Sustainability in Global Supply Chains Under the CISG

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Abstract

In this article, the authors assert that the United Nations Convention for the International Sale of Goods (CISG) can contribute to tackling gaps in statutory legislation and defective business conduct that have been associated with unsustainable trade in Global Supply Chains (GSCs). The authors provide evidence that the CISG contains rules enabling a general legal framework for establishing uniform sustainable standards for goods concerning suppliers, sellers and buyers located in different countries. For instance, the CISG provisions on contract formation ease the incorporation of joint codes of conduct for sustainable trade in GSCs. In addition, the contracting parties' circumstances and current trade usages are now more relevant to determine what constitutes conformity of the goods under the contract and the default warranties in Article 35 CISG. On the level of remedies, the authors show that best-efforts provisions, possibly included in a code of conduct or inferred from standards applicable to the goods, may redefine the notion of impediment in Article 79 CISG, which could lead to exoneration of liability for the seller. They also demonstrate why fundamental breach and the calculation of damages are at the centre of the discussion regarding the remedies for breach of an obligation to deliver sustainable goods.

Keywords: CISG, sustainability, supply chains, UN Global Compact, Codes of Conduct, conformity of the goods.

A Introduction

International trade has become more complex than the simple act of selling and buying a product harvested from one territory and transformed by a single seller. Consumers are most of the time at the final stage of the elaborate networks of a global supply chain with intermediate buyers, sellers or service providers. Global

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supply chains (GSCs)[1] refer to goods and services that are obtained across international borders as inputs for further production or for retail sale.[2] It is estimated that 80% of global trade is made through supply chains.[3] GSCs have the potential to generate economic growth, employment, skill development and technological transfer. Their implementation allows that work opportunities are distributed globally, that knowledge is shared among societies and that product prices are accessible to many. They also make it possible for goods with a multinational origin to exist. An average mobile phone, for example, contains some 30 mineral commodities such as lithium, platinum, copper, silver, and so on (none of which can be found in a single territory)[4] and is fabricated with components from dozens of jurisdictions which are finally assembled and redistributed worldwide from few countries.[5]

Nevertheless, *unsustainable*[6] practices, including corruption, environmental destruction and violations to international labour standards as well as human rights – including child labour, forced labour and human trafficking –[7] have been linked to GSCs.[8] While identifying where and to what extent these types of unethical and unsustainable events occur along supply chains is not *always* possible – as such would entail tracing the origins of all components of a final product by

1 The expression is used here in the broadest sense, synonymous with other commonly used terms, such as 'procurement,' 'buying,' 'sourcing' and 'purchasing.'

2 According to the UN Alliance Report on Child Labour, a number of terms are used in the literature on supply chains to describe different locations along supply chains. The term *upstream* is used to refer to production processes in supply chains that occur closest to raw material production, whereas the term *downstream* is used to delineate those production activities in supply chains that occur closest to retail, *see* Ending child labour, forced labour and human trafficking in global supply chains, *see* ILO et al., 'UN Alliance Report on Child Labour – Ending Child Labour, Forced Labour and Human Trafficking in Global Supply Chains' (International Labour Organization, Organisation for Economic Co-operation and Development, International Organization for Migration and United Nations Children's Fund, 2019) at 2.

3 UN Global Compact, *Supply Chain Sustainability – A Practical Guide for Continuous Improvement* (2nd edn.: United Nations Global Compact & BSR, 2015) at 3.

4 More than one-half of all components in a mobile device – including its electronics, display, battery, speakers, and more – are made from mined and semi-processed materials (mineral commodities), *see* US Department of Interior, 'US Geological Survey' (US Department of Interior, 2016), available at https://pubs.usgs.gov/gip/0167/gip167.pdf.

5 *See* the iPhone example where manufacturers-sellers from all over the world participate in the production of parts in Sam Castello, 'Where Is the Iphone Made? – It Takes a Village to Build an Iphone' (Online: LifeWire, 2001), available at www.lifewire.com/where-is-the-iphone-made-1999503.

6 We understand sustainability in GSCs as the management of environmental, social and economic impacts including pollution, international human rights violations and corruption, see the same understanding in UN Global Compact, *Supply Chain Sustainability – A Practical Guide for Continuous Improvement*, at 5.

7 Child labour means "any work that deprives children of their childhood, their potential and dignity, and that is harmful to physical and mental development". It is defined by the ILO Minimum Age Convention, 1973 (No. 138), and the Worst Forms of Child Labour Convention, 1999 (No. 182), and by the United Nations Convention on the Rights of the Child. On the other hand, Force labour is defined by the ILO Forced Labour Convention, 1930 (No. 29), as "all work or service that is exacted from any person under the menace of penalty and for which the said person has not offered himself voluntarily".

8 *See* for instance in latest news, Rajini Vaidyanathan, 'Indian Factory Workers Supplying Major Brands Allege Routine Exploitation', *BBC News*, 17 November 2020, available at www.bbc.com/news/world-asia-54960346.

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capturing statistics not only in the market where it is 'consumed', but also all along its supply chain –[9] companies operating under this trade strategy have a responsibility to ensure that an international level of sustainability is respected by all suppliers.

Evidence suggests that labour exploitation, environmental destruction and corruption in GSCs are the result of the interplay of three critical dimensions: first, gaps in statutory legislation, dysfunctions in enforcement and access to justice which creates space for non-compliance; second, socio-economic pressures facing individuals and workers at the country of origin; and third, defective business conduct and business environment.[10] In this article, we explore how the United Nations Convention for the International Sale of Goods (CISG) contributes to tackling the first and the third of such dimensions. We consider that the CISG has rules that enable a general legal framework for establishing uniform sustainable standards for goods concerning suppliers, sellers and buyers located in different countries. The CISG remedies in case of breach should also promote a change in all parties' business conduct and culture.

With that in mind, Section B describes the factual issues surrounding GSCs, including the problems that this commercial scheme creates, the compliance issues that the chain of suppliers and the final buyer faced, as well as the growing importance of the CISG in this matter. Section C explains how sustainable standards become part of a CISG contract; in particular, the solution to the battle of standard codes of conduct that may arise in GSCs scenarios. Section D clarifies how any applicable sustainable standards attach to the goods' nonphysical characteristics, with which the supplier must comply under Article 35 CISG. Finally, Section E addresses the remedies for breach of sustainable standards depending on whether compliance with such standards becomes an obligation of results or an obligation of best efforts under the CISG contract.

B Factual Issues

I Effects of GSCs on Sustainability: Labour Rights, Environment and Corruption

Legal diversity and unequal law enforcement are part of the landscape where GSCs operate. Domestic laws and the rule of law[11] in the world's jurisdictions still differ from one another. Individual norms do not always reflect the same level of ethics and sustainability in relation to production of goods and services. Commodity harvest (or extraction) and manufactured goods that have a 'legal or tolerable

9 A task that is beyond the scope of any traditional survey and national accounting methods, according to ILO et al., 'UN Alliance Report on Child Labour – Ending Child Labour, Forced Labour and Human Trafficking in Global Supply Chains', at 5.

10 Those are the factors identified for child labour, forced labour and human trafficking that may also apply to environmental impact and corruption in GSCs, *see ibid.*, at 17.

11 The rule of law is defined in the Oxford English Dictionary as "[t]he authority and influence of law in society, especially when viewed as a constraint on individual and institutional behavior; (hence) the principle whereby all members of a society (including those in government) are considered equally subject to publicly disclosed legal codes and processes", available at www.oed.com/.

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origin' in some jurisdictions may be the result of labour exploitation, environmental destruction or government corruption in the eyes of other cultures.

According to the latest global estimates, 152 million children perform child labour and 25 million adults and children are victims of forced labour.[12] In relation to GSCs, it is estimated that 26% of child labour from Eastern and Southeastern Asia and 9% from Northern Africa and Western Asia contribute to export of goods to other regions (either directly or indirectly).[13] There is also evidence that forced labour contributes to exports in GSCs across most industries.[14]

The adverse environmental impact of GSCs includes toxic waste, water pollution, loss of biodiversity, deforestation, long-term damage to ecosystems, hazardous air emissions, greenhouse gas emissions, excessive energy use, and so on.[15] The problem also lies in the disparity between trading nations' environmental protection policies. According to the 2020 Environmental Performance Index,[16] which ranks countries on their environmental performance, the score difference between the top 10 environmentally friendly countries[17] and the 10 most contaminated nations[18] reaches more than 50.0 points.[19] The gap is huge and it is difficult to attribute this score imbalance to specific country policies or regulations. Many countries have met to discuss the need for stronger international legal frameworks against pollution.[20] Yet, the countless sources of pollution and diverse pathways to human exposure make it difficult to effectively detect, or manage, much less eliminate them.[21] National and international pollution monitoring is not consistent. Indeed, there is evidence that good policy results are associated with

12 *See* ILO et al., 'UN Alliance Report on Child Labour – Ending Child Labour, Forced Labour and Human Trafficking in Global Supply Chains', at 11.

13 *Ibid.*, at 8, 9.

14 *Ibid.*, at 13-15.

15 *See* Dieh, Cowi, and Danish Federation of Small and Medium-Sized Enterprises, 'Environmental Supply Chain Management – A Guide to Danish Companies' (Copenhagen Danish Environmental Protection Agency, 2010) at 7.

16 *See* Zachary Wendling et al., *2020 Environmental Performance Index (EPI)* (New Haven, CT: Yale Center for Environmental Law & Policy, 2018), available at https://epi.yale.edu/downloads/epi2020report20210112.pdf

17 It ranks countries in aspects such as Air Quality, Water & Sanitation, Heavy Metals, Biodiversity & Habitat, Forests, Fisheries, Climate & Energy, Air Pollution, etc. and includes in the top ten: 1 Denmark 82.5, 2 Luxembourg 82.3, 3 Switzerland 81.5, 4 United Kingdom 81.3, 5 France 80.0, 6 Austria 79.6, 7 Finland 78.9, 8 Sweden 78.7, 9 Norway 77.7, 10 Germany 77.2. *See ibid.*, at XII.

18 The ten most contaminated nations according to this report are 170 Burundi 27.0, 171 Haiti 27.0, 172 Chad 26.7, Solomon Islands 26.7, 174 Madagascar 26.5, 175 Guinea 26.4, 176 Côte d'Ivoire 25.8, 177 Sierra Leone 25.7, 178 Afghanistan 25.5, 179 Myanmar 25.1, 180 Liberia 22.6. *See ibid.*

19 *Ibid.*

20 The Paris Agreement, which operates at the state level, is one of the latest examples that purports to mitigate greenhouse gas emissions with the long-term temperature goal of reaching the global average temperature in pre-industrial levels. The Paris Agreement is an agreement within the United Nations Framework Convention on Climate Change (UNFCCC), dealing with greenhouse gas emissions mitigation, adaptation and finance, signed in 2016. The agreement's language was negotiated by representatives of 196 state parties at the 21st Conference of the Parties of the UNFCCC in Le Bourget, near Paris, France, and adopted by consensus on 12 December 2015. As of February 2020, all UNFCCC members have signed the agreement, 189 have become party to it, and the only significant emitters which are not parties are Iran and Turkey.

21 *See* Wendling et al., *2020 Environmental Performance Index (EPI)*, at 47.

wealth (GDP per capita), meaning that economic prosperity makes it possible for nations to invest in policies and programmes that lead to desirable outcomes in terms of environmental protection.[22] The opposite reality emerges starkly among poor nations, with cheap labour, where incidents of heavy pollution often go unnoticed or unreported, and public health laws are not properly enforced.

Neither are GSC networks free of corruption scandals. Corruption risks in the supply chain include procurement fraud perpetrated by suppliers, often in association with the buyer's own employees, and suppliers who engage in corrupt practices involving governments and other public actors.[23] Corruption materializes in the form of kickbacks, fraudulent billing, suppliers who corruptly bypass health and safety requirements, suppliers who evade legitimate law, necessary licensing, and who bribe customs officials, licensing authorities or government officials to bypass taxes.[24] While there are no figures related to GSCs, it has been estimated, for example, that the cost of corruption equals more than 5% of global GDP (US $2.6 trillion), with over US $1 trillion paid in bribes each year.[25] A look at the Rule of Law Index 2020 by the World Justice Project, which measures adherence to the rule of law by looking at peoples' access to courts or whether crime is effectively controlled, shows that countries that are in the upstream or middle-stream level (closer to the raw material or intermediate components) of GSCs, such as Latin America, Africa, Eastern Europe and Southeastern Asia countries, have a rather weak rule of law.[26] On the other hand, countries in the downstream level (closer to the retail) of the GSCs and which are home to many global brands, such as Europe, North America, Oceania, Japan and Korea, enjoy a strong rule of law.[27] The same is evident from the Transparency International Corruption Perception Index 2019; countries at the downstream level of the GSC, which often host international and reputable brands, rank excellent for their lack of corruption practices, while countries in the middle or upstream of the GSC have higher corruption levels.[28]

The blame for GSCs' side effects is usually placed on developing countries with insufficient regulations and weak enforcement mechanisms to mitigate exposure.[29] However, developing countries are not solely responsible for GSC's problems today. Some companies from the developed world have delocalized industries and

22 *Ibid.*, at X.

23 UN Global Compact, *Fighting Corruption in the Supply Chain: A Guide to Customers and Suppliers* (2nd edn; New York: United Nations Global Compact, 2016) at 6.

24 *Ibid.*, at 10.

25 *Ibid.*

26 The World Justice Project, 'The WJP Rule of Law Index® 2020', (The World Justice Project Rule, 2020) at 16-19, available at https://worldjusticeproject.org/sites/default/files/documents/WJP-ROLI-2020-Online_0.pdf.

27 *Ibid.*

28 Transparency International, *Corruption Perception Index 2019* (Berlin: Transparency International, 2019) at 2, 3. The corruption measured goes "from fraud that occurs at the highest levels of government to petty bribery that blocks access to basic public services like health care and education, citizens are fed up with corrupt leaders and institutions. This frustration fuels a growing lack of trust in government and further erodes public confidence in political leaders, elected officials and democracy", *see* page 4 of the Index, available at https://images.transparencycdn.org/images/2019_CPI_Report_EN_200331_141425.pdf.

29 *See* Wendling et al., *2020 Environmental Performance Index (EPI)*, at 12.

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production because some hosting countries have lax rules for sustainability or weak law enforcement and, thus, are considered 'havens for unsustainable manufacturing'. Other more socially responsible companies struggle to monitor their suppliers' compliance with sustainability standards in order to protect their public image. Of course, there is also an economic incentive, as developing countries with insufficient regulations or weak rule of law offer much cheaper manufacturing.[30]

Be that as it may, international trade is a global phenomenon and, thus, companies participating in it are responsible for creating the economic incentives to uphold ethics and sustainability in the long term. People in more regulated jurisdictions have benefitted greatly from consuming the food, commodities, components or end products from developing nations. By allowing production in underdeveloped countries and consumption activities in developed countries to be physically and legally separated, international trade has contributed to globalizing the issue of human rights violations, environmental harm and rule of law.

II Compliance Issues

In principle, a buyer or parent company should not be held liable for damages resulting from labour law violations, environmental harm or corruption committed by their foreign subsidiaries, suppliers or contractual partners, especially when they take place abroad. Under most national laws, the general rule states that a parent company and buyers are legally independent and separate from their foreign subsidiaries and suppliers; hence, they are under no general obligation to make sure that they comply with any laws or sustainable standards.

This general principle is, however, gradually changing in many countries. Buyers, mainly multinational companies, are increasingly being held responsible, both legally and in the court of public opinion, for the activities of their suppliers. As news and social media regularly report, the faults of suppliers can directly affect a buyer's product perception and brand reputation. Indeed, the direct impact of unsustainable GSCs sooner or later translates to an increase in costs for management time and resources to address bad publicity, legal liability and damage to reputation. In the United States alone, every year there is an increase in cases against local companies for breach of international standards by their suppliers abroad.[31] In May 2019, for example, several tuna companies were sued in the Northern District of California for allegedly misleading consumers about whether their tuna was dolphin safe. Plaintiffs alleged that the tuna suppliers were using fishing tactics that could be harmful to dolphins, rendering their 'Dolphin Safe' labels misleading under California law.[32]

Some of these lawsuits have been brought under recent acts requiring disclosure of the activities and processes of suppliers abroad. For example, companies must abide by local anti-corruption and anti-bribery regulations abroad

30 *See* the evident correlation between weak rule of law and low and middle income in The-World-Justice-Project, 'The WJP Rule of Law Index® 2020', at 20, 21.

31 *See* Lauren Staniar, David T. Biderman, and Charles Sipos, 'PC Food Litigation Index: May 2019', *New Filing Supply Chain*, available at www.foodlitigationnews.com/category/supply-chain/, accessed 28 January 2021.

32 *See ibid.*

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if their business interests are in the United States and UK. They must be fully compliant with US Foreign Corrupt Practices Act (FCPA) and the UK Bribery Act that consider it unlawful for certain classes of persons and entities to make payments to foreign government officials to assist in obtaining or retaining business.[33] On the other hand, the UK Modern Slavery Act 2015 requires certain businesses to produce a statement setting out the steps they have taken to ensure there is no modern slavery in their own business and their supply chains.[34] Also, the California Supply Chain Transparency Act requires that large retailers and manufacturers provide consumers with information regarding their efforts to eradicate slavery and human trafficking from their supply chains, as well as to inform consumers on how companies manage their supply chains.[35]

Similar legislation has been adopted – or is being considered for adoption in – Australia, Canada, Brazil, France, Norway, the Netherlands, the United Kingdom and Switzerland.[36] In Germany, the project of a national supply chain law is currently being discussed in Parliament which requires companies to protect human rights in their supply chains.[37] In Switzerland, an initiative that would have introduced a new vicarious liability regime for damage caused by economically controlled entities or suppliers was rejected on 29 November 2020.[38] Now a counter proposal is close to entering into force; it will impose on Swiss publicly traded companies and other regulated businesses, non-financial reporting duties on certain human rights, environmental, social and employment-related matters of their activities abroad. In addition, all businesses with their registered office, headquarters, or principal place of business in Switzerland, which either circulate or process 'conflict minerals' there or offer goods or services in relation to which there is reasonable suspicion of child labour, must report their due diligence actions on those matters.[39] Also, at the EU Community level, Member States have just recently agreed to promote new legislation which would hold countries and

33 For more on this *see* US Department of Justice, 'Foreign Corruption Practices Act – Overview', available at www.justice.gov/criminal-fraud/foreign-corrupt-practices-act, accessed 8 February 2021.

34 UK Government, *Transparency in Supply Chains, Etc. – A Practical Guide*, in Home Secretary (ed.), (London: Government of the United Kingdom, 2015) at 3, available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/649906/Transparency_in_Supply_Chains_A_Practical_Guide_2017.pdf, accessed 8 February 2021.

35 *See* California Supply Chain Transparency Act, S.B. 657, § 2, subd. (j), available at https://oag.ca.gov/SB657.

36 *See* for an overview of existing and planned legislation in Claire Bright et al., *Study on Due Diligence Requirements through the Supply Chain. Part Iii. Country Reports*, ed. Civic Consulting British Institute of International and Comparative Law, London School of Economics and Political Science (The European Commission, 2020) at 192 ff, available at https://op.europa.eu/en/publication-detail/-/publication/8ba0a8fd-4c83-11ea-b8b7-01aa75ed71a1/language-en.

37 Charlotte Nijhuis, 'EU Council Agreement on Supply Chain Law Ups Pressure on Germany to Follow Suit', *ibid.*, available at www.cleanenergywire.org/news/eu-council-agreement-supply-chain-law-ups-pressure-germany-follow-suit, accessed 28 January 2021.

38 *See* Brenna Hughes Neghaiwi, 'Swiss Firms Narrowly Avoid "Responsible Business" Liability as Vote Divides Nation in Sustainable Business', available at www.reuters.com/article/us-swiss-vote-companies-idUKKBN2890EM, accessed 28 January 2021.

39 *See* Andreas Rötheli et al., 'Counter-Proposal to Responsible Business Initiative: Overview of New Duties for Companies', *Newsflash*, available at www.lenzstaehelin.com/fileadmin/user_upload/newsflash/201130_Newsletter_Counter_Proposal_EN_Final.pdf, accessed 28 January 2021.

companies accountable for ensuring that social and environmental standards are upheld across their entire production chains.[40]

As stated earlier, unethical or unsustainable trade in GSCs is often the result of the interplay of three critical dimensions: first, gaps in statutory legislation, dysfunctions in enforcement and access to justice which creates space for non-compliance; second, socio-economic pressures facing individuals and workers at the country of origin; and third, defective business conduct and business environment.[41] Concerning the first dimension, buyers would expect that their suppliers would comply with their local laws and take proactive measures to avoid environmental and social harm under international standards.[42] However, domestic legislation might not properly address the problem or law enforcement could be ineffective. In addition, the economic incentives or conviction for many sellers of inputs might be missing. In that regard, one of the tenets of international responsible business conduct is that companies have a responsibility to address adverse impacts that their activities may cause, including in all of their supply chains and business relationships, irrespective of the state of the law abroad or any legal liability in their places of business.[43]

With that in mind, parties involved in GSCs often work on a sustainable procurement policy and due diligence processes. Such procurement policy and due diligence processes are expressed in codes of conduct for suppliers.[44] Thus, for example, according to a 2019 survey, 87% of 123 multinational apparel companies – representing 480 brands including H&M – have a code of conduct that requires suppliers to observe the ILO's Four Fundamental Principles and Rights at Work prohibiting child labour, forced labour, discrimination, and guaranteeing worker rights to freedom of association and collective bargaining.[45] Today, proper codes of conduct for suppliers are those based on international sustainable standards, such as the Global Compact Principles, which are the main international instruments on sustainable trade,[46] and modern and protective national legislation. In this contribution, we will take the Ten Principles of the UN Global Compact and other international legal sources and standards referred by the UN Global Compact

40 *See* Council of the EU, 'Human Rights and Decent Work in Global Supply Chains: The Council Approves Conclusions', *Press Releases*, available at www.consilium.europa.eu/en/press/press-releases/2020/12/01/human-rights-and-decent-, accessed 28 January 2021.

41 Those are the factors identified for child labour, forced labour and human trafficking that may also apply to environmental impact and corruption in GSCs, *see* ILO et al., 'UN Alliance Report on Child Labour – Ending Child Labour, Forced Labour and Human Trafficking in Global Supply Chains', at 17.

42 UN Global Compact, *Supply Chain Sustainability – A Practical Guide for Continuous Improvement*, at 23.

43 UN Global Compact, *Fighting Corruption in the Supply Chain: A Guide to Customers and Suppliers*, at 8.

44 UN Global Compact, *Supply Chain Sustainability – A Practical Guide for Continuous Improvement*, at 23.

45 Jessica Tatzenko, Claire Hart, and Annie Hollister-Jones, *The 2019 Ethical Fashion Report – The Truth Beyond the Barcode* (New Zealand: Baptist World Aid Australia, 2019) at 26.

46 Such as the United Nations Guiding Principles on Business and Human Rights, ILO Conventions and the Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy (MNE Declaration), and the OECD Guidelines for Multinational Enterprises, *see ibid.*, at 17.

(2015), 'Supply Chain Sustainability – A Practical Guide for Continuous Improvement' (2nd ed. United Nations Global Compact & BSR), as a reference to establish the legal framework for codes of conduct purported to improve supply chain sustainability:

Sample Policy Areas that Align with the UN Global Compact Ten Principles[103]		**Potential Sources for Reference:**
Human Rights and Labour 1. Forced labour 2. Child labour 3. Working hours 4. Wages and benefits 5. Humane treatment 6. Nondiscrimination and equality 7. Freedom of association and collective bargaining 8. Occupational health and safety 9. Emergency preparedness 10. Occupational injury and illness 11. Fire safety 12. Building structure and integrity 13. Industrial hygiene 14. Leave entitlements 15. Freedom of speech 16. Human trafficking 17. Privacy 18. Minority rights 19. Rights of specific stakeholder groups: indigenous people, women, children, older workers, workers with disabilities, migrant workers	**Environment** 20. Material toxicity and chemicals 21. Raw material use 22. Recyclability and end of life products 23. Greenhouse gas emissions 24. Energy use 25. Water use and waste water treatment 26. Air pollution 27. Biodiversity 28. Deforestation **Anti-corruption** 29. Conflict of interest 30. Gifts, meals and entertainment 31. Bribery and kickbacks 32. Accounting and business records 33. Protecting information 34. Fair competition 35. Reporting misconduct	*United Nations Global Compact* *Universal Declaration of Human Rights* *UN Guiding Principles on Business and Human Rights* *ILO Declaration on Fundamental Principles and Rights at Work* *ILO Tripartite declaration of principles concerning multinational enterprises and social policy (ILO MNE Declaration)* *ILO International Labour Standards on Occupational Safety and Health* *Women's Empowerment Principles* *Children's Rights and Business Principles* *OECD Guidelines for Multinational Enterprises* *The Rio Declaration on Environment and Development* *United Nations Convention Against Corruption* *ISO 14001* *ISO 26000* *SA8000* *OHSAS 18001*

[103] UN Global Compact, *Supply Chain Sustainability – A Practical Guide for Continuous Improvement*, at 24.

Codes of conduct based on the legal sources and standards provided in the table are the first steps on the road to address gaps in statutory legislation and to promote a change of business conduct for all actors involved in GSCs. Examples of codes of conduct by non-state bodies, initiatives, associations and organizations are Tesco Nature's standards,[47] and others subsequently referred to in this contribution.

47 The standard was developed to ensure that Tesco's food products come from growers who use good agricultural practices, operate in an environmentally responsible way and with proper regard for the health and well-being of their staff, see more in MKG, 'Tesco Standard', available at http://midkentgrowers.co.uk/tesco-standard, accessed 28 January 2021.

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III Growing Importance of CISG

The CISG potentially governs more than 80% of international sales.[48] Its importance as one of the most successful private international law instruments of direct application is unquestionable. The CISG establishes the rules on contract formation, the obligations and the remedies for breach under sales contracts (Art. 4 CISG) between parties located in different Contracting States (Art. 1 CISG). However, CISG does not contain any default policies or norms regarding how goods must be harvested, extracted or produced in order to be sustainable. Nor does the CISG *expressly* tell us that 'tainted goods', that is, goods that are the result of corruption, labour exploitation, pollution or damage to human health, are, as a matter of fact, nonconforming goods, or that damages automatically ensue from their delivery. A sale governed by the CISG may involve 'tainted goods' that fully comply with the physical characteristics described in the contract, the particular purpose made known to the seller or the ordinary purpose of similar goods (Art. 35 CISG).

The CISG was drafted in the 1970s when the most recent international ethical rules and sustainability policies of today were not anticipated by most lawyers and traders.[49] The drafters may not have foreseen the employment and environmental problems directly and indirectly linked to GSCs and, hence, CISG contracts. The drafters could not predict the consequences of production delocalization in unsustainable havens. However, the Preamble of the CISG contains a reference to 'the establishment of a New International Economic Order'. This may well be interpreted as encompassing the strengthening and protection of human rights in developing countries as the removal of economic underdevelopment cannot be separated from the former.[50]

Above all, the rules and principles that the CISG drafters designed are well suited to address these new challenges. The drafters may not have been capable of distinguishing how regulatory imbalances among countries may affect the expectations of the international community over the goods; however, they were wise to include flexible concepts and provisions that would make the CISG principles derived thereof appropriate to enhance the respect of today's

48 As of this writing, the CISG has been ratified by 95 Contracting States according to UNCITRAL status table that may be accessed at www.uncitral.org/uncitral/uncitral_texts/sale_goods/1980CISG_status.html, accessed 28 January 2021. Every trading nation except for the United Kingdom, India and South Africa has ratified the CISG, *cf.* Stefan Kröll, Loukas Mistelis, and Pilar Perales Viscasillas, 'Introduction to the CISG', in Stefan Kröll, Loukas Mistelis, and Pilar Perales Viscasillas (eds.), *UN Convention on Contracts for the International Sale of Goods – Commentary* (München: Hart Publishing, 2011) at 2, para. 7; Clayton P. Gillette and Steven D. Walt, *The UN Convention on Contracts for the International Sale of Goods* (New York: Cambridge University Press, 2016) at 1.

49 Such as the new commercial order achieved with the establishment of the WTO and the arrival of the Internet. *Cf.* Frank Diedrich, 'The CISG and Computer Software Revisited', *Vindobona Journal of International Commercial Law and Arbitration*, 6 (2002) at 55; Kröll, Mistelis, and Viscasillas, 'Introduction to the CISF', at 18, paras. 61-62; Hiroo Sono, 'The Applicability and Non-Applicability of the CISG to Software Transactions', in Camilla B. Andersen and Ulrich G. Schroeter (eds.), *Sharing International Commercial Law across National Boundaries: Festschrift for Albert H. Kritzer on the Occasion of His Eightieth Birthday* (London: Wildy, Simmonds & Hill Publishing, 2008), 14 at 512.

50 Ingeborg Schwenzer and Pascal Hachem, 'Preamble', in Ingeborg Schwenzer (ed.), *Schlechtriem & Schwenzer: Commentary on the UN Convention on the International Sale of Goods* (4th edn; London: Oxford University Press, 2016) at 15, para. 7.

international values. These conscious choices of the drafters, which some might regard as too abstract notions in the Convention, might actually prove to be appropriate legal solutions to address new realities in GSCs. The CISG has been a key instrument in reducing transaction cost and, thus, a contributing factor in the promotion of international trade. Nevertheless, it is time to also interpret and apply the CISG from a new perspective, one that would enforce contracts intended to ensure ethics and sustainability.

Article 7 CISG is the key to this end. This provision requires that in the interpretation of the CISG, regard is had for its international character and for the need to promote the observance of good faith in international trade.[51] It also requires that questions concerning matters governed by the CISG, but which are not expressly settled by its provisions, be solved in conformity with the general principles on which it is based.[52] These gap-filling rules are instrumental for developing the Convention and adjusting to the new needs.[53] They should be used to meet new challenges from issues in the incorporation of sustainable standards into CISG contracts, the conformity of the goods and the remedies for breach of contract. The appropriateness of such self-contained rules of interpretation and gap filling for uniform law has been recognized by the adoption of the same wording, or at least very similar provisions, in subsequent conventions, model laws and uniform projects.[54]

The cases brought against different big brands and companies for violations of international standards by their suppliers are excellent examples of the importance of ethical expectations of today's markets. Hundreds of products that have been the subject of public scandals during the last years, such as smartphones, sports shoes, apparels, diamonds, gold and many more have led us to wonder who is to bear the risk that the goods do not live up to the required sustainable standards of the markets where they are sold.[55]

51 Art. 7(1) CISG.

52 Art. 7(2) CISG.

53 Ingeborg Schwenzer and Pascal Hachem, 'Article 7', in Ingeborg Schwenzer (ed.), *Schlechtriem & Schwenzer: Commentary on the UN Convention on the International Sale of Goods* (4th edn; London: Oxford University Press, 2016) at 133, para. 30.

54 *See* Art. 2A(2) of the 1985 UNCITRAL Model Law on International Commercial Arbitration (amended in 2006); Art. 5(2) of the 2005 Convention on the Use of Electronic Communications in International Contracts; Art. 2(2) of the 2002 UNCITRAL Model Law on Commercial Conciliation (no reference to domestic law); Art. 4(2) of the 2001 UNCITRAL Model Law on Electronic Signatures; Art. 7(2) of the 2001 UN Convention on the Assignment of Receivables in International Trade; Art. 5(2) of the 2001 UNIDROIT Convention on International Interests in Mobile Equipment; Art. 6(2) of the 1988 UNIDROIT Convention on International Financial Leasing (Ottawa); Art. 4(2) of the 1988 UNIDROIT Convention on International Factoring (Ottawa); Art. 6(2) of the 1983 UNIDROIT Convention on Agency in the International Sale of Goods (Geneva). *Cf also* Art. 1.6(2) of the 2004 UNIDROIT Principles of International Commercial Contracts. Stefan Vogenauer, 'Article 1.6', in Stefan Vogenauer (ed.), *Commentary on the Unidroit Principles of International Commercial Contracts (PICCc)* (2nd edn; Oxford: Oxford University Press) at 181, 82 para. 2.

55 Ingeborg Schwenzer, 'Ethical Standards in CISG Contracts', *Uniform Law Review*, 22/1 (2017) at 123.

It has been argued that in all these cases it is not goods but rather emotions that are sold.[56] However, it cannot be overlooked that these emotions have a very real economic value. In all these cases – although there may be no difference in the physical features of the goods concerned – consumers are ready to pay a higher price for sustainably produced goods compared to goods that are not produced or traded in this way, and thus there is a distinctive market with higher prices for ethically produced goods and the CISG provisions take this into account.[57]

C How Do Sustainable Standards in Codes of Conduct Become Part of a CISG Contract?

A buyer's code of conduct, requiring compliance with the UN Global Compact and other recommended international legal sources or standards (see Section B.II), does not accomplish the task of filling in local legal gaps and changing the business conduct and culture in a GSC unless it is binding upon all suppliers. Joint codes of conduct in GSC are not usually part of the main text of the individually negotiated international distribution or sales contract. As a separate set of norms, the inclusion of a code of conduct into a CISG contract occurs in the same way other standard terms for sale or purchase of goods do. Codes of conduct may become part of a CISG contract by reference to them in the contracting documents or at a party's website (see Subsection C.I). When a buyer and one of its suppliers offers different codes of conduct, a battle of forms takes place, and the prevailing terms are determined by the rules of contract formation in the CISG (see Subsection C.II). In addition, some sustainable standards might also be integrated as part of the obligations binding upon suppliers when they are considered usages of trade under Article 9 CISG (see Subsection C.III).

I Incorporation by Explicit Provision in the Contract or Reference to Websites

It is first and foremost up to the parties themselves to stipulate in their contract what sustainable standards have to be met and how these must be proven. The CISG provisions governing the formation of the contract in Articles 14 to 24 apply to this matter. A buyer may offer to purchase subject to compliance with its code of conduct for suppliers (Art. 14 CISG). An offer by a buyer or the joint contract may indicate, from the outset, that the parties must agree to be bound by a joint code of conduct based on the UN Global Compact and similar international legal sources. This can be ascertained by the language used by the offeror,[58] the offeree or the joint agreement. The intention to be bound by a code of conduct is determined by

56 Christina Ramberg, 'Emotional Non-Conformity in the International Sale of Goods, Particularly in Relation to CSR-Policies and Codes of Conduct', in Ingeborg Schwenzer and Lisa Spagnolo (eds.), *Boundaries and Intersections, 5th Annual Maa Schlechtriem CISG Conference* (The Hague: Eleven International Publishing, 2015) at 71.

57 *See* for example OLG Munich, 13 November 2002, CISG-Online 786, Case No. 27 U 346/02, available at https://cisg-online.org/search-for-cases?caseId=6714, accessed 28 January 2021. In this case the court held that organically produced barley is more than twice as expensive as normal barley.

58 Peter Huber and Alastair Mullis, *The CISG – A New Textbook for Students and Practitioners* (Munich: Seiller, 2007) at 71.

the rules of interpretation in Articles 8 CISG.[59] Therefore, a code of conduct attached to the offer which has been effectively accepted without modifications by the offeree (Arts. 18 and 19 CISG) or which is printed and annexed to the individually negotiated terms of a Contract will become part of the terms determining the conformity of the goods (see Section D).

The content of a contract may not be set out only in the offer, the acceptance or the text of an individually negotiated agreement. Parties often make references to standard terms of business, including codes of conduct for sustainability, which text is not printed in the offer or the acceptance. The reference to and the use of these standardized documents has increased due to electronic means of communication that facilitate their storage and dissemination.[60] Their practical importance is evident in today's GSC and, thus the CISG plays a role in determining when and how a code of conduct becomes part of the contract by reference.

In fact, many companies nowadays have explicit suppliers' codes of conduct that are prominently displayed on their websites and are often translated into many languages.[61] The question then arises how terms contained on a website become part of the contract.[62] Codes of conduct, as any other standard terms, must be made part of the offer or counteroffer in order to be incorporated into the contract.[63] They can become part of the offer if timely referred by the offeror (Art. 8(1),(2) CISG).[64] Incorporation also takes place if the text is sent during the preceding negotiations.[65] In any event, the text should be received by the offeree

59 Ingeborg Schwenzer, Christiana Fountoulakis, and Mariel Dimsey, *International Sales Law, a Guide to the CISG* (Oxford: Hart Publishing, 2012) 842 at 104.

60 Maciej Zachariasiewicz, 'Inclusion of Standard Terms in Electronic Form under the Cisg', in Ingeborg Schwenzer and Lisa Spagnolo (eds.), *The Electronic CISG* (The Hague: Eleven International Publishing, 2017) at 96.

61 *See* the supplier codes of conduct in various languages for example for Unilever, 'Sustainable Agricultural Code 2017, available at www.unilever.com/Images/sustainable-agriculture-code--sac---2017_tcm244-515371_en.pdf, accessed 28 January 2021; The Hershey Company, 'Supplier Code of conduct and Ingredient Sourcing Policy', available at www.thehersheycompany.com/en_us/responsibility/good-business/responsible-sourcing.html, accessed 28 January 2021.

62 CISG-AC Opinion No. 13 Inclusion of Standard Terms under the CISG, Rapporteur: Professor Sieg Eiselen, College of Law, University of South Africa, Pretoria, South Africa. Adopted by the CISG Advisory Council following its 17th meeting, in Villanova, Pennsylvania, USA, on 20 January 2013, para. 3.4.

63 Ingeborg Schwenzer, Pascal Hachem, and Christopher Kee, *Global Sales and Contract Law* (London: Oxford University Press, 2011) at 166, para. 12.06; Ulrich Schroeter, 'Article 14', in Ingeborg Schwenzer (ed.), *Schlechtriem & Schwenzer: Commentary on the UN Convention on the International Sale of Goods* (London: Oxford University Press, 2016d), 1028 at 298, para. 43.

64 A German Court of Appeals, dealing with a contract governed by the CISG, found that a reference made in a pre-contractual communication months before the conclusion of the contract, and not in the offer or acceptance themselves, did not show a party's intent to incorporate its standard conditions pursuant to Art. 8(2) and (3) CISG, *see* OLG Thüringen (Jena), Balancer case, 10 November 2010, CISG-online 2216, IHR 2011, 79,80, Case No. 7 U 303/10, available at https://cisg-online.org/search-for-cases?caseId=8132, accessed 28 January 2021 *apud by* Schroeter, 'Article 14', in Ingeborg Schwenzer (ed.), *Schlechtriem & Schwenzer: Commentary on the UN Convention on the International Sale of Goods* (London: Oxford University Press, 2016d), 1028 at 293, para. 44.

65 OGH, 29 November 2005, CISG-online 1227, Case No. 4 Ob 205/05h, available at https://cisg-online.org/search-for-cases?caseId=7150, accessed 28 January 2021; OLG Linz, Spacers for insulation glass case, 8 August 2005, CISG-online 1087, Case No. 3 R 57/05f, available at https://cisg-online.org/search-for-cases?caseId=7011, accessed 28 January 2021.

before it has dispatched his acceptance.[66] A code of conduct referred after the formation of the contract will be regarded as an offer to modify an already existing contract (Arts. 29 CISG).[67]

The CISG does not establish specific requirements as to the form or style of the reference to a code of conduct. However, Articles 8(2) CISG requires that the other party must have a reasonable opportunity to take notice of the terms. The CISG Advisory Council Opinion No. 13 considers that a party is deemed to have had a reasonable opportunity to take notice of the standard terms where they are attached to a document used in connection with the formation of the contract or printed on its reverse side.[68] A reasonable opportunity to take note of standard terms also occurs where they are available and retrievable electronically.[69] An offer or contract clause providing a hyperlink to a website containing the buyer's code of conduct may suffice for the purpose of incorporation. However, the supplier should not be forced to conduct an excessive search for the code of conduct by clicking through multiple pages, browsing through complicated lists of various terms or having to decide which of the many different terms displayed on the website apply to the contract in question.[70] In negotiations by email or other electronic means, it would generally be enough for incorporation into the contract if the standard terms are contained in an attachment.[71] The burden of proof on their incorporation falls on the party who benefits from such incorporation.[72]

Incorporation also occurs when parties have face to face negotiations and the terms are referred at that moment orally or in a contractual clause and the terms are available at the place of negotiation.[73] In GSCs, buyers would often pay a visit to their suppliers' lands, facilities or production sites – or meet virtually to negotiate the framework of the supply chain – before passing the individual purchase orders; it is at that moment that a reference to a joint Code of Conduct may result in a reasonable opportunity for suppliers to take notice and ask any question.

The code of conduct must be in a language that the supplier could reasonably be expected to understand. The language of the contract, the language of the negotiations or the language used by the other buyer in communications with the supplier or vice versa, are examples of languages that the supplier in question could reasonably be expected to understand.[74]

66 Schroeter, 'Article 14', in Ingeborg Schwenzer (ed.), *Schlechtriem & Schwenzer: Commentary on the UN Convention on the International Sale of Goods* (London: Oxford University Press, 2016d), at 298, para. 52.

67 *Ibid.*

68 CISG-AC Opinion No. 13, para. 3.2.

69 CISG-AC Opinion No. 13, para. 3.4.

70 Zachariasiewicz, 'Inclusion of Standard Terms in Electronic Form under the CISG', at 125.

71 CISG-AC Opinion No. 13, para. 3.5.

72 Larry A. Dimatteo and Daniel T. Osttas, 'Comparative Efficiency in International Sales Law', *American University Law Review*, 26/2 (2011) at 425.

73 CISG-AC Opinion No. 13, para. 3.2.

74 CISG-AC Opinion No. 13, para. 6.5.

II Battle of Codes of Conduct

Contracting between buyers and suppliers in a GSC can lead to a battle of codes of conduct or battle of the forms. Imagine that the buyer makes an offer through a purchase order that incorporates its code of conduct requiring compliance with the principles of the UN Global Compact and other international treaties for the protection of human rights, the environment and prohibiting corruption practices from its supplier. In turn, the supplier accepts and refers to its own code of conduct or other standard conditions which deviate or contradict the buyer's code of conduct. Subsequently, the contract is performed without incident until a dispute arises. Questions such as, 'Was a contract formed?' and 'Which code of conduct applies?' will arise.

The question of contract formation and which of the two (or more) sets of standard conditions govern in a battle of the forms case has been addressed in different ways that lead to diverse practical outcomes in national laws. This section will review the solution proposed by the CISG to this topic. The strict application of the mirror image rule in Article 19 CISG would entail that if an acceptance included a code of conduct that was materially different from the code of conduct previously incorporated into the offer, no contract was concluded, unless there were immaterial differences between the two sets, which rarely occurs. However, the strict application of Article 19 CISG should be rejected in this case. Performance of the contract indicates that the offer was accepted, and therefore, the contract was concluded.[75] Differences in the codes of conduct of the buyer and the supplier may only become relevant in the event of a dispute.[76]

The battle of codes of conduct in GSCs must be solved according to the provisions and principles on which the CISG is based.[77] One of the solutions might be found in Article 19 CISG which endorses the 'last-shot doctrine': the prevailing terms are those of the final communication used without being objected to and

75 Pilar Perales-Viscasillas, 'Battle of the Forms under the 1980 United Nations Convention on Contracts for the International Sale of Goods: A Comparison with Section 2-207 UCC and the UNIDROIT Principles', *Pace International Law Review*, 10/1 (2010) at 107.

76 Ulrich Magnus, 'Last Shot vs. Knock out – Still Battle over the Battle of Forms under the CISG', in Ross Cranston, Jan Ramberg, and Jacob Ziegel (eds.), *Commercial Law Challenges in the 21st Century; Jan Hellner in Memorium* (Stockholm: Stockholm Centre for Commercial Law Juridiska institutionen, 2007) at 187.

77 BGH, Powdered milk case, 9 January 2002, CISG-online 651, Case No. VIII ZR 304/00, available at https://cisg-online.org/search-for-cases?caseId=6594, accessed 28 January 2021; OLG Düsseldorf, Rubber sealing parts case, 25 July 2003, CISG-online 919, Case No. 17 U 22/03, available at https://cisg-online.org/search-for-cases?caseId=6844, accessed 28 January 2021; USDC WD Pennsylvania, *Norfolk Southern Railway Company v. Power Source Supply Inc.*, 25 July 2008, CISG-online 1776, Case No. 07-140-JJf, available at https://cisg-online.org/search-for-cases?caseId=7694, accessed 28 January 2021; *ibid.*, at 188; Perales-Viscasillas, 'Battle of the Forms under the 1980 United Nations Convention on Contracts for the International Sale of Goods: A Comparison with Section 2-207 UCC and the UNIDROIT Principles', at 110.

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thus being accepted by the other party.[78] An important factual element advocating for this solution is that acceptance can occur, and often does, by conduct under Article 18 CISG, for example, by making the delivery, paying the purchase price or taking delivery of the goods.[79] If no performance of the contract is takes place or an objection is raised, no contract is concluded.[80]

A US District Court has supported this solution noting that the purported acceptance had materially altered the terms of the offer, and that, therefore, it was not an acceptance but a counteroffer, which was accepted by the offeror by executing the bills of sale; the prevailing terms were the ones proposed in the counteroffer (last-shot doctrine).[81] Similarly, an appellate court in Germany found that the standard conditions that were sent last became part of the sales contract since they had not been objected to and the other party had paid the invoice.[82]

A different solution in the context of GSCs is to apply the knock-out rule. Under this solution, if there is an agreement over the essential terms of the contract and there is a mutual intention to be bound – demonstrated by the interpretation of the parties' statements or their conduct under Article 8 CISG – it should be assumed that the contract was formed without the colliding terms in the codes of conduct, meaning that the inconsistent aspects of the supplier's and buyer's terms cancel each other out. In a CISG context, the knock-out rule was firstly applied by the French *Cour de Cassation* in 1998,[83] and has since then also been followed by

78 Schroeter, 'Article 19', in Ingeborg Schwenzer (ed.), *Schlechtriem & Schwenzer: Commentary on the UN Convention on the International Sale of Goods* (London: Oxford University Press, 2016d), at 365, para. 33; Franco Ferrari, 'Article 19', in Stefan Kröll, Loukas Mistelis, and Perales Viscasillas (eds.), *UN Convention on Contracts for the International Sale of Goods (CISG)* (Munich: CH Beck Hart Nomos, 2011) at 288, 89; Peter Schlechtriem and Petra Butler, *UN Law on International Sales* (Berlin: Springer, 2009) at 81, para. 92.

79 Patrick Ostendorf, *International Sales Terms* (München: Hart Publishing, 2014) at 60, para. 165.

80 Schwenzer, Hachem, and Kee, *Global Sales and Contract Law*, at 171, 72, para. 12.28.

81 USDC WD Pennsylvania, *Norfolk Southern Railway Company v. Power Source Supply Inc.*, 25 July 2008, CISG-online 1776, Case No. Case No. 07-140-JJf, available at https://cisg-online.org/search-for-cases?caseId=7694, accessed 28 January 2021.

82 OLG Koblenz, Concrete slabs case, 4 October 2002, CISG-online 716, Case No. 8 U 1909/01, available at https://cisg-online.org/search-for-cases?caseId=6152, accessed 28 January 2021; similarly, OLG Hamm, Frozen bacon case, 22 September 1992, CISG-online 57, Case No. 19 U 97/91, available at https://cisg-online.org/search-for-cases?caseId=6037, accessed 28 January 2021.

83 *Cour de Cassation*, *Les Verreries de Saint Gobain v. Martinswerk*, 16 July 1998, CISG-online 344, Case No. J 96-11.984, available at https://cisg-online.org/search-for-cases?caseId=6316, accessed 28 January 2021.

several courts.[84] Nowadays, there is a developing preference for the application of this interpretation.[85]

The knock-out rule results in the contract being formed by the terms in which there is an agreement, that is, by the individually negotiated terms, the conditions of the codes of conduct that are common in substance and the pertinent practices and trade usages.[86] The remaining gaps in the agreement are filled in by the CISG provisions or otherwise the domestic law.

The basis for this approach is the principle of party autonomy in Article 6 CISG, which is the key in determining the content of the contract,[87] and enables the parties to deviate from or vary the effect of any of the CISG provisions. By virtue of this principle, one can assume that the parties departed from the Convention's rules on formation, which is by nature dispositive,[88] and, in particular, from Article 19 CISG which would require one of the parties' codes of conduct to apply.[89] As it was stated by the CISG Advisory Council in Opinion No. 13 the knock-out rule has the advantage that it is in conformity with the intention of typical parties in international commercial relations and leads to acceptable results in cross-border trade situations. The rule avoids an arbitrary choice between the two sets of competing standard terms, instead using only those elements which are common to both sets. This accords with the actual intention of both parties.[90]

The leading CISG case endorsing this rule is the *Powdered milk case* decided by Germany's Supreme Court.[91]

In the context of GSCs, this approach requires that a responsible buyer should bear in mind that if its code of conduct is a *sine qua non* condition for the contract's conclusion with its supplier, it should withhold performance and insist on a contract formation in accordance with a code of conduct that follows the principles of the Global Compact and other international sustainable law and standards.

84 Schroeter, 'Article 19', in Ingeborg Schwenzer (ed.), *Schlechtriem & Schwenzer: Commentary on the UN Convention on the International Sale of Goods* (London: Oxford University Press, 2016d), 1028 at 366, para. 36; Huber and Mullis, *The CISG – A New Textbook for Students and Practitioners*, at 94. For example: BGH, Powdered milk case, 9 January 2002, CISG-online 651, Case No. VIII ZR 304/00; OLG Düsseldorf, Rubber sealing parts case, 25 July 2003, CISG-online 919, Case No. 17 U 22/03; USDC SD NY, *Hanwha Corp. v. cedar Petrochemicals Inc.*, 18 January 2011, CISG-online 2178, Case No. 09 Civ. 10559 (AKH), available at https://cisg-online.org/search-for-cases?caseId=8094, accessed 28 January 2021.

85 Schwenzer, Hachem, and Kee, *Global Sales and Contract Law*, at 172, para. 12.30; Schroeter, 'Article 19', in Ingeborg Schwenzer (ed.), *Schlechtriem & Schwenzer: Commentary on the UN Convention on the International Sale of Goods* (London: Oxford University Press, 2016d), 1028 at 366, para. 36. Examples of modern legislations that have adopted the knock out rule: Art. 385-4 Polish Civil Code (1964), Art. 2.1.22 PICC (in 1994 (as Art. 2.22), 2004, 2010 and 2016 editions), Art. 2:209 PECL (from 1998 and in 2002), Art. II – 4:209 DCFR (2009), Art. 39 CESL (2011), Art. 982 Argentinian Civil and Commercial Code regarding partial agreements (2015), Art. 1119 French Civil Code (2016).

86 John O. Honnold and Harry M. Flechtner, *Uniform Law for International Sales* (The Hague: Kluwer Law International, 2009) at 252, para. 170.4.

87 Schroeter, 'Intro to Arts 14–24', at 262, para. 77.

88 Franco Ferrari and Marco Torsello, *International Sales Law – CISG* (In a Nutshell: West Academic Publisher, 2014) at 133.

89 Huber and Mullis, *The CISG – A New Textbook for Students and Practitioners*, at 94.

90 CISG-AC Opinion No. 13, para. 10.6.

91 BGH, Powdered milk case, 9 January 2002, CISG-online 651, Case No. VIII ZR 304/00.

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III Practices Between the Parties and Trade Usages – Article 9 CISG

Even in cases where incorporation of a code of conduct by explicit or implied statements in the contract or reference to them is absent, contract supplementation under Article 9 CISG may well yield similar results, making it binding on relevant actors of the GSC.

First, prior practices between the parties might result in the incorporation of codes of conduct into contract under Article 9(1) CISG.[92] In the CISG Propane case, the Austrian Supreme Court considered that, unless there was evidence that the buyer had obtained and was willing to enter into prior contracts on the basis of the sellers' standard terms, the latter could not be incorporated into the contract pursuant to Article 9(1) CISG.[93] *Per contra*, a code of conduct that has been part of a GSCs relationship in the past might meet the standard of evidence to be incorporated into a present relationship with the character of practice between the parties involved.

Article 9(1) CISG also states that the parties are bound by any usage which they have agreed to. Pursuant to this rule, it is primarily up to the parties to contractually provide for application of sustainable standards emanating from commercial chambers, trade institutions or associations, which may compile, draft and regularly update norms that reflect the best business conduct (established as *modus operandi* of the operator of international trade). Such standards could fall within the notion of usages agreed by the parties under Article 9(1) CISG. A prominent example is the Kimberley Process Certification Scheme,[94] an international certification scheme for rough diamonds. Participants of this scheme must ensure that any diamond originating from the country does not finance a rebel group (so called blood diamonds), that every diamond export be accompanied by a Kimberley Process certificate and that no diamond is imported from or exported to a non-member of the scheme.[95] Thus, in the diamond trade, the Kimberley Process Certification Scheme nowadays certainly amounts to a trade usage that may be agreed upon by the parties.[96] If one party from a member country enters into a contract with a party from another member country, trade usage calls for the necessary certificates without them being explicitly referred to in the contract.

In addition, Article 9(2) CISG provides that the contract may also be integrated by usages of which the parties knew or ought to have known and which in international trade are widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade concerned. Against this

92 Schmidt-Kessel, 'Article 8', in Ingeborg Schwenzer (ed.), *Schlechtriem & Schwenzer: Commentary on the UN Convention on the International Sale of Goods* (London: Oxford University Press, 2016), 1028 at 172, para. 56.

93 OGH, Propane case, 6 February 1996, CISG-online 224, Case No. 10 Ob 518/95, pp. 162-163, available at https://cisg-online.org/search-for-cases?caseId=6198, accessed 28 January 2021.

94 The Kimberley Process, available at www.kimberleyprocess.com/en, accessed 28 January 2021.

95 The Kimberley Process, 'KPCS Core Document' 6, available at www.kimberleyprocess.com/node/1122, accessed 28 January 2021.

96 Ingeborg Schwenzer and Benjamin Leisinger, 'Ethical Values and International Sales Contracts', in Ross Cranston, Jan Ramberg, and Jacob Ziegler (eds.), *Commercial Law Challenges in the 21st Century: Jan Hellner in Memoriam* (Stockholm: Iustus Förlag Stockholm, 2007) at 265.

background, private initiatives can be found that require minimum sustainable standards such as the prohibition of child labour, setting a maximum number of working hours and prescribing humane treatment as, for example, the Electronic Industry Code of Conduct.[97] There are other standards of national scope, such as the British Retail Consortium (BRC) and its BRC Global Standards;[98] global standards by international consortia of companies such as Global G.A.P. ('Good Agricultural Practice'),[99] the Global Food Safety Initiative (GFSI)[100] or the Equator Principles (EP) Association.[101] International organizations such as the ISO issue standards across various industries and sectors and in a wide range of areas, including technology, food safety, agriculture, healthcare, environment.[102] In addition, standards elaborated by NGOs, such as the Fairtrade Foundation that promulgate what might be called *ethical* standards, concerning human rights, child labour and other labour standards, environmental protection, sustainability and corruption,[103] could be considered usages of trade under Article 9(2) CISG. While all these sustainable standards have a private nature, they can become mandatory, under Article 9(2) CISG, if applied by the majority of businesses in a particular sector and/or where compliance with such standards is required by large companies (usually, buyers) dominating the relevant sector or supply chain.[104]

97 Electronic Industry Citizenship Coalition® (EICC®) Code of conduct is currently in its 5.1 Version and is available online at www.eiccoalition.org/media/docs/EICCCodeofConduct5_1_English.pdf, accessed 28 January 2021. This Code of conduct contains standards to ensure that working conditions in the electronics industry supply chain are safe, that workers are treated with respect and dignity, and that business operations are environmentally responsible and conducted ethically. The Code encourages Participants to go beyond legal compliance, drawing upon internationally recognized standards, in order to advance social and environmental responsibility and business ethics. In alignment with the UN Guiding Principles on Business and Human Rights, the provisions in this Code are derived from key international human rights standards including the ILO Declaration on Fundamental Principles and Rights at Work and the UN Universal Declaration of Human Rights.

98 For instance, the BRCGS Ethical Trade and Responsible Sourcing, available at www.brcgs.com/our-standards/ethical-trade-and-responsible-sourcing/, accessed 30 January 2021.

99 The Global G.A.P. Membership is a set of standards for good agricultural practices (G.A.P.), visit www.globalgap.org/uk_en/who-we-are/about-us/, accessed 30 January 2021.

100 The GFSI-recognized certification is a mark of the highest standards in food safety, allowing food businesses that hold these certificates to access all corners of the global market, more information at https://mygfsi.com/how-to-implement/certification, accessed 31 January 2021.

101 114 financial institutions in 34 countries have joined The Equator Principles which is a risk management framework for determining, assessing and managing environmental and social risk in projects and is primarily intended to provide a minimum standard for due diligence and monitoring to support responsible risk decision-making, more on this at https://equator-principles.com./about/, accessed on 31 January 2021.

102 *See* for instance the ISO 14000 family of standards for companies and organizations of any type that require practical tools to manage their environmental responsibilities, available at www.iso.org/iso-14001-environmental-management.html, accessed 29 January 2021.

103 Fairtrade Standards are designed to support the sustainable development of small producer organizations and agricultural workers in developing countries, visit www.fairtrade.net/standard, accessed on 31 January 2021.

104 Garry Smith, *Interaction of Public and Private Standards in the Food Chain*, ECD Food, Agriculture and Fisheries Papers (Paris: OCDE Publishing, 2009) at 24.

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On the global international level, the UN Global Compact deserves to be specially highlighted as one of the most successful private initiatives.[105] The UN Global Compact covers the protection of basic human rights, labour, environment as well as anti-corruption measures.[106] Since its official launch in 2000 the initiative has grown to more than 16,466 participants today.[107] Whereas in the beginning mostly multinational companies participated in this initiative, recently more and more SMEs[108] from all over the world are joining.

Although the respective provisions in codes of conduct and the UN Global Compact Principles themselves are usually broad and unspecified, there can be no doubt that minimum sustainable standards are to be safeguarded. Thus, at least between parties who belong to the trade concerned or who are members of such initiatives, minimum sustainable standards become part of their contract as an international usage.[109]

It has been argued that it is one thing to generally participate and sponsor a UN initiative and another thing to contractually agree that a party is entitled to remedies if a sustainable standard is not met.[110] However, one has to consider that in many parts of the world, legal and compliance risk which encompasses risks related to unethical behaviour are now outweighing any other business risks.[111] This is clearly evidenced by the data and cases commented earlier (see Subsection B. II). Given this growing importance of minimum sustainable standards, a party that holds itself out adhering to these standards should be bound to comply with them.

Accordingly, in many cases minimum sustainable standards impliedly may become part of the contract via Article 9(1)(2) CISG adding to the description of the goods under Art. 35(1) CISG.

D Nonconformity of Tainted Goods Under Article 35 CISG

Specific problems may arise when determining conformity of the goods with sustainable standards in comparison with traditional physical features. In this

105 According to its website, the UN Global Compact Initiative is the world's largest corporate sustainability initiative. For more *see* www.unglobalcompact.org/what-is-gc, accessed 28 January 2021.

106 *See* 'The Ten Principles of the UN Global Compact', available at www.unglobalcompact.org/what-is-gc/mission/principles, accessed 28 January 2021.

107 *See* all UN Global Compact participants listed online at www.unglobalcompact.org/what-is-gc/participants, accessed 28 January 2021.

108 Small and medium-sized enterprises.

109 Petra Butler, 'The CISG – A Secret Weapon in the Fight for a Fairer World?', in Ingeborg Schwenzer (ed.), *35 Years CISG and Beyond* (The Hague: Eleven International Publishing, 2016) at 304; Schwenzer and Leisinger, 'Ethical Values and International Sales Contracts', at 265.

110 Ramberg, 'Emotional Non-Conformity in the International Sale of Goods, Particularly in Relation to CSR-Policies and Code of Conduct', at 80.

111 According to the UN Global Compact – Accenture Strategy CEO Study On Sustainability 2019 48% CEO's are implementing sustainability into their operations according to the UN Global Compact Progress Report, only 21% feel business is currently playing a critical role in contributing to the Global Goals and 71% of CEOs believe that – with increased commitment and action – business can play a critical role in contributing to the Global Goals, available at www.accenture.com/_acnmedia/PDF-109/Accenture-UNGC-CEO-Study-Infographic.pdf, accessed 29 January 2021.

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section, we revisit Article 35 CISG in the context of those sustainability requirements that go beyond their physical and external features of the goods.

I Article 35 CISG and Nonphysical Features

If the goods do not live up to a given harvest or production process applicable to them, there are no problems in finding nonconformity in the sense of Article 35 CISG. The CISG mandate that the seller must deliver conforming goods might well include an obligation to respect a given harvest or production method that complies with the UN Global Compact and similar sustainable rules and standards. Such is the effect of both Article 6 CISG, endorsing the rule that 'the contract is the law of the parties', and the default CISG provisions on conformity of the goods the review of which is given in Section D.IV.

II Article 35 CISG and Strict Liability

Article 35 CISG sets out when the goods are deemed to be conforming with the contract or the Convention. It defines the physical and nonphysical standards that the buyer expects the seller to reach regarding the goods' features and quality. However, Article 35 CISG does not answer the question of whether the seller would be strictly liable if the requirements for conformity are not met. Liability for breach, including nonconformity of the goods, is dealt with in Article 45 CISG, subject to Articles 79 and 80 CISG. As further explained in the following paragraphs, the seller may be released from its obligation to pay damages if it proves to be exempted by an impediment to perform under Article 79 CISG or by the buyer's contribution to the beach in accordance with Article 80 CISG (see Section E.I).

To illustrate the importance of a distinction between nonconformity under Article 35 CISG and resulting liability for such a nonconformity one must be aware of the following; if tainted goods are treated to be nonconforming under Article 35 CISG the buyer may return the goods and does not have to pay the purchase price even if there has been an impediment in the sense of Article 79 CISG. If one treats the tainted goods as conforming to the contract, there is no breach of contract; thus the buyer remains obliged to pay the price and might even have to incur further costs, for example, related to a necessary destruction of the goods because they violate public law requirements.

III Best Efforts Obligations and Conformity of the Goods

Contracts governed by the CISG may involve obligations of best efforts and obligations of results (see Section E.I.1). The possibility of agreeing on any of these types of obligations comes from Article 6 CISG. This provision recognizes the parties' freedom to design their contract. The extent to which an obligation involves any of these two types should be established by taking into account the rules of interpretation Art. 8 CISG as further explained in Section E.I.1.

With regard to Article 35 CISG, there is an expectation that the seller warrants the supply of goods in accordance with the physical and nonphysical standards provided in the Contract and the Convention. In other words, the seller has a default obligation of result; the result consisting in the delivery of conforming goods. This expectation usually translates in liability for the seller under Article 45

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CISG; it makes it responsible for delivering goods that lack conformity, irrespective of whether the breach is due to its own conduct or that of its suppliers (Art. 79 CISG). This is the meaning of strict liability in Article 79 CISG. However, liability may be limited by obligations of best efforts undertaken by the seller. In Section E.I, we address the implications of obligations of best efforts for the damage liability question.

A different question is whether some obligations of best efforts – that are part of the CISG contract – could affect the description or the features of the goods directly. For instance, let us suppose that the parties agree that the seller shall invest in a mechanism for production or outsourcing monitoring that may be objectively insufficient to guarantee untainted goods. Should this fact impact directly the description or characteristics of the goods, so that the buyer would be barred from alleging a breach of contract for the delivery of goods that followed such a mechanism? If this question is answered in the positive, no breach of contract takes place, that is, the goods would conform to the contract, and the buyer would not be able to resort to any of the remedies under the Convention. The issue of whether an obligation of best efforts may directly impact the description of the goods must be determined by interpretation of Article 8 CISG. Whether the *contra proferentem* principle should apply is in doubt.

This approach is further supported by the following hypothetical: if tainted goods are seized at the border of the buyer's country due to their features, it cannot be decisive whether the parties' contract contains an Incoterms DAP Clause – then there is non-delivery and the buyer has all the remedies available – but if it contains an Incoterms FOB Clause according to which delivery has already taken place – then the buyer would have to pay accordingly. Delivery terms do not allocate the risk between seller and buyer of the goods being tainted somewhere upstream in the supply chain. Under any delivery terms the buyer must have the same remedies as the seller.

IV Different Approaches Under Article 35 CISG

1 Article 35(1) CISG: Contractual Stipulations

If the contract requires the seller to deliver goods that comply with any sustainable standards, either reflected in a joint code of conduct or industry code, the seller is in breach of contract if the goods do not comply with them. The parties might also expressly incorporate into their contract any public law regulations focusing on sustainability, environmental protection or ethical considerations in the manufacturing process, irrespective of whether they have a mandatory application or not for the seller.[112] Examples of public and private sustainable standards were mentioned in Subsections B.II and C.III. The parties' intention to be bound by a code of conduct or any sustainable standard is to be determined by the rules of contract interpretation that require considering all relevant circumstances:

112 CISG-AC Opinion No. 19, Standards and Conformity of the Goods under Art. 35 CISG, Rapporteur: Professor Djakhongir Saidov, King's College London, United Kingdom. Adopted by the CISG Advisory Council following its 25th meeting, in Aalborg Denmark, on 25 November 2018, para. 3.1.

Article 8 CISG. A code of conduct attached to an offer or incorporated into the contract by reference to a website or the like is an example of how the goods are to conform to expressly agreed requirements (see Subsection C.I).

An implicit agreement that the goods ought to comply with a particular sustainable standard may be inferred, for example, from the practice established between the parties or by virtue of a trade usage to this effect (see Section C.III).[113] In addition, a contract, while lacking an express provision, may still contain formulations that reflect the intention for the goods to comply with a certain sustainable standard, such as where: the contract provides that the goods had to bear a 'Fair Trade' label or similar insignias designating a particular type of sustainable goods. References in the contract to international private principles such as the UN Global Compact or international public standards such as the *Codex Alimentarius* could also constitute an implicit agreement that the goods are produced in a particular manner.[114]

That being said, the parties' intention that the goods ought to comply with any sustainable standards should aim at being expressly and clearly stated. End buyers in GSCs have a duty to unequivocally express the applicable standard because they are often the ones setting the rules throughout the chain. As stated by the CISG Advisory Council:

> a powerful and sophisticated commercial party's failure to expressly incorporate a standard, the compliance with which it later demands, into the contract [may] points to the intention not to require the seller to comply with.[115]

2 *Article 35(2)(b) CISG: Particular Purpose*

Insofar as the contract does not – neither explicitly nor impliedly – contain any or only insufficient details in order to determine the application of sustainable standards to be satisfied – especially in producing the goods – recourse is to be had to the subsidiary determination of conformity set forth in Article 35(2) CISG.

First of all, the goods must be fit for its particular purpose according to Article 35(2)(b) CISG. In this context, one might first think of a buyer purchasing goods to sell them in specific markets such as one specializing in fair trade, which encompasses respect for human rights and the environment during the harvest or production process.[116] However, this particular purpose must be made known to

113 CISG-AC Opinion No. 19, para. 3.2.

114 *See* for instance Appellate Court's-Gravenhage, Netherlands, 23 April 2003, Case No. 99/474, http://cisgw3.law.pace.edu/cases/030423n1.html, accessed 29 January 2021, where the Court considered that the buyer (Belgian) could reasonably interpret the seller's (Dutch) statement as warranting that the bread improvers would be of a quality corresponding, at least, to international standards. However, the potassium bromates added to the goods by the seller had been banned in the Netherlands and in the EU, of which the seller was aware and it was also prohibited by the Codex Alimentarius, an international public standard, which both the Netherlands and Mozambique have agreed to use and, for this reason, the court regarded the Codex as the 'appropriate general standard'.

115 CISG-AC Opinion No. 19, para. 3.4.

116 Ingeborg Schwenzer, 'Article 35', in Ingeborg Schwenzer (ed.), *Schlechtriem & Schwenzer: Commentary on the UN Convention on the International Sale of Goods* (4th edn; London: Oxford University Press, 2016a) at para. 21; Ramberg, 'Emotional Non-Conformity in the International Sale of Goods, Particularly in Relation to CSR Policies and Code of Conduct', at 86.

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the seller at the time of the conclusion of the contract, be it expressly or impliedly.[117] This requirement may be fulfilled in cases where the buyer's company, *i.e.* the commercial name or brand, contains information in this regard or where its reputation is widely known in the trade sector concerned.[118] A particular purpose may also arise from the sheer fact that the buyer intends to use the goods in a certain country and it is reasonable to assume that a supplier in a GSC understands the culture and the consumers' expectations of that country, which leads us to the second prerequisite laid down in Article 35(2)(b) CISG.

Certainly, the buyer must reasonably rely on the seller's skill and judgment to deliver goods in accordance with the particular purpose.[119] The buyer should conduct audits and make sure that the supplier understands the meaning of 'fair trade' or the like. Although it might not be expected that a buyer monitors its supplier's production process all the time,[120] a buyer that suspects a supplier's lack or narrow understanding of its market or that doubts the ethics of any supplier's production practices, should explain and stress the need that the goods comply with their purpose.

If the buyer communicates a particular purpose in a defective manner (in the eyes of a reasonable person in the supplier's shoes under Article 8(2) CISG), it may be unable to rely on the supplier's skill and judgment under Article 35 (2)(b) CISG. In addition, the supplier is not liable for the lack of conformity, if the buyer had objective knowledge of the fact that the information or instructions it shared with the supplier were insufficient or erroneous to achieve the particular purpose under Article 35(3) CISG (see Subsection D.IV.4). Even if the buyer did not know or could not have been aware of the lack of conformity, the buyer's defective instructions or information would prevent it from relying on the supplier's failure to perform, to the extent that such failure was caused by the buyer's act or omission under Article 80 CISG.

3 *Article 35(2)(a) CISG: Fitness for Ordinary Purpose*

If a particular purpose cannot be established, the goods must still be fit for the ordinary purpose such goods are used for (Art. 35(2)(a) CISG). Ordinary purpose primarily requires that the goods must be fit for commercial purposes. In the GSC's context, it must be possible to resell the goods or incorporate them into a manufacture process for goods that can be resold.[121] The merchantability or use of

117 Paulo Nalin, 'International Fair Trade (Fair Trade in International Contracts and Ethical Standard)', in Ingeborg Schwenzer (ed.), *35 Years CISG and Beyond* (The Hague: Eleven International Publishing, 2016) at 334.

118 *Ibid*; Schwenzer and Leisinger, 'Ethical Values and International Sales Contracts', at 267; Simon Wilson, 'Ethical Standards in International Sales Contracts: Can the CISG Be Used to Prevent Child Labour?', (Victoria University of Wellington, 2015) at 36, available at http://researcharchive.vuw.ac.nz/xmlui/bitstream/handle/10063/4622/thesis.pdf?sequence=2, accessed 29 January 2021.

119 Schwenzer and Leisinger, 'Ethical Values and International Sales Contracts', at 267.

120 Wilson, 'Ethical Standards in International Sales Contracts: Can the CISG Be Used to Prevent Child Labour?', at 38.

121 High Court of New Zealand, 31 March 2003, CISG-Online 833, available at https://cisg-online.org/search-for-cases?caseId=6759, accessed 29 January 2021; Schwenzer, 'Article 35', in Ingeborg Schwenzer (ed.), *Schlechtriem & Schwenzer: Commentary on the UN Convention on the International Sale of Goods* (London: Oxford University Press, 2016d), at 17.

the goods, however, is not always related to the traditional tangible aspects of the quantity, quality, description or packaging, but also relates to compliance with standards affecting the use of the goods.[122] The International Organization for Standardization (ISO) defines a standard as 'a document that provides requirements, specifications, guidelines or characteristics that can be used consistently to ensure that materials, products, processes and services are fit for their purpose'.[123] Accordingly, standards are often concerned with conformity of the goods and include technical, ethical, environmental, health and safety considerations and/or the process of designing, manufacturing or producing the goods.[124]

Standards defining the ordinary use of similar goods under Article 35(2)(a) CISG might be public or private in nature. As we mentioned, codes of conduct are the reflection of private standards that may affect the conformity of the goods (see Subsection B.II). If, for example, the supplier has expressed a public commitment to observing a code of conduct for sustainable trade or advertise itself as a member of the UN Global Compact or similar associations and present such associations' logo in its pre- and post-contractual communications with the buyer, that type of statement will be relevant in determining what constitutes the ordinary use of the goods, particularly if other suppliers in the same sector have also declared their adherence to similar sustainable standards.[125] Similar examples of pre-contractual statements or conduct pointing in favour of complying with sustainable standards will also become relevant in determining conformity under Article 35(2)(a) CISG, which may include the seller presenting itself as a supplier of sustainable products, which complies with applicable standards, or gives assurances that its products will be acceptable to the fair trade community.[126]

The buyer's reliance that the goods would comply with minimum ethical standards could also define what constitutes the ordinary use of the goods under Article 35(2)(a) CISG. For instance, even if their previous contracts for the same goods did not expressly require compliance with sustainable standards, but the seller observed them in performing those contracts, that fact can still be relevant in determining ordinary use if the buyer relied on them by, for example, informing its clients that the goods will comply with such standards.[127] In addition, where the parties belong to the same industry, trade, organization or association that has adopted or follows sustainable standards – reflected in industry codes of conduct or guidelines – that fact could indicate a common commercial context within which

122 CISG-AC Opinion No. 19, para. 1.3.

123 *See* for instance the ISO 14000 family of standards for companies and organizations of any type that require practical tools to manage their environmental responsibilities, available at www.iso.org/iso-14001-environmental-management.html, accessed 29 January 2021.

124 CISG-AC Opinion No. 19, para. 1.3.

125 CISG-AC Opinion No. 19, para. 4.6.

126 *See ARL Lighting (Manitoba) Ltd v. Dixon ARL Lighting (Manitoba) Ltd*, Case No. [1998] BCJ No 2442, a Canadian case, for the seller's statement to the buyer that '[o]ur quality program will assure you a product which will be acceptable to the industry'. Appellate Court's-Gravenhage, Netherlands, 23 April 2003 (n 31) cited in CISG-AC Opinion No. 19, para. 4.3.

127 CISG-AC Opinion No. 19, para. 4.16.

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the parties operate and compliance with that can be part of the 'ordinary use' of the goods under Article 35(2)(a) CISG.[128]

The mandatory nature of any sustainable standards can also be relevant in determining the goods' ordinary use under Article 35(2)(a) CISG.[129] Supply chain legislation in the country where the goods are to be sold or used might impact their merchantability and, hence, fitness for ordinary purpose. In this context, the first question that arises is whether the seller must comply with such local standards under Article 35(2)(a) CISG, when the buyer did not make known such standard as a particular purpose under Article 35(2)(b) CISG. According to the CISG Advisory Opinion No. 19, the seller may have an obligation to comply with any binding standard at the place of use or resale of the goods if, at the time of the conclusion of the contract, it knew or could not have been unaware of that place.[130] There is a legal expectation that the seller should investigate the existence of any local standards affecting the use of the goods in such a place. It is also reasonable to expect from the seller to understand that compliance with local standards is necessary or required.[131] This allocation of risk is consistent with the underlying principles upon which the CISG is based; expressed in Article 42(1)(a) CISG where the seller has an obligation to deliver clean goods if the right or claim is based on intellectual property rights 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. Where the seller neither knew nor could not have been unaware of the place of use of the goods, it might still need to comply with any public law standards applicable at the buyer's place of business.[132] Again, there is a legal expectation that the goods will be used at the buyer's place of business and, therefore, that the seller investigates and complies with the local standards of such a place. Such allocation of obligations responds to a subsidiary principle underlying the Convention: if Article 42(1)(a) is not applicable, under Article 42(1)(b) the seller has an obligation to deliver goods free from third parties' intellectual property rights or claims under the law of the State where the buyer has his place of business'.

In the case of GSCs and sustainable standards, however, the above default rules must be applied with caution. Sellers are usually part of a network of suppliers for different components where a single place of use or a single buyer's place of business is not discernible. In addition, some suppliers of raw materials and components may lack the language skills and the resources to access information about foreign public sustainability standards. For that reason, additional factors should be considered in assessing whether a supplier has an obligation to comply with a local standard. For instance, whether the supplier knew or could not have been unaware of the relevant standard at the place of intended use. It might be unreasonable and unfair to expect the seller to comply with local standards if the standards are complex to understand, difficult to implement or too different

128 *Ibid.*
129 CISG-AC Opinion No. 19, para. 4.19.
130 CISG-AC Opinion No. 19, para. 5.1.
131 *Ibid.*
132 CISG-AC Opinion No. 19, para. 5.2.

depending on the importing country's region. On the other hand, if the seller's prior dealings at the place of intended use or at the relevant buyer's place of business, either because it has a branch or subsidiary in such places or has already exported or promoted its goods there, it is assumed to have actual or implied knowledge of the existence of local standards and therefore, an obligation to comply with them.[133] The same applies if the standard at the place of use or the relevant buyer's place of business also applies or is the same as the seller's place of business. As the same standard coincides in all relevant places (buyer's, intended use and seller's) it becomes the relevant context with reference to the 'ordinary use' under Article 35(2)(a) CISG.

The relevant standards are those existing at the time of the conclusion of the contract.[134] As a matter of certainty and fairness, a seller should only be obliged to follow the standards based on the sustainable values at the time of contracting. Whether the goods actually conform to the standard so established will be decided according to Article 36 CISG, that is, at the time of passing of risk.

4 Article 35(3) CISG

It cannot be overlooked that, in many instances and despite affirmations to the contrary, buyers will be complicit in corrupt practices and in violation of basic human rights. They may know about such crimes and violations, and may turn a blind eye to them, or upon auditing and finding out about the violations they might not call the attention of their suppliers (see Subsection B.I). Most importantly, the pricing, the region where the supplier is based, or the origin of the raw materials may be indicative of such violations.[135] In such a case, according to Article 35(3) CISG the supplier is not liable for the nonconformity, if at the time of the conclusion of the contract, the buyer knew or could not have been unaware of such lack of conformity.

E Remedies

As stated earlier, failure to comply with any binding code of conduct or any sustainable rules of private or public nature, will constitute a breach of contract by the seller, because the goods (or services, via Art. 3(2) CISG) would lack conformity under Article 35 CISG. This will trigger the right of the buyer to access the remedies offered to it by the Convention (Art. 45 CISG). However, the seller may be able to limit or reduce its liability for damages due to conduct attributed to its suppliers or any third persons involved upstream in the GSC. A way to do so is by including a limitation of liability clause in the contract that would exempt the seller from a supplier's failure to comply with any sustainable standards (see Section E.II.5). Such a provision, nevertheless, would be hardly accepted by any responsible buyer.

133 CISG-AC Opinion No. 19, para. 5.5.

134 CISG-AC Opinion No. 19, para. 2.1.

135 Ramberg, 'Emotional Non-Conformity in the International Sale of Goods, Particularly in Relation to CSR Policies and Code of Conduct', at 84; Schwenzer and Leisinger, 'Ethical Values and International Sales Contracts', at 265.

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Global buyers that are subject to reporting or auditing supply practices under their local public laws or corporate codes of conduct would be unlikely to agree to such a candid exception. That being said, a seller who may recognize itself to be physically and financially incapable of monitoring every extraction or manufacturing aspect of its upstream supply chain could possibly bargain for obligations of best efforts in that respect. In this section, we address the effect that best-efforts obligations have on the principle of strict liability reflected in Article 79 CISG. We also review particular questions that exist in connection with sustainable standards and remedies for breach under the Convention.

I Strict Liability Versus Best Efforts

Before turning to the effect that best-effort obligations have in the remedies for breach of contract, we provide some thoughts on the question of how to distinguish between obligations of result clauses – leading to strict liability – and best-efforts clauses.

1 Distinction Between Obligation of Result Clauses (Strict Liability) and Best-Efforts Clauses

As noted earlier, CISG contracts may involve obligations of best efforts and obligations of results.[136] Article 5.1.4 PICC reflects this distinction. It reads that

> [t]o the extent that an obligation of a party involves a duty to achieve a specific result, that party is bound to achieve that result [and] to the extent that an obligation of a party involves a duty of best efforts in the performance of an activity, that party is bound to make such efforts as would be made by a reasonable person of the same kind in the same circumstances.[137]

The extent to which the obligation of a party is any of the two kinds should be established by taking into account the rules of interpretation in Article 8 CISG, which require consideration of all the relevant circumstances of the case.[138] This is also in line with Article 5.1.5 PICC, which requires giving due consideration to, inter alia, the way the obligation is drafted in the contract, the price and other terms, the degree of risk normally involved in achieving the expected result and the ability of the other party to influence the performance in order to establish whether an obligation is of best efforts or results.[139]

136 Djakhongir Saidov, *The Law of Damages in International Sales, the CISG and Other International Instruments* (Portland: Hart Publishing, 2008a) at 23; Christoph Brunner, *Force Majeure and Hardship under General Contract Principles: Exemption for Non-Performance in International Arbitration* (International Arbitration Law Library, 18; The Hague: Kluwer Law International, 2008) at 73.

137 Art. 5.1.4 PICC.

138 Cesare Massimo Bianca and Joachim Michael Bonell, 'Article 35', in Cesare Massimo Bianca and Joachim Michael Bonell (eds.), *Commentary on the International Sales Law: The 1980 Vienna Sales Convention* (Milan: Giuffré, 1987) at 272.

139 Brunner, *Force Majeure and Hardship under General Contract Principles: Exemption for Non-Performance in International Arbitration*, at 61, 70, 71 ; Michael Joachim Bonell, *The Unidroit Principles in Practice* (2nd edn., Ardsley, NY: Transnational Publishers, 2006) at 258, 59; Marcel Fontaine, 'Content and Performance', *American Journal of Comparative Law*, 40/3 (1992) at 649.

Against that background, if an obligation involves performing an activity, expressed by words such as 'will do all that is possible', rather than delivering an item, a presumption exists that the obligation is conduct-oriented, that is, one of best efforts.[140] Where a contract clause refers to vague standards in determining the conditions of fulfilment of an obligation rather than directly providing specific conditions for success, such a type of clause is also one of best efforts.[141] In the same line of reasoning, an ICC tribunal has decided that obligations that consist of the activity of acting as coordinator or implementer of guidelines and policies are of best efforts.[142] Similarly, obligations that do not have an unusually high price or another non-monetary reciprocal obligation would indicate a duty of best efforts.[143] An obligation that normally involves high risk may also indicate that the parties did not agree on a duty to achieve a specific result.[144]

The following table may serve as a laboratory example as to how obligations of result might be broadly expressed in a code of conduct [Option A] and how obligations of best efforts might also be roughly expressed in a different code of conduct [Option B]. But first, let us assume that a clause in a CISG contract pertaining to the description of the goods states:

> Description of the goods. The seller shall deliver chocolate cakes which ingredients have to be sourced in a sustainable manner in accordance with the stipulations of the applicable code of conduct (either Option A or Option B in the table).

Topic	**Ob.**	**Option A** **Code of conduct**	**Option B** **Code of conduct**
		RESULTS	***BEST EFFORTS***
Ethics	1	To fully refrain from corruption	To establish mechanisms to detect corruption
	2	To comply with anti-bribery laws	To conduct business with integrity and monitor compliance of suppliers with applicable laws and ethical standards
	3	To disclose information regarding potential conflict of interest	To be transparent in its hiring of suppliers

140 Brunner, *Force Majeure and Hardship under General Contract Principles: Exemption for Non-Performance in International Arbitration*, at 72.

141 Mert Elcin, *Lex Mercatoria in International Arbitration Theory and Practice* (Florence: European University Institute, 2012) at 525.

142 ICC Case No. 9797, *Andersen Consulting Business Unit Member Firms v. Arthur Andersen Business Unit Member Firms and Andersen Worldwide Societe Cooperative*, 28 July 2000, available at http://www.unilex.info/case.cfm?id=668, accessed 29 January 2021.

143 Bonell, *The Unidroit Principles in Practice*, at 259.

144 Vogenauer, 'Article 5.1.4', at 631; Bonell, *The Unidroit Principles in Practice*, at 259; Elcin, *Lex Mercatoria in International Arbitration Theory and Practice*, at 540.

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(continued)

Topic	Ob.	Option A Code of conduct	Option B Code of conduct
		RESULTS	***BEST EFFORTS***
Environment	1	To refrain from pollution practices and environmental risks	To adopt practices to benefit and improve sustainable performance, making a difference in the environment
	2	To ensure suppliers comply with the same requirements	To communicate to suppliers the principles of the supplier code of conduct
	3	Guarantee the conduct of business in an environmentally sustainable way	To conduct business minimizing environmental impact
Procurement	1	To audit suppliers according to international standards and by reputable firms	Reservation of the right to audit
	2	If not in compliance, all necessary actions must be taken	If not within expectations, remedial actions are to be taken
	3	To ensure and demonstrate compliance, record of relevant documents must be kept and provided upon request	Suppliers are expected to maintain and be able to provide documentation that demonstrates compliance
Suppliers	1	To ensure suppliers' adherence to standards comparable to those in code of conduct for suppliers	To monitor that suppliers comply with principles of the supplier code of conduct

As we referred to it, the description clause clearly sets the standard of conformity by requiring delivery of goods the ingredients of which have been harvested in a sustainable manner. However, depending on the applicable code of conduct, the supplier may see its liability limited by what is possible under the circumstances. Certainly, clauses in Option B code of conduct calling for discretional audits, the establishment of mechanisms or monitoring of suppliers in a broad sense, without specific provision to guarantee an outcome and so on, may be interpreted as obligations of best efforts. These types of obligations may modify the assumption that the seller is strictly liable for delivering chocolate cakes that have sustainably sourced ingredients unless there is an impediment; a best-effort obligation may modify the understanding of what is unexpected, unavoidable and beyond control under Article 79 CISG (Sections E.I.3 and E.I.2).

2 Performance of Best-Effort Obligations

Obligations of best efforts are complied with in a different manner than obligations of results. Fulfilling a duty of best efforts requires performing an activity with due

diligence.[145] However, the assessment of non-performance of an obligation of best efforts also requires a soft judgment, based on a comparison with the efforts that a reasonable person of the same kind would have made in similar circumstances.[146] Whether those efforts are reasonable, would require a court or arbitral tribunal to give the agreed obligation a post-dispute context by taking into account the knowledge of particular circumstances of time and place.[147]

In relation to this, an ICSID Tribunal, applying Article 5.1.4 UNIDROIT Principles, upheld that it was not enough that the claimant had proved that the respondent did not obtain the radio frequency licence that was agreed on, because the required test for a duty of best efforts would consist of evidence showing that the respondent had failed to make such efforts as should have been made by a reasonable party in the same circumstances.[148] In the context of sustainable goods, following ISO standards in services may be an indicator of compliance with best-efforts obligations. Also obtaining certificates from reputable third parties or governments would attest to compliance with, for instance, organic production process under public norms, such as Article 6 Council Regulation EEC No. 2092/91.[149] In general, delivery of documentation reflecting the required monitoring and reporting regarding the goods manufacturing process might serve as evidence that the seller has deployed its best efforts to achieve a given sustainable standard, irrespective of whether the goods were tainted by conduct of the suppliers. To conclude, the standard of endeavour prescribed by a best efforts clause is characteristically measured by what is reasonable in the circumstances having regard to the particular contract in its business setting and to what could reasonably be expected of the party subject to the obligation.[150]

3 Best-Efforts Obligations and Remedies

The delivery of nonconforming goods entitles the buyer to claim all remedies set forth in the contract and the CISG (see Section E.II). However, best-efforts clauses in CISG contracts may result in exoneration of liability for the seller, affecting the buyer's right to damages compensation under Articles 74-77 CISG.

145 Brunner, *Force Majeure and Hardship under General Contract Principles: Exemption for Non-Performance in International Arbitration*, at 70, 71.

146 *Joseph Charles Lemire v. Ukraine, ICSID Tribunal*, Case No. ARB/06/18; IIC 424 (2010) 14 January 2010, available at www.unilex.info/case.cfm?id=1533, accessed 2021; Bonell, *The Unidroit Principles in Practice*, at 256; Fontaine, 'Content and Performance', at 650.

147 Elcin, *Lex Mercatoria in International Arbitration Theory and Practice*, at 94.

148 *Joseph Charles Lemire v. Ukraine*, ICSID Tribunal, Case No. ARB/06/18; IIC 424 (2010) 14 January 2010.

149 As explained in the Organic Barley Case, what is important in determining whether the goods conform to an organic production process under public norms, such as Art. 6 Council Regulation EEC No. 2092/91, is not a proven quality but providing the certificates attesting to the observation of the inspection scheme at transport and processing, see OLG Munich, Germany, Organic barley case, 13 November 2002.

150 Federal Court of Australia, *Australian MedicCare Company Ltd v. Hamilton Pharmaceutical Pty Ltd*, 30 October 2009 Case No. [2009] FCA 1220, available at www.unilex.info/case.cfm?id=1519, accessed 29 January 2021.

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a) Strict Liability for Supply Chain Under Article 79(1) CISG

In accordance with Article 79 CISG, a party, as a default rule, is liable for any breach of contract.

> A party is not liable for a failure to perform any of his obligations [reads the first sentence of Article 79(1) CISG] [only] if he proves that the failure was due to an impediment [...].[151]

In other words, the default rule reflected in Article 79(1) CISG is that of strict liability. The seller is strictly liable for whatever breach occurs upstream in its supply chain. It is not relevant whether the seller could recognize the mistakes of its suppliers because they are considered within its control.[152] In other words, Article 79(1) CISG assigns to the seller the risk that its own suppliers fail to comply with its obligations, placing the seller in breach of its own obligations towards the buyer. Therefore, the seller is strictly liable for the third persons it uses to perform the contract and must respond to the buyer.[153] Article 79(2) CISG that governs situations where the seller has engaged a third person to perform the contract is not applicable to suppliers.[154]

b) Modification of Article 79 by Best-Efforts Clause

Strict liability under the CISG requires compliance with an objective standard of conduct so the debtor may be liable even if he was not guilty of any actual or subjective fault.[155] Only objective elements could exonerate the seller from its conduct or its suppliers' incapacity to perform. Those objective elements are stated in Article 79(1) CISG.

However, as described earlier, a duty of best efforts requires performing an activity – like acting as coordinator, supervisor or implementer of guidelines and policies – with due diligence.[156] It also calls for measuring performance by what is reasonable in the circumstances having regard to the clause in its business setting

151 And Art. 79(1) CISG qualifies impediment as one "beyond [a party's] control and that he could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome it or its consequences".

152 Schwenzer, 'Article 35', at 1132; Gillette and Walt, *The UN Convention on Contracts for the International Sale of Goods* at 318; Sonja Kruisinga, *(Non-)Conformity in the 1980 UN Convention on Contracts for the International Sale of Goods: Uniform Concept?* (Antwerp: Intersentia, 2004) at 135.

153 Germany Supreme Court, Vine wax case, 24 March 1999, abstract available at cisgw3.law.pace.edu/cases/990324g1.html, accessed 29 January 2021; Germany Supreme Court, 9 January 2002 (*Powdered milk case*) abstract, available at cisgw3.law.pace.edu/cases/020109g1.html, accessed 29 January 2021.

154 Ingeborg Schwenzer, 'Article 79', in Ingeborg Schwenzer (ed.), *Schlechtriem & Schwenzer: Commentary on the UN Convention on the International Sale of Goods* (4th edn; London: Oxford University Press, 2016c) at 1145, para. 38.

155 Saidov, *The Law of Damages in International Sales, the CISG and Other International Instruments*, at 22.

156 Brunner, *Force Majeure and Hardship under General Contract Principles: Exemption for Non-Performance in International Arbitration*, at 70, 71.

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and to what could reasonably be expected of the party subject to the obligation.[157] Such conduct-oriented characteristics of best-efforts obligations (see Section E.I.1), coupled with more flexible standards in determining the conditions of fulfilment (see Section E.I.2), may redefine the strict liability principle in Article 79 CISG. Such redefinition is possible via Article 6 CISG, which endorses the freedom of the parties to modify or deviate from the Convention's default rules and its principles.

c) Possible Impediment Under Article 79 CISG

As stated earlier, Article 79(1) CISG provides that a party is exempted from liability for damages only if the failure to perform is due to, first, an impediment beyond its control, second, that such party could not reasonably be expected to have taken this impediment into account at the time of the conclusion of the contract and, third, to have avoided or overcome this impediment or its consequences.[158]

Objective circumstances beyond control usually encompass nature's events or State and human interventions.[159] These 'external' circumstances are different from personal or corporate ones which impair a party's ability to perform. The seller is expected to carry the risk for circumstances that have their origin in its own person or corporation, including the choice of suppliers.[160] Additionally, if the events could have been foreseen, for instance, a supplier committing corrupt practices or causing environmental harm, then it must be assumed that the seller has taken the risk of breach, unless such risk is contractually modified in its benefit. Finally, whether a party can be expected to overcome the impediment has to be decided by considering the threshold reflected in Article 79 CISG. The CISG AC Opinion No. 7 considers that the 'limit of sacrifice' should be exceeded to reach the threshold beyond which the obligor cannot be expected to perform under Article 79 CISG.[161]

However, whenever the contract requires delivery of sustainable goods in accordance with best-efforts provisions, and the seller applies its best efforts but still fails to comply with the delivery of such goods, it may be argued that it has been prevented from performing the contract due to an impediment as defined by the contract. In that case, the best-effort provision, possibly included in a code of conduct or inferred from guidelines applicable to the contract, may redefine what is considered to be under the seller's control. In other words, such a clause might make unethical conduct by its suppliers – that go undetected after a best-effort

157 Federal Court of Australia, *Australian MedicCare Company Ltd v. Hamilton Pharmaceutical Pty Ltd*, 30 October 2009, Case No. [2009] FCA 1220, available at www.unilex.info/case.cfm?id=1519, accessed 29 January 2021.

158 Regarding force majeure, Art. 7.1.7(1) UNIDROIT PICC; Art. 8:808(1) PECL; Art. III – 3:104(1) DCFR are practically identical to Art. 79(1) CISG; Art. 89 PLACL. The same holds true for the ICC Force Majeure Clause. However, the latter gives a list of events that may amount to an impediment.

159 Schwenzer, 'Article 79', in Ingeborg Schwenzer (ed.), *Schlechtriem & Schwenzer: Commentary on the UN Convention on the International Sale of Goods* (London: Oxford University Press, 2016d), at 1136, 1137, paras. 17, 18.

160 *Ibid.*, at 1138, para. 19.

161 CISG-AC Opinion No. 7, Exemption of Liability for Damages under Art. 79 of the CISG, Rapporteur: Professor Alejandro M. Garro, Columbia University School of Law, New York, N.Y., USA. Adopted by the CISG-AC at its 11th meeting in Wuhan, People's Republic of China, on 12 October 2007, paras. 35, 37 & 38.

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implementation of the applicable monitoring mechanism, for instance – to fall outside the seller's sphere of risk. A best-effort provision could also mean that it was unreasonable to foresee – after applying its best efforts to comply with, for instance, certain audit practices – that the goods could still be tainted by unethical supplier's practices. Finally, a best-efforts clause provision may also modify the impediment threshold. The seller may no longer be required to exceed the 'ultimate limit of sacrifice'[162] to be exonerated; evidence of application of due diligence or efforts that a reasonable person of the same kind would have made in similar circumstances might suffice.

Even if the seller is exempted from liability, it is important to note that pursuant to Article 79(5) CISG the buyer can exercise the remedies available under the CISG, except for damages.[163] In this regard, the seller's inability to deliver sustainable goods would not preclude a buyer from its right to avoid the contract, request substitution of the goods, price reduction, and so on (see Section E.II).

In light of the legal consequences that best-efforts obligations might have on the principle of strict liability in the CISG (see Section E.I.2), global buyers should be careful in the drafting of their codes of conduct. Similarly, attention should be given to the wording of other codes of conduct from suppliers – likely to be incorporated into the CISG contract (see Section C) – that might not guarantee the result of delivering sustainable goals in GCS.

II Remedies Available for the Buyer

1 General

In the case of the seller delivering goods that do not comply with the sustainable standards applicable under the contract or the Convention, the buyer may resort to the usual remedies, namely specific performance, avoidance of the contract, damages and price reduction. All these remedies raise particular questions in connection with nonphysical features of the goods.

2 Examination and Notice, Articles 38 and 39 CISG

In the first place, the buyer has a duty to examine the goods under Article 38 and if the goods are nonconforming then it must notify the seller in accordance with Article 39 CISG. This will be relatively easy in case of missing or nonconforming documents that are necessary to label the goods in a certain way, to obtain administrative approval of the goods, or just to trade them in a specific market.[164] However, where the nonconformity results from the unsustainable way in which the goods are manufactured or processed, any eventual examination of the goods

162 OLB Hamburg, Iron molybdenum case, 28 February 1997.

163 Kruisinga, *(Non-)Conformity in the 1980 UN Convention on Contracts for the International Sale of Goods: Uniform Concept?* at 125; Schwenzer, Fountoulakis, and Dimsey, *International Sales Law, a Guide to the CISG*, at 584.

164 OLG Munich, 13 November 2002, CISG-Online 786, available at https://cisg-online.org/search-for-cases?caseId=6714, accessed 29 January 2021; Schwenzer and Leisinger, 'Ethical Values and International Sales Contracts', at 268.

themselves may not reveal this fact.[165] Thus, notification can only be required from the buyer after it has actually learned about the violation of any sustainable standards that may apply to the transaction.[166] Such knowledge may, however, be inferred from missing certificates relating to the manufacturing process or the origin of the goods.

3 Delivery of Substitute Goods Under Article 46(2) CISG

As we are dealing here with nonconformity of the goods, specific performance may be asked for in the form of delivery of substitute goods (Art. 46(2) CISG) or in the form of repair (Art. 46(3) CISG). If the necessary documents attesting compliance with sustainable standards, such as documents of origin, are missing, they may be supplied by the seller, a third person, or the buyer, if it is able to do so, may get them itself. It may then ask for the costs incurred by way of damages. However, if the goods have been produced by violating sustainable standards, repair is not conceivable.[167] Rather, the buyer may rely on delivery of substitute goods if the violation of such standards amounts to a fundamental breach. Thus, the same threshold is required as for avoidance.

4 Avoidance Under Articles 49(1)(a) and 25 CISG

Avoidance of the contract is possible only in cases where the nonconformity amounts to a fundamental breach of contract (Art. 49(1)(a) CISG). This presupposes a substantial deprivation of what the buyer is entitled to expect under the contract (Art. 25 CISG).[168] Such deprivation can be ascertained, in the first place, from the terms of the contract itself.[169] If the parties stipulate that certain sustainable standards have to be adhered to, the parties have, thereby, sufficiently made clear that compliance is of special interest to the buyer and, therefore, such deprivation can be assumed in the event of a breach.[170]

If it is clear for both parties that the buyer cannot make any use of the goods as intended a fundamental breach can also be easily ascertained.[171]

In other cases, it is decisive whether the buyer can reasonably be expected to use or sell the goods in another market where their general marketability is not

165 *Ibid.*; Ramberg, 'Emotional Non-Conformity in the International Sale of Goods, Particularly in Relation to CSR-Policies and Code of Conduct', at 86. Agrees 'that it is practically difficult for the buyer to make an examination of the productions methods'. However, she argues that if the buyer uses expensive and extensive auditing procedures to ascertain that suppliers and sub-suppliers adhere to the buyer's Codes of conduct, the buyer's duty to examine the goods may expand to include examination of production methods.

166 Schwenzer and Leisinger, 'Ethical Values and International Sales Contracts', at 268.

167 Ramberg, 'Emotional Non-Conformity in the International Sale of Goods, Particularly in Relation to CSR Policies and Code of Conduct', at 87, 88.

168 Schroeter, 'Article 25', in Ingeborg Schwenzer (ed.), *Schlechtriem & Schwenzer: Commentary on the UN Convention on the International Sale of Goods* (London: Oxford University Press, 2016d), 1028 at 21.

169 *Ibid.*, at 9, 21.

170 *Ibid.*, at 28.

171 CISG-AC Opinion No 5, The buyer's right to avoid the contract in case of nonconforming goods or documents 7 May 2005, Badenweiler (Germany). Rapporteur: Professor Dr. Ingeborg Schwenzer, LLM, Professor of Private Law, University of Basel, para. 4.2.

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endangered.[172] However, it has to be taken into account that at least in certain parts of the world there are fewer and fewer markets where goods that have been produced in violation of minimum ethical standards can be marketed at all. The chocolate case is a prominent example of this. In the case of specialized buyers, such as those specializing in fair trade, turning to another market cannot be expected. Likewise, these buyers do not have to sell the goods at a discount to their usual customers as this might be harmful to their reputation.[173]

5 Damages

Unless the seller is exempted from liability to pay damages under the Article 79 CISG[174] (including any modification of the notion of impediment thereof, see Subsection E.I.3), the easiest way for the buyer to obtain financial redress in case of nonconformity due to nonphysical features of the goods is where the parties have agreed upon a liquidated damages clause or a contractual penalty, whereby the latter generally functions as both a compensatory remedy as well as a deterrent.[175] Such a clause releases the buyer from its – possibly difficult – obligation of proving whether or not it suffered loss at all and, if so, in what amount.[176] However, parties may not think of such a clause, or the buyer may not be in a position to force such a clause on the seller, or a penalty clause functioning as a deterrent may not be valid in the legal system governing the contract's validity.[177] Therefore, it is important to examine what can be considered a recoverable loss within the meaning of the CISG.

If in a case of supply chain legislation in the buyer's country or in the country of use, the buyer is fined because the goods violate applicable sustainable standards, the buyer may recoup these costs as well as any ensuing legal costs from the seller.

Furthermore, if the goods have not been sold before the nonconformity is discovered, lost profits will likely occur.[178] This may be because the goods are not resalable at all – such as goods without the necessary certificates-, or because the buyer decides not to resell them and cannot be expected to resell them under the given circumstances.[179] The same holds true where, after discovering the

172 CISG-AC Opinion No. 5, para. 4.3.

173 OLG Koblenz, 21 November 2007, CISG-Online 1733, available at https://cisg-online.org/search-for-cases?caseId=7651, accessed 29 January 2021; Schwenzer and Leisinger, 'Ethical Values and International Sales Contracts', at 268; Nalin, 'International Fair Trade (Fair Trade in International Contracts and Ethical Standard)', at 336.

174 Flechtner, 'Uniformity and Politics: Interpreting and Filling Gaps in the CISG', in *A chapter in* Festschrift Für Ulrich Magnus, eds. Peter Mankowski and Wolfgang Wurmnest, Sellier European Law Publishers 2014, at 201.

175 Schwenzer, 'Article 74', at 60, 61.

176 Schwenzer and Leisinger, 'Ethical Values and International Sales Contracts', at 269.

177 That is the case in the United States under the Sec. 2-718(1) UCC, as well as in Canada under *Elsley v. JG Collins Insurance Agencies Ltd.* Can Sup Ct, 7 March 1978, 2SCR 916, cited in Pascal Hachem, *Agreed Sums Payable Upon Breach of Obligations*, ed. Ingeborg Schwenzer (International Commercial Law, 7; The Hague: Eleven International Publishing, 2011) at 81, 82.

178 Schwenzer and Leisinger, 'Ethical Values and International Sales Contracts', at 269.

179 Ramberg, 'Emotional Non-Conformity in the International Sale of Goods, Particularly in Relation to CSR-Policies and Code of Conduct', at 92; Wilson, 'Ethical Standards in International Sales Contracts: Can the CISG Be Used to Prevent Child Labour? ', at 44.

nonconformity the buyer is obliged to take back the goods from its customers. In such a case, further costs may be recoverable, such as litigation costs arising from proceedings with customers or costs of a necessary recall of the goods.[180]

If the goods have already been resold prior to discovering the breach, damage in the form of loss of reputation may furthermore come into play.[181] As the CISG recognizes the principle of full compensation, there is no question that loss of goodwill can be recovered.[182] It might, however, be difficult to financially quantify a loss of goodwill in an individual case.[183] In assessing the amount, due regard is to be given to the standing of the individual buyer in the market.[184] A company firmly dedicated to sustainable standards and fair trade will endure a greater loss to reputation than one which just occasionally deals in this trade sector. A possible calculation may be based on the expense incurred by the aggrieved buyer in regaining its reputation and credibility and creating new customer networks.

Problems arise, however, where all goods have been resold and the nonconformity has never become public knowledge.[185] Although, even in such a case, one might argue that there is a loss of goodwill that could perhaps materialize in some future sale of the business itself, for example, during due diligence proceedings, the loss becomes more and more elusive. The crucial question here is how the non-performance loss can be assessed. If a market exists for the goods contracted for as well as a market for the nonconforming goods an easy way for the buyer to calculate damages is according to the difference of the respective market prices. Problems arise if no such market for nonconforming goods exists. Is there a market for T-shirts fabricated by 10-year-olds under inhumane conditions? In these cases, another method of calculating damages is called for if one does not want to allow the seller to get off scot-free. One possibility could be to assess the decrease in value of the goods on an abstract level.[186] The purchase price always reflects the costs of producing of the goods and a profit for the seller. If the seller, by violating ethical standards, substantially reduces the costs in production and thus respectively maximizes its own profit, the equilibrium of the contract has become unbalanced. One may well argue that the real value of the goods is decreased by the amount of the reduced production costs.[187] This is not a non-pecuniary loss,

180 OLG Koblenz, 10 September 2013, CISG-Online 2472, available at https://beck-online.beck.de/?vpath=bibdata/ents/beckrs/2013/cont/beckrs.2013.16570.htm&pos=4&hlwords=#xhlhit, accessed 29 January 2021; Schwenzer, 'Article 74', at 28.

181 Schwenzer and Leisinger, 'Ethical Values and International Sales Contracts', at 270.

182 Swiss Supreme Court, 28 October 1998, CISG-Online 413, available at http://cisgw3.law.pace.edu/cases/981028s1.html, accessed 14 November 2016; CISG-AC Opinion No 6, Calculation of Damages under CISG Art. 74. Rapporteur: Professor John Y. Gotanda, Villanova University School of Law, Villanova, Pennsylvania, USA, para. 7.2.

183 CISG-AC Opinion No 6, para. 7.3.

184 Schwenzer and Leisinger, 'Ethical Values and International Sales Contracts', at 270; Schwenzer, 'Article 74', in Ingeborg Schwenzer (ed.), *Schlechtriem & Schwenzer: Commentary on the UN Convention on the International Sale of Goods* (London: Oxford University Press, 2016d), at 36.

185 Schwenzer and Leisinger, 'Ethical Values and International Sales Contracts', at 270.

186 *Ibid*., at 278.

187 Nils Schmidt-Ahrendts, 'Disgorgement of Profits under the CISG', in Ingeborg Schwenzer and Lisa Spagnolo (eds.), *State of Play, the 3rd Annual Maa Schlechtriem CISG Conference* (The Hague: Eleven International, 2012) at 101.

as has been argued by some authors, but a real economic loss.[188] The buyer may claim this margin as minimum damages.

The seller cannot argue that the buyer received the full purchase price and thus ultimately did not sustain any financial loss at all as this would contravene the principle of full compensation and the nowadays accepted aim of the law of damages; namely, prevention and not just compensation.[189] The same result can also be reached by damages based on a disgorgement of profits. Although this might in the end appear to be a windfall profit for the buyer, any other solution would give the very same windfall profit to the seller who has breached the contract.[190]

6 Price Reduction

Finally, the possibility of a price reduction exists under Article 50 CISG. The mechanism of establishing the lower value of the nonconforming goods equals the one just discussed in relation to damages. Thus, the buyer may reduce the purchase price in proportion to the lower value that the goods actually delivered had at the time of the delivery.[191]

F Conclusion

The benefits that GSCs bring to today's societies are many. In spite of them, unsustainable practices continue to be a big problem that shadows their positive effects. Some global brands and retailers have taken advantage – intentionally or not – of the current gaps in statutory legislation, weak rule of law and defective business conduct in their suppliers' jurisdictions. Some developing nations' plans to adopt legislations that make local companies liable for human rights violations and environmental harm in their supply chains are still in the early stage.

However, one of the tenets of international responsible business conduct is that companies have a responsibility to address adverse impacts that their activities may cause, including in all their supply chains and business relationships, irrespective of the state of the law abroad or any legal liability in their place of businesses. Codes of conduct for suppliers have become the tool to establish sustainable procurement policies and due diligence processes in light of the

188 Djakhongir Saidov, 'Damages to Business Reputation and Goodwill under the Vienna Sales Convention', in Djakhongir Saidov and Ralph Cunningham (eds.), *Contract Damages: Domestic and International Perspectives* (Oxford: Hart Publishing, 2008b) at 393; Ingeborg Schwenzer and Pascal Hachem, 'CISG Provisions on Damages', *ibid.* at 98; Kristian Maley, 'The Limits to the Conformity of Goods in the United Nations Convention on Contracts for the International Sale of Goods (CISG)', *International Trade & Business Law Review*, 12/1 (2009) at 94.

189 Schwenzer and Hachem, 'CISG Provisions on Damages', at 101; Schwenzer, 'Article 74', at para. 6.

190 Edgardo Muñoz and David Obey Ament-Guemez, 'Calculation of Damages on the Basis of the Breaching Party's Profits under the CISG', *Journal of International Commercial Law*, 8/2 (2017) at 212.

191 Nalin, 'International Fair Trade (Fair Trade in International Contracts and Ethical Standard)', at 338; Ramberg, 'Emotional Non-Conformity in the International Sake of Goods, Particularly in Relation to CSR Policies and Code of Conduct', at 90; Schwenzer and Leisinger, 'Ethical Values and International Sales Contracts', at 271.

disparity in sustainability policies among trading nations. Effective codes of conduct for suppliers are those based on international sustainable standards, such as the Global Compact Principles, the main international instruments on sustainable trade, and modern and protective national legislation.

The question bears on the relationship between the CISG and such codes of conduct and sustainable standards of public and private nature. In this contribution, we have demonstrated that Article 7 CISG contains gap-filling rules that can be used to meet new challenges from issues of incorporation of sustainable standards into CISG contracts to the conformity of the goods and the remedies for breach of contract.

With regard to contract formation, the proper interpretation of Articles 14 and 8 CISG allows the incorporation of joint codes of conduct by reference to websites and other electronic media during the negotiations. Article 19 CISG, in conjunction with Articles 6 and 29 CISG, allow the application of the knock-out rule of contract formation; giving certainty as to the applicable terms in colliding codes of conduct.

On the level of defining conformity of the goods in the sense of Article 35 CISG, of utmost importance are international trade usages (Art. 9 CISG) as well as the criterion of fitness for the particular purpose (Art. 35(2)(b)). In addition, the seller's affiliation to a sustainable community or its own statements during the formation of the contract could be relevant in determining what constitutes the ordinary use of the goods under Article 35(2)(a) CISG. Public sustainable standards at the place of use of the goods and the buyer's place of business are becoming part of what ordinary use means for the goods in many scenarios.

We have provided some thoughts on the question of how to distinguish obligations of result clauses – leading to strict liability – and best-efforts clauses. Article 35 CISG defines the physical and nonphysical standards that the buyer expects the seller to reach with regard to the goods' features and quality. An obligation of best efforts to deliver sustainable goods negotiated by the supplier may directly impact the description of the goods, but such effect must be determined by interpretation under Article 8 CISG.

On the level of remedies, best-efforts clauses in CISG contracts may result in exoneration of liability for the seller, affecting the buyer's right to compensation for damages under Articles 74 – 77 CISG. A best-effort provision, possibly included in a code of conduct or inferred from guidelines applicable to the contract, may redefine what is considered to be under the seller's control. In all other cases, fundamental breach and the calculation of damages are at the centre of discussion regarding the remedies for breach of an obligation to deliver sustainable goods.

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