitration tribunal had disregarded the

58. For a more detailed discussion of the meaning of "place of business", see Ferrari in Schlechtriem: *Kommentar*, p. 61 et seq.
59. See the UNILEX and Pace Databases.

requirements of international sales law, in particular the CISG and the decision of the *German Federal Supreme Court* of 8th March 1995.

The District Court rejected the appeal and confirmed the finding of the arbitration tribunal. In its judgment, the court reviewed the decision in the *Mussels* case and referred to Article 35.

Further, the *German Federal Supreme Court* assumed that there would be an exception if the seller has regularly exported goods to the destination state. This view is also a reflection of the concept of the sphere of influence, but probably also that the buyer can expect that the goods will meet the standards required in his state if the seller regularly exports the goods there. What constitutes regular exports is a matter of judgement which is left to the courts.

Finally, the *Federal Supreme Court* assumed that the exception would apply if the seller has *marketed* goods in the destination state. The CISG does not have regulations governing when goods are regarded as having been marketed in the destination state, so this must be decided under the law which is relevant according to the rules of private international law, cf. Article 7(2). This rule can partly be seen as a rule about which party has taken the initiative for the transaction, and partly as a rule on the seller's sphere of influence. If the seller has taken the initiative for the transaction and has contacted the buyer in the buyer's home market, or has advertised in the buyer's market, it will be reasonable to assume that the seller has investigated what requirements the goods must satisfy in the market, and the buyer will be justified in expecting this.

5.5.3.3. The special case of sales agreements between parties from states which have common harmonised rules

As noted in the introduction, the rule on the compliance of goods with special regulations on safety, public health etc., is based on sales between parties in markets which are homogeneous, i.e. markets with common rules. Consideration should therefore be given to the consequences of the harmonisation of laws within common markets, such as the EU and EEA, for assessing the conformity of goods to the contract, cf. the decision of the *German Federal Supreme Court* above. For example, if a Danish seller sells goods which are subject to fully harmonised rules to a German buyer, it is assumed that the goods must satisfy these rules, as there will be the same rules in the states of both the buyer and the seller.[60] However, the situation will be different if the rules provide for minimum standards rather than full harmonisation, as in such cases there can be differences between national rules, cf. the following decision of the *Austrian Supreme Court* of 13th April 2000:[61]

A German seller and an Austrian buyer, who had previously entered into similar agreements, made an agreement by telephone for the sale of four second-hand machines. The buyer examined three of the machines, none of which had CE-marking. During the examination the buyer learnt that the fourth machine would be delivered by a Slovakian freight company, and the buyer therefore believed that the machine originated outside the EU.

According to Council Directive 89/392/EEC on the approximation of the Laws of the Member States relating to Machines, CE-marking is compulsory for machines introduced to the EC market. However, a minimum harmonisation exception was made in favour of second-hand machines which were in existence within the EC at the time when the Directive was introduced.

When the machines were delivered to the buyer, they did not have CE-marking, which the Austrian rules required for all the machines regardless of whether they originated from within the EEA or not. The buyer then complained to the seller.

The seller argued that, under German regulations, second-hand machines need only have CE-marking if they were imported to the EEC, as second-hand machines in existence within the EEC prior to the introduction of the Directive did not need CE-marking. The buyer had also informed the seller that he intended to recondition the machines and to sell them on which meant, at least according to German regulations, that the machines should in any case be CE-marked again by the buyer. There was therefore no point in the buyer demanding that the machines delivered by the seller should be CE-marked. Finally, the seller had not previously supplied machines to the buyer which had been CE-marked.

The buyer objected that at least one of the machines must have come from outside the EEC, so it should be CE-marked. Furthermore, the buyer objected that the seller had made changes to the machines so the seller should have renewed the CE-marking. Finally, the buyer pointed out that, under the Au-

60. See Oberlandesgericht Frankfurt am Main, 29th January 2004, concerning the sale of frozen pork, where the court found that the goods where non-conforming, as they did not live up to the certification rules in the buyers country, based on EU-rules, which applied both in the sellers and the buyers country.

61. See the UNILEX and Pace databases, commented on by Willibald Posch and Thomas Petz: *Austrian Cases on the UN Convention on Contracts for the International Sale of Goods (CISG)* ((2002)VJ 1-24, p. 15 et seq.

strian rules implementing the Directive, second-hand machines imported to Austria must always be CE-marked, so the machines should comply with these regulations. The seller had stated that the machines could be sold in the whole of the EU, but this was not correct. It had been misleading for the seller to make such a statement, and the seller had also failed to provide the promised technical documentation for the machines.[62]

The seller denied that he had made alterations to the construction of the machines, and denied that any of the machines came from outside the EEA.

The court of first instance, which had made an analysis of the choice of law rules and had then applied domestic German sales law, decided in favour of the buyer, since under the German safety regulations second-hand machines should in any case be CE-marked if they were put into circulation, which they would be if they were sold on. In addition to this, the seller had made alterations to some of the machines, which again meant that the seller should arrange for renewed CE-marking of the machines. Finally, the seller had not fulfilled his undertaking that the machines would be capable of being re-sold within the EU.

The Appeal Court refused to consider the seller's appeal on the basis of the facts before it, and referred the case to the Supreme Court, as it concerned a question of law which had not been settled in Austrian law.[63] In its reasoning for this, the court argued that, while the machines should satisfy the Austrian regulations when being imported to Austria, it was not certain, on the basis of an analysis of the German law, that the machines should be CE-marked according to the German safety regulations.

The seller argued before the *Austrian Supreme Court*, that the German regulations on machine safety should be decisive. Referring to the *Mussels* case, the seller pointed out that the *German Federal Supreme Court* had followed the prevailing doctrine that in international trade it is the norms of the seller's state and not the norms of the buyer's state which are decisive. The rules of the buyer's state only apply if the same rules apply in the seller's state, or if the seller has knowledge of the rules.

The *Austrian Supreme Court* agreed with the seller's argument that the norm for the ordinary purposes of the goods is presumed to be the norm in the seller's state, not the buyer's. This means that the goods need not satisfy the rules on safety, labelling and construction in the buyer's state, as the seller cannot be required to know about these rules. The fact that the seller knew of the destination of the goods did not mean that he knew about these rules. Rather, it is up to the buyer to specify these requirements in the agreement, either under Article 35(1) or Article 35(2)(b). The rules in the buyer's state only apply to the transaction if they also apply in the seller's state, if they

62. On this, see Chapter 3, Section 3.5.

63. The reference was for a preliminary ruling, so the *Austrian Supreme Court* expressed its view on the legal principles of the case, but without evaluating the facts in relation to those principles, other than if they concerned the questions of principle.

have been made part of the agreement, or if the seller was aware of them at the time of entering into the agreement.

The *Austrian Supreme Court* then referred the case back to the lower court for further proceedings in the light of this, and subject to the clarification of the facts of the case.

The *Austrian Supreme Court* thereby acknowledged the principles which the *German Federal Supreme Court* had laid down in the *Mussels* case. It also emphasised the close connection of the question to Article 35(1) and Article 35(2)(b).

This case also illustrates that, even though the EU may have harmonised rules on product safety, machinery, public health etc., there can still be differences in the implementation and interpretation of the rules in the individual Member States and this can be relevant to the assessment of the conformity of goods to the contract or under Article 35.

However, in the case itself, there are several elements which favour a finding that the seller did have a duty to CE-mark the machines, even if the seller did not have knowledge of the Austrian rules. Thus, the seller had a duty to CE-mark the machines if he had made any changes to their construction which were relevant to their safety. Furthermore, the seller had a duty to CE-mark the machines if they had been imported to the EU from a third country. Finally, the buyer had given evidence that the seller had a given a *guarantee* that the machines could be sold within the EU, which was not the case.

However, against this the parties had previously transacted for the sale of machines of a similar nature, where the machines had not been CE-marked. Also, the seller pointed out that it was the intention of the buyer to make changes to the machines which would in any case make new CE-marking necessary.[64]

5.5.3.4. Goods purchased for resale – average quality or merely merchantable quality?

Among the ordinary purposes of goods is usually that they should be capable of being resold.[65]

64. Neither UNILEX, Pace nor www.cisgaustria.at report on the new decision of the lower court.
65. Cf. Schwenzer in Schlechtriem: *Kommentar*, p. 377, pt. 14.

> This is illustrated by the decision of the *French Supreme Court* of 23rd January 1996. This concerned an agreement for the sale of wine between an Italian seller and a French buyer. It became clear that a large quantity of sugar had been (fraudulently)[66] added, so the alcohol content of the wine was much higher than normal. As a result the wine was neither suitable for consumption nor for retail. In its decision, the court referred to Article 35,[67] though without specifying which particular part of Article 35 applied, and held that the wine did not conform to the contract.[68]

As the wine in this case was not fit for the purpose for which wine is ordinarily used, namely resale and consumption, the wine did not conform to the contract, cf. Article 35(2)(a).

Even if the rule in Article 35(2)(a) had not existed, if a buyer orders a consignment of wine, it must be a condition that the goods can be described, consumed and resold as wine. In such cases the lack of conformity to the contract could be covered by Article 35(1) and Article 35(2)(a). However, a reference to Article 35(2)(a) would more correctly be regarded as a *lex specialis.*

As for the fitness of goods for resale, see also the decision of the *German Federal Supreme Court* of 24th March 1999:[69]

> In January 1994, an Austrian viticulturist ordered 5,000 kg black vine wax from a German seller, for the protection of vine stocks. Both parties specialised in cultivating and retailing vine stocks, and the buyer had previously bought vine wax from the seller, both for his own use of it and for re-sale. The wax, which was used to prevent the drying out of vine stocks and to protect them from fungal diseases, was supplied direct from a producer who had been encouraged by the seller to develop a new type of wax to replace earlier types. The seller did not examine the new wax or test it before supply-

66. This element was not dealt with in this judgment, which was confined to considering the lack of conformity of goods to the contract.
67. Cf. the following citation from the judgment (translation source: the CISG Database at Pace Law School Law Library): "But whereas an international sale of goods is involved, to which the CISG must be applied, having entered into effect on 1 January 1988 between France and Italy, it is by respecting the provisions of that treaty – and especially Article 35 – that the appellate court held that by shipping some chaptalized wine the [seller] did not meet its obligation to deliver goods conforming to the contract; and in addition, by exercising its fact-finding function held that only the manipulation of the wine rendered the wine unfit for consumption, the court legally justified its decision."
68. Cf. also Veneziano: *Non Conformity,* p. 44.
69. See the UNILEX and Pace databases.

ing it to the buyer, not did the seller inform the buyer that the consignment was of a newly developed wax.

The wax was both used and resold in March, April and May 1994. At the beginning of June the first damage became apparent, whereupon the buyer made a complaint. By reference to Article 45(1)(b) and Articles 74-77, the buyer claimed compensation, partly for the damage to his own vine stocks, and partly to cover current and future claims for compensation made against the buyer by his buyers of the wax and of vine stocks. The buyer also claimed that the seller could not be exempt from liability, cf. Article 79, (this issue has been discussed above in Chapter 2).

The Court stated that was no doubt that the wax supplied by the seller was the cause of the damage, and the seller had not given evidence that the damage had a different cause.[70] Furthermore, with reference to the German law, the Court rejected the claim that the seller could be exempt from liability under his normal conditions for sale, since first, it could not be considered as part of the agreement between the parties, and second, it was invalid, as it excluded all liability whatsoever.[71]

The Court held that the buyer, cf. CISG Article 45(1)(b) and Articles 74-77, had a claim against the seller, and that the seller could not claim exemption under Article 79 as the vine wax did not live up to the requirements that could be expected of it, and so it did not conform to the contract, cf. Article 35.[72]

70. Cf. the following extract from the judgment (translation source: the CISG Database at Pace Law School Law Library): "[The Court stated that] on the basis of the expert's opinion, the defectiveness of the wax was proven without a doubt. [The Court pointed out that] insofar as defendant denied that the delivered vine wax was the cause of the damage, this was unsubstantiated."

71. The condition about exemption from liability was printed on the back of the invoice. The condition is given both in the report from the court of first instance, the *Frankenthal District Court*, decision of 17th April 1997, and the Provincial Court of Appeal, *Pfälzisches Oberlandesgericht Zweibrücken, 8. Zivilsenat*, decision of 31st March 1998, which can both be found at http://www.jura.uni-freiburg.de/iprl/cisg/urteile (UNILEX only reports the Supreme Court decision. The Pace database refers to the Freiburg University CISG website).

72. See the following extract from the judgment(translation source: the CISG Database at Pace Law School Law Library): "[The Court found that] the black vine wax delivered by defendant did not meet industry standards and was therefore not in conformity with the contract pursuant to CISG Art. 35(1) ... The Court of Appeals correctly relies on the fact that defendant was obligated, pursuant to CISG Art. 35(2)(a), to deliver wax that is suitable for the treatment of vines, but that the black vine wax delivered by defendant in 1994 did not meet the industry standards – of which both parties were aware and which both parties applied – and that therefore the wax was not in conformity with the contract within the meaning of CISG Art. 35."

Since the vine wax was not fit for the purpose of treating vine stocks, which was the ordinary purpose of the wax, it did not conform to the contract, cf. Article 35(2)(a). Consequently, the wax was naturally not fit for resale.

As argued by Achilles,[73] a change to a previously used design or composition of the goods, which a buyer has learned to trust, can also be contrary to Article 35(2)(a). However, this also seems to be covered by Article 35(1). Compare this with the decision referred to in Chapter 4 of the *Paderborn District Court* of 25th June 1996, in the case concerning the sale of PVC granules for the manufacture of window blinds.

In connection with the purpose that goods should be capable of being resold, there is a dispute about whether, in order to be fit for this purpose, they should be of *average* quality or merely of *merchantable* quality, so that goods of below average quality may also be said to conform to the contract.[74]

As described above in Chapter 2, a Canadian proposal that goods should be of average quality was withdrawn, since several common law countries did not support it.[75] The practice in English law was of particular importance, as under English law goods that were of below average quality could be considered as conforming to the contract as long as they were merchantable.[76]

As suggested by Schwenzer,[77] this argument, which is rooted in the practice of the English courts, has been somewhat weakened since the English Sale of Goods Act has been amended so it is now requires goods to be of "satisfactory quality", which is decided on the basis of

73. Cf. Achilles: *Kommentar*, p. 94, pt. 4.
74. Those in favour of the average quality standard include: Herber in Herber & Czerwenka: *Kommentar*, p. 164, pt. 4; Ziegler: *Leistungsstörungsrecht*, p. 70; Su: *Vergleich*, p. 28. Those who are undecided or leave the question open include: Schwenzer in Schlechtriem: *Kommentar*, p. 378, pt. 15; Bianca in Bianca & Bonell: *Commentary*, p. 281; Honnold: *Uniform Law*, p. 255 et seq., pt. 225; Ramberg in Ramberg & Herre: *Internationella köplagen*, p. 233 *et seq.*, pt. 4; Achilles: *Kommentar*, p. 95, pt. 6; Lookofsky: *CISG Scandinavia*, p. 88 *et seq.*
75. Cf. Honnold: *Uniform Law*, p. 120 *et seq.*; Bianca in Bianca & Bonell: *Commentary*, p. 271, pt. 1.5., p. 274, pt. 2.5.1, and p. 280 *et seq.*, pt. 3.1.
76. For a general discussion of this see Hyland in Schlechtriem: *Einheitliches Kaufrecht*, p. 316 et seq.
77. Schwenzer in Schlechtriem: *Kommentar*, p. 378, pt. 15.

the expectations of a reasonable buyer.[78] In Schwenzer's view this means that the two viewpoints will become closer to one another, which seems probable.

As reported above in the *Mussels* case, the *German Federal Supreme Court* declined to decide on this question, on practical grounds, since no evidence had been given as to whether the cadmium levels in the mussels were higher than in corresponding mussels from New Zealand. However, the court did say that, even if it was assumed that the goods should be merchantable, this did not mean that the mussels did not conform to the contract, as the seller could not be expected to know the special public law regulations on product safety, public health etc. in the destination state.

There is a single decision of the courts which favours the standard of average quality:

> See the decision of the *Berlin District Court* of 15th September 1994, which concerned the sale of ladies shoes between an Italian seller and a German buyer. This case is also discussed below in relation to Article 35(2)(c). After taking delivery of the shoes, the buyer complained, among other things, that the decorations on the front of the shoes were fixed crookedly and that their soles came loose.

The court found that the shoes were not fit for the purposes for which goods of the same description would ordinarily be used, as they were not of average quality, and that it was not enough to claim that the shoes were just capable of being sold. Consequently, the shoes were found not to conform to the contract.

Article 5.6 of the UNIDROIT Principles states that: "Where the quality of performance is neither fixed by, nor determinable from, the contract a party is bound to render a performance of a quality that is reasonable and not less than average in the circumstances."[79] Similar provisions apply under PECL Article 6:108.[80]

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78. Cf. Bridge: *International Sales*, p. 81.
79. In the Commentary on the provision the following example is given at p. 109: "A buys 500 kg of oranges from B. If the contract says nothing more precise, and no other circumstances call for a different solution, those oranges may not be of less than average quality. Average quality will however suffice unless it is unreasonable defective."
80. "If the contract does not specify the quality, a party must tender performance of at least average quality."

In the *Mussels* case the court refused to decide on the argument between average quality and merchantable quality. However, if the doctrine of the sphere of influence were followed, the norm in the seller's country would be assumed to determine whether the goods should be of average or merely merchantable quality.[81] If the goods should merely be of merchantable quality, this would conflict with the UNIDROIT Principles and PECL, as well as the principle of the sphere of influence. If it is not possible to decide on the basis of other factors what quality the goods should have, then it seems reasonable to decide on the grounds of the decision of the *Berlin District Court*, the UNIDROIT Principles and PECL. In which case, the doctrine of the sphere of influence would rank below the doctrine of average quality.

In this connection the view of Bianca can also be given: "In the absence of an express Convention provision it is not possible to determine once and for all the precise degree of quality to which the buyer is entitled. It must be said, however, that the quality can be more or less good within a tolerable degree, at least not conspicuously below the standard reasonable expected according to the price and other circumstances."[82]

Whether a good shall be of average quality, or of higher or lower quality will therefore often be decided on the basis of other factors, for example, the price of the goods.[83]

This view is supported by a recent arbitral award on the CISG, in which the arbitrators refused to use either the "average quality test" or the "merchantability test".[84] Instead, the test of a reasonable quality was used, as this was considered to be a truly uniform solution to

81. Cf. the Commentary to Article 5.6 of the UNIDROIT Principles at p. 109: "A company based in country X organises a banquet to celebrate its 50th anniversary. Since the cuisine in country X is mediocre, the company orders the meal from a renowned restaurant in Paris. In these circumstances the quality of the food provided must not be less than the average standards of the Parisian restaurant; it would clearly not be sufficient simply to meet the average standards of country X." One may assume that in such cases the price will often be decisive.
82. Bianca in Bianca & Bonell: *Commentary*, pl. 281, pt. 3.1.
83. Cf. Achilles: *Kommentar*, p. 95.
84. See Netherlands Arbitration Institute, Case no. 2319, 15th October 2002, case presentation including English translation available at Pace Database; see also Unilex.

the problem.[85] According to the present author, this solution is in conformity with the UNIDROIT Principles Article 5.1.6., which explicitly refers to a *reasonable quality* that is not less than average *in the circumstances.* In this way, a rigid, mathematical average level is avoided an instead factors like the price and expectations of the parties should be taken into consideration. The same solution could be reached using PECL Article 6:108 with comments, although the wording of the Article seems a bit more inflexible.

The conclusion is, that the Arbitral Tribunal could have supported its findings by a reference to the UNIDROIT Principles Article 5.1.6. However, the solution in the PECL seems to favour more the average quality test, although the corresponding comment to that provision softens this approach considerably. At the same time it should not be forgotten that if both parties to a sales contract come from the same legal culture, this might indicate that the parties' reasonable expectations[86] point towards either the "average quality test" or the "merchantable quality test", although the supporters of the last mentioned test seems to decrease in number.

85. *Cf.* the award, paragraphs 117 and 118:

[117] "On the basis of the arguments above, the Tribunal holds that neither the merchantability test nor the average quality test are to be used in CISG cases and that the reasonable quality standard referred to above (see No. 71) is to be preferred."

[118] "The choice in favour of a test of reasonable quality is supported by the authors and the case cited above in No. 71 as well as by those scholarly writings that have rejected the average quality test. It is compatible with the travaux préparatoires since the Canadian amendment does not exclude an interpretation in favour of reasonable quality since it provided that under article 35 (2) a) CISG goods are fit for their ordinary use if it is reasonable to expect a certain quality having regard to price and all other relevant circumstances. Also, any such interpretation complies with article 7 (1) CISG imposing to take into account the international character of CISG and its reluctance to rely immediately on notions based on domestic law. Furthermore, the interpretation preferred by the Arbitral Tribunal is consistent with article 7 (2) CISG, which primarily refers to the general principles of CISG as possible gap fillers. In this respect, it may be noted that CISG often uses open-textured provisions referring to reasonableness (e.g., articles 8, 18, 25, 33, 34, 37, 38, 39, 43, 44, 46, 48, 49, 65, 72, 75, 77, 79, 86, 87 and 88). Finally, even if one were to rely on domestic law by virtue of article 7 (2) CISG, Dutch law would be applicable and would also impose a standard of reasonable quality."

86. *Cf.* CISG Article 8.

5.5.3.5. Other factors to be taken into account in assessing the ordinary purpose of goods

Other factors which can be relevant to the fitness of goods for the purposes for which goods of the same description would ordinarily be used include requirements as to their durability, i.e., whether the goods can be used for the purposes for which goods of the same description would ordinarily be used for a usual period of time.[87] In Danish sale of goods law the durability of goods is now explicitly included as an element in the assessment of conformity of goods to the contract, cf. § 75a.2.1) of the Sale of Goods Act. Durability is normally understood to refer to how long a good can be used for its ordinary purposes without perishing, needing to have replacement parts or be repaired.[88]

Perishable goods must be capable of being used for their ordinary purposes for a customary period. However, other factors can have influence on this, such as the conditions under which they are stored, the weather and the transport method used.

Non-perishable goods, such as clothing, and consumer durables etc. should be capable of lasting for a usual period without needing replacement parts or repairs. However, it can be relevant whether the goods are new or second-hand, the extent to which the product is used, the climate in which the good is used, etc.

The seller may have given a guarantee about the durability of the goods or their length of operability. If a good does not meet these terms, the good will be considered defective, as long as it has not been subjected to unusual treatment or force etc.

The seller also has a duty to provide the buyer with the necessary product specifications and instructions for use so the buyer can use the goods for their ordinary purposes.[89]

> See the decision of the *Stockholm Chamber of Commerce* of 5th June 1998, referred to in Chapter 4, which concerned the sale of a press which was to be assembled by the buyer. Without telling the buyer, the seller had replaced the

87. Cf. Schwenzer in Schlechtriem: *Kommentar*, p. 377 et seq., pt. 14; Achilles: *Kommentar*, p. 95, pt. 5.
88. Cf. the commentary to the legislative proposal L 9, p. 33 to § 75a.2.1).
89. But cf. Najork: *Treu und Glauben*, p. 74, where such an obligation would only be imposed where it is customary in the market and would be excluded where such a provision would have no independent validity.

lockplate in the press with one which had different dimensions, so the lockplate had to be installed with great precision in order to work properly. The lockplate of the original dimensions was fully described in the contract documentation. The seller was present for the assembly of the press at the premises of the buyer, though without ensuring that the lockplate was correctly installed. After three years the press failed because the lockplate had worked loose. It was argued that since the seller had replaced the lockplate with one which differed from that described in the contract, and since the seller had described the press as being of the highest quality, and since the seller had not provided the necessary instructions for assembly, the press was defective. This meant that the seller could not rely on the buyer's failure to complain in due time, cf. Article 40, since the seller knew of the defect. This is discussed further in Chapter 9.

Finally, the goods must be safe to use, i.e. it should be possible to use them without danger or harm to life or property. Various public law regulations have been referred to above.

5.6. The burden of proof

As the rule in Article 35(2)(a) is a presumptive rule, the seller ought to have the burden of proof for shifting the presumption.[90] The buyer has the burden of proof for showing that the goods are not fit for their ordinary purposes, including showing that the norm may differ from that which may be asserted by the seller.

5.7. Conclusions

The rule in Article 35(2)(a) on the fitness of the goods for their ordinary purposes is not an objective legal standard, but a rule about the presumed intention of the parties which should be interpreted on the basis of all the circumstances of the case, cf. Article 8 and Article 9.

The starting point for assessing the ordinary use of the goods is the objective norm in the relevant commercial sector. According to

90. Cf. Schwenzer in Schlechtriem: *Kommentar*, p. 378; Su: *Vergleich*, p. 29; Piltz: *Kaufrecht*, p. 127.

the prevailing view in practice and in theory, the seller cannot be expected to know the special rules which are relevant for the ordinary use of the goods in the destination state. This means that the starting point is the norm in the seller's state. This also applies to the sale of goods in homogeneous markets with harmonised rules, as for example the EEA, since there can be differences in how the rules are implemented in the individual Member States.

However, this starting position can be derogated from if information about the norms of the destination state are brought within the seller's sphere of influence, for example if the seller knows about the rules, if the parties have previously traded together and the seller knows of the buyer's expectations, or if the seller has marketed the goods in the seller's country.

The use of the goods for their ordinary purposes is not only relevant to the buyer's own use of the goods, but also to the purpose of the resale of the goods, hiring them out, etc. The buyer must be able to rely on the assumption that the goods are of average quality, though other elements of the agreement, such as the price, age and class of the goods will have an influence on this. It is preferable for these issues to be explicitly dealt with in the contract, as there is still some uncertainty as to what the law is on this. The use of goods for their ordinary purposes is not necessarily linked to their durability. However, goods will usually have sufficient durability for them to fulfil their purposes for a customary period. How long this period will be depends on the nature of the goods and their use.

The seller must also provide the buyer with the necessary instructions and guidance as to the use of the goods, so the buyer is able to use the goods for their ordinary purposes.

Chapter 6

The fitness of goods for particular purposes, cf. Article 35(2)(b)

6.1. Introduction

As stated in Article 35(2), cf. Article 35(2)(b), unless otherwise agreed by the parties, goods do not conform with the contract unless they:

> "are fit for any particular purpose expressly or impliedly made known to the seller at the time of the conclusion of the contract, except where the circumstances show that the buyer did not rely, or that it was unreasonable for him to rely, on the seller's skill and judgement."

The provision is based on ULIS Article 33(2)(e), but in both its wording and its content CISG Article 35(2)(b) differs from ULIS Article 33(2)(e) in two respects. First, under ULIS Article 33(2)(e) it was a condition that the particular purpose should be made clear in the contract,[1] while CISG Article 35(2)(b) merely requires that the particular purpose should be expressly or impliedly *made known* to the seller, which is an extension of the provision to the advantage of the buyer, cf. Section 6.3.[2] Second, at the same time the scope of protection for the buyer is narrowed, as there must be consideration for whether the buyer relied on, or whether it was unreasonable for him to rely on the seller's skill and judgement, cf. Section 6.5. However, this part of the provision is broadly in line with the interpretation of ULIS in practice, so the practical difference between the provisions is slight.[3]

The provision is also influenced by the English Sale of Goods Act, 1979, s. 14(3) and the Uniform Commercial Code § 2-315.[4]

1. ULIS art. 33(2)(e) states: "goods which do not possess the qualities for some particular purpose expressly or impliedly contemplated by the contract."
2. Cf. Ziegler: *Leistungsstörungsrecht*, p. 72, pt. 3.a): "Hierin liegt eine Erweiterung zugunsten des Käufers gegenüber der regelung des EKG."
3. Cf. Ziegler: *Op. cit.*, pp. 72-73, pt. 3.b), where it is stated that: "Dieser Unterschied ist aber bei genaurerer Betrachtung gering," and after an analysis continues: "Insofern spielte also auch im EKG die Sachkunde des Verkäufers vertraut."
4. Cf. Schwenzer in Schlechtriem: *Kommentar*, p. 379, pt. 18.

There are thus four parameters for making an assessment under Article 35(2)(b): when can a purpose be considered a particular purpose; what constitutes a seller being expressly or impliedly made aware of the particular purpose; whether the seller has been made aware of this particular purpose before entering into the contract; and whether, in the circumstances, the buyer relied on, or it was unreasonable for him to rely on the seller's skill and judgement. These elements for the assessment are discussed below, and the problems of evidence which these provisions gives rise to are analysed. The chapter ends with a summary of conclusions.

6.2. Particular purpose

6.2.1. Particular purpose as against ordinary purpose

For Article 35(2)(b) to apply, the goods must be used for a purpose which lies outside what is considered the ordinary use of the goods, cf. the discussion in Chapter 5, Section 5.5, on the definition of Article 35(32)(a).[5] A purpose for which a good is only occasionally or seldom used will be assumed to be a particular purpose, falling within the scope of Article 35(2)(b).

A typically example of the fitness of goods for a particular purpose might be that the goods are to be used under special climatic conditions, for example in arctic or in tropical regions where goods of the description are not normally used;[6] this may include a requirement for the goods to be particularly strong or durable etc.

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5. Cf. Schwenzer: *Op. Cit.*, p. 379, pt. 18.
6. Cf. for example Schwenzer: *Op. cit.*, p. 379, pt. 19; Galston & Smit: *International Sales*, § 6-21; Gomard & Rechnagel: *International Købelov*, p. 116, which at p. 19 gives an example of a buyer who wanted marine paint for use on a ship which sailed between Denmark and Greenland. See also *Tribunal of International Commercial Arbitration at the Russian Fedration Chamber of Commerce and Industry*, case 166/1995, 12 March 1996, where it was held that a Russian seller knew or could not have been unaware of the fact that the goods where to be used under tropical conditions in Equador. The case is available at Pace database in English translation.

An example of this can be seen in the decision of the *Barcelona Provincial Court of Appeal* of 4th February 1997,[7] which concerned the sale of adhesive for cardboard boxes. The case involved domestic Spanish sales law, but CISG Article 35 was applied analogously. The buyer had previously bought adhesive of the same kind, but prior to the purchase of the disputed consignment the buyer had made the seller aware that this time the adhesive should be used on boxes which should be able to withstand high temperatures. The seller recommended the adhesive for this purpose. It appeared that the adhesive could not hold the boxes together at temperatures above around 40°C, and the buyer then complained to the seller. The Court stated that the case did not concern whether the adhesive *per se* did not conform to the contract, since it complied with the technical specifications for adhesive of the given description, but the adhesive was not fit for the buyer's particular purpose, which had been made known to the seller. It was irrelevant that the buyer had previously bought the same type of adhesive, as it was clear that the circumstances and the purpose of the adhesive in the earlier transactions were not the same as for the disputed consignment. Consequently, the goods did not conform to the contract, cf. by analogy, Article 35(2)(b) CISG.

Another example can be that the goods are to be used in some special production process.

In this connection see the decision of the *United States Federal Appellate Court (4th Circuit)* (*Schmitz-Werke v. Rockland*) given on 21st June 2002. The case concerned an agreement for the sale of curtain material between an American seller and a German buyer. The German buyer intended to use the material for making finished curtains, and for this purpose the buyer used a special form of colour printing, which applied colour and patterns to the curtain material by means of heat and transfer paper. The seller confirmed that the material was suitable for this form of printing.

After receiving a sample of the material, the buyer drew attention to the fact that there were certain problems with the capacity of the material to take the colour, but that he was otherwise satisfied with the characteristics of the material. The buyer then placed his first order. There were still problems with printing colour on the material, but the seller assured the buyer that the buyer could in any case print the pattern on the material and encouraged the buyer to continue with the printing. Thereupon the buyer placed his largest order. However, this too failed to live up to the requirements of the buyer, as 15-20% of the curtain material did not take the printed colour, so the buyer returned this material and claimed a proportionate reduction in price.

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7. The case is taken from the Pace CISG Database, in a translation by Alejandro Osuna-Gonzales, edited by Patricia Rincón Martín (part of the Queen Mary Case Translation Programme). See also the UNILEX database.

As the buyer had used a printing technique which was customary and known in the trade, and as the material did not take the colours satisfactorily, the court found that the material was not fit for the particular form of colour printing which the buyer had made known to the seller and for which the seller had assured the buyer that the material could be used. Furthermore, the buyer had relied on the seller's professional skill, and it was noted that the seller had encouraged the buyer to continue printing, even though problems had arisen with the printing.

A third example is the situation where a buyer wishes to use a good in a particular way, which differs from the way in which such goods are normally used.

See the decision of the *Court of Appeals of Grenoble* of 26th April 1995,[8] which concerned an agreement for the sale of a second-hand warehouse between a French seller and a Portuguese buyer. The buyer wanted to re-assemble the warehouse elsewhere, and the seller was aware of this. A quarter of the purchase price was attributable to dismantling the warehouse.[9] However, it was not immediately possibly to re-assemble the warehouse, as some metal elements had been damaged during the dismantling. The buyer complained to the seller who repaired the damaged elements but not, in the opinion of the buyer, satisfactorily. The buyer then avoided the contract.

The court held that the seller had not delivered a good which complied with the contract, as the metal elements delivered in the first instance did not enable the warehouse to be reassembled, as it had been before being dismantled, and the seller had been expressly made aware that this was the buyer's purpose, cf. Article 35(2)(b).[10] However, the seller had repaired the defective elements, so the contract could not be avoided but there could be payment of compensation.

6.2.2. The norm for particular purposes is assumed to be the norm in the seller's country

A further example of where there may be a particular purpose for goods consists of cases in which goods must satisfy the official regula-

8. See the Unilex and Pace databases.
9. The court took note of the fact that much the largest part of the purchase price was for the goods and not the service, cf. Article 3(2).
10. "It is to be determined whether the [seller] had delivered goods conforming to the contract as required by Article 35 of the CISG.

    It is agreed between the parties, that a certain quantity of goods (a third according to [buyer], ten parts of girders according to the [seller]) were not fit for the special use of reassembly in the identical manner brought expressly to the seller's attention."

tions in the country where they are to be used, cf. Chapter 5, Section 5.5.3.1 and the discussion of the decision of the *German Federal Supreme Court* of 8th March 1995[11] (the *Mussels* case), and Chapter 5, Section 5.5.3.3., and, e.g., the discussion of the decision of the *Austrian Supreme Court* of 13th April 2000. The primary rule is that it cannot be assumed that the seller should have knowledge of the official regulations in the buyer's state or the destination state. It is the buyer who must make the seller aware of such regulations, cf. Article 35(2)(b), unless, due to special reasons, the seller can be presumed to have knowledge of them, cf. also Article 35(2)(a), as discussed above.

The general norm for what is considered to be a particular purpose must be established in the same way as described above in relation to Article 35(2)(a), and in accordance with the guidelines in the judgments of, among others, the *German Federal Supreme Court* and the *Austrian Supreme Court.* The starting point for assessing what is a particular purpose is therefore objective, in other words, the assessment should not be based on what the individual buyer or seller thought about the matter, since this would lead to an arbitrary result. However, if a buyer and a seller agree about a particular purpose, this view naturally applies, regardless of whether a purely objective assessment might find otherwise, cf. the principles of freedom of contract in Articles 6 and 8.

If the seller and the buyer disagree, an objective assessment must be made of what is considered to be a particular purpose for goods of that description in the given sector of trade. If one of the parties is acting in an area with which he is not familiar, which may be regarded as a particular purpose, then that party's lack of knowledge must be assumed to be at his own risk. If there is a difference of opinion between the buyer's trade sector and the seller's trade sector, the starting point is that the norm in the seller's state applies, according to the *Mussels* case and the similar decisions mentioned above. The same principles apply to exceptions to this assumption.

11. Cf. Schwenzer in Schlechtriem: *Kommentar*, p. 379, pt. 18.

6.3. Where the purpose expressly or impliedly was made known to the seller

6.3.1. Introduction

The most complex and disputed parameter concerns when the seller may have been made aware, expressly or impliedly, of the special purpose for which the goods are intended to be used. As mentioned in the introduction, there is no longer a requirement that it should be agreed in the contract between the buyer and the seller, but merely that the particular purpose should have been "made known" to the seller. The difference between these two will be illustrated below.

The question is also closely linked to the quality and description of the goods, cf. Article 35(1), and it seems difficult to make a clear distinction between Article 35(1) and Article 35(2)(b), just as there is a debate about what is required for the seller to be considered as having been made aware of the particular purpose.

6.3.2. Expressly made known

As an example of the application of Article 35(2)(b), Honnold refers to the situation where the buyer requested the seller, *in writing*, to send a drill bit for use in hardened steel, but where the seller supplied a drill bit which was intended for use in ordinary steel.[12] Honnold explains that this situation is also covered by Article 35(1), cf. Articles 8(2) and 8(3), since an understanding was established between the parties that it was the buyer's intention to use the goods to drill in hardened steel, even though the seller had not said anything about it. Moreover, Honnold says that this overlap between Articles 35(1) and 35(2)(b) will exist in most if not all situations covered by Article 35(2)(b), so the provision may seem superfluous. According to Honnold, the provision makes clear that the seller can be liable for an understanding which he may not himself have articulated, but which he has been party to creating.

Honnold's example is of a situation in which the buyer makes the seller aware of the purpose of the goods expressly and in writing.

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12. Cf. Honnold: *Uniform Law*, pp. 258-259; and with a similar view, Gomard & Rechnagel: *International Købelov*, p. 116, note 18; as well as the Danish Ministry of Justice commentary on the legislative proposal L 35, p. 91.

This situation is clearly covered by Article 35(1), since the buyer gave a description of the purpose of the goods which is part of the agreement between the parties, cf. Article 35(1), so there could be no doubt that the buyer's intention was to acquire a drilling bit which could drill in hardened steel, and the seller either knew or could not have been unaware of this intention, cf. Article 8(1), cf. Article 8(2). If the seller did not want to be bound by the statement of the buyer, he should have objected.[13]

Honnold's example is therefore not the most well chosen case to illustrate Article 35(2)(b), first, because it is clearly covered by Article 35(1), cf. Article 8, and second, because it does not illustrate those cases which are of most interest in relation to Article 35(2)(b), which are cases where it is *doubtful* whether the seller has been made aware of the buyer's particular purpose; this will typically be cases where the purpose is *implicit.*[14] Bianca[15] and Heilmann[16] also clearly reject the idea that Article 35(2)(b) applies to cases in which the buyer has expressly ordered goods for a particular purpose, since Article 35(1) applies to such cases as there is a contractual description of the goods. Instead, both Heilmann[17] and Bianca[18] would restrict the use of Article 35(2)(b) to cases where the particular purpose is exclusively communicated through the buyer's information about the intended use of the goods. This view is in line with the *Secretariat's Commentary* on Article 35(2)(c), which likewise focuses on the use of the goods.[19] Article 35(1) is also applicable if it is the *seller* who has made

13. Schwenzer in Schlechtriem: *Kommentar*, p. 380, pt. 21 at note 65; Enderlein & Maskow: *International Sales*, p. 145, pt. 9.
14. Schwenzer: *Ibid.*; Enderlein & Maskow: *International Sales*, p. 145, pt. 11 are likewise of the view that the particular problem of Article 35(2)(b) is in those cases where the buyer's purpose has not been made known to the seller expressly, but only impliedly.
15. Cf. Bianca in Bianca & Bonell: *Commentary*, p. 275.
16. Cf. Heilmann: *Mängelgewährleistung*, p. 179.
17. Cf. Heilmann: *Ibid.*
18. Cf. Bianca: *Ibid.*
19. "Buyers often know that they need goods of a general description to meet some particular purpose but they may not know enough about such goods to give exact specifications. In such a case the buyer may describe the goods desired by describing the particular *use* to which the goods are to be put. If the buyer expressly or impliedly makes known to the seller such purpose, the seller must deliver goods fit for that purpose." (Author's emphasis).

the buyer aware that the goods can be used for the buyer's particular purpose.[20]

In Honnold's example it does not seem possible to distinguish between the buyer's statement of the intended use of the goods (drilling in hardened steel) and the purpose of the goods (to drill in hardened steel), which to some extent weakens Bianca's and Heilmann's arguments, and justifies Honnold's example. As Bianca[21] also writes, situations covered by Article 35(2)(b) can typically also be solved by interpretation of the contract, but differences in national laws justifies an express provision for such cases being included. Honnold's example clearly shows that it can be difficult if not impossible to draw clear lines between the elements of Article 35.

6.3.3. Impliedly made known

As for situations in which the buyer has *not* expressly made known the particular purpose of the goods, the question is, what information is sufficient for the purpose to be considered as having been impliedly made know to the seller.

Schwenzer[22] and Enderlein & Maskow[23] support the view that "made known to the seller" is less restrictive than "contractually agreed". As stated in Enderlein & Maskow, this interpretation means that it can be hard to see when something which is not contractually agreed can mean that the goods do not conform to the contract. However, Enderlein & Maskow also point out that what is decisive is that the particular purpose becomes part of the contract *through the application of the Convention rules.* In other words, it constitutes a special rule of interpretation. There is a problem in determining when a seller can be said to have been made aware of the purpose, without the seller *actually* being informed of it. Enderlein & Maskow argue that, if the seller has been in a position where he could be aware of the particular purpose, then he is considered to have been aware of it. However, Enderlein & Maskow do not state if the test of whether the seller has been in a position where he could be aware of the

20. Cf. Bianca and Heilmann: *Ibid.*
21. *Ibid.*
22. Cf. Schwenzer in Schlechtriem: *Kommentar*, p. 380, pt. 20: "Zur Kenntnis gebracht ist damit weniger als vertraglich vereinbart."
23. *International Sales*, p. 145, section 11.

particular purpose should be an objective or subjective test. Schwenzer believes that, on the one hand, the *Secretariat's Commentary* favours the test under Article 35(2)(b) being subjective, since what is decisive is the seller's *actual awareness.* On the other hand, according to American law it is enough[24] that the seller had reason to understand the particular purpose, which argues in favour of an objective assessment. In the same way, Schwenzer thinks that the wording of Article 35(2)(b) and reasons of evidence point towards an objective test, i.e. what a reasonable seller would have understood,[25] as it would obviously be difficult to prove the seller's actual knowledge. However, Schwenzer foresees that Article 35(2)(b) will be interpreted very disparately, and therefore encourages buyers to make express references to particular purposes in the contract.

Heilmann's view is that the seller should have positive knowledge of the particular purpose. The fact that the seller ought to have known, or there is something which the seller could have understood is not enough.[26] According to Heilmann, for something to be made known to the seller, cf. Article 35(2)(b), it requires that *all* the factors which indicate that the goods have a particular purpose should be known to or *knowable* to the seller.[27] But the addition of the word *knowable* introduces uncertainty to Heilmann's argument on subjectivity.

Achilles[28] is of the opinion that Article 35(2)(b) is distinguished from German domestic law in there not being a requirement for an *agreement of intentions*,[29] but merely that the seller has obtained sufficient knowledge about the particular purpose. This sufficient knowledge will exist when facts which indicate the particular purpose are brought within the seller's field of observation, and when these facts sufficiently reveal the particular purpose.[30] To illustrate this,

24. The reference to American law is due to the fact that Schwenzer regards Article 35(2)(b) as being modelled on §2-315 of the Uniform Commercial Code.
25. Schwenzer uses the word "could" and not "ought", but the meaning is the same when the test is objective. See, similarly, Karollus: *UN-Kaufrecht*, p. 116.
26. Cf. Heilmann: *Mängelgewährleistung*, p. 180.
27. Cf. Heilmann: *Ibid.*
28. Achilles: *Kommentar*, p. 96, sections 7 and 8.
29. "Willesübereinstimmung."
30. This point of view is similar to that of Enderlein & Maskow that the seller becomes made aware of the particular purpose if he has been in a position to be made aware of it.

Achilles uses the following example: giving a delivery address will probably not be enough in itself to indicate a particular purpose, but stating the place where the goods are to be used can probably be enough to indicate a special purpose.[31] In his review of the problem, Ziegler[32] refers to the fact that a German proposal at the diplomatic conference in Vienna, that the particular purpose should be part of the content of the contract, as discussed in Chapter 2, was withdrawn, as critics of it pointed out that it would be difficult to tell when a particular purpose had been impliedly made part of the contract. As Ziegler rightly points out, it is not much easier to determine when an implied particular purpose of the buyer has been so clearly expressed that the seller must be regarded as having been made aware of it. Nor does it seem any easier to impose on the seller an obligation to react to the revealed purpose, as there will still be a question about when the particular purpose has been made sufficiently clear to trigger the seller's obligation to react to it.[33]

Ziegler therefore suggests that implied expressions, i.e., the buyer's behaviour, should so clearly refer to the particular purpose that it can be recognised by the seller without great difficulty or intellectual effort. In Ziegler's view, "made known to the seller" does not mean that the seller could have known of the particular purpose by means of brain teasers, but that he should be able to see directly how the buyer intends to use the goods.[34]

This review shows that the prevailing opinion is that there is not a requirement for the particular purpose to be "agreed" between the parties, which would bring Article 35(1) into play, but merely that the purpose should made known to the seller in such a way that the seller must recognise how the buyer wishes to use the goods. The assessment is therefore objective, not subjective.

If the view is that "make known to" is less restrictive than "contractually agreed", the application of certain parts of Article 35(2)(b) will be seen not just as interpreting or constructing the agreement between the parties, but perhaps as a standard of *negligence* which is relevant for assessing the conformity of the goods to the contract. In

31. Cf. above, the examples of climatic conditions etc.
32. Cf. Ziegler: *Leistungsstörungsrecht*, p. 72, pt. 3.a.
33. Cf. Ziegler: *Ibid.*
34. Cf. Ziegler: *Ibid.*

other words, the Convention fills out an area which is left in doubt in many legal systems, as to whether it is agreed that the goods should satisfy the particular purpose of the buyer. In the decision referred to above of the *Barcelona Provincial Court of Appeal* of 4th February 1997, the seller was expressly made aware of the purpose for which the adhesive was to be used, and had recommended an adhesive specifically for the purpose. In other cases the question is whether, on the basis of information given by the buyer on matters not directly concerning the use of the goods, the seller must have understood that the buyer had a particular purpose.

An example of this is the decision of the *Koblenz Provincial Court of Appeal* on 11th September 1998, which concerned an agreement between a German seller and a Moroccan buyer for the sale of plastic granules for the manufacture of PVC pipes. The plastic granules were sent to the buyer's production unit in Morocco, but because of the difficulties in installing and setting up a second-hand machine which the buyer had bought in Germany, the buyer first made a test production about 3 weeks after receiving the granules.

It emerged that the plastic granules were not suitable for the manufacture of PVC pipes using the second-hand machine, since the machine, which was nearly 20 years old, used a higher melting temperature than modern plastic granules could tolerate. The plastic granules were usable on newer machines, but not on older machines which used higher temperatures in the manufacturing process.

The buyer then complained that the plastic granules did not conform to the contract, and that the seller ought to have known this as the buyer had informed the seller that the granules were to be used with the second-hand machine. The seller, who knew of the country in which the granules were to be used, ought to have told the buyer that the use of the granules in older machines could cause problems.

The seller rejected the buyer's complaint, on the basis that the problem was due to the use of an obsolete machine, and not to the lack of conformity of the granules to the contract. The seller denied that he had been made aware that the buyer's machine was second-hand. The seller had given information about the technical specifications of the granules, but the seller did not have any information about the type of machine with which the granules were to be used. Moreover, the seller rejected the claim by reference to the fact that the buyer had not examined the goods and complained in due time, cf. Articles 38 and 39.

The buyer denied the seller's argument that Articles 38 and 39 restricted the buyer's claim, since the seller knew or could not have been unaware of the lack of conformity of the goods to the contract, cf. Article 40.

The court rejected the buyer's claim, cf. Article 39(1), as the complaint had not been made in due time, and it also rejected the buyer's argument that the seller could not rely on Articles 38 and 39, cf. Article 40. First, it appeared from an expert opinion that the granules were suitable for modern, widely used, standard machines. Second, the court found that even if the buyer had told the seller that the machine was second-hand, and that the granules were to be used in Morocco, this did not mean that the seller should have realised that the machine was so old that there would be problems in using the granules. Therefore, the seller did not have a duty to realise this. It was not the duty of the seller to take a close interest in the buyer's machine; it was the buyer's responsibility to specify the purpose of the goods, and not merely to order the granules offered.

Nor did the seller have a duty to warn or advise the buyer, since the seller, cf. above, had no grounds for doing so. The knowledge that the granules were to be used with a second-hand machine was not in itself enough to impose upon the seller a duty to give advice on the purchase of ordinary granules. This was particularly so when the seller was trading with a buyer who was himself a manufacturer, and who appeared to be as professionally competent as himself.[35]

35. See Section I.2.c)-d) of the judgment (translation source: the CISG Database at Pace Law School Law Library): "c) The [seller's] reliance on Arts. 38 and 39 CISG is precluded when Art. 40 CISG applies. However, the [buyer] did not sufficiently substantiate her assertion that the [seller] knew of the dryblend's low temperature stability and that the use of the dryblend in older machines could cause problems. [Buyer's] claim that the [seller] knew or could not have been unaware of the lack of conformity was therefore also not substantiated. Along with her assertion that the [seller] knew of the low temperature stability, the [buyer] merely evinces the [seller's] knowledge of the blend's mixture, which was delivered to the [buyer] as ordered. The [buyer's] conclusion, from her assertion concerning the [seller's] alleged knowledge of possible problems connected with the blends use on older machines, that the [seller] therefore knew of the lack of conformity is without foundation. The [buyer] herself stated that she had only informed the [seller] that she had acquired a complete production line for the fabrication of PVC-pipes from Company K. The [seller] allegedly did not show interest in further details about the machine and did not inquire the [buyer] about it. The [buyer] later stated that she had informed the [seller] that the machine was second hand. The [seller] disputes this. However, even if the [seller] knew that the [buyer] wished to produce PVC-pipes with a used machine in Morocco, that does not mean that the [seller] imagined that the [buyer] intended production on an older machine, where the use of the dryblend could cause problems because of the machine's age. The [seller] is also not required to come to such a conclusion. As the District Court correctly explained, the [buyer] wrongly blames the [seller] for not having shown further interest in the machine. It was the [buyer's] responsibility to specify the particular purpose and not merely order the offered standard mixture.

d) The loss of the right to rely on the lack of conformity of the goods would also apply if the non-conformity were based upon the breach of a duty to warn or advise by the seller. It cannot be found here that the non-conformity of the blend asserted by the [buyer] is based upon a [seller's] breach of a duty to warn or advise. As shown above, the [seller] had no reason to advise or to warn. The mere knowledge of the

The judgment seems to deal with the buyer's objection under Article 40.[36] However, it is difficult to determine whether the case directly concerns Article 35(2)(b), as this provision is not cited in the judgment. As will be seen from quotation given of Section I.2.d) of the judgment about the seller's obligation to advise or to warn, the references in the legal literature are to the treatment of Article 35, and the obligation to advise or warn is closely associated with the assessment of whether the seller knew or could not have been unaware of the lack of conformity with the contract.[37] At the same time there is a reference to Article 40, and the buyer's duty to make the seller aware of any particular purpose.[38]

In the actual case there were elements of the assessment under Article 40 which coincide with assessments under Article 35(2)(b). Did the seller know, or could he not have been unaware that the buyer would use the granules for a purpose which was, in relation to their ordinary contemporary use, a particular purpose, being production by means of an old machine? If so, the seller would not be able to rely on the late examination of the goods or the complaint, cf. Articles 38 and 39. But at the same time, this is also part of an assessment of lack of conformity with the contract. If Article 35(2)(b) is interpreted restrictively, so that only the positive knowledge of the seller would lead to the conclusion that there was a lack of conformity with the contract, this would not be in accordance with the same criteria in Article 40 which concern both positive knowledge and

[buyer's] intention to use the blend on a used machine is not enough to impose a duty to advise during a purchase of standard mix. This is even more so the case in that the [seller] dealt with the [buyer] who is a producer. It cannot be determined that the [seller] had reason to know that the [buyer] was not at least as technically competent as himself."

36. Article 40 of the Convention states as follows: "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."

37. Cf. the following extract from Section I.2.d) of the judgment: "As shown above, the [seller] had no reason to advise or to warn." Cf. Karollus: UN-Kaufrecht, p. 117 et seq., who believes that such an obligation to warn exists in relation to Article 35(2)(b), among other things by reference to Article 7(1) and the principle of the observance of good faith in international trade, but cf. Najork: *Treu und Glauben*, p. 48 et seq. and p. 69.

38. Cf. the last sentence of Section I.2.c) of the judgment: "It was the [buyer's] responsibility to specify the particular purpose and not merely order the offered standard mixture."

cases where the seller could not have been unaware of the lack of conformity. Article 40 should also be construed in accordance with Article 8, which applies an objective standard for a seller's knowledge. The conclusion must be that, on the basis of a systematic comparative interpretation with Article 40 and Article 8, as well as the above review of the theory concerning Article 35(2)(b), in relation to when the seller has been made aware of the purpose, Article 35(2)(b), not only covers the seller's positive knowledge, but also what a reasonable seller in the same situation could not have been unaware of.

This assessment of the conformity of the goods to the contract cannot be divorced from what must be regarded as the seller's obligation to advise or warn, since the seller has a duty to make the buyer aware if the goods cannot be used for the particular purpose.

In the decision of the *Koblenz Provincial Court of Appeal*, it was established by expert opinion that the granules were suitable for production using modern, widely used, standard machines, which is an assessment of fitness of the granules for their ordinary purposes, cf. Article 35(2)(a). The buyer had ordered and had received goods corresponding to the specifications given, cf. Article 35(1). An evaluation under Article 35(2)(b) must therefore be an evaluation of whether a statement that the machine in question was second-hand (though the seller denied that he had been informed of this), and that the granules were for use in a particular location (Morocco) were sufficient for it to be found that the seller had been made aware of, or could not have been unaware of, the fact that the buyer intended to use the granules for a purpose which was a particular purpose in relation to those granules, being production by means of a second-hand machine using higher temperatures than normal. This question was answered in the negative, but the result could have been different if it could have been proved that the buyer had mentioned the age of the machine. The court also emphasised that the buyer was himself a manufacturer who possessed as much professional knowledge as the seller. This is a clear example of the importance of the principle of spheres of influence. There is also a question about when the information of the particular purpose should be made known to the seller, and how far the information should be derived from the buyer, or whether the information can also come from others. This is considered below.

6.4. The time of the conclusion of the contract

Article 35(2)(b) states that any particular purpose shall be made known to the seller at the time of the conclusion of the contract. It is thus not sufficient that the particular purpose is made known to the seller afterwards.[39]

The rule that the seller should have been aware of the particular purpose at the time the contract is entered into is a mirror image of the principle in Article 35(3), according to which a seller is not liable, under Article 35(2)(a) to (d), 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.

The timing of when a contract is considered to have been made is laid down in Article 23:

> "A contract is concluded at the moment when an acceptance of an offer becomes effective in accordance with the provisions of this Convention."

A contract is thus made when an offer[40] is accepted[41] within the period of time for acceptance fixed by the offeror[42], where the acceptance is unconditional[43] and where the parties have not withdrawn their offer or acceptance.[44]

This model for the formation of a contract can be difficult to apply in practice, if a contract is entered into by other means, for example if there are long term negotiations, or if there is a series of declarations, letters of comfort, letters of intent, framework agreements etc.[45]

It should also be remembered that the Nordic countries have not ratified Part II of the Convention, cf. Article 92. This means that if Danish or the law of other Nordic countries is applicable, the Nordic

39. Cf. Schwenzer in Schlechtriem: *Kommentar*, p. 380, pt. 22; Heilmann: *Mängelgewährleistung*, p. 180.
40. Cf. Article 14 and Article 15.
41. Cf. Article 18.
42. Cf. Article 20 and Article 21.
43. Cf. Article 19.
44. Cf. Article 16 (withdrawal of an offer) and Article 22 (withdrawal of an acceptance).
45. Cf. Gomard & Rechnagel: *International Købelov*, p. 83, note 2.

Contracts Act and Nordic law in general will determine when a contract has been concluded.[46]

6.5. The buyer could not rely on the seller's skill and judgement

The rule in Article 35(2)(b), that the goods shall be fit for the buyer's particular purpose, can be derogated from if the circumstances show that the buyer did not rely on, or that it was unreasonable[47] for him to rely on, the seller's skill and judgement. This is the principle of the sphere of influence.

In general, a buyer will be able to enter into a transaction relying on the seller's professional skill and judgement, if the seller is a specialist in the manufacture or trade in goods of the description which shall be used for particular purpose intended by the buyer, and if the buyer does not possess professional skill or judgement.[48] This also applies if the seller presents himself to the buyer as an expert or specialist, even though this is not the case in fact.[49]

The fact that the buyer has professional skill and judgement in the use of the goods for the particular purpose does not in itself mean that the buyer will not be able to rely on the seller's skill and judgement,[50] but this must be evaluated on a case by case basis,[51] cf. for example the decision referred to above on the PVC granules, where the court found that it was relevant that the buyer appeared to be professionally competent in relation to the machine and the use of the granules.

46. Cf. Gomard & Rechnagel: *Op. Cit.*, p. 84, note 5.
47. The test of unreasonableness must reflect the reasonableness standard. See also Albert Kritzer: *Reasonablenes* (Editorial remarks on reasonableness), available at Pace database: http://www.cisg.law.pace.edu/cisg/text/reason.html#def with further references, and PECL Article 1:302 with comments in Lando & Beale: *PECL*, p. 126 et seq. See also Guillaume Weiszberg: *Le "Raisonnable en Droit du Commerce International* (Paris, 2003), available online at Pace database: http://www.cisg.law.pace.edu/cisg/biblio/Reasonableness.html.
48. Cf. Heilmann: *Mängelgewährleistung*, p. 181.
49. Cf. Schwenzer in Schlechtriem: *Kommentar*, p. 380, pt. 23.
50. Cf. Schwenzer in Schlechtriem: *Ibid.*
51. Cf. Bianca in Bianca & Bonell: *Commentary* p. 275, pt. 2.5.3; Kihlman: *Fel*, p. 137.

Other relevant factors can be whether the buyer takes part in selecting the goods, examines the goods or a sample or a model before concluding the contract, whether the buyer has any influence over how the goods are manufactured, or gives the seller particular specifications or chooses a particular brand of goods which the seller does not normally stock.[52]

In such a case, as pointed out by Schwenzer, there can be a conflict between what is agreed between the parties under Article 35(1), and the fitness of the goods for the particular purpose, cf. Article 35(2)(b), since the buyer has to a certain extent laid down detailed requirements for the quality and description of the goods, and thus their potential fitness for the particular purpose.[53] It is possible to regard this as putting the conformity of the goods to the contract within the buyer's sphere of influence.

This conflict could be resolved if the seller had recognised that the goods selected by the buyer, the specifications given by the buyer, the samples examined etc. meant that the goods would not be fit for the buyer's particular purpose.[54] In such an event the seller would have a duty to advise or warn the buyer that the goods could not be used for the buyer's particular purpose, cf. the observance of good faith in international trade, cf. Article 7(1).[55] Should a buyer decide to buy the goods despite the reservations of the seller, the buyer then accepts the risk that the goods will not fit his particular purpose.[56]

The buyer cannot normally rely on the professional expertise of the seller if the seller is not himself the manufacturer of the goods, but merely a middleman, and if he lets the buyer know that he has no special knowledge about the goods, or if the necessary skill or judgement is not normally possessed in the business sector in ques-

52. Cf. Schwenzer in Schlechtriem: *Kommentar*, pp. 380-381, pt. 23; Achilles: *Kommentar*, p. 96, pt. 9, Gomard & Rechnagel: *International Købelov*, p. 116, note 20.
53. Cf. Schwenzer in Schlechtriem: *Kommentar*, p. 381, pt. 23.
54. Cf. Schwenzer in Schlechtriem: *Ibid.*
55. Cf. Schwenzer in Schlechtriem: *Ibid.*, but compare this with Karollus: *UN-Kaufrecht*, p. 118, note 49, where doubt is expressed about the extent to which a seller has a duty to warn expert buyers.
56. Cf. Bianca in Bianca & Bonell: *Op. cit.*, pp. 275-276, pt. 2.5.3.; Schwenzer in Schlechtriem: *Ibid.*

tion.[57] Regardless of this, the seller has a duty to warn and to advise if he nevertheless realises that the goods are not fir for the buyer's particular purpose.[58]'

6.6. The burden of proof

Under Article 35(2)(b), the burden of proof has several different elements. First, the buyer must show that the goods supplied cannot be used for the particular purpose.

> See the decision referred to above of the *United States Federal Appellate Court (4th Circuit) (Schmitz-Werke v. Rockland)* of 21st June 2002, on the suitability of curtain material. After it had been established that about 15-20% of the material was defective, which the seller did not deny, the seller argued that the claim of the buyer should be dismissed, as the buyer had not demonstrated the exact cause of the defects in the colour printing of the material. This required an expert examination, which had not been undertaken. Therefore, the seller argued that the burden of evidence would in fact, and contrary to custom, be reversed if the seller were required to prove that the material was suitable and the printing process was unsuitable.
>
> The court rejected this argument, both under the CISG and under Maryland law, as the buyer satisfied the burden of proof if he could show that the material had been used correctly for the agreed purpose and that the result was unsatisfactory. It had been shown that the printing process used was customary and competent and that the result was nevertheless unsatisfactory. In the view of the court this was enough to support the claim of the buyer.

It was for the buyer to show that the seller had been made aware of the particular purpose, cf. Section 6.3 above.[59] The seller then had to show that it was clear from the circumstances of the case that the buyer had not relied on, or that it was unreasonable for him to rely, on the seller's skill and judgement, cf. Section 6.5.[60]

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57. Cf. Schwenzer in Schlechtriem: *Ibid.*; Achilles: *Ibid.* It must be an assumed that the starting point is what the usual objective opinion is in the seller's business sector, about the particular purpose, cf. above, but the evaluation depends on the circumstances in each case, cf. Honnold: *Uniform Law*, p. 258, pt. 226, note 12.
58. Cf. Achilles: *Op. Cit.*, pp. 96-97, pt. 9.
59. Cf. Schwenzer in Schlechtriem: *Kommentar*, p. 388, pt. 50.
60. Cf. Schwenzer in Schlechtriem: *Ibid.*; Honnold: *Uniform Law*, p. 258, pt. 226; Ramberg in Ramberg & Herre: *Internationella köplagen*, pp. 234-235, pt. 5.

If, in the negotiations between the parties, samples are submitted, or if the buyer has had the opportunity to examine the goods himself, the burden of proof must be assessed in accordance with this, cf. Chapters 7 and 9.

See the case on the suitability of curtain material, where the buyer had been given a sample of the material by the seller. The seller had drawn the attention of the seller to the fact that the material did not take the dye satisfactorily, but the seller had encouraged the buyer to continue with the trial printing. The first consignment had not been suitable for colour printing, but the seller had assured the buyer that the material could be used for the printing of patterns. The buyer then ordered a further consignment. However, this further consignment was no more suitable for colour printing, and on these grounds the material did not conform to the contract, cf. Article 35(2)(b). The buyer could thus rely on the fact that the goods would be made suitable for the agreed purpose, cf. Chapters 7 and 9.

6.7. Conclusions

Under Article 35(2)(b), a seller has an obligation to supply goods which are fit for the particular purpose of the buyer if, on the basis of an objective assessment of the buyer's statements and conduct, the seller knew or could not have been unaware of the buyer's purpose, cf. Article 8 and the principle in Article 40. In such cases, it lies within the seller's sphere of influence to ensure that the goods conform to the contract.

There will be a particular purpose if it is other than an ordinary purpose, cf. Article 35(2)(a). The norm for assessing the particular purpose will be presumed to be the norm in the seller's country, which is the same as the principle which applies in relation to Article 35(2)(a), cf. the *Mussels* case.

The protection of the buyer under the rule in Article 35(2)(b) is restricted if the buyer has not relied upon, or it would be unreasonable for the buyer to rely upon the seller's skill and judgement. The buyer knows that in these circumstances the conformity of the goods to the contract does lie within the seller's sphere of influence. In such a situation, it can be significant if, for example, the buyer has participated in arranging the production or the selection of the goods.

Chapter 7

Quality corresponding to a sample or a model, cf. Article 35(2)(c)

7.1. Introduction

As stated in Article 35(2)(c), cf. Article 35(2), unless otherwise agreed by the parties, in order to conform to the contract, goods must

> "possess the qualities of goods which the seller has held out to the buyer as a sample or model."

The purpose of showing a sample or a model is to make the terms of the agreement more substantial for the buyer. A sample or a model can either be in a tangible or an intangible form, cf. below. Making the agreement more tangible is an important element in its interpretation, since it raises the assumption that the quality of the goods correspond to the sample or model shown. Regardless of the provisions of Article 35(2)(c), showing a sample or a model can be included as an element in the interpretation of an agreement between the parties according to Article 35(1), cf. Article 8.[1,2]

Article 35(2)(c) of the Convention confirms the assumption that the qualities of the goods should conform to that of a sample or

1. Cf. Honnold: *Uniform Law*, p. 258 et seq.; Bianca in Bianca & Bonell: *Commentary*, p. 276; Enderlein & Maskow: *International Sales*, p. 146; Ramberg: *Transactions*, p. 89.
2. In Danish law, questions concerning samples and models have traditionally been dealt with under § 47 of the Sale of Goods Act, on the inspection of the goods or of a sample by the buyer (caveat emptor), as well as under the general provisions on lack of conformity of the goods, cf. §§ 42-43 of the Sale of Goods Act. With consumer sales, the question is regulated by § 76.1.4) of the Sale of Goods Act, which is regarded as expressing the general concept of lack of conformity in Danish law which also applies to business-to-business sales and public procurement. With the implementation of Directive 1999/44/EC on certain aspects of the sale of consumer goods and associated guarantees, new provisions were introduced in § 75a.2.4) of the Sale of Goods Act, according to which the goods in a sales agreement must have the same qualities as a sample or a model which the seller has shown to the buyer prior to entering into the agreement. As stated, this new provision does not express any change to Danish law, as the same applied prior to the amendment to the Act, cf. § 76.1.4), § 47 and §§ 42-43 of the Sale of Goods Act.

model shown to the buyer, cf. in more detail below. This is not comparable with sales "on approval", where the buyer has a right to return the goods at the end of the trial period, regardless of whether or not the goods are defective. On approval sales require explicit agreement between the parties, cf. Article 6, in order to derogate from Article 35.[3]

7.2. The presumptive rule in Article 35(2)(c)

While Article 35(2)(c) operates with an *unconditional* presumption that the quality of the goods shall live up to that of a sample or model, it was clear from ULIS Article 33(c), on which CISG Article 35(2)(c) is based, that the quality of the goods should live up to that of the sample or model, unless the seller had submitted the sample or model without an express or implied statement that the goods would correspond to it.[4] According to ULIS Article 33(c), the quality of the goods should thus only correspond to the sample or model if the seller has expressly or impliedly given an undertaking that the quality of the goods will correspond to the sample or model. In Article 35(2)(c) of the Convention this reservation is removed.[5] The submission of a sample or model is considered as amounting to an undertaking that the quality of the goods will correspond therewith, unless otherwise agreed.[6]

This difference is not insignificant, even though it seems to have been overlooked both in theory and in practice. If, under ULIS Article 33(c), one party asserts that a sample or model is relevant to the assessment of the conformity of goods to the contract, that party must clearly show that that it has been agreed, either explicitly or

3. Cf. Ferrari in Schlechtriem: *Kommentar*, to Article 1, p. 56, pt. 23.
4. Article 33(c) states as follows: "... 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."
5. Cf. Bianca in Bianca & Bonell: *Ibid.*
6. Cf. Bianca: *Ibid.*; Su: *Vergleich*, p. 33 *et seq.*

implicitly, that the sample or the model should have such an effect.[7] By contrast, under CISG Article 35(2)(c), the starting point is that it is sufficient for the party, who claims that a sample or model should be relied upon, to prove that a sample or model has been shown, and that the quality of the goods does or does not conform to it.

See the previously discussed decision of the *Berlin District Court* of 15th September 1994, which concerned the sale of women's shoes between an Italian seller and a German buyer. After taking delivery of the shoes, the buyer complained, among other things, that the decorations on the front of the shoes were fixed askew and that their soles came loose. The seller disputed the claims of the buyer, arguing, among other things, that the complaints had not been made in due time, and that the goods in any case conformed to a model which had been submitted.

The court held that a model only had binding effect if the parties had agreed that this should be so. Since the seller had not claimed that there had been such an agreement, and should in any case have proved that the model had the same faults as the goods delivered, the court rejected the seller's argument about conformity to the model as being irrelevant.[8]

The court also held that the shoes were not fit for the purposes for which goods of the same description would ordinarily be used, cf. Chapter 5, since they were not of average quality, and in this respect it was not sufficient that the goods were just about merchantable. In view of this, the court held that the shoes could not be regarded as conforming with the contract.

The court thus gave weight to the fact that there were no elements in the agreement to indicate that the model should be used for evaluating the conformity of the goods to the contract. This view is not

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7. Cf. Heilmann: *Mängelgewährleistung*, p. 187, citing the judgment of the German Federal Supreme Court of 16th February 1966: "Eine abweichung von der Probe oder dem Muster galt nach dem Einheitlichen Kaufgesetz nur dann als Vertragswidrichkeit, wenn deres Eigenschaften Vetragsbestandteile geworden waren, d.h. 'der Verkäufer nach dem Umständen des Falles die Eigenschaften des Musters bindend zugesagt hat und die Vertragsparteien darüber einig waren, daß der Verkäufer eine der Probe entsprechende Ware zu liefern hat und die eigenschaften der probe für die nach dem Vertrage vereinbarte Beschaffenheit maßgeblich sein sollen.'"
8. "Insofar as the seller maintains that the delivered shoes were in accordance with the sample on the basis of which the shoes were ordered, this argument is irrelevant. A sample only has binding effect where the parties actually agreed so (Herber/Czerwenka, Commentary to the CISG, 1st edition 1991, Art. 35 No. 6). The seller never alleged such an agreement. Additionally, seller then would have had to show specifically that the sample also had the same defects as alleged by the buyer." Translation source: the CISG Database at Pace Law School Law Library.

in line with the wording of Article 35(2)(c), cf. Article 35(2), which clearly states the directly opposing rule, that where it can be proved that a sample or model with the characteristics claimed has been shown to the buyer, it is binding for the evaluation of the conformity of the goods to the contract, *unless* otherwise agreed; in other words, there is an assumption that the sample or model will automatically be included in evaluating the conformity of the goods to the contract. This means that showing a sample or model is in itself an element of the contract which should be included in evaluating the conformity of the goods. The court supported its argument by reference to *Herber/Czerwenka* who, in discussing Article 35(2)(c), include a reference to a decision of the *German Federal Supreme Court* from 1966,[9] and conclude that, despite the wording of the provision, the same applies under CISG Article 35(2)(c). However, this view does not seem to have been repeated in more recent theoretical writings (though see the discussion of *Schwenzer* below) which emphasise that the sample or model is a tangible representation of the description of the goods in the agreement, unless it is clear that the agreement between the parties intends otherwise.[10] Thus, the decision of the court does not seem to be justified by the previous history of Article 35(2)(c),[11] by the wording of the provision, nor by reference to the prevailing view in theory. The view of the court does not even seem to be soundly based on pragmatic grounds. A party, to whom a sample or model has been shown, could not be sure that it would be taken into account in assessing the conformity of the goods to the

9. *Bundesgerichtshof* decision of 16th February 1966, in DB 1966, 415, cf. Heilmann: *Ibid.*
10. Cf. Schwenzer in Schlechtriem: *Kommentar*, p. 381 *et seq.*; Honnold: *Uniform Law*, p. 258 *et seq.*; Bianca: *Ibid.*; Enderlein & Maskow: *International Sales*, p. 147, Heilmann: *Op. cit.*, pp. 187-188. But perhaps for a more qualified view, compare with Achilles: *Kommentar*, p. 97, with reference to domestic German sale of goods law (the now repealed BGB § 494): "Genauso wie im unvereinheitlichen deutschen Recht ... müssen sich die Parteien zusätzlich über dieses Übereinstimmungserfordernis einig sein."
11. The *Secretariat's Commentary* seems rather to support the main point of the argument made here: "If the contract is negotiated on the basis of a sample or model, the goods delivered must possess the qualities which are possessed by the goods the seller has held out as the sample or model. Of course, 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."

contract unless that party made sure that this was included in the agreement, preferably explicitly.

It might be possible to explain the judgment on the basis of the facts of the case, since the court did not find that the seller had given sufficient evidence to prove that the model had been shown to the buyer prior to entering into the agreement. However, this is a question of evidence, which should not be confused with the question of whether or not a sample or model should be assumed to be included in assessing the conformity of the goods. Whatever the case, the wording of the judgment is such as to raise doubt about the court's correct application of Article 35(2)(c).

The question is further illustrated in a case considered by the *Austrian Supreme Court*, decision of 11th March 1999, which concerned the purchase of bicycles following a visit to a trade fair. At the fair, the seller had shown the buyer a model of a cycle frame in which, in order to cut down on weight, the insides of the tubes had specially milled. The court of first instance, which applied domestic Austrian sale of goods law, emphasised that the seller had neither expressly nor impliedly given an undertaking that the cycles would correspond to the model shown at the fair, and therefore found in favour of the seller.[12] However, the appeal court found against the seller by reference to the fact that the goods had been ordered in part on the basis of a brochure which contained information about the specially milled tubing, and partly on the basis of an article in a trade periodical in which the specially milled tubes were referred to. The seller appealed against this decision. Referring to Article 35(2)(c), the Supreme Court gave weight to the fact that, in the absence of agreement to the contrary, the buyer is entitled to expect that the deliveries would be based on the model shown at the fair.[13] The Supreme Court referred the case back for renewed process, as the court of appeal should have made its judgment on whether the goods conformed to the contract, not only on the basis of the contents of the brochure and the article in the trade periodical, but also on the basis of the model shown at the trade fair. The decision of the court of first instance should have been reversed on these grounds as well as the references to the brochure and the article, cf. also Article 8.

12. "The Court of First Instance stated that the [seller] had neither explicitly nor tacitly promised that all the bicycles to be delivered had specially milled frames." Translation source: the CISG Database at Pace Law School Law Library.
13. "A business partner could have inferred from the [seller]'s presentation that all the bicycles produced by the [seller] had the new kind of frame. The specification lists on which the order was based did not conflict with that as they were in so far neutral." Translation source: the CISG Database at Pace Law School Law Library.

On the basis of the decision of the *Austrian Supreme Court*, and the clear wording of Article 35(2)(c), as well as current theory, it must be concluded that, while the presentation of a sample or model cannot be assumed to relate to other contractual conditions, there is a presumption that the quality of the goods should correspond to a sample or model which is shown by the seller to the buyer. Of course, the significance of a sample or model should always be considered in the light of all the circumstances of the case, cf. Article 8(3).

7.3. The link between Article 35(2)(c) and Article 35(3)

The decision of the *Berlin District Court* illustrates that, in addition to giving support to the buyer's reasonable expectations when a sample or model has been shown, Article 35(2)(c) is also closely connected to the rules on the buyer's examination of the goods prior to entering into the contract, and thus that the buyer knew or could not have been unaware of a lack of conformity of the goods. In the decision of the *Berlin District Court*, it seemed natural for the seller to try to use Article 35(2)(c) as a lever for arguing that the buyer was aware of the defects in the goods which were later the subject of complaint. In this respect, Article 35(2)(c) is closely connected with Article 35(3), on whether the buyer knew or could not have been unaware of the lack of conformity of the goods, and thus with the maxim of *caveat emptor* and the buyer's duty to examine the goods.[14] The rules on the buyer's duty to examine the goods, the buyer's awareness of any defect in the goods, and the significance of showing

14. Cf. Danish law, where the question of the presentation of a sample is seen, among other things, as relating to the buyer's duty to examine the goods under the Sale of Goods Act § 47, cf. for example Hedegaard Kristensen in Elmelund et al: *Lærebog*, p. 119 et seq.; as well as Nørager & Theilgaard: *Købeloven*, p. 857 and p. 869 et seq. Under § 76.1.4) of the Sale of Goods Act, goods are not regarded as having the qualities and functions which they ought to have, according to the agreement, if they do not correspond to a sample which may have been shown, cf. Report 1403 on the implementation of Directive 1999/44/EC on certain aspects of the sale of consumer goods, p. 59. At the same place it is also stated that the concept of lack of conformity in the Sale of Goods Act does not include explicit provisions on samples or suchlike. This view does not appear to be correct, cf. the reference to § 47 of the Sale of Goods Act made in the Introduction to this chapter.

a sample or a model, are all closely linked to the assessment of conformity of the goods to the contract.[15] However, the difference is that, while Article 35(2)(c) decides whether the goods conform to the contract or not, Article 35(3) presumes that there is a lack of conformity, cf. Chapter 9 below. If the buyer has been shown a sample where, objectively and against an average standard, the goods are defective (for example, the decorations on shoes are affixed askew and their soles come loose, as in the case before the *Berlin District Court* referred to above) then there is not lack of conformity of the goods to the contract within the terms of Article 35(3), since in such a case the buyer would have received the goods agreed. Nor does showing a sample exempt the buyer from the obligation to examine the goods upon receipt, cf. Article 38.[16] Article 35(2)(c) is in the interests of both the buyer and the seller. Showing a sample or model is in the buyer's interest as he can assume that he will receive goods of the same quality as the sample or model shown. At the same time, Article 35(2)(c) is in the interests of the seller, as the buyer will not be able to claim that there is some defect in the goods if the buyer either knew of or could not have been unaware of the defect through an examination of the sample or model shown. In other words, Article 35(2)(c) is a meeting point between the spheres of interest of the buyer and the seller. However, there are limits to the extent to which the seller can be absolved from responsibility simply by showing a sample or model.

As stated, the assumption that the quality of the goods will correspond to the sample or model can be overturned, cf. the wording "Except where the parties have agreed otherwise ..." The provision should not, therefore, be regarded as a *lex specialis* in relation to Article 35(1), since the parties are free to agree that, in some given aspects, the sample or model shall not determine the quality of the goods. Article 35(2)(c) should thus always be read together with Article 35(1).[17] A party who does not want some of the characteristics

15. Compare with Krüger: *Norsk Kjøpsrett*, p. 172, where, in relation to Norwegian sales law, it is stated: "In legal theory these rules belong to the concept of lack of conformity itself: the buyer's neglect means that circumstances which would otherwise have given rise to a claim cannot be regarded as a defect at all."
16. Cf. the decision of the *Berlin District Court* of 25th May 1999, see the Unilex database.
17. Cf. Heilmann: *Mängelgewährleistung*, p. 186.

of a sample or model to be binding on the interpretation of the contract must therefore ensure that this is stated in the agreement, unless this is in any case clear from the wording of the contract or from its other circumstances, cf. Article 8, or unless it has been established by the usage or practice of the parties, cf. Article 9. Both the buyer and the seller can have an interest in this.

7.4. Quality corresponding to the sample or model

The requirement that the goods shall be of a quality which conforms to the sample or model means that the goods are assumed to correspond to all the characteristics and qualities revealed by the sample or model, whether relating to appearance, function, durability, capacity, colour, labelling, packaging etc. The word "qualities" used in Article 35(2)(c) should thus be interpreted broadly. Some of the aspects reviewed in connection with Article 35(1) can give guidance in this respect.

> An example of this is the decision of the *US Court of Appeal, 2nd Circuit* (*Delchi Carrier v. Rotorex*), given on 6th December 1995, where the compressors supplied were less effective and used more energy than the sample which had been provided by the seller, and which the buyer had tested prior to entering into the contract. The energy requirements and the cooling effectiveness were also specified in the written contract between the parties. Consequently, the compressors were found not to conform to the contract.[18]

As referred to in Chapter 4, even minimal variances from the contract are assumed to be covered by Article 35(1). Correspondingly, minimal variances from a sample or model will be assumed to mean that the goods may be regarded as not conforming to the contract. However, there will often be usage or practice to the effect that insignificant defects will not be regarded as deviating from the contract.

18. Cf. the following quotation from the judgment: "The president of Rotorex, John McFee, conceded in a May 17, 1988 letter to Delchi that the compressors supplied were less efficient than the sample and did not meet the specifications provided by Rotorex. Finally, in its answer to Delchi's complaint, Rotorex admitted 'that some of the compressors ... did not conform to the nominal performance information.'" The case report is available on the Unilex and Pace Databases.

7.5. Sample or model

Neither the Convention itself nor the preparatory documentation gives a detailed explanation of the concepts of sample and model. There is not a uniform view about what is meant by the concepts in theory. While some authors do not deal with this question in detail,[19] and others do not distinguish between samples and models,[20] *Schwenzer, Achilles* and *Enderlein & Maskow*[21] consider a *sample* to be goods taken from an existing stock of the goods, from which the seller proposes to make a delivery, while a *model* does not represent existing goods, but goods which will be produced with a view to delivering them to the buyer. This seems logical.

Schwenzer examines more closely the distinction between samples and models. While a model can show all, some, or just a single aspect of the intended goods, with a sample, the seller is effectively giving an undertaking that the goods will match *all* the characteristics of the sample. This means that when a model is presented, there must be interpretation of which characteristics the parties intend should be applicable.[22]

Schwenzer's more detailed view cannot be accepted as a definition. Article 35(2)(c) does not make such a distinction between a sample and a model. How far this may be the case must be determined on the basis of an interpretation of the agreement, cf. Article 35(2): "Except where the parties have agreed otherwise ..." According to this, it could very well be that the goods are not intended to match all the characteristics of the sample or model, or that the goods to be delivered should have additional characteristics, but this does not alter the fact that Article 35(2)(c), cf. Article 35(2) clearly states that it is the *assumption* that the goods should match the sample or model, and this must start from the assumption that this refers to all the characteristics of the goods. The fact that a different result may be arrived at through interpretation of the contract, or by usage or practice, is a different matter altogether.[23] *Schwenzer's* view is probably based on the fact that previously in Ger-

19. Cf. for example Heilmann: *Ibid.*
20. In relation to Swedish sale of goods law, see Kihlman: *Fel*, p. 141, note 146.
21. Cf. Schwenzer in Schlechtriem: *Kommentar*, p. 381.
22. Cf. Schwenzer: *Ibid.*
23. See Hyland in Schlechtriem: *Einheitliches Kaufrecht*, p. 322 *et seq.*

man law the presentation of a sample or model was considered to give some assurance about the characteristics of the sample or model, cf. the BGB § 494 then in force as well as ULIS Article 33(c).[24] As BGB § 494 has now been repealed and replaced by a general provision on the conformity of goods to the contract, and in view of the distinction referred to above between ULIS Article 33(c) and CISG Article 35(2)(c), *Schwenzer's* view should be rejected as a definition of samples, but it is probably more applicable as an assumption.

The term *typeprøve*[25] (representative specimen), known in Danish law refers to a specimen which is only intended to show some of the characteristics which the goods will possess. A representative specimen can be compared with both a sample and a model and is covered by Article 35 (2)(c). It depends on the interpretation of the actual agreement whether the sample is only intended to show certain characteristics, i.e., whether it is a representative specimen. There is therefore no need to use the concept of representative specimen in addition to the concepts of sample and model.

Danish law also has the concept of an *udfaldsprøve* (production sample), which is a sample which is sent *after* the contract has been entered into.[26] Finally, as has been said above, *sale on approval*, which in Denmark is regulated by § 60 of the Sale of Goods Act, should not be confused with sale on the basis of a sample. Sale on approval may well take place following the presentation of a sample or model, in which case the situation will be dealt with accordingly.

Samples and models need not be tangible; they can also be intangible, for example, with samples of software programmes. Here, the potential buyer often has access to only part of the programme, so there can obviously not be conformity between the sample or model

24. The then BGB § 494 stated: "Bei einem Kaufe nach probe oder nach Muster, sind die Eigenschaften der Probe oder des Musters als zugesichert anzusehen." This provision has now been repealed and replaced with a general rule on the conformity of goods to the contract in BGB § 434 and a provision on the buyer's awareness of any defect in § 442. See Schimmel & Buhlmann: Schuldrecht, *Ibid.* For a short and precise review of the reform in relation to defects, see: Stefan Grundmann: *European sales law – reform and adaption of international models in German sales law*, European Review of Private Law, 2&3 (2001) pp. 239-258.
25. Cf. Hedegaard Kristensen in Elmelund et al: *Lærebog*, p. 120; Ussing: *Køb*, p. 122.
26. However, a party's acceptance of a production sample may possibly be the basis for asserting that goods supplied conform to the contract.

and the goods delivered under the contract. Such intangible samples and models are covered by Article 35(2)(c), see the practice of the German courts.

The decision of the *Munich District Court* of 8th February 1995 illustrates this. A German buyer had a test version of a graphics programme made available to him by a French seller for several months before entering into a contract. After confirming that the purchase of standard software is covered by the CISG, the court held that the full version of the computer programme supplied fully lived up to the test programme, so the goods did conform to the contract, cf. Article 35(2)(c).

7.6. Goods held out by the seller as a sample or model

Article 35(2)(c) states that the seller should hold out the goods to the buyer as a sample or model. The seller is naturally identified with persons who are authorised to act on his behalf.[27] If the *buyer* has presented a sample or model to the seller, the prevailing view of the theory is that Article 35(2)(c) does not apply, but that Article 35(1) applies, as the buyer thereby makes the sample or model part of the contract as an *ordering sample*.[28] However, the practice of the courts allows for the possibility that both situations are covered by Article 35(2)(c):[29]

The decision of the *Graz Provincial Court of Appeal* of 9th November 1995 concerned the sale of granite between an Italian seller and an Austrian buyer. The parties had agreed that the granite should be of the *Giallo Veneziano* variety, i.e. yellow Venetian granite. When ordering the goods, the buyer had shown an example of the stone required, which had a clearly yellow appearance. However, the stone delivered was pink, so the buyer complained.

The court held that it was immaterial whether the sample shown could be regarded as being covered by Article 35(2)(c) or not, since the sample could

27. Questions of authorisation are determined under national laws and not under the CISG, cf. Article 4.
28. Cf. Schwenzer in Schlechtriem: *Kommentar*, p. 382; Achilles: *Kommentar*, p. 97; Karollus: *UN-Kaufrecht*, p. 118; and apparently in agreement with this: Enderlein & Maskow: *International Sales*, p. 146; Ramberg Ramberg & Herre: *Internationella köp*, p. 235, note 10. See also Gomard & Rechnagel: *International Købelov*, p. 116, note 22. Honnold: *Uniform Law*, p. 258 et seq.; Bianca in Bianca & Bonell: *Commentary*, p. 276; and Heilmann: *Mängegewährleistung*, p. 186 et seq. seem undecided.
29. Cf. Herre in Ramberg & Herre: *Op. cit.*, p. 235, note 10.

in any case be taken into account in interpreting the agreement, cf. Article 35(1). The appeal court then referred the case back to the court of first instance to reconsider the case in the light of this ruling.

On the basis of this judgment, a sample held out by the buyer could also be considered as being covered by Article 35(2)(c), even though this is contrary to the wording of the provision. In practice, the difference will not be apparent, since the sample would in any case be assessed under Article 35(1). However, it is not inconceivable to argue more generally for the assumption that goods should conform to a sample or model when it is held out by the buyer. The usual assumption is that it is the seller should supply, produce or procure the goods, and is therefore closest to this process. In other words, the seller is assumed to know about the goods; they are within his sphere of influence. This is not necessarily the case if the buyer presents the sample or model. There the situation will be the other way round, and the seller must examine the goods, so the extent of the duty to examine the goods will be decisive. This does not seem appropriate, so it cannot be said that Article 35(2)(c) ought always to apply when a buyer shows a sample or a model to the seller.[30] If anyone other than the seller presents a sample or a model to the buyer, Article 35(2)(c) does not apply. Since the sales agreement is between the seller and the buyer, cf. Article 4(1), it must be assumed that no significance can be attached to samples or models which are not shown by the seller himself or on his behalf. This means that if the buyer has seen a sample or model shown by a third party who is unconnected with the seller, the situation does not fall within the scope of Article 35(2)(c).[31] On the other hand, if the seller has en-

30. Cf. also NU 1984:5, p. 226: "However, the buyer's sample or model should not necessarily be given the same importance as the seller's in all situations of assessing defective goods. A general standard according to which the buyer's and seller's samples or models should be considered as comparable would therefore not be appropriate." But compare Kihlman: *Fel*, p. 142, note 148, which in relation to 17 § 2.3 of the Swedish Sale of Goods Act does not consider it decisive whether it is the seller or the buyer who has presented a sample or model.
31. Compare this with the commentary to § 75a of the Danish Sale if Goods Act in Legislative proposal L 9 for an Act to amend the law on sale of goods, p. 35: "The provision thus does not cover the situation where the consumer has seen a sample at another supplier or where the consumer brings his own sample with a view to buying goods equivalent to it."

couraged the buyer to look at the goods of an unconnected third party, who is recognised by the seller, this can be included as an element of the assessment made under Article 35(1). This could arise, for example, if the seller does not have a sample or model to show, and refers the buyer to look at one in the possession of another customer or trader.[32] In the same way, goods ordered by reference to previous independent transactions are not regarded as being covered by Article 35(2)(c), but rather by Article 35(1).[33]

If the seller shows a sample or model to a buyer at a trade fair, as part of a promotional campaign or suchlike, and if the parties enter an agreement in connection with this, then a sample or model shown in such circumstances will be covered by Article 35(2)(c), cf., in respect of trade fairs, the decision of the *Austrian Supreme Court* of 11th March 1999, referred to above. In any case, samples, models and other factual evidence about the quality of the goods etc. can be included in the assessment of the conformity of the goods to the contract, cf. Article 35(1), cf. Article 8.

7.7. Except where the parties have agreed otherwise

If the goods to not match all the characteristics and qualities of the sample or model, there will be assumed to be lack of conformity to the contract, *except where the parties have agreed otherwise*, cf. the introduction to Article 35(2).

Therefore, if the seller proposes to supply goods which do not match all the characteristics of the sample or model, it is up to him to tell the buyer this.

Certain legal writers appear to consider that the seller has a stricter duty to inform if the sample or model only represents some of the characteristics of the goods, so this should be clearly stated in the agreement between the parties.[34] However, even if this can be advis-

32. Compare this with the position in Danish law, U.2000.2420 H (Delsey suitcases), where consideration was given to the fact that the buyer had been referred by the seller to a third party who had bought a set of suitcases which, according to the information given by the seller, would correspond to the goods which would be supplied.
33. Cf. Schwenzer in Schlechtriem: *Kommentar*, p. 382; Achilles: *Kommentar*, p. 97.
34. Cf. Bianca in Bianca & Bonell: *Commentary*, p. 276 and in line with this, Heilmann: *Mängelgewährleistung*, p. 186.

able for the seller, it seems is doubtful that the seller can be subject to such a strict duty to inform the buyer that the goods will not correspond to the sample or model shown, as this depends on the interpretation of the contract in the light of all the relevant circumstances, cf. Article 8(3).

An example from Danish domestic sale of goods law which may be expected to give the same result as under Article 35(2)(c), is reported at U 2000.2420 H, which concerned an agreement for the sale of a large number of suitcases between a wholesaler and a large retail chain. At a meeting prior to entering into the contract, the buyer was given samples of suitcases by the seller, which were branded "VISA by Delsey". In connection with this meeting, the seller offered the buyer suitcases and beauty boxes at a price which was 14-25% below the normal sales price. In his offer, the seller said that the goods would be marketed under the name VISA. The seller also referred to a trader who sold the goods in the buyer's area, and the price at which they were sold.[35] The buyer then bought a set of luggage from the trader referred to, which were indeed branded "VISA by Delsey". The buyer then placed an order in which the goods were described as "Delsey suitcases – VISA model." In his order confirmation the seller asked the buyer to confirm that that goods would be marketed under the name VISA. The buyer replied that they would be marketed under the name "Delsey", to which the seller did not react. The buyer was sent a further set of samples to be photographed for the buyer's sales material, and these were also branded "VISA by Delsey."

When the goods were delivered, the buyer noted that the goods were branded merely with "VISA", and not with the name "Delsey" as expected. The buyer then complained to the seller, since in the view of the buyer it was a significant defect that the goods were not branded "Delsey", which had been a relevant precondition for the buyer.

By a majority (3/2) the Danish Supreme Court held that the buyer would reasonably expect to receive goods which corresponded to the samples shown, i.e., branded "VISA by Delsey". It was up to the seller to make it clear to the buyer that goods supplied would be branded differently from the sample.[36] The fact that, in his offer, the seller stated that the goods must not be marketed under the name "Delsey", did not prompt the buyer to consider that the goods would be supplied with a different brand name, especially when the seller had referred to another retailer where the goods shown were branded in

35. This was to comply with the Danish marketing laws, as the buyer could not otherwise indicate a special offer price in relation to the normal recommended price.
36. "If, in order not to damage its relations with its usual customer base – specialist shops and department stores – Delsey did not want to sell goods corresponding to the sample, branded with the name "Delsey", to Dansk Supermarked (Føtex), but only goods which bore the name Visa, it was up to Delsey to make this clear to Dansk Supermarked."

> the same way as the samples supplied. Furthermore, the discount given by the seller was not considered to be related to the difference in brand names, but to be a quantity discount. Finally, the seller had supplied further samples, corresponding to the first samples shown, and the buyer had stated that he would market the goods under the name "Delsey", to which the seller had not reacted. Based on all these factors, the Supreme Court found, that the goods did not conform to the contract.[37]

It must therefore be expected that any lack of clarity about whether the seller has made reservations in the contract about the correspondence of the sample or model with the goods supplied ought to be interpreted against the draftsman of the contract, cf. also the *contra proferentum* rule discussed in Chapter 3.[38]

If there are differences between the description of the goods in the contract and the sample or model presented, it must be decided by interpretation, whether the description or the sample or model will be given priority.[39]

7.8. The buyer's examination of the goods and the relation to the rest of Article 35

If the seller has shown a sample or model to the buyer which does not meet the standards of fitness for purpose for which goods of the same description would ordinarily be used, cf. Article 35(2)(a), which does not meet the standards of fitness for the particular purpose of the buyer, cf. Article 35(2)(b), or which is not contained or packaged in the manner usual for such goods, cf. Article 35(2)(d), the question is whether the presentation of a sample or model will exclude the application of other parts of Article 35(2). If so, the buyer would not be able assert a claim against the seller that the goods should be fit for their customary purposes etc. if it was apparent from the sample or model shown that this was not the case.

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37. The minority opinion of the Supreme Court found that the buyer had not complained in due time, so it was not necessary to consider whether the goods conformed to the contract or not.
38. This *contra proferentum* rule is a generally recognised legal principle, cf. Chapter 3 and Lookofsky: *CISG Scandinavia*, p. 41, note 172.
39. Cf. Schwenzer in Schlechtriem: *Kommentar*, p. 381, pt. 25.

While some writers in such cases would, *per se*, exclude the application of other parts of Article 35(2),[40] others think that this depends on the interpretation in the actual case.[41] If, for example, a seller has shown a model to a buyer which is only intended to show some of the characteristics of the goods, but where the model is presented with a view to showing suitability for particular purposes, then in *Ramberg's* view Articles 35(2)(b) and 35(2)(c) apply cumulatively.[42] *Schwenzer* gives the example that if a seller replies affirmatively to a buyer's question about the fitness of goods for some particular purpose, without the buyer being able to test the claim by examining a sample or model, then Article 35(2)(b) will apply as well as Article 35(2)(c).[43] The question here is whether the buyer needs to test the fitness of the goods for his particular purposes at all, or whether the seller's confirmation of the fitness for particular purposes etc. definitively apportions the risk between the buyer and seller.

It seems reasonable to argue that any of the other parts of Article 35(2) can be applied together with Article 35(c), if the buyer would not have been able to examine or assess the quality or characteristics etc. which he subsequently claims to be contractual defects, cf. subsections (a), (b) and (d) of Article 35(2), and compare with the discussion in Chapter 2 and the delegates' view that the provisions of Article 35(2) are cumulative. Correspondingly, any of the subsections could apply if the seller has given the buyer cause to refrain from making a detailed examination in respect of some particular characteristics which might be relevant to assessing the fitness of the goods for their customary purposes, particular purposes or concerning their packaging.

A simultaneous application of Article 35(3) in relation to Article 35(2)(c) is assumed not to be relevant in practice if the goods correspond to the sample or model shown, since the goods will be as-

40. Cf., in relation to Article 35(2)(a) and (b): Bianca in Bianca & Bonell: *Commentary*, p. 276; Heilmann: *Mängelgewährleistung*, p. 188; Enderlein & Maskow: *International Sales*, p. 146.
41. Cf. Schwenzer in Schlechtriem: *Kommentar*, p. 381 (with reference to Article 35(2)(b)); Achilles: *Kommentar*, p. 97 (with reference to Article 35(2)(a) and Article 35(2)(b)); Ramberg in Ramberg & Herre: *Internationella köp*, p. 235 (with reference to Article 35(2)(b)).
42. Ramberg: *Ibid.*
43. Cf. Schwenzer: *Ibid.*

sumed to correspond to the contract, so that Article 35(3), which presupposes lack of conformity to the contract, does not apply.[44]

The relations between the presentation of a sample or model, the agreement between the parties, the fitness of the goods for customary or particular purposes, and the buyer's examination of the goods is illustrated by the case reported at U 1955.988 H, which concerned the sale of material from a Belgian seller to a Danish buyer. The buyer had contacted the seller's agent in Denmark with a view to buying material for covering bus seats, and had given a sample of some material to the agent. The agent contacted the seller, who then supplied two different samples of material. The buyer then bought material on the basis of these samples.

It appeared that the material supplied was not suitable for covering the seats, as it split too easily. The buyer complained to the seller, as the material could not be used for the stated purpose of upholstering the seats.

The seller rejected the complaint, on the grounds that the material corresponded to the material shown by the agent, that the fitness of the material for the purpose was not a part of the agreement, and that it was not a relevant assumption. Furthermore, the buyer ought to have tested the samples given him, especially as a choice between the two sample materials had to be made by the buyer, and this could have revealed the suitability of the material.

The buyer rejected this argument since, as distinct from the seller, he was only peripherally professionally concerned with upholstery materials, and he had given a sample to the agent which represented the desired quality. The buyer had therefore considered the samples shown by the seller in the light of samples of colour and pattern, and not as samples of the quality of the material, for which the samples were, in any case, too small.

The Maritime and Commercial Court of Copenhagen found that the seller was not liable, as the court considered it decisive that, when given the samples by the agent, the buyer could have raised the question of the suitability of the goods for their purpose. The court stated as follows: "The fact that (the seller) knew the purpose for which the goods were to be used does not mean that a risk which is naturally borne by (the buyer) is transferred to the (the seller). For this, there must be an express condition on the part of (the buyer), or (the seller) must have had clear knowledge of the fitness of the goods for the purpose, and there is insufficient evidence in this case to support this assumption. It is emphasised that, in this instance, (the seller) could reasonably have assumed that this matter had been dealt with by the submission of the samples."

Before the Supreme Court, the buyer said that he had stretched the material in both directions, though without using great force. Expert witnesses stated that the material had a structural fault which made it unsuitable for use in covering bus seats, and that the seller ought to have known this. Expert wit-

44. Cf. Schwenzer in Schlechtriem: *op cit.*, p. 385.

nesses also said that the buyer could have identified the defect if he had sufficiently tested the sample, or submitted it to analysis. In the view of the expert witnesses, it was not customary for buyers to stretch materials or submit them to analysis. As against this, the *Grosserer-Societetet* (a trading association) said that it was normal for a buyer to make a stretch test of a sample such as that submitted.

With these comments, the Supreme Court upheld the decision of the Maritime and Commercial Court on the basis of the arguments submitted.

This case illustrates the complex balancing of the different spheres of interest. In the case in question the buyer was supplied with material which corresponded to the sample which had been shown (see Article 35(2)(c)), but at the same time the material was not fit for covering bus seats (see Article 35(2)(a) and Article 35(2)(b)), and equally, the material supplied did not correspond to the sample which the buyer had shown to the seller's agent (see Article 35(1)).

The statement of the Maritime and Commercial Court: "The fact that (the seller) knew what the goods were to be used for does not mean that a risk which is naturally borne by (the buyer) is transferred to the (the seller)," gives clear priority to the rule of *caveat emptor* as the starting point for assessing lack of conformity of goods to the contract, which does not seem to be justified today under the CISG, see Article 35(1) and Article 35(2)(b). However, the buyer had had an opportunity to see that the sample did not live up to the agreement, simply by testing the material by stretching. What was decisive for the courts here was that the risk as to the fitness of the goods which a buyer accepts by being shown a sample or model, cannot be shifted, even if the material is not in fact fit for the purpose, if the buyer could have discovered this by examining the sample. As stated by the Maritime and Commercial Court: "For this, there must be an express condition on the part of (the buyer), or (the seller) must have had clear knowledge of the fitness of the goods for the purpose, and there is insufficient evidence in this case to support this assumption." However, this seems doubtful, on the basis of the showing of the sample to the agent. Even though the expert witnesses told the Supreme Court that the seller *ought* to have been aware that the material was not fit for covering bus seats, this is not the same as actual evidence in support of the view that the seller was *in fact* aware that the material was to be used for this purpose.

It seems that the Supreme Court considered it decisive that the buyer ought to have realised that the goods did not correspond with his expectations, since he had had the possibility of testing the strength of the material but had not done so, cf. also § 47 of the Danish Sale of Goods Act.[45] However, it is remarkable that the court chose to rely on information which was contrary to the trade custom in this area.

The case illustrates the close connection between Articles 35(2)(c), 35(2)(b), 35(2)(a), 35(1) and 35(3). At the same time, this review illustrates that Article 35 has a structure which is excellent for examining the aspects which are required for the assessment of the conformity of goods to the contract under domestic law.

7.9. Burden of proof

If there is disagreement between the parties about whether a sale is made by reference to a sample or model which has been shown, the party that relies on a claim that a sample or model has been shown must produce evidence of this, in accordance with the principle that a person who claims a right has the burden of proving it.[46]

As noted in the introduction, it need not be proved that the parties have agreed that the sample or model should be used as a standard against which the goods supplied should be measured since Article 35(2)(c) includes the presumption that the goods supplied shall possess the qualities of goods which the seller has held out to the buyer as a sample or model.

However, there must be evidence of the qualities of the sample or model, according to an objective assessment, whereupon it must be shown that the goods delivered to not have these qualities or characteristics, for which the buyer has the burden of proof.[47]

If the parties agree that a sample or model has been shown, but

45. Compare the Swedish law in the almost identical case at NJA 1960, p. 446, referred to by Kihlman: *Fel*, pp. 145-146.
46. Achilles: *Kommentar*, p. 99, pt. 19. See also Schwenzer in Schlechtriem: *Kommentar*, p. 388, pt. 51, though here there is only a discussion of the buyer's burden of proof in this respect.
47. Cf. Achilles: *Ibid.* and Schwenzer: *Ibid.*

that, for one reason or another, it is no longer available, the burden of proof will generally be reversed.[48]

7.10. Conclusions

Article 35(2)(c) lays down the clear contractual presumption that, if a seller has presented a sample or model to the buyer, the goods shall match the qualities of the sample or model.

On the basis of the decision of the *Austrian Supreme Court*, and of the clear wording of Article 35(2)(c), as well as more recent legal theory, it must be concluded that this presumption will remain in force, even if no other contractual conditions are associated with the presentation of the sample or model. This is most appropriate, since a party to whom a sample or model has been shown can be sure that this will be taken into account in assessing the conformity of the goods to the contract, unless there is agreement to the contrary. Thus the party need not ensure that there is a positive agreement to include the sample or model in the interpretation of the contract.

When a seller shows a sample or a model to a buyer, the buyer has an opportunity to examine it. Even if this does not mean that the buyer has the opportunity to examine the goods which are delivered subsequently, there is a close connection between the maxim *caveat emptor*, and the buyer's obligation to take care, and the rule in Article 35(3) that the buyer cannot complain of defects in the goods which he knew of or could not have been unaware of at the time of entering into the contract. This applies in particular to the presentation of samples which are taken from a consignment from which the seller intends to make delivery and which have a lower quality than is customary for goods of the same description. The conformity of the goods to the contract is thereby put within the buyer's sphere of influence.

However, the buyer is only obliged to examine the goods in respect of characteristics which have been broadly agreed and which the sample or model is intended to show.

The starting point is that the goods should correspond to all the

48. Cf. Schwenzer: *Ibid.*

characteristics and qualities of the sample or model, unless otherwise agreed, but there will often be a practice or usage so that the sample or model only represents some of the characteristics and qualities of the goods to be delivered later. A sample or model can be either tangible or intangible.

According to it's wording, the rule in Article 35(2)(c) only applies if it is the seller who has held out a sample or model to the buyer. For other circumstances Article 35(1) applies. The application of Article 35(2)(c) does not exclude the application of other subsections of Article 35(2).

Chapter 8

The usual or adequate packaging of the goods, cf. Article 35(2)(d)

8.1. Introduction

Unless the parties have otherwise agreed how the goods shall be contained or packaged, then according to Article 35(2)(d), the goods shall be

> "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."

This rule, whose content can be said to follow from a general interpretation of the agreement,[1] was introduced by the Working Group, as referred to in Chapter 2, in drafting what became Article 35, and it was put forward by a group consisting of representatives from the UK and USA. There is no predecessor of the provision in ULIS,[2] but it draws inspiration from § 2-314(2)(e) of the Uniform Commercial Code, which covers labelling as well as containers and packaging.[3] The provision also forms the basis for the new Chinese Contract Act Article 156,[4] for the Swedish and Finnish Sale of Goods Acts, § 17.2.4),[5] as well as the Norwegian Sale of Goods Act § 17.2.d).[6]

1. Cf. Ramberg in Ramberg & Herre: *Internationella köp*, p. 235; Ramberg: *Transactions*, p. 90.
2. Cf. Schwenzer in Schlechtriem: *Kommentar*, p. 382, pt. 28, with note 87.
3. UCC § 2-314(2)(e) states as follows: "Goods to be merchantable must be at least such as ... are adequately contained, packaged and labeled as the agreement may require."
4. Article 156 state as follows: "Packing Method. The seller shall deliver the subject matter packed in the prescribed manner. Where a packing method was not prescribed or clearly prescribed, and cannot be determined in accordance with Article 61 hereof, the subject matter shall be packed in a customary manner, or, if there is no customary manner, in a manner adequate to protect the subject matter."
5. This states as follows: "Unless otherwise agreed, the goods ... shall be packaged in a usual and otherwise appropriate manner, whether the packaging is required for the preservation or protection of the goods." The use of the qualifying "whether" differs from CISG Article 35(2)(d), since the Swedish provision is only regarded as covering cases where the container or packaging is necessary to protect the goods, and so does not cover cases where the container is more a part of the goods themselves, cf. Kihlman: *Fel*, pp. 150-151 and p. 153.

Also, as from 2002, a new provision was included in the Danish Sale of Goods Act, § 75a.2.1), according to which goods must have "such durability and other qualities, including containers, as the buyer can reasonably expect, given the nature of the goods and other circumstances." This provision is based on Article 2.2.c) and d) of Directive 1999/44/EC on certain aspects of the sale of consumer goods and associated guarantees, though the provision in the Directive does not refer to containers or packaging. The provision was included in order to clarify and expand on the elements contained in § 76.1.4) of the Sale of Goods Act (the general concept of defects) and to adapt the Sale of Goods Act to changes in Nordic sale of goods law as well as CISG Article 35.[7] § 75a.2.1) therefore expresses, in the same way as § 76.1.4) of the Sale of Goods Act, the concept of defects which applies in consumer sales, business-to-business sales and public procurement in Danish law.

Article 35(2)(d) establishes that containers and packaging are included in the requirements for the conformity of the goods to the contract, cf. below. If, contrary to this assumption, the parties wish to refrain from packaging the goods in a manner which is usual and adequate, this must be agreed.[8]

8.2. Containers or packaging and the conformity of the goods to the contract

The dogmatic solution of Article 35(2)(d) is that containers and packaging of goods should be regarded as an integral part of the

6. This states as follows: "Unless otherwise agreed, the goods ... shall be packaged in a usual and otherwise appropriate manner, as may be required to preserve and protect the goods."
7. Cf. the commentary on the legislative proposal L 9, p. 15. It is not directly clear, either from the commentary on the law or from Report No. 1413, which rules were the basis for inserting the provision on packaging in § 75a, but it seems reasonable to assume, from p. 82 and p. 180 of the Report, that the provision originated in CISG Article 35(2)(d).
8. Ramberg: *Transactions*, p. 90, says there must be a specific term in the agreement for this. Even if, on evidential grounds, this will often be required in practice, such an agreement can also be implied, for example on the basis of the established practice between the parties, cf. Articles 8 and 9.

conformity of the goods to the contract.[9] As distinct from this, there is a view that containers and packaging should not be regarded as being part of the goods themselves,[10] and so do not concern the conformity of the goods to the contract, but are instead the subject of an independent subordinate obligation, supplementary service or suchlike.[11] Article 35(2)(d) does away with such doubts, and this seems justified on a number of grounds.

First, there are weighty arguments against dividing up the obligations of the parties to the contract into primary and subordinate obligations.[12] This applies not least in relation to the CISG, which has no mention of primary and subordinate obligations, and where the main emphasis is on whether some defect can be considered as significant or not.[13]

Second, it does not seem possible to frame any general rules for when containers or packaging should be regarded as a part of the goods or not, as this will depend on the *purpose* of the containers or packaging in each individual contract.

Finally, there are good reasons for including a rule about containers and packaging of goods under the provisions on the conformity of the goods to the contract, since containers and packaging most naturally concern the correct performance of the contract. What specific rights the buyer then has, proportionate reduction in price, revocation of contract etc., is decided on a case by case basis, without affecting the basic principle that containers or packaging of the goods are part of the contractual terms.

In specific cases containers or packaging will often be considered a small and insignificant part of the performance of the contract by the seller. For example, if the agreement concerns goods which are to be used by the buyer himself, and if they are delivered undamaged, the fact containers or packaging, whose sole purpose is to protect the

9. And of Article 35(1), cf. Chapter 4.
10. See the example referred to in Honnold: *Uniform Law*, p. 259, pt. 228.
11. As examples of legal systems which share this view, see Schlechtriem: *UN-Kaufrecht*, p. 84, pt. 141, and Schwenzer in Schlechtriem: *Kommentar*, p. 376, note 36 and p. 382, note 88. Compare with Kock: *Nebenpflichten*, p. 148, who apparently regards the requirements of Article 35(2)(d) as a subordinate obligation.
12. Cf. Andersen & Lookofsky: *Obligationsret*, pp. 42-43.
13. Cf. Bianca in Bianca & Bonell: *Commentary*, p. 270, pt. 1.3.

goods, were not usual or adequate, is not significant, since the goods have been safely delivered to the end user.[14] In such a case the containers or packaging of the goods are not an integral part of the goods themselves, so the obligation in the particular case can be described as a subordinate obligation.[15] In any case, the result will be that the buyer will have no claim on the basis that the goods were not packaged to a usual or adequate standard.[16] To grant the buyer a proportionate reduction in payment, on the basis of what usual or adequate packaging would have cost would not seem allowable, at least in those cases where the packaging would have been thrown out.[17] However, the situation might be different if the packaging has some value for the buyer, for example by recycling it, cf. below.

On the basis of the example discussed above, it is not possible to draw a general conclusion that, as long as the goods are delivered undamaged, the performance has conformed to the contract within the meaning of Article 35(2)(d), since containers and packaging of goods should be included in the assessment of the conformity of the goods to the contract.[18] Therefore, an assessment made in accordance with Article 35(2)(d) ought to focus on containers and packaging, including their purpose, and only thereafter focus on whether the

14. Cf. the Ministry of Justice commentary to legislative proposal L 9, on § 75a: *Ibid.*, where it is stated that, "If a good, which according to the terms of an agreement should have been packaged, is delivered without packaging, the buyer can reject the good." In connection with this, see Dahl: *Kommentar*, note 92. This statement seems rather blunt, since in the example given here it would be unreasonable if such conclusions were drawn automatically, without a concrete assessment of the remedies for the defect. The statement is also opposed by Elmelund in Elmelund et al: *Lærebog*, p. 263, note 32, with reference to Hellner & Ramberg: *Speciell avtalrätt I, Köprätt*, Ed. 2, (1991), p. 61, at least in cases where the goods are rejected after they have been delivered unharmed. A different result is conceivable for example, where the seller delivers or proposes to deliver the goods agreed in packaging which will clearly risk part of the goods being lost or damaged.
15. Cf., in relation to the Swedish Sale of Goods Act, § 17.2.4): Kihlman: *Fel*, p. 151, where it is concluded that the obligation in such a situation is a subordinate obligation.
16. However, compare this with the comments on § 75a above. See also below, on the rights of buyers when buying goods supplied in a series of deliveries.
17. Compare with Kihlman: *Fel*, p. 151.
18. Cf. Heilmann: *Mängelgewährleistung*, pp. 188-189 and Ziegler: *Leistungsstörungsrecht*, p. 74, pt. 5., both with reference to Stumpf in Caemmerer/Schlechtriem (a former edition of the Schlechtriem: *Kommentar*). Ziegler also distinguishes between sales made by a series of deliveries and a single delivery, since in the former the buyer is able to require the lack of conformity to the contract to be made good in subsequent deliveries.

buyer can make any claim in the concrete circumstances. For example, if the goods are bought with a view to retailing them, the possibility of forwarding and selling the goods could depend on whether they are contained and packaged in a usual manner, and the fact that the goods have safely reached the immediate buyer does not necessarily mean that this will be the case if the goods are forwarded to retail buyers. For example, if the goods are delivered to the buyer by one of the seller's own salespeople, while the next link in the transport chain is to be undertaken by independent carriers, this would require the goods to be usually and adequately contained and packaged.

Furthermore, certain goods are typically contained or packaged in a standard manner, so they can be transported by the usual means, warehoused using the usual warehouse facilities etc. To the extent that the usual transport, warehousing and retail sales is hindered by the lack of usual containers and packaging, it must be assumed that there is a lack of conformity to the contract, regardless of whether the goods themselves conform to the contract, and regardless of whether, taken in isolation, the containers or packaging could be considered adequate to preserve and protect the goods. The same applies to containing and packaging the goods in usual and appropriate quantities, enabling the usual or appropriate retailing of the goods unless, of course, the buyer has requested goods which do not make this possible.

If it is usual for the goods to be delivered in containers which have an independent value in the retail trade, for recycling or as returnable containers, the lack of such containers would lead to a loss of value for the buyer, and this would raise the assumption that the goods do not conform to the contract.[19]

Containers or packaging can also be significant if they are an integral part of the goods themselves. Bottles of perfume are overwhelmingly sold in boxes. On the one hand, the aim of this is to protect the bottle, and on the other hand the box is an important signal to consumers, emphasising the exclusivity and value of the perfume; as perfume is often given as a present, consumers demand that the boxes

19. Cf. Achilles: *Kommentar*, p. 98, pt. 13. However, as loss of value is not a pre-condition for finding that there is lack of conformity to the contract.

should be in perfect condition. The buyer will therefore expect the boxes to be undamaged, even though the perfume and the bottles may in any event be undamaged.

Such examples illustrate the close connection between Article 35(2)(d) and Article 35(2)(a), as the purposes for which the goods are ordinarily be used, retail to consumers, requires the containers to be undamaged. However, this requirement will often already apply through practice or usage, cf. Article 35(1), cf. Articles 8(3) and 9(2). In such a case, Article 35(2)(d) makes it clearer that there is a lack of conformity to the contract.[20]

As this review shows, it is not possible to categorise the seller's duty to contain or package goods as either a primary or a subordinate obligation, or as consisting of part of the goods or not. Instead, what is decisive is whether the seller's obligation to supply goods conforming to the contract can be extended to cover containers and packaging. This is answered in the affirmative by Article 35(2)(d), where it concerns containers and packaging that are usual and adequate.[21]

The remedies of the buyer, in respect of the seller's obligations under Article 35(2)(d), are determined under Article 49 et seq., and can vary from no remedy at all,[22] to a proportionate reduction in the price, to avoidance of the contract and payment of compensation to the buyer, if the defects of containers or packaging are significant to the buyer. It can very well be that the lack of usual or adequate containers or packaging is not significant to the buyer, but this must be determined under the rules on lack of conformity to the contract, and not by an assessment based on Article 35(2)(d) similar to the assessment of insignificant defects. This means that the assessment of whether the containers and packaging of the goods conform to the contract ought to be made independently and separately from the

20. Compare with Kihlman: *Fel*, p. 150, with reference to the Swedish Sale of Goods Act, § 17.2.4).
21. Cf. Honnold: *Uniform Law*, p. 259, pt. 228: "Whether the packaging is part of the goods is a false issue; the relevant question is whether the seller's contractual duty extends to packaging. This question is answered by Article 35(2)(d) ..."
22. For example, in the situation referred to above, where the goods are not contained in a usual or adequate manner, but where they have nevertheless been delivered undamaged to a buyer who shall use the goods himself, the packaging has no significance.

assessment of whether the buyer has any remedy. Containers or packaging which are either are not as required by the contract, cf. Article 35(1), or which do not live up to the requirements of the secondary rule in Article 35(2)(d), must therefore be assumed not to conform to the contract, regardless of whether the goods which are contained or packaged are in themselves defective.

In addition to this, in some circumstances containers and packaging can themselves be an indication of the lack of conformity of the goods to the contract, cf. the decision of the *Danish Western High Court* of 11th October 1999, referred to in Chapters 3 and 4, where the buyer claimed that the Christmas trees delivered were too small, and referred, among other things, to the fact that, on the basis of the number of trees loaded onto a lorry, it was impossible for the goods to have been of the agreed size.

Since the containers and packaging are a part of the conformity of the goods to the contract, it follows that the buyer has a duty to examine not only the goods, but also the containers and/or packaging, cf. Article 38, and the buyer must give notice of any claim arising out of this in good time, cf. Article 39.

8.3. Distinguishing between Article 35(1) and Article 35(2)(d)

If the requirements for containers and packaging are clear from the practice of the parties or if they are bound by usage, cf. Article 8(3) or Articles 9(1) and 9(2), the requirements could be said to follow from an interpretation of the agreement between the parties, cf. Article 35(1).[23]

For example, if a buyer orders goods by referring to previous purchases and if, contrary to the usual practice between the parties, the goods are delivered *without* containers or packaging, then according to Article 35(1) this will be contrary to the agreement between the parties. Conversely, the delivery of goods without containers or pack-

23. Cf. Ramberg in Ramberg & Herre: *Internationella köp*, p. 235: "This is already the consequence of the principles of interpretation of contracts, so there was no need to state this directly in Article 35(2)(d)."

aging could be justified by the same reasoning, that this is in accordance with the usual practice between the parties, even though similar goods are usually delivered in containers or packaging, cf. Article 35(2)(d).

If there is a usage in international trade for how such goods are contained or packaged, cf. Article 9(2), then in principle the situation will be governed by both Article 35(1) and Article 35(2)(d). If the parties have explicitly referred to the usage, then Article 35(1) will apply, while if there is some doubt about whether the usage has been agreed or not, or where it insufficiently certain whether such usage exists, it can be an advantage to apply Article 35(2)(d). Thus, in order to apply Article 35(2)(d), it is not necessary for some usage to exist within the terms of Article 9, since Article 35(2)(d) merely requires that the containers or packaging should be usual or, if there is no such usual manner, which would exclude the application of Article 9, that it is adequate to preserve and protect the goods. Thus, if there is any doubt about what has been agreed, it can be an advantage to apply Article 35(2)(d).[24]

8.4. Contained or packaged

The terms "contained or packaged" are broadly interpreted in legal theory, cf. in Chapter 4 on Article 35(1). For example, a seller's duty to ensure that goods are contained or packaged includes the provision of usual and adequate instructions and markings on the container or packaging, so the buyer and carriers can handle the goods correctly during transport, as well as ensuring that the goods are unpacked correctly and with due care.[25] It can be difficult to draw the boundary between the obligation to ensure that goods are contained or packaged and the similar obligations which do not fall within Article 35(2)(d). An example of this could be machines which are contained and packaged, and where, in this connection, the seller has an obligation to drain water from cooling systems, so they do not get ruptured by ice if the machine passes through zones with sub-zero tem-

24. Cf. in line with this, Su: *Vergleich*, p. 35.
25. Cf. Incoterms 2000, Standard form A9: "Packaging is to be marked appropriately."

peratures.[26] Likewise, a seller may have an obligation to drain oil form a machine in order to avoid spillage and environmental damage during transport. The seller may also have a duty to advise the buyer on the need to fill any empty tanks or reservoirs with various fluids before using the machine. In some instances the seller may have a duty to spray metal parts with a protective coating against corrosion, or to wrap machine parts in plastic film or oiled paper to give sufficient protection during transport.

Finally, the observance of good faith in international trade may mean that the seller has a duty to step in if he sees that containers or packaging used by an independent carrier are wrong or inadequate, even after possession of the goods may have passed, cf. Article 36. If it is agreed that the seller shall deliver different kinds of goods to the buyer, for example, clothes in different sizes and colours, and these are all contained or packaged in the same way, it will be usual to mark the packaging so the buyer can distinguish the different kinds of goods, sizes, etc. from each other. In addition to this, Article 35(2)(d) is interpreted so the obligation for the goods to be contained or packaged includes usual or adequate declarations of the content of the goods, their durability etc.[27] An example of this is the trade in different kinds of foods, cf. the decision of the *French Court of Appeal*, referred to in Chapter 4, concerning parmesan cheese.

To the extent that computer software is regarded as goods within the meaning of the Convention,[28] the delivery of a floppy-disk, CD-ROM or other storage medium will partly be considered to be a composite product,[29] and partly a product (software) which is delivered contained or packaged in a physical medium. The storage medium may be covered by Article 35(2)(d). If the software is delivered on a floppy disk, instead of by a means more commonly used in the trade, such as a CD-ROM or some other medium, it will probably not be possible to say that the goods are contained or packaged in

26. Larger machines must typically have a test run before they are delivered, for which the seller must put in oil, water and so on. This must be drained afterwards.
27. Cf. Schwenzer in Schlechtriem: *Kommentar*, p. 382, pt. 29. This interpretation is in line with UCC 2-314(2)(e).
28. See, for example, Lookofsky: *CISG Scandinavia*, p. 20 *et seq.*
29. See, for example, Lookofsky: *Op. Cit.*, p. 25, note 71, where software and disks are regarded as a composite good.

accordance with the contract. Conversely, such disputes could typically be decided by reference to Article 35(1), cf. Articles 8 and 9.

8.5. Contained or packaged in a usual or adequate manner

8.5.1. Introduction

Unless otherwise agreed, the goods shall be 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. What is considered usual or adequate naturally depends on the characteristics of the goods, for example, whether the glass is a waste product or whether it is in the form of crystal wine glasses, whether tomatoes are tinned or are loose fresh fruit,[30] and it depends on the purpose of the container or packaging, for example, whether the container is to protect the goods, or also serves other purposes, such as for use in marketing the goods.

The provision does not give rise to a general duty for goods to be contained or packaged if they are normally delivered without being contained or packaged,[31] as with certain raw materials[32] or waste products.

The question then becomes, what norm should apply when considering how to define "usual" or "adequate" containers or packaging.

8.5.2. Primary rule: The objective norm of the commercial sector in the seller's country

As stated above, the norm for "usual" containers or packaging, cf. Article 35(2)(d), can be determined by reference to practice or

30. See for example the decision of the *Bochum District Court* given on 24th January 1996 (reported on the Unilex website), where a German buyer complained that some truffles supplied by an Italian seller were too soft and were worm-eaten as a result of being kept at too high a temperature during their transport. The buyer's complaint was dismissed because it was made too late, cf. Article 39.
31. Cf. Incoterms 2000, pt. A9: "The seller must provide at his own expense packaging (unless it is usual for the particular trade to send the goods of the contract description unpacked ..."
32. Cf. Achilles: *Kommentar*, p. 98, pt. 14. See also Dahl: *Kommentar*, note 92; and with respect to § 75a.2.1) of the Danish Sale of Goods Act, see the Commentary on the legislative proposal L 9, § 75a, p. 34. Refer also to Incoterms 2000, pt. A9.

usage,[33] but if, for example, the case concerns sales between parties who have not traded with each other before, or where there is no recognised international practice, cf. Article 9, the norm for what constitutes "usual" containers and packaging must be defined.

The point of departure is that there must first be an objective assessment based on the existing usual practice in the *seller's* sector of commerce.[34] In other words, it is not the view of the buyer that should be emphasised, or the shared subjective view of the parties, unless this is an expression of their agreement, cf. Article 35(1), cf. Articles 8 and 9.

If there are differing views about what is usual for containers and packaging in the commercial sectors of the seller's and the buyer's countries, then a solution can be based on what are considered to be usual containers or packaging in international trade.[35] As stated, there cannot be a requirement for the existence of a usage, within the terms of Article 9, before a claim is made under Article 35(2)(d).

If there are no usually accepted standards in international trade then, according to the prevailing view in theory, the norm which applies is that of the place where the seller has his place of business,[36] or of the place of delivery.[37]

This argument runs parallel to the arguments set out above in Chapters 5 and 6, in relation to Articles 35(2)(a) and 35(2)(b) respectively,[38] and confirms the thesis of the general application of the principle of spheres of influence. If the buyer has requirements for containers or packaging which go beyond what is usual, this must be

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33. See, for example, Achilles: *Op. Cit.*, p. 97, pt 12, where in assessing the meaning of "usual" in Article 35(2)(d) emphasis is put on the usage between the parties or on the customs and practices recognised in international trade, cf. Article 9. There is also a gradual transition between interpretation of a contract under Article 35(1), and construction of a contract under Article 35(2)(d).
34. Cf. Bianca in Bianca & Bonell: *Commentary*, p. 277, pt. 2.7.2; and in line with this, see Schwenzer in Schlechtriem: *Kommentar*, p. 382, pt. 29, at note 91; as well as Heilmann: *Mängelgewährleistung*, p. 189.
35. Cf. Bianca in Bianca & Bonell: *Ibid.*; and in line with this, Heilmann: *Ibid.*
36. Cf. Bianca in Bianca & Bonell: *Ibid.*; and in line with this, Heilmann: *Ibid.*; as well as Achilles: *Op. Cit.*, p. 97. The problem is not as referred to by, among others, Ramberg & Herre, Honnold, Galston & Smit and Enderlein & Maskow.
37. Cf. Rognlien in Bergem & Rognlien: *Kjøpsloven*, p. 504.
38. Cf. Honnold: *Uniform Law*, p. 259; and in line with this Lookofsky: *CISG Scandinavia*, p. 91, note 99.

regarded as a particular purpose for containers or packaging, to which the seller's attention should be drawn, in line with the reasoning given above in the discussions on Articles 35(2)(a) and 35 (2)(b). It follows from the arguments which apply in relation to Articles 35(2)(a) and 35(2)(b) that it is the buyer who must make the seller aware of any particular requirements for containers and packaging, unless, according to the circumstances, the seller either knew or could not have been unaware that the goods should be contained or packaged in a particular manner. The same applies where there are special rules on containers or packaging in public law regulations.[39] For example, the seller may be deemed to be aware of such particular purposes if he has a branch or subsidiary in the destination state, if he has previously exported to the destination state, or if he has marketed his goods in that state. The fact that the seller knows where the goods are to be delivered or used, does not in itself mean that the goods shall be contained or packaged in accordance with the usual or adequate requirements in the destination state. However, the seller's knowledge of the mode of transport and the destination of the goods has usually been given some weight in assessing how goods should usually be contained or packaged.

8.5.3. The significance of the mode of transport and the destination of the goods for assessing whether they are contained or packaged in a usual or adequate manner

While the starting point may be that the seller cannot be expected to know the requirements for containers and packaging in the destination state, it can be expected that the goods should be contained and packaged so they can be transported to the buyer, or if the goods are to be collected by the buyer, so they can be collected and carried away by the buyer.

The principal obligation of the seller, to ensure that the goods are contained or packaged in a usual or adequate manner, is assumed to apply, regardless of whether the goods are dispatched by the seller or collected by the buyer,[40] but traditionally, the obligation of the seller has been acknowledged to be lower if the buyer himself collects the

39. Cf. Bianca: *Op. cit.*, p. 283, pt. 3.2.
40. Cf. Achilles: *Kommentar*, p. 97, pt. 12.

goods from the seller, from where the goods are produced or stored.[41] However, Article 35(2)(d) does not recognise this difference in the manner of delivery, so the assumption must be that the duty of the seller is the same, regardless of whether the goods are to be dispatched or collected.[42]

If the buyer is to be responsible for usual or adequate containers or packaging, this requires unequivocal agreement.[43] If the goods are to be dispatched, Article 31(1)(a) governs when the goods are regarded as having been delivered, unless otherwise agreed. The parties will often have determined the place of delivery in their agreement, either in particular, or by reference to standard terms such as Incoterms 2000.[44] Depending on the contract, and on the particular terms on transport, the seller will know what mode of transport is involved, how far the goods are to be carried, how long the transport will take, through which climate zones etc. If the seller is responsible for arranging the transport, for example through the use of Incoterms 2000 standard clauses, CFR,[45] CIF,[46] CPT,[47] CIP,[48] DES,[49] DEQ,[50] DDU,[51] or DDP,[52] the seller should ensure that the goods are contained and packaged according to his knowledge, cf. also point A9 of the clauses referred to.[53,54]

If the seller is not responsible for arranging the transport and does not necessarily know how the goods are to be carried, he will only have a duty to ensure that the goods are contained or packaged in accordance with the needs for onward transport if he has knowledge

41. Cf. Bianca in Bianca & Bonell: *Commentary*, p. 277, pt. 2.7.1.
42. Cf. Bianca: *Ibid.*
43. Cf. Bianca: *Ibid.*
44. ICC Publication No. 560.
45. Cost and freight (... agreed destination port).
46. Cost, Insurance and Freight (... agreed destination port).
47. Carriage Paid To (... agreed destination).
48. Carriage and Insurance Paid to (... agreed destination).
49. Delivered Ex Ship (... agreed destination port).
50. Delivered Ex Quay (... agreed destination port).
51. Delivered Duty Unpaid (... agreed destination port).
52. Delivered Duty Paid (... agreed destination port).
53. This states as follows: "The seller must provide at his own expense packaging (unless it is usual for the particular trade to send the goods of the contract description unpacked) which is required for the transport of the goods arranged by him ..."
54. Cf. Ramberg: *Transactions*, p. 90.

of the mode of transport, cf. the Incoterms 2000 clauses FCA,[55] FAS,[56] FOB,[57] and DAF,[58] all under point A9.[59,60]

As for the practice of the courts on Article 35(2)(d), see:

COMPROMEX (Mexico), decision of 29th April 1996, referred to above in Chapter 4. A Mexican buyer had ordered from an Argentine seller, a consignment of tinned fruit which was to be delivered FOB a Chilean harbour by a Chilean subcontractor. The seller had presented samples of tins and labels, and the buyer had presented samples of cardboard packing cases which the tins were to be transported and delivered in. When the goods were delivered, the buyer complained about the lack of conformity of the goods to the contract. A public notary engaged by the buyer prepared an inspection report, from which it appeared that some of the cardboard packing cases were damp and damaged. As a result of this, and as a result of the poor quality of the tins, some of the tins had rusted. Furthermore, the contents of some of the tins had become rotten, because of their faulty hermetic sealing, so the tins swelled up. The buyer also complained that the labels did not correspond to the samples shown, the quantity of goods delivered was less than agreed, and the contents of fruit in the tins did not correspond to the agreed mix of the different kinds of fruit. The seller rejected the complaints, among other things, on the ground that he had not been present during the inspection of the goods which had been carried out by a public notary appointed by only one of the parties.

On the basis of the documentation shown to it, COMPROMEX found that it had been shown that a part of the consignment had been spoiled because of the poor quality of the tins and of the cardboard packing cases, which were not suited to transport by sea. The seller, who had known that the goods were to be transported by sea, had a duty to ensure that the goods were contained and packaged in the manner agreed, or in the absence of agree-

55. Free Carrier (... agreed place).
56. Free Alongside Ship (... agreed transhipment place).
57. Free On Board (... agreed transhipment place).
58. Delivered At Frontier (... agreed place).
59. "The seller must provide at his own expense packaging (unless it is usual for the particular trade to ship the goods of the contract description unpacked) which is required for the transport of the goods, to the extent that the circumstances relating to the transport (for example modalities, destination) are made known to the seller before the contract of sale is concluded."
60. Cf. Ramberg: *Transactions*, p. 90.

ment, in a manner which ensured the preservation and protection of the goods. Since this had not happened, the seller was liable, cf. Article 35.[61]

In the context, the reference by the court to Article 35 must naturally be assumed to be a reference to the second part of Article 35(2)(d), on adequate containers and packaging. As the seller knew the goods were to be transported by sea, and exposed to damp, the containers (the tins) and the packaging (the cardboard packing cases) were not adequate. However, the judgment also gives rise to several conflicting questions, since it appeared that the seller had presented samples of the tins and the buyer had presented samples of the cardboard packing cases, cf. Article 35(2)(c). It was not clear whether the samples had been intended to show colours, sizes, etc., but the case does prompt the question as to whether the containers and packaging could be said to have been agreed, cf. Article 35(2)(c), and whether the buyer knew or could not have been unaware that the containers or packaging did not conform to the contract, cf. Article 35(3).[62]

See also the decision of the *Paris Court of Appeal*, given on 14th June 2001,[63] which concerned the sale of decorated glass panels between a French seller and a buyer in the United Arab Emirates. It was not clear how far the defects in the products, which it was claimed existed, were due to faults in the production process, defective containers and packaging, extraordinary circumstances of the transport by sea from Montreuil to Dubai, or the buyer's cleaning of the glass panels using the wrong cleaning method. As a result of this, the case against the seller was dismissed.

61. "It is this Commission's opinion that LANIN is liable for not supervising the canning, packing and baling used by the company it subcontracted with, and for having caused damage to the goods as a result of the inadequate canning and failure to use the baling required to preserve or protect the goods." It is also stated in the judgment: "Because of those circumstances, LANIN, or the company with which it subcontracted, should have forwarded the goods that were the object of the transaction in the amount, quality, and of the type as agreed in the terms; as provided under articles 35 and 36 of the Vienna Convention, the containers and baling should have also conformed to the agreed terms. In the absence of a specific agreement between the parties regarding these issues, this Commission considers these legal provisions applicable."
62. Cf. also the commentary of Alejandro Osuna González: *Dictamen Emitido Por La Comisión Para La Protección Del Comercio Exterior A Petición De Conservas La Costeña, S.A. De C.V. with commentary*, 17 Journal of Law and Commerce (1998) 427-443; see the English translation of the case report at the Pace Database: http://cisgw3.law.pace.edu/cases/960429m1.html.
63. See the Unilex and Pace databases.

A case decided by the *Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry*, on 10th February 1996,[64] can be said to concern a special instance of the seller's duty to ensure that the goods are contained or packaged adequately, since this duty arose out of the seller's duty of care under Article 85.

> An agreement was entered into between a Russian seller and a Swiss buyer for the sale of goods,[65] which were to be delivered FOB a port to be nominated in the Black Sea. The goods were sent to the port by train, whereupon the goods were to be loaded by crane on board a ship chartered by the buyer. However, the arrival of the ship was delayed, so loading could not take place. At this point, about 1/3 of the goods had already been off-loaded from the railway wagons and lay on the quay, ready for loading on the ship. The seller arranged for the rest of the goods to stay in the railway wagons. Some days later, after the risk for the goods had passed to the buyer, cf. Article 36, the goods on the quay were rained on, which did not immediately affect the quality of the goods greatly, but it did mean that the goods could not be packed as intended by the buyer. The buyer thereupon claimed compensation and a fresh delivery. The tribunal held that the seller had not fulfilled his duty of care under Article 85, since he should have taken measures to protect the goods on the quay against the rain, and he ought to have ensured that the wet goods were not loaded together with the dry part of the consignment, so the whole consignment ended up being damp.

If the seller knows that the goods can be delayed while being transported, or that they may be diverted or sent back, the seller has a duty to contain or package the goods so they are preserved and protected during the whole journey.[66]

If it is agreed that the goods are to be collected from the seller, either from a warehouse or from the place of production, which may be different from the seller's place of business or production plant, the seller is still presumed to have a duty to ensure that the goods are contained or packaged in the usual or adequate manner, cf. Article

64. See the Unilex and Pace Databases.
65. The report of the case does not indicate the nature of the goods.
66. Cf. Bianca: *Op. cit.*, p. 277 *et seq.*, pt. 2.7.3.; and in addition to this see Enderlein & Maskow: *International Sales*, p. 147, pt. 17(2); Schwenzer in Schlechtriem: *Kommentar*, p. 383, pt. 31.

35(2)(d).[67] However, the seller will not necessarily know how and where the buyer intends to carry the goods. If he knows nothing about it, the seller will not have a duty to pack the goods so they can withstand carriage by sea, for example. This is also the situation under the Incoterms clause EXW,[68] point A9. If, when goods are collected by the buyer, the buyer is to be responsible for the goods being contained and packaged, this must be agreed between the parties.[69]

8.5.4. The distinction between a usual and an adequate manner for containing or packaging goods

If there is no usual manner for containing or packaging goods, then the goods should be contained or packaged in a manner which is adequate to *protect* and *preserve* them. This will typically be the case with goods which have not previously been produced or with goods which are specially manufactured for the buyer.

In evaluating whether containers and packaging are adequate to protect and preserve the goods, consideration is given to the mode and duration of the transport, including probable delays, climatic conditions etc., as discussed above.

Since Article 35(2)(d) exclusively refers to containers and packaging which are adequate to *preserve* and *protect* the goods, it does not provide a basis for laying down standards for containers and packaging in relation to other criteria, such as marketing, labelling and product declarations. If such questions arise, the outcome will depend on an interpretation of the agreement on the basis of all the circumstance of the case, cf. Article 35(1).[70] However, it must be assumed that the seller still has a duty to mark the goods so they can be correctly handled by those responsible for their transport, and when being unpacked by the buyer or by the retail customer.

67. Cf. Bianca: *Op. cit.*, p. 277, pt. 2.7.1; Schwenzer in Schlechtriem: *Kommentar*, p. 382, pt. 30.
68. Ex Works (... designated place).
69. Cf. Schwenzer in Schlechtriem: *Kommentar*, p. 382, pt. 30, where there is also a reference to the effect that this can apply on the basis of the custom of the trade; and Bianca: *Op. cit.*, p. 277, pt. 271, who would require "an unmistakable contractual clause to this effect." See also Enderlein & Maskow: *International Sales*, p. 147, pt. 17(3).
70. See Kihlman: *Fel*, pp. 152-153, since the second part of Article 35(2)(d) is comparable with § 17.2.4) of the Swedish (and Finnish) Sale of Goods Act.

8.6. Burden of proof

A person who claims a right under Article 35(2)(d) must first show that no agreement has been entered into with respect to containers or packaging for the goods, cf. Article 35(1). The party must then show that there is a norm for the usual or adequate manner for containing or packaging the goods, and that the containers or packaging of the goods vary from that norm.[71]

8.7. Conclusions

Containers and packaging for goods are regarded as an integral part of the conformity of the goods to the contract, cf. Article 35(1) and Article 35(2)(d), and are part of the seller's duty of correct fulfilment. If the goods are not contained or packaged in a usual or adequate manner, then Article 35(2)(d) establishes the assumption that the goods do not conform to the contract. In other words, containing and packaging the goods are within the seller's sphere of influence.

This assumption cannot be overturned merely by reference to the fact that the goods contained or packaged are themselves undamaged, since containers or packaging can have other purposes than the mere protection or preservation of the goods during their transport to the party to the contract with the seller.

The buyer can thus reasonable expect that the goods will be contained or packaged in a usual or adequate manner if this is necessary for the goods to be retailed or transported onwards, if the containers have an independent value for the buyer, or if the containers or packaging otherwise have an independent value, for example in the marketing of the goods or suchlike. The seller can therefore be liable if he fails to contain or package the goods in a usual or adequate manner, even if he delivers the goods to the buyer in an undamaged condition, unless he knows that it is the buyer of the goods himself who is to use the goods.

If the goods are not to be delivered contained or packaged in a usual or adequate manner, this should be agreed, and some legal

71. Cf. Achilles: *Kommentar*, pp. 99-100, pt. 19.

writers believe that this agreement should be explicit. Even though this is advisable,[72] other circumstances of the transaction, for example the usage of the parties, can indicate how this should be done, cf. Article 35(1), cf. Article 8. If there is doubt about what has been agreed, Article 35(2)(d) will be decisive.

The terms "contained or packaged" should be broadly interpreted, so labelling can also be covered. This interpretation brings Article 35(2)(d) into line with UCC § 2-314(2)(e), which was a strong influence on the framing of Article 35(2)(d), and which is often referred to in the context of this provision.

The definition of the norm for what may be considered as contained or packaged in a usual or adequate manner starts from the basis of what is the recognised norm in the seller's commercial sector. If there are different norms in the countries of the seller and the buyer, it will be the norm in the seller's country which will decide, cf. also the principles referred to in connection with Articles 35(2)(a) and 35(2)(b), cf. the decision of the *German Federal Supreme Court* of 8th March 1995.

In deciding what is usual and adequate, there should be consideration for the nature of the goods and the mode of transport, including the destination of the goods. The assumption is that the obligation of the seller is unaffected by whether the goods are to be dispatched or collected, but the seller is only required to contain or package the goods in accordance with a particular mode of transport if the seller knew or could not have been unaware of the circumstances, cf. the decision of COMPROMEX of 29th April 1996. This interpretation is in line with Incoterms 2000.

72. Cf. Su: *Vergleich*, p. 37.

Chapter 9

The buyer knew or could not have been unaware of lack of conformity to the contract, cf. Article 35(3)

9.1. Introduction

According to Article 35(3) of the Convention:

> "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."

The idea behind this provision is that the buyer's expectations will not be disappointed if he is aware of some defect, so the buyer ought not to enjoy the protection of the relatively "buyer-friendly" rules of Article 35(2).[1] Article 35(3) is also an expression of a certain relaxation of the burden of evidence for the seller, who need not prove the buyer's actual awareness of some defect, which can often be very difficult to prove, but merely that the buyer could not have been unaware of the defect.[2]

The fact that the seller is not liable not only means that the buyer cannot hold the seller responsible for the payment of compensation, but that all the remedies of the buyer lapse, for example, the right to revoke the contract, the right to have the goods repaired, and the right to a proportionate reduction in the price.[3] Compared with ULIS Article 36, samples and models are now also covered by the seller's exemption from liability under Article 35(3).[4] The main area where this provision applies is in connection with the sale of specific goods,

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1. Cf. Heilmann: *Mängelgewährleistung*, p. 205.
2. Cf. Schwenzer in Schlechtriem: *Kommentar*, s. 384, pt. 34.
3. Cf. Gomard & Rechnagel: *International Købelov*, p. 117, note 27. As far as is known, this question is not dealt with by other writers.
4. Cf. Bianca in Bianca & Bonell: *Commentary*, p. 279, pt. 2.9.1.

for example, second-hand machines,[5] but the provision can apply to all kinds of sales covered by the Convention, including goods manufactured to the order of the buyer, cf. Article 3(1), and sales where a subordinate part of the sales contract consists in supplying labour or other services, cf. Article 3(2).[6]

As will be seen in the following review of this provision, it expresses a limited *caveat emptor* rule.[7,8] The review of the Article in this chapter will first concentrate on one of the aspects of the provision which is the subject of much theoretical debate, which is whether the scope of the provision is restricted to matters covered by Article 35(2)(a) to (d), or whether matters covered by Article 35(1) can also be covered. After a short consideration of the relevant timing of evaluations under Article 35(3), there is an analysis of what is required for it to be said that buyer either knew or could not have been unaware of a defect. The expression "could not have been unaware of" is another cause of theoretical debate, and is also of great practical importance. In this connection, the extent of the buyer's duty to examine the goods is analysed, including whether it can count against the buyer if he disregards an invitation from the seller to inspect the goods. There is an analysis of whether there are cases in which a seller cannot rely on this provision, even though the buyer knew of or could not have been unaware of some defect in the goods. Finally, there is a discussion of the burden of evidence.

5. Cf. Schwenzer: *Ibid.*
6. The main comments in the following review of this provision also apply to the buyer's awareness of defects relating to the element of the supply of labour and other service provision in such agreements.
7. Compare with Lookofsky: *CISG Scandinavia*, p. 91.
8. In Danish law the buyer's awareness of defects in governed by § 47 of the Sale of Goods Act, under which a buyer cannot make a claim based on defects in the goods which the buyer ought to have been aware of; for consumer sales § 77b applies, under which a buyer cannot make a claim based on a defect in the goods if he knew of or could not have been unaware of the defect. The rule in § 77b was introduced against the background of Directive 1999/44/EC on certain aspects of the sale of consumer goods and associated guarantees, and the model for this was, among other things, the rule in CISG Article 35(3).

9.2. The scope of the provision

According to its clear wording and its antecedents, Article 35(3) only covers cases that are covered by Articles 35(2)(a) to (d). If the seller delivers goods and the buyer knew or could not have been unaware that they were not fit for their usual purposes, or for the particular purpose of the buyer, or did not possess the qualities of a sample or model, or were not contained or packaged in a usual or adequate manner, then the seller is not liable.

At the diplomatic conference in Vienna, Norway proposed that Article 35(3) should also refer to Article 35(1), but this was rejected by a majority of the delegates, as discussed in Chapter 2. This is also expressed in the *Secretariat Commentary*, though it only refers to cases where the requirements are *expressly* stated in the agreement.[9]

This means that an analogous or expanded interpretation of the provision so as to apply it to Article 35(1) seems in principle to be ruled out,[10] at least where the requirements for the goods are *explicitly* stated in the agreement between the parties.

The background for this restriction in relation to Article 35(1) is the view that a buyer ought to be able to rely on what the parties have agreed. Therefore, the starting point is that the buyer can assume that the seller will make good any defects if there is any discrepancy between the contract and the goods inspected, cf. in more detail below.[11]

The presumptive rule in Article 35(3) must mean that it is the seller who must, in the first instance, show that the parties have agreed that the goods shall have a different quality than that stated (in practice,

9. Cf. the *Secretariat Commentary* to Article 33, pt. 14: "This rule does not go to those characteristics of the goods explicitly required by the contract and, therefore subject to the first sentence of paragraph (1). Even if at the time of the conclusion of the contract the buyer knew that the seller would deliver goods which would not conform to the contract, the buyer has a right to contract for full performance from the seller. If the seller does not perform as agreed, the buyer may resort to any of his remedies which may be appropriate."
10. Cf. Schlechtriem: *UN-Kaufrecht*, p. 85, pt. 144; Schwenzer in Schlechtriem: *Kommentar*, p. 385, pt. 38; Achilles: *Kommentar*, p. 98, pt. 17; Kircher: *Sachmängelhaftung*, p. 55,. But for a opposite view see: Enderlein & Maskow: *International Sales*, p. 147 *et seq.*, pt. 19; and Rognlien in Bergem & Rognlien: *Kjøpsloven*, p. 504 *et seq.*
11. Cf. Schlechtriem: *Ibid.*

explicitly) in the agreement; in other words, the fact that the buyer knew of or could not have been unaware of the defect, and that those parts of the agreement which conflict with this cannot be relied on by the buyer. If this were not the case, and if there were a reference to Article 35(1) in Article 35(3), the provision could support the view that the seller could argue that the buyer had, *de facto*, accepted that the goods should be delivered with the defects in question, merely by showing that the goods were defective when they were examined by the buyer, or that the buyer knew that the goods did not conform to the contract on the basis of other information.[12]

However, this argument is somewhat weakened by the argument that Articles 35(2)(a) to (d) are largely an expression of rules of contractual interpretation which do not, in principle, need to be stated, but can be contained in Article 35(1).[13]

In any event, the fact that there is not a reference to Article 35(1) in Article 35(3) gives some protection to the buyer. This means that the buyer is entitled to expect that the goods will conform to the agreement, in practice the written agreement, and that any variance from what should apply under the agreement and under Article 35(1) will be made good by the seller prior to delivering the goods to the buyer.[14] This applies regardless of whether the buyer knows of a defect, if it is agreed[15] that the seller shall deliver the goods without the defects.[16]

The principle that Article 35(3) does not apply in connection with Article 35(1) can also be said to apply under the general rules of contractual interpretation discussed in Chapter 3. Under the general rules of priority, the parties must be assumed to have expressed their wishes in their written agreement. If the seller has drafted the terms of the contract, then any lack of clarity will be construed against him.

An example of this is the situation in which the buyer, either prior

12. The argument is most often illustrated by reference to examination of the goods, but it could be based on circumstances other than examination.
13. Cf. Ramberg in Ramberg & Herre: *Internationella köp*, p. 237, pt. 8.
14. Cf. Ramberg: *Ibid.*
15. If the buyer has expressed himself ambiguously or with lack of clarity, this will be interpreted against him.
16. Cf. Schwenzer in Schlechtriem: *Op. cit.*, p. 384, pt. 36; Heilmann: *Mängelgewähleistung*, pp. 207-208.

to entering into an agreement or in connection with the agreement, examines a construction vehicle which is quite obviously missing a wheel. Immediately afterwards, the buyer sends his order, to which he adds that he expects the vehicle to be delivered in a state in which it is "ready to drive". The seller accepts the order by sending the vehicle to the buyer, but without it being ready to drive. At no point have the parties discussed the missing wheel.

The fact that the construction vehicle was missing a wheel effectively means that it was not fit for the purpose for which goods of that description are ordinarily used, since it could not be driven. However, Article 35(2)(a) is not applicable, since the goods have been described as being expected to be "ready to drive," cf. Article 35(1).

In such a situation the assumption under Article 35(1), cf. Article 35(3), is that the buyer is entitled to have a vehicle delivered which is ready to drive, and thus with all its wheels, since this is clearly expressed in the agreement. The fact that the buyer knew from his examination of the goods, or could not have been unaware, that at the time of the entering into the agreement, the vehicle was not in fact ready to drive, cannot justify exempting the seller from liability under Article 35(3).

The fact that the seller cannot rely on the provisions of Article 35(3) does not mean that he cannot rely in the provisions of Article 35(1). Thus, under Article 35(1), which is the *primary* rule in Article 35, the seller has the possibility of showing that, despite the wording of the written agreement, the parties have otherwise agreed that the vehicle should be delivered as seen, or that the buyer could not have been unaware that the goods were not as described in the agreement.[17] For example, this may be supported by witness statements or on the basis of the practice or usage between the parties, cf. Articles 8 and 9.

Schlechtriem gives another example of this dichotomy, where a buyer has examined a machine which, on the basis of its construction and the kind of steel plates which can be used by the machine in production, can only produce steel wire up to a thickness of 1mm, but where the contract states that the machine can produce steel wire up to a thickness of 2 mm. In Schlechtriem's view, it is an open

17. It is also possible that the seller may rely on national rules of invalidity, see below.

question whether the buyer will be able to hold the seller liable. According to Schlechtriem, this will depend on the facts of the case, cf. Article 8(3).[18]

The evaluation of these cases could thus depend on whether the seller could make good the defect relatively easily, or whether this would require extensive and expensive changes to the goods before they could live up to the specifications of the buyer.[19] In the example with the construction vehicle, this would typically be to the advantage of the buyer, but in the example with the wire drawing machine, this would be to the advantage of the seller. It would seem more reasonable to focus on the *price* of the goods, since this can indicate whether the buyer can expect the quality of the goods to be brought up to the level expressed in the agreement or not. In Schlechtriem's example, this could also follow from the minimum rule, since the seller cannot be presumed to have entered into a contract which results in extraordinary costs for him. Reference can also be made to the principle of equivalence and thus to interpretation on the basis of reasonableness. This means that it does not seem possible to fix a precise limit to when the provision in Article 35(3) applies, and the special circumstances under which a defect cannot form the basis of a claim, and when Article 35(1) applies, so there is not, by definition, a defect since the buyer has merely received what has been agreed, cf. Articles 8 and 9.[20] In other words, the application of Article 35(3) is conditional on it having been established that there is a defect, which will not be the case if, under Article 35(1), it is found that the buyer has got what was agreed. This is a dichotomy which undermines the

18. Schlechtriem in Galston & Smit: *International Sales*, pp. 6-24, § 6.03.
19. Cf. Rognlien in Bergem & Rognlien: *Kjøpsloven*, p. 504.
20. In respect of Danish sale of goods law, see Kristensen in Elmelund et al: *Lærebog*, p. 117, under the heading of the concept of defects: "Even though, according to its wording, § 47 of the Sale of Goods Act concerns cases in which it has been established that the goods are defective ("he cannot claim on the basis of defects"), the provision is nevertheless discussed in this section on the concept of defects, since it is closely linked to the evaluation of defects, which is based on all the circumstances of the agreement and all its associated circumstances." See also Lookofsky: *CISG Scandinavia*, p. 91, note 102: "If, under domestic sales law conceptions, we say that the caveat emptor ("what you see is what you get") principle applies in a given situation, that is really the same as saying the goods conform to the contract ..."

restriction of Article 35(3) to apply only to cases covered by Article 35(2).[21]

See the decision of the *Cantonal Appellate Court of Valais* of 28th October 1997.[22] An oral agreement was entered into for the sale of a second-hand bulldozer between an Italian seller and a Swiss buyer. The buyer examined the bulldozer before the contract was entered into. It was agreed that the seller should carry out 3 minor repairs before delivering the machine to the buyer. After the bulldozer had been delivered, the buyer complained about other defects.

To start with, the Court stated that, according to Article 35(1), a seller has a duty to deliver goods in accordance with the agreement between the parties. However, this was not the case if the buyer knew or could not have been unaware that the goods were defective, cf. Article 35(3). A buyer who buys goods, despite their obvious defects, must be assumed to have accepted the goods as they are. This is also in accordance with the principle in Article 36 and the observance of good faith in international trade.[23]

In this case, the seller had explicitly informed the buyer about the condition of the good, and the buyer had also tested the bulldozer. Apart from the three repairs, there was no agreement that anything else should be done to the bulldozer, so the seller had delivered the goods as agreed, and in a condition which was known to the buyer, so the seller had no further liability, cf. Article 35(1).

See also the decision of the *Cantonal Appellate Court of Valais* of 29th June 1998, which concerned the sale of sports clothing as part of a reciprocal distribution agreement between a Swiss buyer and an Italian seller.[24] In its analysis of the conformity of the goods to the contract under Article 35(1), the court emphasised that the buyer could not complain about defects of which he either knew or could not have been unaware, cf. Article 35(3). A person who buys goods despite their obvious defects accepts the goods as they are. The court also said that this is in accordance with the principle in Article 36 and the observance of good faith in international trade.[25]

Thus, both decisions directly link the application of Article 35(3) to Article 35(1), and refer to the principle in Article 36 and the observance of good faith in international trade, even though this is directly contrary to the wording of Article 35(3) and the antecedents of the

21. Compare with Hyland in Schlechtriem: *Einheitliches Kaufrecht*, p. 326.
22. The report of the judgment is reported in the Unilex and Pace databases.
23. Cf. Section 4.b) of the judgment.
24. The report of the judgment is reported in the Unilex and Pace databases.
25. Cf. Section 7.b) of the judgment.

provision and the view of it in theory.[26] However, it is not necessary to apply Article 35(3) if it has been *agreed* that the goods shall have the quality in question, since Article 35(3) will not then be relevant. However, it can sometimes be very difficult to establish what has been agreed. Neither of the cases referred to above involved clear written requirements for the goods.

In this respect see the decision, previously discussed, of the *US District Court, Illinois, N.D.* (*Mitchell Aircraft Spares v. European Aircraft Service*) of 28th October 1998, which is referred to in Chapter 3 on the interpretation of contracts, cf. Article 8(3) and the "parol evidence rule", as well as Chapter 4 and the description of the goods. A Swedish seller offered aircraft spare parts for sale on an international database using specification numbers. The buyer understood that each part had an individual number, while the seller intended the parts to be offered under several different specification numbers. The buyer placed an order for spare parts with the specification number 729640. In his order confirmation the seller had given the same number, but did not think this was decisive as he had previously sent the buyer a fax in which he stated that he could not be absolutely sure that the parts had the number given. He therefore sent the buyer a fax giving the numbers which were on the spare parts, and encouraged the buyer to check that the spare parts corresponded to the specification numbers. Furthermore, the seller pointed out that the buyer was a specialist in the trade in spare parts of this kind, but the seller was not. It was therefore at the buyer's risk that he had not investigated the spare parts in more detail prior to buying them. In refusing to give a preliminary ruling, the court said that in deciding whether the goods conformed to the contract or not, attention should be paid not only to the statement of the specification number in the order and order confirmation, but also to the intentions of the parties, cf. Article 8(1). In this connection, all the relevant circumstances of the case should be taken into account, including the negotiations between the parties, cf. Article 8(3). The court thus rejected the application of the "parol evidence rule."

This decision also illustrates the connection between Article 35(1) and Article 35(3). The seller had clearly listed the goods with the specification number in the contract. According to the restrictive theory, Article 35(3) does not apply, but this presupposes that there is a *defect*. There will not be a defect if it has been agreed that the

26. Cf. Bianca in Bianca & Bonell: *Commentary*, p. 280: "The fact that the buyer knows or ought to know of the real condition of the goods is irrelevant when there is a specific contractual provision because it does not change the content of what the seller has promised to the buyer nor can it free him from his promise."

seller cannot guarantee that the spare parts have the given number, or that the buyer accepts the risk of this. This shows that this question is closely linked to whether the seller has given a guarantee or assurance of the description or quality of the goods. It also shows that the application of Article 35(3) may not exclude the use of certain elements of contractual interpretation, cf. Article 8(3), since otherwise Article 35(3) would be a *de facto* parol evidence rule.

Unless it is clear from the agreement that the buyer can expect the goods to be free from defects upon delivery, a buyer who insists on enforcing the written contract, even though he knew that the goods were not free from defects, will not be entitled to a remedy, cf. the general principles of good faith, *venire factum contra proprium*[27] and the observance of good faith in international trade.[28]

As stated, it is also possible that the buyer may not claim that the goods are defective if they are in accordance with the practice or usage of the parties, for example if the seller has usually sold goods to the buyer which have been defective without the buyer objecting, or if, purely on the basis of the price of the goods, the buyer should expect to receive defective goods.[29]

However, the most simple solution is to conclude that the condition of the goods, as known to the buyer, should be the basis for defining the agreement between the parties, cf. Article 35(1).[30]

In this connection, see the decision of the *Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce*, of 22nd January 1997.[31] An agreement was entered into between a German seller and a Russian buyer for the sale of 300 tons of butter. At least, that was what the buyer understood. In the pre-contractual negotiations the butter was described as "table butter 82% fat", and in the seller's invoices as "animal fat butter". However, the seller was not able to procure Belgian butter, so he wrote to the buyer saying that he would instead supply "absolutely equivalent English butter". In the accompanying specification the goods were stated to be "Pura sub butter, 80% fat content, 05-07 salt content". The buyer accepted this offer.

27. Cf. Achilles: *Kommentar*, pp. 98-99, pt. 17.
28. Cf. Rognlien in Bergem & Rognlien: *Kjøpsretten*, p. 504 et seq.; Karollus: *UN-Kaufrecht*, p. 119.
29. Cf. Bianca in Bianca & Bonell: *Commentary*, p. 279, pt. 2.8.3.
30. See Lookofsky: *CISG Scandinavia*, p. 91, note 102.
31. See the Unilex and Pace databases.

Upon the arrival of the goods in Russia, the obligatory certificate of quality had to be obtained. The buyer obtained a report from the certifying institute in Russia. From this appeared that the goods were in fact margarine ("Pura sub butter" corresponded to "domestic margarine of standard quality"), and that under the Russian public health rules there the level of lead in the butter was higher than permitted, so the obligatory certificate of quality could not be issued.

The buyer then rejected the goods on the grounds that they did not conform to the contract, and claimed compensation corresponding to the difference in price between margarine and butter. The seller rejected the buyer's claim because "Pura sub butter" had been sold, and because the seller did not believe that the finding of the certifying institute should be decisive, since tests made in Germany did not show too high a level of lead.

The arbitration tribunal started by stating that, by accepting the offer of the seller, despite the different description of the goods, the buyer had accepted delivery of margarine, cf. Article 35. Since the buyer had not asked for a reduction of the price in this connection, the buyer could not subsequently claim such a reduction.[32]

The contract did not provide for how certificates of quality required by law should be obtained. According to the rules in the buyer's country, the buyer could obtain a statement from an expert from the local certifying authority. Since the tribunal did not have any reason to doubt the conclusion of the report, the seller's claim for compensation for the costs of the buyer's rejection of the goods was dismissed, since the buyer was unable to accept delivery for reasons which were beyond his control, cf. Article 74.

This decision is a good illustration of the close connection between a decision about whether the parties have agreed on the specification of the goods, and the question of whether, if agreement has not been made on the specific point, the buyer knew or could not have been unaware of the defect.

32. "The arbitration tribunal found that the claimant, having received the specification for Pura sub butter, could not have failed to notice the difference between the terms and some other descriptions of the substitute goods offered for delivery and those specified in the supplement number 2 but, however, agreed in his letter to the seller of 10 February 1995 with the goods and did not ask for a price reduction. On this ground the tribunal, under reference to Art. 35 CISG and para 459 of the German Civil Code, dismissed the buyer's plea for damages concerning the difference between the contract price and price for margarine, having taken into consideration the opinion of the independent laboratory experts who had qualified the goods stated in the supplement number 2 and Pura sub butter as "domestic margarine of standard quality."

An explanation for this can be that there is nevertheless some doubt about whether it was agreed that butter should have been delivered. The great majority of the written material points towards the conclusion that the goods should have been butter. The specification of the goods was decisive. Normally this follows from the ordinary rules of interpretation, cf. the rule of priority, but in this case the specification of the goods effectively meant that the primary description of the goods in the contract (butter) was changed to something totally different (margarine). This somewhat undermines the application of the rule of priority. At the same time, the buyer appeared to pay the price for butter, which ought also to have been considered relevant to the interpretation, cf. the minimum rule. Finally, the status of the parties can be relevant, and this is not referred to in the report of the case.

The decision is also notable in relation to the problem of the conformity of goods to the public law rules in the buyer's country. Among other things, the buyer rejected the goods because the legally required certificate of quality could not be issued due to the level of lead in the product. It is not clear from the case report whether the level of lead exceeded the permitted level in the seller's country, or the average market standard, or whether it made the goods unfit for consumption, but it does appear from the case report that the seller had himself presented an analysis report from which it appeared that there was not a high level of lead in the goods. However, it does not seem that the seller put forward such arguments, but instead sought to cast doubt on the quality report presented by the buyer. It is possible that the tribunal would have reached a different conclusion if the arguments discussed in relation to, among others, the *Mussels* case in Chapters 4, 5 and 6 had been put forward.

9.3. At the time of the conclusion of the contract

It is stated in Article 35(3) that the critical time for assessing the buyer's knowledge of lack of conformity in the goods is the time of the conclusion of the contract. However, it is not only the time when the agreement is regarded as binding that is decisive, for example the date when the buyer's acceptance reaches the seller can also be relevant. Information which the buyer has been given up to that point will also be relevant.[33] However, knowledge which the buyer obtains after this date is not relevant.[34]

9.4. Which the buyer knew or could not have been unaware of

9.4.1. Introduction

If the buyer knew, or could not have been unaware, that the goods did not conform to the contract at the time of the conclusion of the contract, the seller is not liable for such lack of conformity. This evaluation is to be made on the basis of the circumstances seen from the buyer's point of view. The fact that the seller may have believed, and may even have been objectively justified in believing, that the buyer knew of the lack of conformity of the goods to the contract, is not decisive in relation to Article 35(3),[35] but it can be relevant to Article 35(1). The starting point is that what is decisive is the actual circumstances seen from the buyer's point of view.[36]

The knowledge which is important with respect to Article 35(3) need not come from the seller himself. Information derived from third parties, for example professional periodicals or colleagues, can also be relevant.[37]

According to the provision, it is the buyer who should have the relevant knowledge. The buyer is identified with persons who act for him under a power of attorney or in a similar status, and who have obtained such knowledge.[38] In such a case, this must be determined

33. Cf. Heilmann: *Mängelgewährleistung*, p. 209.
34. Cf. Heilmann: *Ibid.*
35. Unless an agreement exists on this basis, in which case Article 35(1) applies, cf. Chapter 4.
36. Heilmann: *Op. cit.*, p. 205.
37. Su: *Vergleich*, pp. 67-68.
38. See, for example, the decision of the *Cologne Provincial Court of Appeal* of 21st May 1996, where the fact that the buyer's wife knew of a lack of conformity of the goods did not automatically mean that the buyer himself had corresponding knowledge within the terms of Article35(3). No details were given of the nature of the married relationship. See also the *Norwegian Supreme Court* in its decisions from the 4th of June 2002 (Rt. 2002, p. 696 *et seq.*) and the 13th September 2002 (Rt. 2002, p. 1110 *et seq.*), in regard to Norwegian domestic Sale of Goods Act Article 20(1) and the Sale of Property Act Article 3-7, both of which is based on the rule in Article 35(3).

by national rules, cf. Article 4.[39] If the buyer has positive knowledge that the goods do not conform to the contract, and it has not been agreed that the goods shall be delivered without defects, the buyer has no remedy for breach of contract. The question of the extent of the buyer's knowledge of the defect is a matter of evidence. The most interesting question is when the buyer *could not have been unaware* of lack of conformity of the goods to the contract.

9.4.2. Which the buyer could not have been unaware of

The evaluation of whether the buyer could not have been unaware of lack of conformity of goods to the contract has been laid down both in the practice of the courts and in theory.

To start with, it is clear that "could not have been unaware of" is not the same as "ought to have known," since the latter expression involves stricter standards for the buyer.[40] "Ought to have known" means that the buyer may have a duty to undertake, on his own initiative, a detailed examination of the goods or to question the seller about the goods; this would not be the starting point with the expression "could not have been unaware of".[41,42]

39. Cf., for example, Gomard & Rechnagel: *International Købelov*, p. 41.
40. The phrase "could not have been unaware of" is identical to the phrases used in Article 8(1) which is discussed above chapter 3, and to Article 40, which is discussed below, section 9.6. Furthermore, the phrase is identical to the phrase used in Article 42. The interpretation of the phrases in Article 8(1), Article 35(3) and in Article 40 is not necessarily always the same, e.g. in relation to whether the standard of awareness should be the norm in the sellers country or the buyers country, as discussed in the main text. For further references to rules which involves the evaluation of degrees of knowledge, see: http://www.cisg.law.pace.edu/cisg/text/words35.html.
41. Cf. Honnold: *Uniform Law*, p. 260.
42. Against the background of Directive 1999/44/EC on certain aspects of the sale of consumer goods and associated guarantees, a new provision was introduced in the Danish Sale of Goods Act, § 77b, according to which a buyer cannot make a claim based on a defect about which the buyer either was or must have been aware of, unless there is justification for this in the agreement or the seller has acted in bad faith. As argued in the statement of the reasons for the amendment, cf. Report 1403, p. 65 et seq., the reason for replacing § 47 of the Sale of Goods Act with § 77b on consumer purchases is that the wording of the Directive ("could not reasonably be unaware of") means that there no longer seem to be grounds for retaining the term "ought to have known", cf. § 47 of the Sale of Goods Act. This would have meant that a buyer would enjoy greater protection for international sales, cf. CISG Article 35(3), than he would have for corresponding domestic sales under § 47 of the Sale of Goods Act, which can be compared with the protection given to consumers now under § 77b of the Sale of Goods Act.

Correspondingly, Article 35(3) means that the assumption is that a buyer does not have a general duty to examine the goods on his own initiative before entering into a contract.[43] However, it is often argued in theory that a buyer cannot be unaware of some defect in the goods if he acts with *gross negligence.*[44] This view is discussed in detail by some writers.

Heilmann's view is that the standard of gross negligence, as opposed to simple negligence, cannot be established objectively, but must be established on the basis of the circumstances of each transaction. Gross negligence is defined here as "... particularly serious failure to act, in the given circumstances, with the required care which would be expected of any party to a transaction in order to protect themselves against the risk of damage or loss."[45] It is not immediately obvious that this is an altogether objective evaluation.

Similarly, *Ziegler* believes that the term ought to be treated as equivalent to gross negligence, which means that the legal status is the same as under German domestic law.[46] *Kircher* agrees that the standard is that of gross negligence, but is also critical of that part of the theory that directly applies the standard developed in Germany for gross negligence, since he argues that an *autonomous* interpretation of the concept should be established, cf. Article 7(1). For example there is a difference in the way in which the provision is understood by German and by Swiss commentators. However, with *Kircher's* view it is difficult to identify what cases of gross negligence under German law would not be covered by Article 35(2)(b), and *Kircher* does not make any proposal for how this *autonomous standard* should be interpreted.[47]

43. Cf. the predominant view of the theory: Schwenzer in Schlechtriem: *Kommentar,* p. 384, pt. 35; Heilmann: *Mängelgewährleistung,* p. 209; Achilles: *Kommentar,* p. 98, pt. 16; Ramberg in Ramberg & Herre: *Internationella köp,* p. 238; Gomard & Rechnagel: *International Købelov,* p. 117, note 30; Elmelund in Elmelund et al: *Lærebog,* p. 263, note 33; and Lookofsky: *CISG Scandinavia,* p. 91, at note 100.
44. Cf. Heilmann: *Op. cit.,* p. 208 *et seq.*; Achilles: *Op. cit.,* p. 98; Ziegler: *Op. cit.,* p. 103; Karollus, *Op. cit.,* p. 119.
45. Cf. Heilmann: *Op. cit.,* p. 208, okt. c): "... die besonders schwere Vernachlässigung der im konkreten Fall erforderlichen Sorgfalt, die von jedem Verkehrsteilnehmer erwartet werden kann, um sich selbst vor Schaden zu bewahren."
46. Cf. Ziegler: *Op. cit.,* p. 103, pt. b.
47. Cf. Kircher: *Sachmängelhaftung,* p. 54 et seq., especially note 31.

Honnold believes that a buyer cannot be unaware of a defect in the goods, if the defect would be obvious to anyone who can see. This exempts "blind" buyers, meaning for example buyers who do not have the relevant professional expertise or knowledge of the goods. However, the intention is to alleviate the burden of evidence to show that defects which are obvious have in fact been identified as such by the buyer. In *Honnold's* view, the provision is a significant restriction of the effect of Article 35(3) on the protection of the buyer under Article 35(2).[48]

Achilles agrees with Honnold that a buyer cannot have been unaware of a defect in the goods if such defect would have been *obvious*, in other words that, in the context, the buyer's lack of awareness is due to such gross negligence as to constitute almost culpable conduct.[49] *Schlechtriem* and *Enderlein & Maskow* do not express a direct view, but refer to the fact that the provision is often understood as referring to gross negligence.[50]

Schwenzer believes, as does *Achilles*, that defects in the goods should be obvious, but also believes that something more than gross negligence is required.[51] This is explained only by the argument that the evaluation cannot be purely objective and should have regard for the position of the buyer.[52] *Schwenzer* herself says that this view is in accordance with *Honnold's*.[53]

The overall conclusion is that the prevailing view of legal writers is that "could not have been unaware of" cannot be understood as simple negligence by the buyer, since this would be comparable to "ought to have known".[54] There is agreement that there should at

48. Cf. Honnold: *Uniform Law*, p. 260.
49. Cf. Achilles: *Op. cit.*, p. 98: "... diese ihm also ins Auge springen mußte, so daß ihm aus seiner angeblichen Unkenntnis ein im Bereich grober Fahrlässigkeit liegender Vorwurf zu machen ist."
50. Schlechtriem: *UN-Kaufrecht*, p. 84 et seq., pt. 143; Enderlein & Maskow: *International Sales*, p. 148, pt. 19.
51. Cf. Schwenzer in Schlechtriem: *Kommentar*, p, 384, pt. 34: "Nicht-in-Unkenntnis-Sein-Können ist dabei mehr als grobe Fahrlässigkeit. Ausgeschlossen ist die Haftung lediglich für gleichsam ins Auge springende Vertragswidrigkeiten." See Schwenzer's further references to the literature at p. 384, pt. 34, note 102.
52. Cf. Schwenzer in Schlechtriem: *Op. cit.*, p. 384, pt. 34.
53. Cf. Schwenzer in Schlechtriem: *Op. cit.*, p. 384, pt. 34, note 102.
54. Compare, with respect to Danish sale of goods law, Hedegaard Kristensen in Elmelund et al: *Lærebog*, p. 118: "In other words, it is decisive whether the buyer's lack of knowledge about the goods is due to *lack of care* on his part." This formulation must be

least be gross negligence, and several leading writers believe there such gross negligence is required as to border on the culpable.

The concept of gross negligence has also been used by the courts in relation to Article 35(3). See the decision of the *Cologne Provincial Court of Appeal* of 21st May 1996, which is discussed in more detail in Section 9.6 below.

Whether the introduction of the term "gross negligence" actually leads to a more appropriate or exact evaluation of whether the buyer could not have been unaware of some defect in the goods seems doubtful. The introduction of the negligence norm has undoubtedly been influenced by the national laws of the legal writers concerned, which is natural, since Article 35(3) can be considered as a limited *caveat emptor* rule, which is an expression of a negligence norm or a duty to take care.

9.5. Invitation by the seller to the buyer to examine the goods

9.5.1. Introduction

The fact that the buyer does not have a general duty to examine the goods before entering into a contract must logically mean that the buyer does not have a duty to examine the goods, even if the seller invites him to do so.[55] This is particularly so in international sales, where the distances involved will often make pre-contractual examination of the goods costly and time consuming.

Furthermore, the seller could thereby free himself from liability for defects to a greater extent than the contractual clauses on exemption from liability would normally allow. A seller ought not to be able to exempt himself from liability, especially if he dishonestly expects that

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understood as saying that simple negligence is enough. Compare this with Gomard & Rechnagel: *International Købelov*, p. 117, note 30: "... Article 35(3) differs from § 47 of the Danish Sale of Goods Act which imposes on the buyer an obligation to undertake an active inspection of the goods before entering into the contract, as not all knowledge which the buyer "ought to have known" takes away the buyer's remedies for breach of contract, but only those where there is a specially high degree of negligence." See also Dahl: *Kommentar*, note 93.

55. Cf. Schwenzer in Schlechtriem: *Kommentar*, p. 384, pt. 35.

the buyer will not discover some defect, cf. the principle in Article 40 of the Convention and the observance of good faith in international trade.[56]

Even though Article 35(3) does not explicitly deal with the question of the seller's invitation to the buyer to examine the goods, there will be cases where this could be to the disadvantage of the buyer, where the seller's invitation makes the buyer aware that the goods can have certain defects, and that the buyer would have been able to discover these defects by an inspection or examination of the goods. This could be the case at least with regard to obvious defects.[57]

In other cases a buyer will usually be able to ignore an invitation to examine goods, especially if they are standard goods or new goods.[58]

The situation will be different with second-hand or specific goods. Here, an invitation to examine the goods will often draw the buyer's attention to the fact that the goods can often be defective or non-standard, and the buyer will not then be able to complain about defects in the goods which were obvious or which would easily have been discovered by a customary examination of the goods, cf. below in relation to the extent of the buyer's examination.[59] In other words, in such circumstances the seller's invitation ought rather to lower the buyer's expectations as to the quality of the goods.[60]

In any case, it is advisable for the parties to address the question of the examination of the goods, and the extent of the examination, in their contract since this is not explicitly regulated in the Convention. This can be done by agreeing to sell the goods "as they stand" and adding that the buyer ought, in his own interest, to examine the goods as thoroughly as possible prior to entering into the agreement.[61] However, it is an open question whether the buyer can thereby reasonable be expected to receive goods which are of a significantly lower quality than normal, since the price will typically be relevant;

56. Cf. Ramberg in Ramberg & Herre: *Internationella köp*, p. 238, and in relation to Swedish domestic sale of goods law: Kihlman: *Fel*, p. 324.
57. Cf. Schwenzer: *Ibid.*
58. Cf. Ramberg: *Ibid.*
59. Cf. Ramberg: *Ibid.*
60. Cf. Kihlman: *Ibid.*, and in connection with this; Ramberg in Ramberg & Herre: *Op. cit.*, p. 239, note 17.
61. Cf. Ramberg in Ramberg & Herre: *Op. cit.*, pp. 238-9.

compare with the discussion in Chapter 5 concerning goods of average or merely merchantable quality.

9.5.2. The extent of the buyer's examination of the goods

If the buyer has an opportunity or duty to examine the goods, there is then the question of the required extent of such an examination.

The starting point is that the buyer has a duty to undertake such examination as is normal or usual in the circumstances, according to the practice of the relevant commercial sector.[62] If there are differences between the norms in the commercial sectors of the seller's and the buyer's countries, the prevailing norm must be assumed to be that of the buyer's country, since Article 35(3) clearly emphasises the circumstances of the buyer, so it will be most natural to use the norm of the buyer's country.[63] However, the established practice, professional conduct, usage of the parties or international usages may lead to a different conclusion. The buyer is not normally required to undertake special analysis of the goods using complicated and sophisticated methods. This means that the seller remains liable for hidden defects which would require an unusual examination to uncover.[64]

A case in Danish domestic law which may be expected to have the same result if decided under CISG Article 35(3) is reported at U 1989.713 H. The case concerned tomatoes which were found to contain abnormal levels of lead, and where the buyer was not obliged to make a chemical analysis of tin or lead in the tin cans, even though the price was low and the tin cans were dented, rusty and the labels spoiled.

Similarly, in the Danish case reported at U 1968.194 Ø, a writing desk was sold as having been owned by the famous Danish Golden Age poet Oehlenschläger, and priced accordingly. However, the seller stated that she could not produce documentation to support the claim. It was argued that the buyer ought himself to have investigated the claim, if he gave it any weight, and the buyer had no remedy when it subsequently appeared that the desk had not belonged to the poet. This was a borderline case as to what investigations the buyer ought to undertake in accordance with Article 35(3).

The professional status and skills of the buyer can also be relevant. If the buyer has special skills which are relevant in relation to potential

62. Cf. Bianca in Bianca & Bonell: *Commentary*, p. 279, pt. 2.8.2.
63. Cf. Bianca: *Ibid.*
64. Cf. in respect of this whole topic, Bianca: *Ibid.*

defects in the goods, the duty to examine the goods will usually be stricter.

Moreover, the appearance of the goods may be relevant, whether they are new or second-hand, and whether the seller has expressed doubts as to whether the goods are in perfect condition.

9.6. Exceptions to the rule that the buyer cannot claim defects in the goods

If it can be shown that the buyer knew or could not have been unaware of some lack of conformity of the goods to the contract, the assumption is that the seller will be exempt from liability. However, there is an exception to this where the seller has deliberately and in bad faith kept quiet about a defect which was known to him, since even a buyer who is grossly negligent is more deserving of protection that a seller who acts in bad faith. In such cases, the seller cannot rely on the buyer's acceptance of the goods as being in conformity with contract, cf. the principle of the observance of good faith in international trade, cf. Article 7(1), as well as the principle in Article 40 that 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, cf. Article 7(2).[65]

This principle is clearly established in the decision, previously referred to, of the *Cologne Provincial Court of Appeal* of 21st May 1996, on the sale of a car which it appeared had a higher mileage than shown in the contract between the seller and buyer and than shown on the car's odometer. Also, the car had initially been registered in 1990, and not, as stated in the contract, in 1992.

After having established that the goods did not conform to the contract in accordance with Article 35(1), the court held that the seller could not have been unaware that the car had been registered earlier than was shown in the contract, and that it must have been driven further than shown on the odometer.

The seller's claim that the buyer could not have been unaware that the car was registered in 1990, as the buyer's wife had been informed of this, so that the buyer could not make a claim to this effect, cf. Article 35(3), was rejected

65. Cf. Schwenzer in Schlechtriem: *Kommentar*, pp. 384-385, pt. 37; Schnüll: *Haftung*, p. 164; Kircher: *Sachmängelhaftung*, p. 54 *et seq.*; Ziegler: *Leistungsstörungsrecht*, p. 103.

> by the court, on the grounds that even a very negligent buyer deserves more protection than a fraudulent seller. The court stated that this was in accordance with the principle in Article 40, in connection with Article 7(1) on good faith.[66]

In this case, an objection to the validity and revocation of the contract would not be relevant, since the car had been sold on, and the buyer had an interest in obtaining a remedy in the form of compensation, as he had already paid out compensation to the subsequent buyer of the car. The seller had to have acted in a culpable manner for compensation to be payable. However, if the buyer has positive knowledge of the defect, he cannot benefit from this protection, as the seller will have been able to rely on the seller's acceptance of the goods.

The principle was also laid down in the decision of the *Arbitration Institute of the Stockholm Chamber of Commerce*, 5th June 1998, which stated that a seller cannot rely on the provisions of Articles 38 and 39, cf. the principle in Article 40 which applies as a general principle, cf. Article 7(1), regardless of whether there was a lack of conformity of the goods to the contract according to Article 35, or as the result of a contractual guarantee given by the seller.

If the seller has given a guarantee or assurance to the buyer that the goods are without defects, the assumption is that the buyer will be able to base a claim on any defects, regardless of whether the buyer could not have been unaware of the defects.[67]

66. Cf. Section 2 of the judgment of the court: "It has to be inferred from the basic idea of Art. 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 Art. 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. Therefore, the statements of the [seller] pertaining to the supposed possibilities of perception of the [buyer]'s wife – which, as has to be pointed out supplementary, cannot be equated with the possibilities of perception of the [buyer] himself – are not relevant. Even a grossly negligent unknowing buyer appears to be more protection-worthy than a seller acting fraudulently (von Caemmerer/ Schlechtriem, Kommentar zum einheitlichen UN-Kaufrecht, CISG, 2nd edn., Art. 35, Annotation 37 with further evidence). 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."
67. Aue: *Mängelgewährleistung*, p. 85.

9.7. Burden of proof

The question of the burden of proof has already been referred to above in the introduction. It is the seller who has the burden of proof to show that the buyer knew or could not have been unaware that the goods lacked conformity to the contract.[68] The buyer has the burden of proof to show that he does not have the necessary usual professional experience or knowledge of the relevant commercial sector etc. The buyer also has the burden of proof to show that the seller has acted in bad faith, or that the transaction was contrary to good business practice, cf. the decision of the *Cologne Provincial Court of Appeal* referred to above.

9.8. Conclusions

The provisions in Article 35(3) are an expression of a limited *caveat emptor* rule, which applies when there is a defect in the goods. The provision is also an expression of the principle of spheres of influence. The decision as to whether there is a defect is thus decisive for the application of the provision, so the relationship of this provision to Article 35(3) is complicated. It has been seen that, both in the practice of the courts and in theory, Article 35(3) is used directly in connection with Article 35(1), also with reference to the principle of good faith, *venire contra factum proprium*, and to the observance of good faith in international trade. However, there does not seem to be any need to seek refuge in such basic principles before an attempt has been made to interpret the requirements for the quality of the goods, Article 35(1). At the same time, the applicability of the *caveat emptor* rule in international trade is limited, since the buyer will often not have the opportunity to examine the goods before entering into the contract. Therefore, Article 35(3) means that there is not a general duty for the buyer to examine the goods on his own initiative, before entering into the contract. If the buyer does view the goods before buying them, or if it is possible for him to have been aware of defects in the goods by other means, then both in theory and according to

68. Cf. Dahl: *Kommentar*, note 93.

the practice of the courts, the buyer will be considered not to have been unaware of the defects if he has acted with gross negligence. The assessment of gross negligence is largely subjective. According to the circumstances, failure to inspect or examine the goods could be grossly negligent if the seller has invited such inspection or examination. The buyer's examination of the goods should correspond to what is normal and usual in the commercial sector in question. If there is a difference between the norm for examination in the commercial sector in the buyer's country and in the seller's country, the assumption is that the norm in the buyer's country will apply, cf. also the subjective standard for negligence. Knowing the norm in the seller's country is not within the buyer's sphere of influence, unless this follows from Article 8 or Article 9. The buyer is not normally obliged to undertake an examination of the goods by using complex and sophisticated methods. Even though the buyer may only have been unaware of some defect through his own gross negligence, there is general agreement, both in the practice of the courts and among legal writers, that a seller who acts in bad faith cannot rely on the provisions of Article 35(3), cf. the principle of *bona fides*, the principle in Article 40 and the observance of good faith in international trade, cf. Article 7(1).

Chapter 10

Summary and Conclusions

10.1. Introduction

The aim of this chapter is to give a *thematic* summary of the individual conclusions of this treatise, and on this basis to reach an overall conclusion in relation to the aims and hypotheses set out in Chapter 1.

The starting point for this treatise is Ernst Rabel's conclusion that the assessment of the lack of conformity of goods to the contract is not an independent legal category, but is part of the law of contract. Article 35 is an attempt to express the contract law principles on the assessment of lack of conformity, and in its provisions the principle of *caveat venditor* confronts the principle of *caveat emptor.* The treatise therefore analyses these contract law principles, as applied to international sales.

As stated in the introduction, the principles of *caveat venditor* and *caveat emptor,* as expressed in Article 35, should be considered mainly on the basis of which party's sphere of influence is more closely linked to the conformity of the goods to the contract. This leads to proposals for a number of presumptive rules. The party, whose sphere of influence lies closest to disputed circumstances which are relevant to the conformity of the goods to the contract, ought to be liable if, in respect of these circumstances, the goods do not (allegedly) conform to the contract. It is also pointed out that there are a number of rules which *compete* with Article 35, especially rules on contractual validity. Since the Convention does not, in general, govern questions of validity of contracts, the assumption is that national law should apply to such cases. However, in some cases the rules on validity overlap with the rules on lack of conformity, for example where one or other of the parties has been misled. This means that there is potential conflict between the Convention and national laws, unless the Convention displaces the competing national rules.

This means that it is not possible to analyse the concept of lack of conformity contained in Article 35 without at the same time recognising that the provisions should be seen in the context of the rules of general contract law, both under the Convention and outside it, and that Article 35 is in competition with such rules, for example national rules on the validity of contracts.

Since there is not a unanimous view on these questions, due to differing views on the priority to be given to the Convention and the scope of its regulatory powers, the second thesis of this treatise is that Article 35 cannot be expected to lead to fully uniform law, cf. Article 7, before the law of contract which lies behind it has been harmonised or before the rules of the Convention have been amended. Whether this will happen is a matter of legal policy.

Thus, it has been the aim of this treatise to illustrate these hypotheses and to assess whether Article 35 is interpreted autonomously and uniformly. It has also been the aim of this treatise to look at Article 35 in the context of national laws, and other relevant rules such as the UNIDROIT Principles and PECL. The results of these analyses are reviewed in the context of the aims and hypotheses.

10.2. The dynamic doctrine and the restrictive doctrine

In Chapter 1 there is a review of the different methodological approaches to the application of the CISG Convention. There is a conflict between a dynamic doctrine and a restrictive doctrine, and it is concluded that it is not possible to give a definitive opinion as to which doctrine is more in line with Article 7. Therefore, the choice of method is largely a matter of legal policy, though it is also to some extent subject to an evaluation as to which doctrine is more likely to be in accordance with the practice and doctrines of international law. This results in favouring the dynamic doctrine.

The analysis of the practice of the courts and of legal theory undertaken in Chapters 3-9 shows that it is predominantly the dynamic doctrine which is followed in applying Article 35. Thus, the provision is interpreted autonomously, since national concepts are not ascribed any significance in the interpretation of the Convention, cf., for example, the discussion in Chapter 4 on variances in quantity, *aliud pro alio* (the supply of totally different goods than those agreed), and minor defects. Furthermore, the antecedents of the provision are taken into account (see for example the decision of the *German Feder-*

al Supreme Court of 8th March 1995), and consideration for the uniformity of interpretation of the Convention can be seen in the way in which courts refer to principles on Article 35 which have been developed by the courts of other countries, (see again the decision of the *German Federal Supreme Court* of 8th March 1995). The principles of this case have thus acquired the *ipso facto* status of *stare decisis.*

Moreover, Article 35 is interpreted dynamically, since the wording of its provisions is mostly interpreted broadly, for example in applying broad quality criteria, so that the way goods are contained or packaged also covers their labelling, and the fact that the seller has a certain duty to protect the buyer by giving information and guidance, giving instructions for use etc. Also, other provisions are used analogously in the interpretation of Article 35. For example, Article 35(3) can also be applicable to Article 35(1), even though it is shown that this is self-contradictory, since Article 35(3) only applies if there is a defect in the goods. The dynamic doctrine is also seen in the application of the principles of *venire contra factum proprium* and *bona fides*, cf. also the principle in Article 40 and the observance of good faith in international trade, cf. Article 7(1). Here too the UNIDROIT Principles and PECL support the findings of the research, for example, as to whether goods should be of average quality or merely merchantable quality.

It has also been seen that the restrictive doctrine can be used, especially on the question of how far the principle of the exhaustion of rights should apply, or whether national rules on the validity of contracts can be asserted in competition with Article 35. These are dichotomies which cannot only be solved by the application of a functionally adequate solution, since there is not even agreement within individual national legal systems about how to solve such problems, cf. for example, the discussion of the principle of exhaustion of rights in Danish law.

Therefore, even though the method of the dynamic doctrine is chosen, it must be recognised that there are questions to which answers cannot be found on the basis of *lege lata* (existing law), but which depend on statements of legal policy.

10.3. Basic principles, caveat venditor, caveat emptor and spheres of influence

The review of the practice of the courts and of legal theory in each of the chapters also shows that the assessment of lack of conformity to the contract under Article 35 requires a balance to be struck between the principles of *caveat venditor* and *caveat emptor*, as expressed in Article 35 and in general contractual principles.

Among other things, the application of these principles is based on which party's sphere of influence is most closely linked to the lack of conformity of the goods. Where Article 35 does not give any direct guidance, the courts fall back on consideration of the relevant sphere of influence, which can also be seen as an expression of reasonableness or of economic considerations. Thus, the assumption is that the norm in the seller's country shall form the basis for judging what is a customary purpose, or a particular purpose or the usual manner for containers and packaging. This applies equally to Article 35(1), for example in relation to the norm for some given quality. These principles also find support in the decision of the *German Federal Supreme Court* of 8th March 1995, which has been widely accepted both in practice and in theory.

There are a number of exceptions to this rule which are also expressions of the concept of the sphere of influence, for example if the seller is aware of the norms which apply in the destination state of the goods, regularly makes exports there, or markets his goods to that country etc., just as the generally recognised principles of contractual interpretation apply. Laying down such assumptions, and exceptions to them, affects the burden of proof, as the buyer must show that the seller knew or could not have been unaware of the norm in the destination state, i.e., that the relevant elements were within the seller's sphere of influence.

The concept of spheres of influence also appears to be particularly justified in international trade, where the seller cannot be expected to be familiar with all the different norms of all the different countries. As stated, this point of view can be justified on economic grounds, since the party who can most easily and economically ensure that the norm of the contract can be complied with is assumed to be liable for ensuring this.

10.4. Contract law as the background law to the Convention and as a competing set of rules

Article 35 does not exist in a legal vacuum, but should be seen in the context of general contract law as well as special contractual rules based on the law of obligations.

The review undertaken in Chapters 3-9 has shown that Article 35 should be interpreted against the background of Articles 8 and 9, and that there are competing rules which challenge the pre-eminence and effect of Article 35. The rules of interpretation in Article 8, as well as the usage of the parties and the binding effect of any practices which the parties have established between themselves according to Article 9, are in line with most domestic contract laws and with internationally recognised principles, for example the UNIDROIT Principles and PECL.

This review has also shown that when presumptive rules are laid down, these also have an effect as rules on the burden of evidence, so the Convention also affects the rules of evidence. This follows from the basic rule of the law of obligations, that a person who claims to have a right must show evidence for this. It also follows that there is an assumption that it is for the buyer to show that the goods do not conform to the contract. The Convention does not regulate the degree of proof, what must be proved etc., but the presumptive rules must not be made illusory through the strict application of national rules of evidence and procedure.

In connection with Article 8(3), national rules of evidence and procedure are not effective if they conflict with the rules of the Convention. It can also be argued that the Convention rules have priority over national rules, even if the rules on the formation of contract are covered by an Article 92 reservation. The review has shown that Article 92 reservations only create further confusion in an already complex situation, and that such reservations should be nullified as soon as possible. As stated in Section 10.3, the general rules of contractual interpretation can be used in assessing the conformity of goods to the contract, for example, the *contra proferentum* rule, priority rules, interpretation on the basis of reasonableness and considerations of good faith. This is confirmed both in the practice of the courts and by legal scholars.

10.5. Relationship to domestic sale of goods law

Article 35 expresses the many domestic concepts of lack of conformity of goods in relation to international sales. In the preceding chapters the Nordic concepts of lack of conformity of goods, the German BGB, the United States Uniform Commercial Code, The United kingdom Sale of Goods Act, the new Chinese Contract Code, The French Code Civil and others have been used to illustrated differences, similarities and trends.

It has been shown that, to a considerable extent, there is agreement between these rules and, including the principles of interpretation which apply as the background law. It has also been shown that there are differences, for example in relation to minor defects, the view about containers and packaging being part of the performance of the contract, the liability of the seller when he has marketed the goods, as well as the extent of the buyer's knowledge in relation to the principle of *caveat emptor.* However, apart from this, there appears to be agreement between the concept of lack of conformity of the goods under the CISG and the concept in different domestic sale of goods laws.

Finally, Directive 1999/44/EC on certain aspects of the sale of consumer goods and associated guarantees, whose concept of lack of conformity largely reflects Article 35, has led to major amendments to national sale of goods laws. This has also had a knock-on effect on business-to-business sales and public procurement sales, cf. for example the amendments to the German BGB. This means that the analysis and findings of this treatise are also relevant to understanding domestic sale of goods laws.

10.6. Article 35 in perspective, and future developments

Article 35 amounts to a codification of sale of goods principles which can also be seen as an expression of the general, internationally recognised principles of the law of obligations. These principles radiate like ripples through water in sale of goods laws, and from there through the general law of obligations.

At the same time, the practice of the courts and the arguments of legal scholars show that the Article 35 operates in an area of tension between differing doctrines and rules of the law of obligations, so there is sometimes conflict and thus uncertainty about the application of Article 35. This is unquestionably a problem to achieving uniform application of the provisions.

This automatically puts a focus on the need for the harmonisation of contract law or a revision of the Convention. This is illustrated by the fact that an informal body has now been set up which, as in the manner of the European Court of Justice, gives its opinion on the interpretation of the Convention.[1]

It is suggested that the ideal approach would be to seek globally recognised principles on the basis of comparative analyses, as seen, for example, in the UNIDROIT Principles. However, whether the solution is to be found in *binding rules*, or whether an international *lex mercatoria* is sufficient is in the end a matter of legal policy, and not something on which a definitive answer is offered the present context.[2] Alternatively, the practice of the courts and the writings of legal scholars will work out the principles on which the Convention, including Article 35, will be developed. It is the hope that the present treatise has illustrated this.

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1. See the recently established "CISG-Advisory Council" in London, which give advisory opinions on the interpretation of the CISG Convention. The list of members can be seen at http://www.ccls.edu/ eclu/iclaw/courses/schmitthoff.html.
2. For writers who are critical of this, see: Mads Bryde Andersen & Joseph Lookofsky: *Nationale aftaleregler og EU-integration: Problemer og løsningsmodeller*, UfR 2002 B 211 *et seq.*; Ana M. López Rodriguez: *Lex Mercatoria and Harmonization of Contract Law in the EU* (DJØF Publishing, Copenhagen 2003). But for a different view, see: Lando & Beale: *PECL*, p. xxi *et seq.*; Ole Lando: *Does the European Union need a Civil Code?* Recht der Internationalen Wirtschaft, 1/2003, p. 1 *et seq.*; "Communication from the Commission to the Council and the European Parliament on European contract law" (COM 2001/0398 final), on possible harmonisation of substantive private law, in particular contract law; and more recently "Communication from the Commission to the European Parliament and the Council – A more coherent European contract law – An action plan" (COM 2003/0068 final).

List of Abbreviations

ABGB	Allgemeines Bürgerliches Gesetzbuch – Austrian Civil Code
AGBG	Gesetz zur Regelung des Rechts der allgemeinen Geschäftsbedingen – German Code for the regulation of standard forms
Am.J.Comp.L.	American Journal of Comparative Law
Art.	Article
Arts.	Articles
BGB	Bürgerliches Gesetzbuch – German Civil Code
CCC	Chinese Contract Code
Cf.	Confer (latin): compare
CE	Conformité Européene – European Conformity marking
CISG	nited Nations Convention on Contracts for the International Sale of Goods
CLR	Columbia Law Review
CMR	Convention on Contracts for the International Carriage of Goods by Road
Cornell ILJ	Cornell International Law Journal
Duke J. of Comp. & Int'l L.	Duke Journal of Comparative & International Law
Eur.B.L.Rev.	European Business Law Review
EC	European Community
EEC	European Economic Community
Ed.	Edition or editors
Eds.	Editors
EEA	European Economic Area
E.g.	Example given
EJCL	Electronic Journal of Comparative Law
Et seq.	Et sequens (latin): and the following one or ones
ERPL	European Review of Private Law
EU	European Union
HGB	Handelsgesetzbuch – German Commercial Code
IBLJ	International Business Law Journal
ICC	International Chamber of Commerce
Ibid	Ibidem (latin): the same place
Int.Bus.L.Rev.	Internaitonal Business Law Review
IHR	Internationales Handelsrecht – International Commercial Law
JLC	Journal of Law and Commerce
L.Q.R	Law Quaterly Review
RabelZ	Rabels Zeitschrift für ausländisches und internationals Privatrecht
RIW	Recht der Internationalen Wirtschaft

T	Retstidende (Norwegian Legal Journal)
NCJL	Nordic Journal of Commercial Law
NDS	Nordisk Domssamling (Nordic Collection of Judgments)
NJA	Nytt juridisk Arkiv (Swedish New Legal Archive)
NJW	Neue Juristische Wochenzeitschrift
No.	Number
Nos.	Numbers
OJLS	Oxford Journal of Legal Studies
Op.cit.	Opera citato (latin): the work cited, abovementioned
ORGALIME	Organization of the Association of the European Metal Industries
P.	Page
Pp.	Pages
PECL	Principles of European Contract Law
SGECC	Study Group on a European Sales Code
TfR	Tidskrift for Retsvetenskap
U	Short for UfR: Ugeskrift for Retsvæsen (Danish weekly Law Journal), see also below
UCC	Uniform Commercial Code
UfR	Ugeskrift for Retsvæsen (Danish Weekly Law Journal)
ULF	Uniform Law on the Formation of Contracts or the International Sale of Goods
ULIS	Uniform Law on International Sales
ULR	Uniform Law Review
UN	United Nations
UNCITRAL	United Nations Commission on International Trade Law
U.Pa.L.Rev.	University of Pennsylvania Law Review
UNIDROIT	International Institute for the Unification of Private Law
Unif. L. Rev.	Uniform Law Review
VJ	Vindobona Journal of International Commercial Law and Commercial Arbitration
V.	Versus
Vol.	Volume
YLJ	Yale Law Journal

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