CONFORMITY OF GOODS IN INTERNATIONAL SALES GOVERNED BY CISG ARTICLE 35: CAVEAT VENDITOR, CAVEAT EMPTOR AND CONTRACT LAW AS BACKGROUND LAW AND AS A COMPETING SET OF RULES

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1. INTRODUCTION

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[2] to the contract in different western legal systems, Rabel reached the following conclusion:[3]

"Das »Wesen« der Gewährleistung ist nur historisch erklärbar. In einem rationellen System ein Stück Vertragsrecht, das ausdrüchliche Fürsorge nur in einem bescheidenen Mabe 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.[4] Thus, he found that some legal systems considered lack of conformity from a standpoint which has its roots in the Roman law principle of *tale quale*, where it is assumed that the goods are 'bought as seen' (also referred to as the principle of *caveat emptor*[5]), 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.[6] Other legal systems 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.[77] Cf. also Andreas Schwartze: Europäische Sachmängelgewährleistung beim Warenkauf: optionale Rechtsangleichung auf der Grundlage eines funktionalen Rechtsvergleich (Tübingen, 2000), p. 26; Reinhard Zimmermann: The Law of Obligations (München, 1993), p. 307.

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 zusammengefabt werden müssen."[8]

Among other things, it was on the basis of Rabel's work that the *uniform sales laws*, ULIS[9] and ULF[10] were developed, and these later led to the adoption of the CISG in 1980.[11] 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 rule in Article 35 of the CISG is as follows:

> 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.
>
> (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.

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. 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.[12] The focus of this article 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, including EU law.

The purpose of this article is twofold: namely to analyse the battle between the principles of *caveat venditor* and *caveat emptor* and to analyse the relationship between Article 35 and the contract law as background law and as a competing set of rules. The aim is to illustrate whether or not Article 35 creates uniform rules on the conformity of goods in international sales. The article first discusses the basic principles of Article 35. Then, the relationship to supplementary and competing rules is discussed. The article then analyses how theory and practice generally have seen Article 35 as an independent concept. Following this, the battle between *caveat venditor* and *caveat emptor* is described through an analysis of Art. 35(2)(a) and Article 35(3). Finally, the paper ends up concluding 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 provision.

2. THE BASIC PRINCIPLES OF ARTICLE 35

Article 35 is founded on the basic 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,[13] 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.[14]

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. Furthermore, the seller is usually the one who knows 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 – as a starting point – 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.[15]

The principle underlying Article 35 is an ethical-juridical axiom,[16] and constitutes an important element of the guarantee of trade.[17] If the premises of the argument are changed, for example if 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 buyers knowledge and skills are superior to the sellers,[18] 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.[19] 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* is the core of article 35 and – in general – in every assessment of the conformity of the goods.

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 or not a good complies with the contractual obligations or not. It is the proposition of this article 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. 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 understanding of the terms in the contract, normal quality standards or fitness for purpose between the seller's country and the buyer's country? In this case, it is assumed that the seller should supply goods which meet the standards in the buyer's country or in the seller's country? Unless the solution follows from an interpretation of the contract, this can only be decided if a choice is made between the principles of *caveat emptor* and *caveat venditor*. It is the proposition of the present writer 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.*

3. ARTICLE 35 AND ITS RELATIONSHIP TO SUPPLEMENTARY AND COMPETING RULES.

In this article the analysis of Art. 35 are 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 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. 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, 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.[20] For example, there can be fundamental rules on *bona fides*, contract interpretation 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, but internationally recognised rules and principles, for example UNIDROIT Principles (by the International Institute for the Unification of Pri-

vate Law) or PECL (Principles of European Contract Law by the Commission on European Contract Law, also known as the *Lando-Commission*) may be helpful in providing a truly international and uniform solution.

There are also provisions which *compete* with Article 35, in particular the rules on validity. Since Article 4 clearly states that the convention – unless otherwise expressly provided – 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 Convention *supersedes* or *absorbs* the competing national rules. 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 article 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*.

To conclude, in every case where Article 35 comes into play, 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:[21]

-the *formation* of the contract (that the conditions concerning a specific characteristic "X" of the goods is actually in, or is not in the contract),[22]
-the *interpretation* of the contract (that the conditions concerning the characteristics 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 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. To a great extent the rules on formation of contract, interpretation and validity are the same in different jurisdictions, but there are still major in differences, i.e. between the literal approaches to contract interpretation in common law and the more liberal approach to contract interpretation in civil law.[23]

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.[24] 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.[25] This means that the parties still need to make a choice of law in order to avoid unpleasant surprises.

It should also be noted that there can be elements in the agreement which could trigger the application of other competing national laws, for example *culpa in contrahendo* or rules on product liability. According to the opinion of the present writer, if the Convention does not give an exhaustive functionally adequate solution, then national rules ought to apply. For example, 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. 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.[26] 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.[27] 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 Article 79 in cases of defective delivery.[28] In the practice of the courts, Article 79 is applied in cases of lack of conformity of goods to the contract.[29] 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 relatively infrequently in connection with the delivery of defective goods.[30]

4. ARTICLE 35 IN THEORY AND PRACTICE

4.1. The conformity of goods according to the contract – Article 35(1)

In general, courts have regarded favourably attempts to interpret Article 35(1) as an independent concept 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, even though the existence of assurances or guarantees can be included in an assessment under Article 35.[31] Although the overall conclusion is that the starting point is that Article 35 governs cases of *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*.[32] Here, domestic rules on mistake might be allowed to govern the case, and therefore the parties ought to take this into consideration in there contract.

The relevance of the concept of insignificant defects has been rejected both in theory and in practice,[33] 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, although a minor defect will also amount to a fundamental breach in some cases.

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.[34] 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).[35]

4.1. Article 35(2)(a) – fitness for ordinary purposes

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 relevant circumstances of the case, cf. Article 8 and Article 9.[36]

The starting point for assessing the ordinary use of the goods is the objective norm in the relevant commercial sector.[37] Some writers think that, in such cases, the principle should be that the norms in the seller's state should apply.[38] Others think that such cases should be assessed according to the norms in the buyer's state.[39] 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.[40]

If it is assumed that norms for 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.

Nevertheless, 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.[41] 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.[42]

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 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.[43] 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.[44] 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.[45]

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 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.[46]

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:[47]
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,[48] 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.[49]

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.

As stated by the German Federal Supreme Court, the 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. This was the case in the decision of the *Grenoble Court of Appeal*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' date as well as in the decision from the *US District Court, E.D. of Louisiana*, 17th May 1999, and the principles in the Mussels case now seems to have widespread acceptance, see also the Austrian Supreme Court of 13th April 2000, making the judgement of the German Federal Supreme Court *ipso facto stare decisis*.[50]

4.2. The limited caveat emptor principle in Art. 35(3)

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).[51] 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.[52]

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.[53] Compared with ULIS Article 36, samples and models are now also covered by the seller's exemption from liability under Article 35(3).[54] The main area where this provision applies is in connection with the sale of specific goods, for example, second-hand machines,[55] 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).[56]

As will be seen in the following review of this provision, it expresses a limited *caveat emptor* rule.[57] 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. This is also expressed in the *Secretariat Commentary*, though it only refers to cases where the requirements are *expressly* stated in the agreement.[58]

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,[59] 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 out 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.[60]

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 a different quality than that stated (in practice, 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.[61]

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).[62]

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.[63] This applies regardless of whether the buyer knows of a defect, if it is agreed[64] that the seller shall deliver the goods without the defects.[65]

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. 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 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.[66] 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 2mm. In Schlechtriem's view, it is an open 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).[67]

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.[68] 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.[69] 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 restriction of Article 35(3) to apply only to cases covered by Article 35(2).[70]

See the decision of the *Vaud Cantonal Appellate Court* of 28th October 1997.[71] 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.[72]

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 *Sion Cantonal Appellate Court* 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.[73] 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.[74]

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 provision and the view of it in theory.[75] 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 of the *US District Court, Illinois, Eastern Division*, of 28th October 1998. 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 a 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 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*[76] and the observance of good faith in international trade.[77]

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.[78]

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).[79]

In this connection, see the decision of the *Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce*, of 22nd January 1997.[80] 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.

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 "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.[81]

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. In the UNILEX database the decision is listed under Article 35(3), but strangely enough, not under Article 35(1).

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.[82]

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).[83]

This principle is clearly established in the decision 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 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).[84]

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.[85] Here, the *caveat venditor* seems to supersede the *caveat emptor.*

5. CONCLUSIVE REMARKS

As stated in the beginning of this article, 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.*

As also stated, 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 bear the risk if, in respect of these circumstances,

the goods do not (allegedly) conform to the contract.

The review of the practice of the courts and of legal theory 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. 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. These principles find strong 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.

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 article was 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.

It has also been seen that a restrictive interpretation has been 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 looking for a functionally adequate solution in the Convention, since there is not even agreement within individual national legal systems about how to solve such problems.

Therefore, even though a dynamic interpretation 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.

Overall it can be concluded that 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 theorists 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.[86]

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. Alternatively, the practice of the courts and the writings of legal theorists will work out the principles on which the Convention, including Article 35, will be developed. This article can be seen as an example of this.

Footnotes)

[1] Assistant Professor, Ph.D., Master of Law (LLM), Department of Law, Aarhus School of Business. External Associate Professor, Aarhus University. Editor, www.cisg.dk, Senior-Editor, www.unilex.info. This article is an abstract of some few of the most important points in the authors Ph.D.-thesis: *The conformity of goods in international sales*, published in a revised and updated version in June 2004 (Thomson, Copenhagen).

[2] Cf. Ernst Rabel: *Das Recht des Warenkaufs*, vol. 2 (Berlin, 1968), 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.

[3] Cf. Rabel: above , p. 132 and p. 282 et seq.

[4] Cf. Rabel: above, pp. 101-104.

[5] *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. Jakob Nørager-Nielsen and Søren Theilgaard: *Købeloven med kommentarer* (København, 1993), p. 855, with reference to Stig Iuul.: *Caveat emptor-reglens oprindelse*, Festskrift til Henry Ussing, p. 220.

[6] 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 Eugen Bucher: *Wiener Kaufrecht* (Bern, 1991), p. 249 et seq.

[7] Cf. also Andreas Schwartze: *Europäische Sachmängelgewährleistung beim Warenkauf: optionale Rechtsangleichung auf der Grundlage eines funktionalen Rechtsvergleich* (Tübingen, 2000), p. 26; Reinhard Zimmermann: *The Law of Obligations* (München, 1993), p. 307.

[8] Cf. Ernst Rabel: above, p. 288.

[9] **U**niform **L**aw for the **I**nternational **S**ale of Goods.

[10] **U**niform **L**aw on the **F**ormation of Contracts for the International Sale of Goods.

[11] United Nations **C**onvention on Contracts for the **I**nternational **S**ale of **G**oods. 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 Peter Schlechtriem in Peter Schlechtriem: *Kommentar zum Einheitlichen UN Kaufrecht (CISG)* (München, 2000), p. V, note 1.

[12] 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.

[13] 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.

[14] Cf. Ulrich Krüger: *Modifizierte Erfolgshaftung im UN-Kaufrecht* (Frankfurt a. M, 1997), p. 25 et seq.

[15] Compare this with Jan Heilmann: *Mängelgewährleistung in UN-Kaufrecht* (Berlin, 1994), p. 141.

[16] 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. Mads B. Andersen and Joseph Lookofsky: *Lærebog i Obligationsret* (Copenhagen, 2000), vol. 1, p. 34.

[17] The principle thus has a legal-economic content.

[18] See for example Article 35(2)(b) and Article 35(3), discussed below.

[19] This does not take into account the change to the premisses which can result from the changed considerations.

[20] Article 7 states:

(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 god 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 rues of private international law.

[21] See also Kai Krüger: *Norsk Kjøpsrett* (Bergen, 1999), p. 36 et seq.

[22] This creates particular problems for the Nordic countries, as they are not contracting states to part II of the convention (the Article 92 reservation), see René Franz Henschel, above, chapter 3.

[23] For an analysis of this, see René Franz Henschel, above, chapter 3. See also Jan H. Dalhuisen: *Dalhuisen on International Commercial, Financial and Trade Law* (Oxford, 2000), chapter 2, especially p. 262-264.

[24] See Ulrich Drobnig: Substantive Validity, American Journal of Comparative Law, vol. 40 (1992), p. 635 et seq. For a view supporting exhaustion of rules of validity, see Ferrari in Peter Schlechtriem: *Kommentar zum Einheitlichen UN Kaufrecht (CISG)*, p. 97, pt. 4; John Honnold: *Uniform Law for International Sales under the 1980 United Nations Convention* (Hague, 1999), p. 261 et seq.; Jan Ramberg in Jan Ramberg and Johnny Herre: *Internationella köplagen (CISG)* (Stockholm, 2000), p. 112; Wilhelm-Albrecht Achilles: *Kommentar zum UN-Kaufrechtsübereinkommen (CISG)* (Neuwied, 2000), p. 19; Karin Flesch: *Mängelhaftung und Beschaffenheitsirrtum* (Baden-Baden, 1994), p. 140 et seq., especially at pp. 156-159; seemingly Heilmann: above, p. 146, though here the view is that only the buyer's mistake is covered, not the seller's; Bruno Zeller: *The United Nations Convention for the International Sale of Goods: A Methodology for its Interpretation and Application* (Melbourne, 2001), p. 194 et seq.; but opposed to this, see Bernhard Gomard and Hardy Rechnagel: *International Købelov* (København, 1990), 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 Joseph Lookofsky: *Understanding the CISG Scandinavia* (Copenhagen, 2002), p. 31, concerning the competition between contractual and non-contractual compensation, where it is uncertain whether national rules must give way to Convention rules.

[25] Cf. Michael Bridge: *International Sale of Goods: law and Practice* (Oxford, 2000), p. 82 et seq.

[26] Cf. Honnold: above, p. 479. See similarly Denis Tallon in C.M Bianca and M. J. Bonell: *Commentary on the International Sales Law* (Milan, 1987), pt. 2.6.1 and 2.6.2.

[27] Cf. Krüger: above, p. 14, Footnote 5; Stoll in Peter Schlechtriem: above, p. 760 et seq., with further references to the literature in Footnote 44.

[28] Cf. Krüger: above, p. 68, after a review and refutation especially of Honnold's arguments.

[29] See the *German Federal Supreme Court* decision of 24th March 1999, analysed in René Franz Henschel, above, chapter 2.

[30] See René Franz Henschel, above, chapter 2, with reference to more cases.

[31] Cf. Bianca in Bianca and Bonell: above, 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 Peter Schlechtriem: above, p. 374, pt. 4; Ramberg in Ramberg and Herre: above, pp. 226-229; Achilles: above, p. 93; as well as the decision of the *German Supreme Court* of 3rd April 1996 (see UNILEX), 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 (see UNILEX).

[32] See the *German Federal Supreme Court* decision of 3rd April 1996, but compare the Austrian Federal Supreme Courts decisions of 29th June 1999 and 21st March 2000 (UNILEX)

[33] See Schwenzer in Peter Schlechtriem: above, p. 383, pt. 3; Jan Heilmann: above p. 202 et seq, and *Zurich Cantonal Commercial Court*34 of 21st September 1999 (UNILEX), but compare Teija Poikela: Conformity of goods in the 1980 United nations Convention on Contracts for the International Sale of Goods, Nordic Journal of Commercial Law, issue 2001 # 1, p. 19, note 78.

[35] See for instance *Oldenburg District Court* of 28th February 1996, *Swiss Federal Supreme Court* of 22nd December 2000 and for more examples: René Franz Henschel: above, chapter 3.

[36] In this respect see the decision of the *US District Court, Illinois, Eastern Division,* of 28th October 1998, referred to in section 4.2 below, overruling earlier American case law.

[37] Cf. Peter Schlechtriem: *Internationales UN-Kaufrecht* (Tübingen, 1996), p. 80 et seq.

[38] Cf. Also article 9 of the convention.

[39] Cf. Bianca in Bianca and Bonell: above, p. 274; Fritz Enderlein and Dietrich Maskow: *International Sales Law* (New York, 1988), p. 144; Wolfgang Kircher: *Die Voraussetzungen der Sachmängelhaftung beim Warenkauf* (Tübingen, 1998), p. 52; Burghard Piltz: *Internationales UN Kaufrecht* (München, 1993), p. 187.

[40] See Gomard and Rechnagel: above, p. 115, note 15.

[41] See Peter Schwenzer in Schlechtriem: *Kommentar zum Einheilichen UN-Kaufrecht (CISG)*, 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: above, 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."

[42] See Bianca in Bianca and Bonell: above, p. 274; and in connection with this Enderlein and Maskow: above, p. 144 and Achilles: above, p. 95.

[43] See Anna Veneziano: *Non Conformity of Goods in International Sales: a survey of current case law on CISG* (International Business Law Journal), No. 1 (1997), p. 46.

[44] 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.

[45] See 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."

[46] See 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]."

[47] 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.

[48] 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 case (*see, e.g.*, Piltz, *supra*, 6 35; Bianca, *supra*). None of these possibilities can be assumed in this case."

[49] 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.

[50] 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.

[51] All the cases can be found on UNILEX

[52] Cf. Heilmann: above p. 205.

[53] Cf. Schwenzer in Peter Schlechtriem: above, p. 384, pt. 34.

[54] Cf. Gomard and Rechnagel: above, p. 117, note 27. As far as is known, this question is not dealt with by other writers.

[55] Cf. Bianca in Bianca and Bonell: above, p. 279, pt. 2.9.1.

[56] Cf. Schwenzer: *Ibid.*

[57] 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.

[58] Compare with Lookofsky: above, p. 91.

[59] 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." This is indeed a literal approach to contract interpretation.

[60] See Schwenzer in Peter Schlechtriem: above, , p. 385, pt. 38; Achilles: above, p. 98, pt. 17; Kircher: above, p. 55; Poikela: above, , p. 52, although modified on p. 53. But for a opposite view see: Enderlein and Maskow: above, p. 147 et seq., pt. 19; and R. Rognlien in J. Bergem and R. Rognlien: *Kjøpsloven 1988 og FN-konvensjonen 1980 om internasjonale løsørekøb* (Oslo, 1995), p. 504 et seq.

[61] Cf. Schlechtriem: *Ibid.*

[62] The argument is most often illustrated by reference to examination of the goods, but it could be based on circumstances other than examination.

[63] Cf. Ramberg in Ramberg & Herre: above, p. 237, pt. 8.

[64] Cf. Ramberg: *Ibid.*

[65] If the buyer has expressed himself ambiguously or with lack of clarity, this will be interpreted against him.

[66] Cf. Schwenzer in Schlechtriem: above, p. 384, pt. 36; Heilmann: above, pp. 207-208.

[67] It is also possible that the seller may rely on national rules of invalidity, see below.

[68] Schlechtriem in N ina M.Galston and Hans Smit: *International Sales: The United Nations Convention on Contracts for the Internaitonal Sale of Goods* (New York, 1984), pp. 6-24, § 6.03.

[69] Cf. Rognlien in Bergem and Rognlien: above p. 504.

[70] See Lookofsky: above, 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 ..."

[71] Compare with Hyland in Schlechtriem: *Einheitliches Kaufrecht*, above, p. 326.

[72] The report of the judgment is reported in the UNILEX and Pace University CISG websites. Note that in the Pace website the case is wrongly listed under the Valais Cantonal Appeal Court.

[73] Cf. Section 4.b) of the judgment.

[74] The report of the judgment is reported in the UNILEX and Pace University CISG websites. Note that in the Pace website the case is wrongly listed under the *Valais* Cantonal Appeal Court.

[75] Cf. Section 7.b) of the judgment.

[76] Cf. Bianca in Bianca & Bonell: above, 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."

[77] Cf. Achilles: *Kommentar*, pp. 98-99, pt. 17.

[78] Cf. Rognlien in Bergem & Rognlien: *Kjøpsretten*, p. 504 et seq.; Karollus: *UN-Kaufrecht*, p. 119.

[79] Cf. Bianca in Bianca & Bonell: *Commentary*, p. 279, pt. 2.8.3.

[80] See Lookofsky: *CISG Scandinavia*, p. 91, note 102.

[81] See the UNILEX and Pace University CISG websites.

[82] "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."

[83] 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 the *Mussels* case had been put forward.

[84] Cf. Schwenzer in Schlechtriem: above, pp. 384-385, pt. 37; Dagmar Valcárel Schnüll: *Die Haftung des Verkäufers für Fehler und Zugesicherte Eigenschaften im europäischen Rechtsvergleich* (Bonn, 1994), p. 164; Kircher: above, p. 54 et seq., and Ulrich Ziegler: *Leistungsstörungsrecht nach dem UN-Kaufrecht* (Baden-Baden, 1995), p. 103.

[85] 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."

[86] See Joachim Aue: *Mängelgewährleistung im UN-Kaufrecht unter besonderer Berücksichtigung stillschweigender Zusicherungen* (Frankfurt a. M., 1989), p. 85.

[87] 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.