

## **CISG Advisory Council\* Opinion No 19**

### **Standards and Conformity of the Goods under Article 35 CISG**

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SIEG EISELEN, Secretary

#### **OPINION [BLACK LETTER TEXT]**

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\* The CISG-AC started as a private initiative supported by the Institute of International Commercial Law at Pace University School of Law and the Centre for Commercial Law Studies, Queen Mary, University of London. The International Sales Convention Advisory Council (CISG-AC) is in place to support understanding of the United Nations Convention on Contracts for the International Sale of Goods (CISG) and the promotion and assistance in the uniform interpretation of the CISG.

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## *Article 35 CISG*

*(1) The seller must deliver goods which are of the quantity, quality and description required by the contract and which are contained or packaged in the manner required by the contract.*

*(2) Except where the parties have agreed otherwise, the goods do not conform with the contract unless they:*

*(a) are fit for the purposes for which goods of the same description would ordinarily be used;*

*(b) are fit for any particular purpose expressly or impliedly made known to the seller at the time of the conclusion of the contract, except where the circumstances show that the buyer did not rely, or that it was unreasonable for him to rely, on the seller's skill and judgement;*

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

*(d) are contained or packaged in the manner usual for such goods or, where there is no such manner, in a manner adequate to preserve and protect the goods.*

*(3) The seller is not liable under subparagraphs (a) to (d) of the preceding paragraph for any lack of conformity of the goods if at the time of the conclusion of the contract the buyer knew or could not have been unaware of such lack of conformity.*

**1. The conformity of goods is determined not only by their quantity, quality, description, or packaging, but also by compliance with standards affecting the use of the goods, such as public law regulations and industry codes.**

**2. The relevant standards are those at the time of the conclusion of the contract.**

**3. Under Article 35(1), the seller must deliver goods which comply with the standards expressly or impliedly agreed upon.**

**4. In assessing whether, under Article 35(2), the seller must deliver goods that comply with a given standard, the following factors may be taken into account:**

**(a) the parties' statements and conduct before and after the conclusion of the contract;**

**(b) whether the buyer has drawn the seller's attention to the standard;**

**(c) whether the seller has expressed a public commitment to the standard;**

**(d) any prior dealings between the parties;**

**(e) the extent of the buyer's involvement in designing the goods and advising the seller as to the manufacturing or production process;**

**(f) the parties' expertise in relation to the goods;**

**(g) the business identity, characteristics, standing and size of the seller and the buyer;**

**(h) whether the parties are in the same industry, trade, organisation, association or initiative that has adopted or follows the standard and whether compliance with the standard is required or expected;**

**(i) the price;**

**(j) the nature, complexity and prominence of the standard;**

**(k) the accessibility of information regarding the standard;**

- (l) whether the standard is incorporated in the seller's code of conduct or the buyer's code of conduct for suppliers, provided that they are publicly available;**
- (m) the existence of competing standards;**
- (n) any relevant trade usage that is not based on the standard in question.**

**5.1 The seller may have an obligation to deliver goods that comply with local standards:**

- (a) applicable at the place of use of the goods if, at the time of the conclusion of the contract, the seller knew or could not have been unaware of that place;**
- (b) in any other case, applicable at the buyer's place of business.**

**5.2 In assessing whether such standards are to be complied with, regard may be had to the following factors, in addition to those in Rule 4:**

- (a) whether the seller knew or could not have been unaware of the relevant standard at the place of the intended use;**
- (b) the seller's prior dealings at that place, such as whether the seller had a branch or subsidiary or promoted goods of the same kind at that place;**
- (c) whether the standard at that place is the same as that at the seller's place of business.**

## **COMMENTS**

**1. The conformity of goods is determined not only by their quantity, quality, description, or packaging, but also by compliance with standards affecting the use of the goods, such as public law regulations and industry codes.**

### **Standards**

1.1. Many products today have some corresponding standard(s) concerning their composition, features, such as health and safety, or the process to be followed in making them. A standard can be understood as a benchmark or a level of quality or attainment, with reference to which something is evaluated or the compliance with which is desirable or expected.<sup>1</sup> The International Organisation 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'.<sup>2</sup> It is helpful to distinguish 'public' from 'private' standards. The former are adopted by state organisations, often being contained in public law regulations, or by inter-governmental organisations, such the United Nations, International Labour Organisation or Codex

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<sup>1</sup> See <<http://www.oxforddictionaries.com/definition/english/standard>>.

<sup>2</sup> See <<http://www.iso.org/iso/home/standards.htm>>.

Alimentarius Commission.<sup>3</sup> Public standards can be mandatory or voluntary. Other standards are ‘private’ in the sense that they are produced by non-state bodies, initiatives, associations and organisations. These can be: companies, adopting their own standards or codes of conduct, (such as Tesco Nature’s Choice)<sup>4</sup>; national industry bodies, such as the British Retail Consortium (BRC) and its BRC Global Standards;<sup>5</sup> international consortia of companies and their global standards, such as GlobalG.A.P. (‘Good Agricultural Practice’),<sup>6</sup> the Global Food Safety Initiative (GFSI)<sup>7</sup> or the Equator Principles (EP) Association;<sup>8</sup> international organisations that adopt standards across various industries and sectors, such as the ISO that adopts standards in a wide range of areas, including technology, food safety, agriculture, healthcare, environment;<sup>9</sup> civil society, represented by non-profit non-governmental organisations (NGOs), such as the Fairtrade Foundation<sup>10</sup> that promulgate what might called ‘ethical’ standards, concerning human rights, child labour and other labour standards, environmental protection, sustainability and corruption. Being adopted by non-state actors, private standards are voluntary. However, they can become mandatory or quasi-mandatory.<sup>11</sup> The former is the case where a private standard is incorporated into a national regulatory framework.<sup>12</sup> The example of the latter is where standards are 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.<sup>13</sup>

1.2. The existence of such standards raises the question of their relationship with the Convention on Contracts for the International Sale of Goods (CISG) that governs the rights and obligations of the parties arising from a ‘contract’ of the sale of goods. Being a contract law instrument that seeks to assign duties, risks, liabilities and remedies between the two contracting parties, the CISG is not concerned with giving effect to any such standards. However, buyers often claim that sellers breach a contract and/or the Convention if the goods do not meet a particular public or private standard. An important question therefore is: to what extent should such standards be taken into account in defining the seller’s obligations as to the conformity of goods under Article 35 CISG? This Opinion addresses this question, providing guidance as to the degree to which standards should be taken into account in interpreting a contract, governed by the CISG, and Article 35 CISG.

## Determining the conformity of goods and standards

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<sup>3</sup> ‘The Codex Alimentarius was established by FAO and the World Health Organization in 1963 to develop harmonised international food standards, which protect consumer health and promote fair practices in food trade’ (<<http://www.codexalimentarius.org/>>).

<sup>4</sup> <<http://www.tesco.com/csr/g/g4.html>>.

<sup>5</sup> <<http://www.brcglobalstandards.com/>>. For examples of British standards in respect of heating appliances and carbon dioxide for industrial use, see *Medivance Instruments Ltd v Gaslane Pipework Services Ltd, Vulcana Gas Appliances Ltd* [2002] EWCA Civ 500 and *Messer UK Ltd and Anr v Britvic Soft Drinks Ltd* [2002] EWCA Civ 548, respectively.

<sup>6</sup> <[http://www.globalgap.org/uk\\_en/who-we-are/about-us/](http://www.globalgap.org/uk_en/who-we-are/about-us/)>.

<sup>7</sup> <<http://www.mygfsi.com/about-us/about-gfsi/what-is-gfsi.html>>.

<sup>8</sup> <<http://equator-principles.com/index.php/about-ep/governance-and-management>>.

<sup>9</sup> <<http://www.iso.org/iso/home/about.htm>>.

<sup>10</sup> <<http://www.fairtrade.org.uk/en/what-is-fairtrade/who-we-are>>.

<sup>11</sup> See D Saidov, ‘Standards and Conformity of Goods in Sales Law’ [2017] LMCLQ 65, 68-71.

<sup>12</sup> See, eg, G Smith, ‘Interaction of Public and Private Standards in Food Chain’ (2009) OECD Food, Agriculture and Fisheries Working Papers No. 15, OECD Publishing, 32-33.

<sup>13</sup> See, eg, *ibid*, 24.

1.3. It is increasingly recognised that the conformity of goods comprises the relationship of the goods with their surrounding environment, of which standards are an important part.<sup>14</sup> Thus, the conformity of goods should in principle be determined not only by their quantity, quality, description, or packaging, but also by compliance with standards affecting the use of the goods. According to Article 35(1) CISG, the ‘conformity’ of goods comprises their quantity, quality, description, containment or packaging. Standards, whether public or private, are often concerned with these aspects of conformity, as well as with many others, such as technical, ethical, environmental and health and safety considerations and/or the process of designing, manufacturing or producing the goods. It must also be stressed that when interpreting the contract under Article 35(1), regard must be had to all relevant circumstances, as is made clear by Article 8(3) CISG.<sup>15</sup> Given that standards deal with various aspects and features of the goods, the standards can be such a ‘relevant circumstance’ or factor that must be taken into account when interpreting the contract.

1.4. Some key terms as to the conformity of goods, implied under Article 35(2), focus on the use of the goods. Article 35(2)(b) is concerned with the seller’s obligations where a particular purpose, for which the goods are intended to be used, has been made known to the seller. Article 35(2)(a), in turn, provides a fall-back rule, according to which goods are to be ‘fit for the purposes for which goods of the same description would ordinarily be used’.<sup>16</sup> Standards can affect the use of the goods, whether it is the use flowing from the particular purpose under Article 35(2)(b) or the ordinary use under Article 35(2)(a), including their containment or packaging (Article 35(2)(d)). Thus, if a standard is contained in public law regulations, the use of the goods may be affected if they do not comply with this standard. Even if a standard is not mandatory, companies in a given market, sector or supply chain may have to comply with such a standard in order to enter, remain in the market or carry on business effectively if such compliance is expected by within that market or sector<sup>17</sup> and/or required by a company dominating a supply chain (usually, the buyer).<sup>18</sup>

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<sup>14</sup> See, eg, H Collins, ‘Conformity of Goods, the Network Society, and the Ethical Consumer’ (2014) 5 *European Rev Private L* 619; I Schwenzer, ‘Conformity of the Goods – Physical Features on Wane?’ in I Schwenzer and L Spagnolo (eds), *State of Play: The 3rd Annual MAA Schlechtriem CISG Conference* (The Hague: Eleven International Publishing, 2012) 103-106; K Maley, ‘The Limits to the Conformity of Goods in the United Nations Convention on Contracts for the International Sale of Goods (CISG)’ (2009) 12 *Int’l Trade Business L Rev* 82.

<sup>15</sup> Art 8(3) CISG: ‘In determining the intent of a party or the understanding a reasonable person would have had, due consideration is to be given to all relevant circumstances of the case including the negotiations, any practices which the parties have established between themselves, usages and any subsequent conduct of the parties.’

<sup>16</sup> Art 35(2)(a).

<sup>17</sup> Take, for example, Electronic Industry Citizenship Coalition (EICC), that comprises more than 100 companies, probably including all major companies (see <<http://www.eiccoalition.org/about/members/>>). Not only do the EICC members subscribe and are held accountable to a common Code of Conduct, but many of them have also adopted their own Codes of Conduct. In addition to the EICC members, thousands of suppliers of those companies are required to implement the EICC Code (see: <<http://www.eiccoalition.org/about/members/>>; G Nimbalkar, C Cremen, Y Kyngdon and H Wrinkle, ‘The Truth Behind the Barcode: Electronic Industry Trend’, at: <<http://www.baptistworldaid.org.au/assets/BehindtheBarcode/Electronics-Industry-TrendsReport-Australia.pdf>>, 15, (for the results of a survey of 39 EICC members, according to which 82% out of those companies have a code of conduct that covers core ILO principles)).

<sup>18</sup> See, eg, Smith (n 12). For the structure of supply chains, see F Cafaggi, ‘Sales in Global Supply Chains: A New Architecture of the International Sales Law’ in D Saidov (ed), *Research Handbook on International and Comparative Sale of Goods Law* (Edward Elgar 2019; forthcoming).

## 2. The relevant standards are those at the time of the conclusion of the contract.

2.1. If a particular standard is in principle relevant to determining the conformity of goods under the CISG, the question arises as to the point in time with reference to which the standard in question is to be taken. The question is important where the standard in question changes subsequent to the time of the conclusion of the contract, such as where new scientific evidence about an aspect of the goods<sup>19</sup> or suspicions about the goods being unsafe emerge after the contract is made.<sup>20</sup> The Convention's general rule in Article 36(1) is that the seller is liable for a lack of conformity which exists 'at the time when the risk passes to the buyer'.<sup>21</sup> However, this point is for assessing the seller's conformity obligations in their entirety and it needs to be distinguished from the point in time at which a particular standard is to be taken. The timing of a standard is more closely aligned with the parties' agreement than with the time of the passage of risk and, specifically, with the allocation of risks between the parties. For this reason, the relevant standards are those at the time of the conclusion of the contract. Whether the goods in fact meet the relevant standards is, however, to be assessed with reference to the time when the risk passes to the buyer, as required by Article 36(1).

2.2. It can be argued that in determining the seller's obligations as to the conformity of goods it is 'artificial' to ignore changes in standards, arising after the contract is made, particularly if they arise because of the newly emerging scientific evidence that becomes available at the time of legal proceedings.<sup>22</sup> However, if changes to standards made after the contract is made are taken into account, the seller's conformity obligations can never be tested with reference to a fixed point in time and would be continuously subject to any changes in standards occurring up to the time of legal proceedings.<sup>23</sup> Such a position would be unfair and unsettling to sellers. In contrast, the time of making the contract is when the contracting parties assume risks associated with their contractual performance. Taking standards at the time of the conclusion of the contract promotes legal certainty and predictability that parties need to be able to effectively and reliably plan and manage their potential risks, liabilities and costs. The contracting parties' intention may be that the seller ought to comply with standards, affecting the use of the goods, as they are at a time subsequent to the conclusion of the contract. If so,

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<sup>19</sup> See, eg, Canton Appellate Court Basel, 22 August 2003, 33/2002/SAS/so, (Switzerland) <<http://cisgw3.law.pace.edu/cases/030822s1.html>>, where the contract, made in 1996 on DDP terms, required the food products to be free from genetically modified organisms (GMO). The seller argued that more than two years after the contract had been made (1999) the amount of GMO found in the delivered goods (between 0.1 and 1%) was declared by the authorities in the buyer's country (Switzerland) as being GMO free. The court rejected this argument stating that 1997 (when the goods seem to have been delivered and inspected and when no such change to the regulations was yet made) was decisive.

<sup>20</sup> See, eg, Federal Supreme Court, VIII ZR 67/04, 2 March 2005 (Germany) <<http://cisgw3.law.pace.edu/cases/050302g1.html>>, where the contract was made in April 1999, but in June 1999 suspicions arose that the meat originating in Belgium contained dioxin. These suspicions led, between June and July, to the adoption of regulations in Germany, the EU and Belgium declaring the meat unmarketable unless accompanied by a certificate declaring it as 'dioxin free'.

<sup>21</sup> Drawing any analogy with Art. 42 is inappropriate because under Art. 42 the goods' freedom from third parties' intellectual property rights or claims is to be assessed with reference to the time of *delivery* of the goods as to opposed to the time when *risk passes* to the buyer (Art. 36(1)), as is required when assessing conformity under Art. 35. In other words, the requirements as to the time of assessing whether the seller has complied with its obligations under Arts. 35 and 42 are different under these two provisions.

<sup>22</sup> See, eg, the English case *Henry Kendall & Sons v William Lillico & Sons Ltd* [1962] 2 AC 31, 75 and 108-109 (per Lord Reid and Lord Guest). See also the dissenting view of Lord Pearce (*ibid*, 119).

<sup>23</sup> E McKendrick, *Goode on Commercial Law*, 5<sup>th</sup> edn (London, Penguin Books 2016), para. 11.93.

such an intention needs to be made clear in the contract, so as to effectively derogate from the rule that the relevant standards are those at the time of the conclusion of the contract.

### **3. Under Article 35(1), the seller must deliver goods which comply with the standards expressly or impliedly agreed upon.**

3.1. Based on the principle of freedom of contract, Article 35(1) CISG gives primacy to the contract.<sup>24</sup> If the contract requires the seller to deliver goods that comply with a particular standard, the seller is in breach of contract if the goods do not comply with the contractually specified standard. The parties can expressly incorporate a given standard or, alternatively, a document, such as public law regulations or an industry code, that contain a standard.<sup>25</sup> Some such standards may be concerned with the goods' physical features, whereas some others focus on the manufacturing process, setting out, for instance, benchmarks of safety, sustainability, duties of care, environmental protection or ethical considerations.<sup>26</sup>

3.2. Article 8 CISG makes clear that the parties may agree on the need for the goods to comply with a certain standard implicitly. Whether that is the parties' intention needs to be determined by interpreting their statements and conduct in the light of all relevant circumstances of the case, such as those set out in Article 8(3).<sup>27</sup> An implicit intention that the goods ought to comply with a particular standard may be inferred, for example, from the practice established between the parties or by virtue of a trade usage to this effect.<sup>28</sup> In some cases, a contract, whilst lacking an express provision, may still contain formulations that reflect the intention for the goods to comply with a certain standard, such as where: the contract provides that the goods are to be 'CE approved';<sup>29</sup> and, before the contract was made, the seller had known that the goods were to be used in the European Union and had presented itself to the buyer as an international supplier with the CE certification. In this case, the parties can be taken to have intended, by

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<sup>24</sup> See also Art 6 CISG.

<sup>25</sup> See, eg, ICAC Arbitration, 168/2001, 17 February 2003 <<http://cisgw3.law.pace.edu/cases/030217r1.html>>; CIETAC Arbitration, 16 July 1996 <<http://cisgw3.law.pace.edu/cases/960716c1.html>>; *Ginza Pte Ltd v Vista Corporation Pty Ltd* [2003] WASC 11.

<sup>26</sup> Standards may also be concerned with a procedure or criteria to be followed during the inspection of the goods. In this case, a buyer's failure to observe such standards may lead to its claim of a lack of conformity being rejected. See, eg, CIETAC Arbitration, 27 October 1997 <<http://cisgw3.law.pace.edu/cases/971027c1.html>>, where the standard (Russian GOST), applicable to hot-rolled steel coils required that surface defects be established by examining the entire consignment and that thickness be measured by taking samples 'at a distance of not less than 1.5 turns from the end of the rolled length'. The tribunal did not accept the results of the inspection, which did not meet these requirements.

<sup>27</sup> See note 15 above. See also Art 8(1) and (2) CISG.

<sup>28</sup> See Art 9 CISG; also Art 8(3) CISG.

<sup>29</sup> See: <<http://www.ce-marking.org/what-is-ce-marking.html>> ('The letters "CE" are the abbreviation of French phrase "Conformité Européene" which literally means "European Conformity". The term initially used was "EC Mark" and it was officially replaced by "CE Marking" in the Directive 93/68/EEC in 1993. "CE Marking" is now used in all EU official documents...CE Marking on a product is a manufacturer's declaration that the product complies with the essential requirements of the relevant European health, safety and environmental protection legislation, in practice by many of the so-called Product Directives.').

virtue of Article 8(3) CISG, that the seller was required to deliver goods that comply with standards in the Directives of the European Community.<sup>30</sup>

3.3. More difficult cases for determining whether there was an implicit intention for a seller to comply with a certain standard are those where there are no relevant contractual provisions. All relevant circumstances need to be taken into account and balanced against one another, as is exemplified by a CISG case<sup>31</sup> that concerned a sale of wheat flour by a Dutch seller to a Belgian buyer for further resale to Mozambique. The seller had added a substance containing potassium bromate, capable of causing cancer and damaging DNA structures, to the flour which upon delivery to Mozambique was confiscated by the authorities. There was evidence that the import of flour enriched with potassium bromate was *de facto* permitted in Mozambique and that a company appointed by the Mozambican government had tested the batches of wheat before shipment and had issued a Clean Report for the purpose of an import licence. The court held the seller liable. First, it was evident from the pre-contractual exchanges between the parties that the quality of the flour was very important to the buyer and that the seller declared the flour to be of very high quality. It was held that the buyer could reasonably interpret the seller's statement as warranting that the bread improvers would be of a quality corresponding, at least, to international standards. Secondly, the use of potassium bromate had been banned in the Netherlands and in the EU, of which the seller was aware. Thirdly, it was also prohibited by the Codex Alimentarius, an international public standard,<sup>32</sup> which both the Netherlands and Mozambique have agreed to use and, for this reason, the court regarded the Codex as the 'appropriate general standard'. Taken together, these factors pointed towards the seller's liability, overriding a contrary factor, namely, that the import of such goods to Mozambique was *de facto* permitted.<sup>33</sup>

3.4. The parties' implicit intention that the goods ought to comply with a given standard should not be inferred lightly. If a buyer wants to ensure such compliance, the buyer can bargain for and contractually incorporate such an obligation of the seller.<sup>34</sup> This point is particularly relevant in global supply chains where the end-buyers are often the ones setting the standards throughout the chain:<sup>35</sup> a powerful and sophisticated commercial party's failure to expressly

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<sup>30</sup> See *Taurus Importgesellschaft J Seeborn MBH v Wide Loyal Industries Ltd* [2009] HKEC 1236, a case decided under the law of Hong Kong. The court held that although 'CE Approved' was only 'a placed mercantile or trade term and not a legal term used either in the European Community Directives or even in German Law', the seller had committed a breach of contract (see para. [66]). The court accepted evidence that the CE mark was a 'passport into Europe' and held that '[w]ithout full compliance with all the relevant directives, it is difficult to see how it can be "a passport into Europe" for the products involved' (para. [71]).

<sup>31</sup> Appellate Court's-Gravenhage, 99/474, 23 April 2003 (Netherlands), <<http://cisgw3.law.pace.edu/cases/030423n1.html>>.

<sup>32</sup> See n 3.

<sup>33</sup> The court also held that accepting the argument that the import of such goods was *de facto* permitted would mean 'that products unfit for human consumption could be delivered without contractual sanction by a seller from a highly developed country to a purchaser from a less developed country, who - due to the contract - may rightfully expect to have delivered to him a product that is reliable according to international standards and fit for human consumption' (Appellate Court's-Gravenhage, 23 April 2003 (Netherlands), point 8). For the argument that sales laws can play a regulatory function of promoting minimum benchmarks of quality in a society, see D Saidov, 'Quality Control, Public Law Regulations and the Implied Terms of Quality' [2015] LMCLQ 491.

<sup>34</sup> In a similar vein, P Schlechtriem, 'Non-Material Damages – Recovery under the CISG?' (2007) 19 Pace Int'l L Rev 89, 100-101.

<sup>35</sup> See, e.g., LC Backer, 'Economic Globalization and the Rise of Efficient Systems of Global Private Law Making: Wal-Mart as Global Legislator' (2007) 39 Connecticut L Rev 1741; ER Pedersen and M Andersen, 'Safeguarding

incorporate a standard, the compliance with which it later demands, into the contract points to the intention not to require the seller to comply with it. Some regard should also be had to a close relationship and potential overlap between inferring an implicit intention under Article 35(1) and implying a term that the goods must be fit for any particular purpose impliedly made known to the seller under Article 35(2)(b)).<sup>36</sup> Article 35(2)(b) is subject to two restrictions: (1) that in Article 35(3);<sup>37</sup> and (2) the displacement of the rule in Article 35(2)(b), where the circumstances show that the buyer did not rely or it was unreasonable for the buyer to rely on the seller's skill and judgement. Article 35(1) is not subject to the same restrictions,<sup>38</sup> but it should not be seen and used as a way of establishing the seller's liability by means of a lower threshold<sup>39</sup> because, in contrast with Article 35(2)(b),<sup>40</sup> it requires a term to be contractually incorporated.

**4. In assessing whether, under Article 35(2), the seller must deliver goods that comply with a given standard, the following factors may be taken into account:**

**General**

4.1. The CISG implies a number of terms relating to the conformity of goods, unless the parties have agreed otherwise (Article 35(2)). These terms are those requiring the goods to be: 'fit for the purposes for which goods of the same description would ordinarily be used' (Article 35(2)(a)); 'any particular purpose expressly or impliedly made known to the seller at the time of the conclusion of the contract' (Article 35(2)(b)); 'possess the qualities of goods which the seller has held out to the buyer as a sample or model' (Article 35(2)(c)); 'are contained or packaged in the manner usual for such goods or, where there is no such manner, in a manner adequate to preserve and protect the goods' (Article 35(2)(d)). As explained, the existence of a standard, affecting the use of the goods, can be a factor in determining the conformity of goods under these terms implied under the Convention.

4.2. The tests implied under Article 35(2) are highly fact-sensitive and need to be interpreted within the context surrounding the contract, of which standards affecting the use of the goods are a part. Whether compliance with a given standard is part of the conformity under these implied tests must be determined on a case-by-case basis. A wide range of factors may then be relevant to deciding whether a given standard should influence the seller's conformity obligations under Article 35(2). The factors may be conflicting in that some factors may point in favour of the seller's liability, whereas some others may point in favour of the seller's not

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Corporate Social Responsibility (CSR) in Global Supply Chains: How Codes of Conduct are Managed in Buyer-Supplier Relationships' (2006) 6 J Public Affairs 228; F Cafaggi, 'The Regulatory Functions of Transnational Commercial Contracts: New Architectures' (2013) 36 Fordham Int'l L J 1557.

<sup>36</sup> See D Saidov, *Conformity of Goods and Documents - The Vienna Sales Convention* (Oxford, Hart Publishing 2015) 72-74.

<sup>37</sup> Art. 35(3): 'The seller is not liable under subparagraphs (a) to (d) of the preceding paragraph for any lack of conformity of the goods if at the time of the conclusion of the contract the buyer knew or could not have been unaware of such lack of conformity.'

<sup>38</sup> For the discussion of the consequences of the buyer's pre-contractual knowledge of a lack of conformity in the context of Art 35(1), see, eg, Saidov (n 36) 38-41.

<sup>39</sup> See S Kröll in S Kröll, L Mistelis and P Perales Viscasillas (eds), *UN Convention on Contracts for the International Sale of Goods – A Commentary*, 2<sup>nd</sup> edn (München, CH Beck-Hart Publishing-Nomos 2018) Art. 35, para. 48.

<sup>40</sup> that does not require a particular purpose to be a contractual term; a mere communication of a particular purpose to the seller is sufficient under Art 35(2)(b).

being responsible for complying with the standard in question. The weight to be attributed to each factor is a matter of the particular circumstances of the case. Determining the seller's conformity obligations under Article 35(2) should ultimately be the result of a careful balance of all the relevant factors, set out in Rule 4(a)-(n).

#### **(a) the parties' statements and conduct before and after the conclusion of the contract**

4.3. What the parties say or do before or after the conclusion of the contract can be highly relevant to determining conformity under Article 35(2).<sup>41</sup> The examples of pre-contractual statements or conduct pointing in favour of a given standard being relevant to determining conformity under Article 35(2) include:<sup>42</sup> the seller's presenting itself as a supplier of high quality products, who complies with 'all applicable standards',<sup>43</sup> or gives assurances that its products will be acceptable to the industry;<sup>44</sup> or the buyer's stressing the importance and/or its expectation of receiving high quality goods<sup>45</sup> meeting the relevant standards. Another example is where, before the contract is made, the seller makes a public commitment, such as that published in the press or publicised in a press release, to observing a certain standard. The publicly expressed commitment to a certain standard creates a reasonable expectation that the seller will follow this standard in its contracts with its counter-parties and can be relevant to determining conformity under Article 35(2).<sup>46</sup>

4.4. The same statements and conduct can feature both before and after the contract is made. For instance, the seller may continuously, before and after making the contract, advertise itself as a member of a particular industry association and present this association's logo in its pre- and post-contractual communications with the buyer.<sup>47</sup> If so, these representations by the seller are relevant to determining conformity under Article 35(2) with reference to a standard adopted by this industry association. An example of the relevant post-contractual conduct is the buyer's reliance on the goods' compliance with a given standard,<sup>48</sup> such as where after making the contract with its seller the buyer: makes the resale arrangements of the goods to be delivered by the seller; and represents to its sub-buyer or incorporates a term into a sub-sale contract that the goods will comply with that standard.

#### **(b) whether the buyer has drawn the seller's attention to the standard**

4.5. Whether the buyer has drawn a particular standard to the seller's attention is likely to indicate the relevance of that standard to determining conformity under Article 35(2). The buyer's making known to the seller the *need to comply* with a given standard is likely to trigger

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<sup>41</sup> See also Article 8(3) CISG.

<sup>42</sup> These examples are particularly relevant where a given standard contains high, rigorous or demanding requirements in respect of the goods.

<sup>43</sup> See, eg, *Cortem SpA v Controlmatic Pty Ltd* [2010] FCA 852.

<sup>44</sup> See *ARL Lighting (Manitoba) Ltd v Dixon ARL Lighting (Manitoba) Ltd* [1998] BCJ No 2442, a Canadian case, para. [13], 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'.

<sup>45</sup> See, eg, Appellate Court's-Gravenhage, 23 April 2003 (Netherlands) (n 31).

<sup>46</sup> See also Rule 4(c) and Comments on it in paras. 4.6. 4.7.

<sup>47</sup> See, eg, *ARL Lighting* (n 44), where the buyer relied on the fact that: the seller, a manufacturer, was a member of North American Die Casters Association (NADCA) and advertised itself as such; and the NADCA 'logo' was present in several communications before and after the conclusion of the contract.

<sup>48</sup> See, eg, *ARL Lighting* (n 44).

the seller's obligation under Article 35(2)(b)<sup>49</sup> (namely, that the particular purpose of the intended use of the goods requires compliance with that standard). In contrast, the buyer's merely making known to the seller the *existence* of a standard may fall short of a clear communication of a particular purpose under Article 35(2)(b). However, such a communication is still part of the context against which Article 35(2)(b) and Article 35(2)(a) and (d) are to be interpreted because it signals the importance of the standard to the buyer; otherwise, the buyer would not have mentioned its existence to the seller.

### **(c) whether the seller has expressed a public commitment to the standard**

4.6. The seller may express a public commitment to observing particular standards, such those made in the press, publicised press releases or its publicised codes of conduct.<sup>50</sup> Such public commitments are part of the context against which terms implied under Article 35(2) should be interpreted. Such a commitment can be relevant, for example, to determining what constitutes the ordinary use of the goods (Article 35(2)(a)) or the 'usual manner' in which goods are to be contained or packaged (Article 35(2)(d)), particularly if other suppliers in the same sector have also declared their adherence to these standards. The fitness for a particular purpose test (Article 35(2)(b)) is less relevant because the seller's expression of its commitment to a standard does not normally communicate a particular purpose for which the *buyer* intends to use the goods (the first part of Article 35(2)(b)).<sup>51</sup> However, this factor is highly relevant to determining whether the buyer relied or whether it was reasonable for the buyer to rely on the seller's skill and judgement (the second part of Article 35(2)(b)).

4.7. Generally, there is tension between a seller's declaration of commitment to particular standards, particularly those of ethical nature,<sup>52</sup> and its argument that it does not have an obligation to comply with them. From a policy perspective, it may be desirable for sellers to have such an obligation because by making public declarations of commitment to certain standards, companies often seek to induce the public to do business with them or promote a positive commercial image. Holding sellers liable for non-compliance with the declared standards helps protect the public and encourages sellers to stay true to their public representations.<sup>53</sup>

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<sup>49</sup> See, eg, Supreme Court, 8 March 1995, VIII ZR 159/94 (Germany) <<http://cisgw3.law.pace.edu/cases/950308g3.html>>; *Kingspan Environmental Ltd v Borealis A/S* [2012] EWHC 1147 (Comm).

<sup>50</sup> Many companies today adopt their own codes of conduct. The majority of top 500 companies in the US and the UK have adopted some kind of code of conduct (<<http://www.ilo.org/global/standards/introduction-to-international-labour-standards/international-labourstandards-use/lang--en/index.htm>>).

<sup>51</sup> Although it is not inconceivable that the buyer's entering into a contract with the seller, who declared adherence to certain standards, or some other act of the buyer's reliance on the seller's public declaration can potentially make known to this seller a particular purpose that the goods were bought for the use requiring compliance with these standards.

<sup>52</sup> There are many examples of ethical standards, such as those contained in: international instruments (International Labour Organisation (ILO) Conventions, UN Convention on the Rights of the Child or the Universal Declaration of Human Rights); international initiatives (e.g., the UN Global Compact (UNGC), the 'Kimberly Process' (KP)); non-governmental organisations' documentation (e.g., ISO 14001 or SA8000); or industry coalitions' documents (e.g., Electronic Industry Citizenship Coalition (EICC)).

<sup>53</sup> See, similarly, Draft Common Frame of Reference (DCFR), Comment A on Art 2:303, in C von Bar and E Clive (eds), *Principles, Definitions and Model Rules of European Private Law: Draft Common Frame of Reference (DCFR)* (Munich, Sellier European Law Publishers, 2009) vol II, 1296. See also Appellate Court's-Gravenhage, 23 April 2003 (Netherlands) (nn 31 and 33), where the Convention's conformity rules are seen as performing broader societal goals.

#### **(d) any prior dealings between the parties**

4.8. Prior dealings between the parties can reveal their knowledge, individual expectations as well as expectations in the relevant commercial environment, all of which are part of the context against which Article 35(2) is to be interpreted. If the parties' previous contract(s) for the same goods required the seller to comply with the standard in question or to deliver certificates showing compliance with it,<sup>54</sup> this factor can point to the relevance of that standard for determining the goods' fitness for a particular purpose.<sup>55</sup> The parties' incorporation of that standard in their previous contract(s) may also reflect a broad understanding within their respective commercial sector or market concerning what constitutes the 'ordinary use' of the goods (Article 35(2)(a)) or the 'usual manner' of their containment or packaging (Article 35(2)(d)). Even if their previous contract(s) for the same goods did not expressly require compliance with a given standard, but the seller observed that standard in performing those contract(s), that fact can still be relevant. For instance, the buyer may rely on the expected compliance with the standard by representing to its sub-buyer that the goods will comply with that standard. If the seller was aware of such a representation before making the contract with the buyer, this factor together with the seller's prior observance of the standard can point in favour of the implicit communication of a particular purpose to the seller (Article 35(2)(b)).

4.9. Caution is needed, however, in deciding whether a seller's obligation to comply with a particular standard should be implied under Article 35(2) based on the parties' previous dealings. A powerful countervailing consideration is that, in the examples in paragraph 4.8, the buyer has not incorporated any such term in the contract or has not expressly communicated a relevant particular purpose under Article 35(2)(b), which is not difficult to do. This may well evidence that the parties did not intend the seller to comply with the standard.<sup>56</sup>

#### **(e) the extent of the buyer's involvement in designing the goods and advising the seller as to the manufacturing or production process**

4.10. The buyer's involvement in designing the goods and advising the seller as to the manufacturing or production process is a factor pointing against implying a duty on the seller to comply with a standard. In this case, the seller is to some degree relying on the buyer in terms of how the contract ought to be performed. The greater the buyer's involvement, the greater is the weight to be attributed to this factor in pointing to the parties' intention that the seller was not expected to comply with a standard. Otherwise, the buyer would have communicated the need to comply with the standard during its involvement in designing the goods or when advising the seller. The seller's reliance on the buyer<sup>57</sup> also points against implying a term under Article 35(2)(b) because the buyer does not rely or it is unreasonable for the buyer to rely on the seller's skill and judgement.

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<sup>54</sup> District Court Ellwangen, 1 KfH O 32/95, 21 August 1995 (Germany) <<http://cisgw3.law.pace.edu/cases/950821g2.html>> (the amount of ethylene oxide in paprika exceeded the level permissible under the German Food Safety Laws whilst the contract required the seller to deliver the certificate of the absence of aflatoxins and salmonellae).

<sup>55</sup> In that this factor points in favour of an implicit communication of a particular purpose that the intended use of the goods requires compliance with the standard in question (see *ibid*).

<sup>56</sup> See the opening words of Art 35(2) ('Except where the parties have agreed otherwise) and Art 6 CISG.

<sup>57</sup> On the question whether contracts involving the provision of drawings, know-how, technical specifications, technology or formulae fall within the CISG, see the CISG-AC Opinion No. 4, 'Contracts for the Sale of Goods to Be Manufactured or Produced and Mixed Contracts (Article 3 CISG)', Rule 5 and paras. 2.13-2.15 in the Comments, available at: <[https://www.cisgac.com/file/repository/CISG\\_AC\\_Opinion\\_4\\_English\\_.pdf](https://www.cisgac.com/file/repository/CISG_AC_Opinion_4_English_.pdf)>.

#### **(f) the parties' expertise in relation to the goods**

4.11. The level and balance of the parties' expertise in relation to the goods are a factor with particular relevance under Article 35(2)(b). The greater the buyer's expertise, the greater is the expectation that the buyer will draw the need to comply with a standard to the seller's attention, triggering the seller's obligation under Article 35(2)(b).<sup>58</sup> The implicit communication of a particular purpose (the first part of Article 35(2)(b)) should not therefore be inferred lightly where the buyer possesses substantial expertise. If the buyer's expertise in respect of the goods is equal to or greater than that of the seller,<sup>59</sup> that may also lead to the conclusion that the buyer does not rely or that it is unreasonable for the buyer to rely on the seller's skill and judgement (the second part of Article 35(2)(b)).

#### **(g) the business identity, characteristics, standing and size of the seller and the buyer**

4.12. Various characteristics relating to the identity, characteristics, standing and size of the parties' business can be relevant to determining conformity under Article 35(2). If both parties have well-known and established reputations as ethical businesses, the seller's obligation to comply with an ethical standard may be implied under various tests under Article 35(2). The seller will be aware of the buyer's identity as an ethical business and, being such a business itself, the seller's skill and judgement may well be relied upon by the buyer (the second part of Article 35(2)(b)). Similar reasoning can apply even where only the buyer has a strong reputation as ethical business, but the seller knows that the buyer always sells goods at markets, specialising in organic or fair trade products, or where the focus on ethical standards is evident from the name of the buyer's business.<sup>60</sup> These circumstances may suffice to implicitly communicate to the seller that the goods' intended use requires compliance with certain ethical standards (the first part of Article 35(2)(b)).<sup>61</sup> However, if the buyer has greater expertise in relation to ethical goods than the seller, that may point against the buyer's reliance on the seller's skill and judgement (the second part Article 35(2)(b)).<sup>62</sup>

4.13. If both parties identify themselves and have reputations as ethical businesses, possibly also reflecting the ethical nature of the market/sector in which they operate, that can mean that: the particular purpose of use of the goods requires compliance with certain ethical standards

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<sup>58</sup> See Appellate Court Arnhem, 97/700 and 98/046, 27 April 1999 (Netherlands) <<http://cisgw3.law.pace.edu/cases/990427n1.html>>. where the German buyer of mobile units argued the seller had committed a breach because they did not meet the construction standards in force in Germany. Even possible mention by the buyer to the seller of the existence of special requirements with respect to mobile units, together with the fact that the parties had a long-standing relationship and the seller's knowledge that the goods would be used in Germany, was deemed insufficient to imply an alleged term into the contract. The court took the view that the buyer was just as an expert in mobile units as the seller was, and although the parties have had long-standing business dealings, the buyer never carried out sufficiently thorough investigations of whether the seller had been taking those special standards into account. On this basis, it was held that it was the buyer's responsibility to point out to the seller those specific requirements which were applicable to mobile units.

<sup>59</sup> The result in *ibid* may be partly explained by the fact that the buyer was, like the seller, an expert in the manufacture of mobile units.

<sup>60</sup> See, eg, I Schwenzler and B Leisinger, 'Ethical Values and International Sales Contracts' in R. Cranston, J. Ramberg and J Ziegel (eds), *Commercial Law Challenges in the 21st Century: Jan Hellner in Memoriam* (Stockholm: Stockholm Centre for Commercial Law Juridiska Institutionen, 2007) 266.

<sup>61</sup> This reasoning applies with greater force where the buyer's business standing is that of a market leader in promoting ethical products.

<sup>62</sup> See also comment on paragraph (f) above.

(Article 35(2)(b));<sup>63</sup> the goods' ordinary use (Article 35(2)(a)) or 'usual' manner of packaging or containment (Article 35(2)(d)) should also be interpreted with reference to such standards.<sup>64</sup>

4.14. The size of and resources available to the parties are also of relevance. Compare one seller, a large multinational company with considerable resources, with another who is a small inexperienced company with inconsiderable resources. It is reasonable to expect the former to investigate and/or have much greater knowledge of the existence and content of standards affecting the use of the goods.<sup>65</sup> The knowledge of a particular purpose, requiring compliance with such standards, can be implied under Article 35(2)(b) more readily in respect of the former seller, than the latter.

4.15. If the buyer is a large multinational business, it can also be expected to investigate or know about the existence and content of the relevant standards and draw the seller's attention to them. This factor in itself demands caution when deciding whether to infer an implicit communication of a particular purpose (the first part of Article 35(2)(b)). The buyer's superior access to resources can mean that there is no reliance on the seller's skill and judgement (the second part of Article 35(2)(b)). Conversely, if the buyer is a small company with inconsiderable resources, there is much lower expectation that this buyer would know the relevant standards and their content. In itself, this factor sets the scene for a lower threshold for inferring an implicit communication of a particular purpose under Article 35(2)(b).

**(h) whether the parties are in the same industry, trade, organisation, association or initiative that has adopted or follows the standard and whether compliance with the standard is required or expected**

4.16. Where the parties are in the same industry, trade, organisation, association or initiative that has adopted or follows the standard and where compliance with the standard is required or expected, this factor can implicitly communicate to the seller that the particular purpose of using the goods necessitates compliance with that standard (Article 35(2)(b)).<sup>66</sup> This factor also indicates a common commercial context within which the parties operate. Therefore, compliance with that standard can be part of the 'ordinary use' of the goods (Article 35(2)(a)) or of the 'usual manner' of containment or packaging (Article 35(2)(d)).

**(i) the price**

4.17. The price can be a powerful indicator of what can be expected of the goods from the perspectives of tests in Article 35(2). If the contract price corresponds to high quality or premium goods that are associated with a particular standard, this price points in favour of an implicit communication of a particular purpose that requires compliance with this standard (Article 35(2)(b)). Conversely, if the price is much lower than the value of high-quality/premium goods, associated with this standard, this points against inferring an implicit communication of such a particular purpose.

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<sup>63</sup> For a similar point in the context of English law and labour standards, see M Bridge, *The Sale of Goods*, 3rd edn (OUP Oxford, 2014) para. 7.112.

<sup>64</sup> For the examples of some such standards, see n 52.

<sup>65</sup> See, e.g., I Schwenzer in I Schwenzer (ed), *Schlechtriem & Schwenzer Commentary on the UN Convention on the International Sale of Goods (CISG)*, 4<sup>th</sup> edn (Oxford, OUP 2016) Art. 35, para. 19; I Schwenzer, P Hachem and C Kee, *Global Sales and Contract Law* (Oxford, OUP 2012) para. 31.138 (arguing that much greater knowledge of the regulations in the country of use can be expected of a multinational company than of a small business which exports the goods to that country for the first time).

<sup>66</sup> See *Kingspan Environmental Ltd v Borealis A/S* (n 49) para. [645].

4.18. Generally, a low contract price indicates that the goods were not intended to be premium goods.<sup>67</sup> So, even if compliance with a certain standard would otherwise be required under Article 35(2), an uncharacteristically low price can evidence that the goods were not intended to comply with any standard.<sup>68</sup>

#### **(j) the nature, complexity and prominence of the standard**

4.19. The nature of a standard, such as whether it is mandatory or voluntary, is relevant under Article 35(2). If the buyer is aware of the mandatory character of a standard, it can be reasonably expected to draw this standard to the seller's attention. This factor on its own points to a high threshold for implying a seller's duty under Article 35(2)(b). The *seller's* awareness of the relevant standard and its mandatory nature sets the context for implying an obligation under Article 35(2)(b) more readily than in the previous example. The mandatory nature of a standard can also make it relevant to determining the goods' 'ordinary use' (Article 35(2)(a)) or 'usual manner' of containment or packaging (Article 35(2)(d)).<sup>69</sup>

4.20. If a standard is voluntary or advisory, the weight to be attributed to it depends largely on its significance in practice. If, despite being voluntary, the standard is widely expected to be complied with in a relevant market, industry or sector, it should be treated similarly to mandatory standards (quasi-mandatory).<sup>70</sup> Another example of its significance is where its voluntary character is temporary, with it being widely expected that it will inevitably become mandatory.<sup>71</sup> In these examples, the standard is relevant to determining a particular purpose (Article 35(2)(b)), 'ordinary use' (Article 35(2)(a)) and the 'usual manner' of containment or packaging (Article 35(2)(d)). If the standard does not have such practical significance, its relevance is much weaker.

4.21. High complexity of a standard can decrease its relevance under Article 35(2). If compliance with such a standard requires special knowledge, expertise, experience or resources, this factor points against inferring an implicit communication of a particular purpose to the seller without such knowledge, expertise and resources (the first part of Article 35(2)(b)).<sup>72</sup> Its skill and judgement are also unlikely to be relied upon (the second part of Article 35(2)(b)). The relevance of such a standard may also be weak under Article 35(2)(a) or (d). These tests are premised on a common understanding or acceptance, within a trade or market, of what constitutes the goods' 'ordinary use' or 'usual manner' of containment or packaging. If a market comprises a wide range of parties with different levels of business sophistication,

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<sup>67</sup> It may, of course, be that a low price simply reflects a good bargain struck by the buyer or a particular agreement structured in that way because of the parties' other arrangements or transactions.

<sup>68</sup> This can lead to the inapplicability of tests under Art 35(2) by virtue of either the opening words of this article ('Except where the parties have agreed otherwise') or Art 6 CISG.

<sup>69</sup> However, in practice a mandatory standard may not be enforced by the authorities and not regarded as important by the market. In this case, the weight attributed to the standard's mandatory nature may have to be lower. See, eg, a UK case *Bramhill v Edwards* [2004] EWCA Civ 403 (non-compliance of a vehicle with the requirements as to width under the applicable Regulations was not held to be a breach of the satisfactory quality test in s. 14(2) of the UK Sale of Goods Act 1979, because in practice such vehicles were still able to be insured and the authorities did not enforce the regulations strictly, which meant that there was no real risk of prosecution). See also *Activa DPS Europe SARL v Pressure Seal Solutions Limited T/A Welltec System (UK)* [2012] EWCA Civ 943.

<sup>70</sup> See n 12 and the accompanying paragraph in the main text.

<sup>71</sup> See, eg, a UK case *Hazlewood Grocery Ltd v Lion Foods Ltd* [2007] EWHC 1887 (QB).

<sup>72</sup> See Appellate Court Arnhem (n 58), where the seller was not liable for non-compliance with standards in Germany because of their complexity flowing from each German state imposing different construction standards.

it is unlikely that a highly complex standard, which is difficult for many parties to follow, has gained general acceptance.

4.22. The more prominent a standard, whether private or public, the greater is its relevance for inferring an implicit communication of a particular purpose (Article 35(2)(b)) and determining the ‘ordinary use’ (Article 35(2)(a)) or the ‘usual manner’ of containment or packaging (Article 35(2)(d)).

**(k) the accessibility of information regarding the standard**

4.23. The more accessible the information regarding the standard, the greater is its relevance under Article 35(2). If this information is publicly visible, easily found and identifiable (eg, via internet search engines and identifiable without difficulty on a relevant webpage), available in widely spoken languages (eg, English), this sets a favourable context for the seller to be in a position to know about the existence and content of the standard, affecting the use of the goods, and consequently the need to comply with it (Article 35(2)(b)). These factors are also conducive to this standard being relevant under Article 35(2)(a) and (d).

**(l) whether the standard is incorporated in the seller’s code of conduct or the buyer’s code of conduct for suppliers, provided that they are publicly available**

4.24. The considerations in paragraphs 4.6 and 4.7 are applicable to cases where the standard is incorporated in the seller’s code of conduct. The incorporation of the standard in the *buyer’s* code of conduct can also be relevant in the context of Article 35(2). In principle, such incorporation can implicitly make known to the seller a particular purpose that the intended use requires compliance with those standards (Article 35(2)(b)). Such an interpretation can only be adopted if two conditions are met, whereby the seller can be expected to know about the standard and the need to comply with it. First, the buyer’s code of conduct must be addressed to its suppliers, rather than being its internal code. Secondly, this code must be publicly available and otherwise accessible<sup>73</sup> to the seller. At the same time, the buyer’s failure to expressly incorporate the standard in the contract is a countervailing factor militating against implying an obligation under Article 35(2)(b) lightly. This factor may even warrant the conclusion that the seller was not intended to comply with the standard because the tests under Article 35(2) that could otherwise lead to such an obligation are not applicable.<sup>74</sup>

4.25. The incorporation of the standard in the seller’s code or the buyer’s code for its suppliers can also be relevant under Article 35(2)(a) and (d). For example, the incorporation of the standard in the end-buyer’s code for its suppliers may be relevant to what constitutes the ‘ordinary use’ or ‘usual manner’ of containment or packaging in the context of a particular supply chain. However, this consideration needs to be counter-balanced against the buyer’s failure to incorporate the standard in the contract or communicate it clearly to the seller, which can point strongly to the intention that no compliance with the standard was required.

**(m) the existence of competing standards**

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<sup>73</sup> See further para. 4.21.

<sup>74</sup> By virtue of either the opening words of Article 35(2)(b) or Art 6 CISG. For similar analyses, see the main text accompanying nn 35, 56 and 68.

4.26. The existence of competing standards can militate against the relevance of the standard in question to implying obligations under Article 35(2)(a), (b) or (d).<sup>75</sup> This is particularly so if the standards are of similar prominence and/or the extent to which they are followed in a relevant market, sector or industry is also similar. In these circumstances, there is no one standard that can claim common acceptance so as to be relevant to determining the ‘ordinary use’ or the ‘usual manner’ of containment or packaging (Article 35(2)(a) and (d)). It may also be difficult to establish an implicit communication that the use of the goods required their compliance with the standard in question, as opposed to other existing standards (Article 35(2)(b)).

**(n) any relevant trade usage that is not based on the standard in question**

4.27. If a trade usage is based on the standard in question, an obligation of comply with it will be implied by virtue of contract interpretation under Article 35(1).<sup>76</sup> Therefore, in determining the seller’s obligations under Article 35(2), a usage is relevant insofar as it is not based on this standard. A usage in a given trade sector may be of general nature, requiring sellers to comply with the applicable industry standards. In this example, a usage is not based on any particular standard, but requires compliance with industry standards in general. Conversely, a usage may provide that sellers are not required to comply with any standards, unless specifically informed to the contrary by their buyers; or may be based on a standard other than that in question. In these latter examples, the standard in question is not relevant under Article 35(2).

**5.1 The seller may have an obligation to deliver goods that comply with local standards:**

**(a) applicable at the place of use of the goods if, at the time of the conclusion of the contract, the seller knew or could not have been unaware of that place**

5.1. Rule 5.1 is concerned with standards that are specific to a particular place (local standards). It provides for general fall-back guidance as to whether under Article 35(2) the seller must comply with local standards at the place of use of the goods. Different positions are advanced in cases and commentary on whether, by default, the seller is required under Article 35(2) to comply with such local standards. Considering the significance of this question and the divergence of views, it is important for there to be a steer as to how risks should be allocated between the contracting parties in order to promote legal certainty, consistency and uniformity in the Convention’s application.<sup>77</sup> According to Rule 5.1(a), the seller *may* have an obligation to comply with local standards applicable at the place of use of the goods if, at the time of the conclusion of the contract, the seller knew or could not have been unaware of that place. Thus, subject to various factors that may be relevant,<sup>78</sup> Rule 5.1(a) signals its preferred allocation of risk: namely, the seller should have an obligation to comply with local standards at the place of use of the goods.<sup>79</sup> The rationale is twofold. First, if the seller knew or could not have been

<sup>75</sup> See, eg, Appellate Court Arnhem (n 58).

<sup>76</sup> See para. 3.2.

<sup>77</sup> Cf J Honnold (updated and revised by H Flechtner), *Uniform Law for International Sales under the 1980 United Nations Convention*, 4<sup>th</sup> edn (The Netherlands, Wolters Kluwer Law & Business 2009) p. 335.

<sup>78</sup> See Rules 4 and 5.2.

<sup>79</sup> See, eg, *RJ & AM Smallmon v Transport Sales Limited and Grant Alan Miller* [2011] NZ CA 340 (the seller’s knowledge that trucks would be used in Australia was a communication of a particular purpose, but it was not reasonable for the buyer to rely on the seller’s skill and judgement). To the contrary, see, eg, Supreme Court, 8 March 1995 (Germany) (n 49) (‘The agreement regarding the...place of destination is in itself...neither under subsection (a) nor under subsection (b) of CISG 35(2) sufficient to judge whether the mussels conform with the contract pursuant to certain cadmium standards used in Germany...Decisive is that a foreign seller can simply not be required to know the not easily determinable public law provisions and/or administrative practices of the

unaware of the place of use of the goods, it should investigate the existence of any local standards, affecting the use of the goods.<sup>80</sup> If they exist, it is reasonable to expect the seller to understand that compliance with local standards is necessary or required. Secondly, this position is in line with how the Convention allocates risks between the contracting parties in the context of the question whether the seller has an obligation to deliver goods free from rights or claims of a third party based on industrial property or other intellectual property (IP).<sup>81</sup> As Article 42(1)(a) CISG makes clear, the seller does have such an obligation if the right or claim is based on IP ‘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’.

### **(b) in any other case, applicable at the buyer’s place of business**

5.2. Rule 5.1(b) is applicable where the seller neither knew nor could not have been unaware of the place of use of the goods. In this case, subject to various relevant factors,<sup>82</sup> the seller *may* have an obligation to comply with standards applicable at the buyer’s place of business. The rationale is that in this situation it is reasonable for the seller to expect that the goods will be used at the place where the buyer has its place of business. Therefore, if there are local standards at that place, affecting the use of the goods, such standards should be complied with.<sup>83</sup> This approach is once again line with the Convention’s allocation of risk in the context of rights or claims arising from IP. 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’ IP rights or claims ‘under the law of the State where the buyer has his place of business’.

### **5.2 In assessing whether such standards are to be complied with, regard may be had to the following factors, in addition to those in Rule 4:**

#### **(a) whether the seller knew or could not have been unaware of the relevant standard at the place of the intended use**

5.3. The fall-back guidance in Rule 5.1 is not prescriptive as it does no more than provide that the seller *may* have an obligation to comply with local standards in places specified in Rule

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country to which he exports’); Supreme Court, 2 Ob 100/00w, 13 April 2000 (Austria) <<http://cisgw3.law.pace.edu/cases/000413a3.html>>; District Court Rotterdam, 295401/HA ZA 07-2802, 15 October 2008 (Netherlands) <<http://www.cisg.law.pace.edu/cisg/wais/db/cases2/081015n2.html>>. For a similar approach in English law, see, e.g., *Sumner Permain & Co v Webb & Co* [1922] 1 KB 55; *Phoenix Distributors Ltd v L B Clarke (London) Ltd* [1966] 2 Lloyd’s Rep 285; affirmed [1967] 1 Lloyd’s Rep 518 (CA).

<sup>80</sup> See P Schlechtriem, ‘Uniform Sales Law in the Decisions of the *Bundesgerichtshof*’ at <<http://cisgw3.law.pace.edu/cisg/biblio/slechtriem3.html>>; P Schlechtriem and P Butler, *UN Law on International Sales* (Berlin, Heidelberg, Springer-Verlag 2009) p. 119; Kröll (n 39) para. 126.

<sup>81</sup> See, eg, See Kröll (n 39) para. 127. To the contrary, see CM Bianca in CM Bianca and J Bonell (eds), *Commentary on the International Sales Law* (Milan, Giuffrè 1987) Art. 35, para. 3.2.

<sup>82</sup> See Rules 4 and 5.2.

<sup>83</sup> To the contrary, see, eg, Appellate Court Saarbrücken, 5 U 426/96-54, 17 January 2007 (Germany) <<http://cisgw3.law.pace.edu/cases/070117g1.html>> (a case involving the sale of marble panels where the court held that the standards in the seller’s country were controlling).

5.1(a) and (b). This is so because the question whether the seller has an obligation under Article 35(2) to comply with local standards is highly fact-sensitive. Determining whether the seller has such an obligation is ultimately a balancing exercise, with various relevant factors having to be weighed against one another. Rule 5.2 makes clear that the factors in Rule 4 are relevant to determining whether the seller has an obligation under Rule 5.1 to comply with local standards. Rule 5.2 goes further and identifies other factors, in addition to those in Rule 4, that are *specific* to the question whether the seller has an obligation to comply with local standards applicable at a particular place.

5.4. One such context specific factor is presented in Rule 5.2(a): namely, whether the seller knew or could not have been unaware of the relevant standard at the place of the intended use. If so, this factor points to it being reasonable and fair to expect the seller to comply with local standards.<sup>84</sup> This is so particularly under Article 35(2)(b) as the seller's actual or implied knowledge is likely to constitute a communication of a particular purpose that the goods will be used in a particular place.<sup>85</sup> without compliance with the standards in that place, affecting the use of the goods, they cannot be used there. However, there may be other relevant but competing factors, such as the buyer's having equal or greater expertise than that of the seller and/or the standards being complex and different depending on the importing country's region. In one case,<sup>86</sup> this latter set of factors prevailed over the seller's knowledge of there being local standards affecting the use of the goods, resulting in no obligation being implied on the seller to comply with local standards.

**(b) the seller's prior dealings at that place, such as whether the seller had a branch or subsidiary or promoted goods of the same kind at that place**

5.5. The seller's prior dealings at the place of the intended use of the goods is relevant to determining whether the seller: had actual or implied knowledge of the existence of local standards, affecting the use of the goods, at that place; and an obligation to comply with those standards.<sup>87</sup> In addition to showing the relevance of this factor, Rule 5.2(b) gives examples of such prior dealings. They include the cases where the seller had a branch or subsidiary in the place of the intended use of the goods or its prior experience of promoting the goods of the same kind at that place.<sup>88</sup>

**(c) whether the standard at that place is the same as that at the seller's place of business**

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<sup>84</sup> See, eg, Supreme Court, 8 March 1995 (Germany) (n 49).

<sup>85</sup> See *Cortem SpA v Controlmatic Pty Ltd* (n 43).

<sup>86</sup> See Appellate Court Arnhem (n 58).

<sup>87</sup> See, eg, Appellate Court Grenoble, 93/4126, 13 September 1995 (France) <<http://cisgw3.law.pace.edu/cases/950913f1.html>> (in the light of the parties' dealings that had lasted for several months, the seller knew that the goods would be marketed in France and should have interpreted the buyer's order as being conditional on the goods complying with the 'marketing regulations of the French market').

<sup>88</sup> See Supreme Court, 8 March 1995 (Germany) (n 49); *Medical Marketing v Internazionale Medico Scientifica*, 1999 WL 311945, US District Court for the Eastern District of Louisiana <<http://cisgw3.law.pace.edu/cases/990517u1.html>>. For the discussion of the broader relevance of prior dealings between the contracting parties, see Rule 4(d) and Comments 4.8-4.9.

5.6. According to Rule 5.2(c), whether the standard at that place is the same as that at the seller's place of business is relevant to whether the seller has an obligation to comply with the local standard at the place of the intended use of the goods. The relevance of this factor varies depending on which provision in Article 35(2) is applicable. As far as Article 35(2)(b) is concerned, *in itself* the fact of the standard being the same in the place of use of the goods and in the seller's place of business adds nothing to the seller's knowledge of a particular purpose. If the seller has knowledge of the place of the intended use of the goods (Rule 5.1(a)) and, where applicable, the standard there (Rule 5.2(a)), the seller's liability flows from Rule 5.1(a) and Rule 5.2(a) (and possibly Rule 5.2(b)). In this situation, the fact that the standard is the same in both places is of no significance. If the seller has no knowledge of the place of use of the goods, the fall-back guidance in Rule 5.1(b) points to the seller's obligation to comply with the standard in the buyer's place of business. In this case, the mere fact that the standard in the seller's place of business is the same as that in the buyer's place of business changes nothing in terms of the seller's knowledge of a particular purpose of the use of the goods (the first part of Article 35(2)(b)). However, this factor is relevant to the 'reliance on the skill and judgement' provision (the second part of Article 35(2)(b))<sup>89</sup> because it weakens the seller's ability to argue that the buyer did not rely or that it was unreasonable for the buyer to rely on the seller's skill and judgement. The standard in the seller's place of business being the same as that in the place of use of the goods normally demonstrate that the seller has the required skill and judgement to comply with it.

5.7. This factor is directly relevant to determining the 'ordinary use' (Article 35(2)(a)) or the 'usual manner' of containment or packaging (Article 35(2)(d)). Since the seller's place of business and the place of the intended use of the goods are the places that are relevant to the parties' contract, the 'ordinary use' of the goods or their 'usual manner' of containment or packaging should be defined in a way that is compliant with the standard applicable in both these places.<sup>90</sup> Put differently, these two places and the same standard applicable in them constitute the relevant context with reference to which the 'ordinary use' or 'usual manner' of containment or packaging should be determined.<sup>91</sup>

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<sup>89</sup> See Schlechtriem (n 89).

<sup>90</sup> See, similarly, Schwenzer, Hachem and Kee (n 65) para. 16.

<sup>91</sup> This line of reasoning is relevant regardless of whether the legal nature of the rules in Article 35(2) is seen as based on the parties' presumed intentions or detached or independent from such intentions.