

18 THE CISG – A SECRET WEAPON IN THE FIGHT FOR A FAIRER WORLD?

Petra Butler*

18.1 INTRODUCTION

I would like to start this contribution by thanking Professor Ingeborg Schwenzer for organizing ‘The CISG and Beyond’, a conference to celebrate the CISG’s 35th anniversary, and for the invitation to share my thoughts on the topic in this book. This paper is based on the conference commemorating 35 years of the CISG in Basel at the end of January 2015.

‘The CISG and Beyond’ concerns the question of the CISG’s future, and the contributions in this volume aptly discuss the CISG’s future within the realm of international commercial law. However, will questions of the interpretation of the CISG and its relationship with the wider international commercial law be the main playground for the CISG in the future? Or, might the CISG be destined to help to achieve far more – a better future for everyone?

What kind of future are we talking about?

- Will we in – say 50 years’ time – still have 168 million children working 10 hour days under degrading conditions?¹
- Will governments force and/or enslave people to work in mines, *i.e.* will we be able to use our smartphones knowing that they were produced with conflict free coltan?² and
- Will the world’s geography have changed with some small island states being erased from the map? Will the number of environmental refugees, currently estimated at 30 million, triple? Will we still be able to enjoy the beaches of Mauritius or the Maldives?³

* I would like to thank Associate Professor Alberto Costi for his helpful comments on a draft of this paper and Justin Li for his proof-reading skills. Simon Wilson’s discussion of the issues discussed in his LLM thesis provided helpful references.

1 <www.ilo.org/global/topics/child-labour/lang--en/index.htm> (last accessed 25 May 2015).

2 <www.laborrights.org/in-the-news/plight-african-child-slaves-forced-mines-our-mobile-phones> (last accessed 25 May 2015).

3 Compare in 2008 Deputy High Commissioner for Refugees L Craig Johnstone who put the figure conservatively to 250 million by 2050, available from <www.unhcr.org/493e9bd94.html> (last accessed 23 May 2015). Natural disasters displaced on average 27 million people a year (UNCHR, *Global Estimates 2014: People displaced by disasters* (UNCHR, Sept 2014) Executive Summary, 8.

While it is primarily the duty of states to safeguard its citizens and their well-being, in other words implementing universally accepted human rights, this can be difficult in practice.⁴ In one sense, it has become harder to do this in a globalized world where many corporations operate across borders and human rights abuses often occur far away from the corporation's headquarters, like the pollution in Nigeria⁵ or the unsafe working conditions in Bangladesh.⁶ Multinational corporations often generate profits larger than states' GDP.⁷

However, those corporations are also often crucial in a state's well-being through paying taxes, providing employment and infrastructure, thereby being able to exert a certain amount of political influence.⁸

Like the CISG, multinational corporations play undoubtedly a crucial role in the world's future. Even though corporations are not (yet) *directly* subject to any human rights obligations under international law,⁹ they can either immensely effect human rights compliance or be responsible for aiding human rights violations.

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- 4 I. Schwenzer & B. Leisinger, 'Ethical Values and International Sales Contracts', in R. Cranston, J. Ramberg & J. Ziegel (Eds.), *Commercial Law Challenges in the 21st Century: Jan Hellner in Memoriam*, Iustus Forlag, Stockholm, 2007, pp. 249 *et seq.*; J. Ruggie, 'Business and Human Rights: The Evolving International Agenda', *American Journal of International Law*, Vol. 101, 2007, p. 819.
 - 5 See *Gbembre v Shell Petroleum Nigerian Limited, et al.* FHC/B/CS/53/05, High Court of Nigeria, 2006; [2005] - F.H.C.L.R. - (Nigeria), available from <www.climatelaw.org/media/gas.flaring.suit.nov2005/ni.shell.nov05.decision.pdf> (last accessed 20 May 2015). See, generally, Shi-Ling Hsu, 'A Realistic Evaluation of Climate Change Litigation through the Lens of a Hypothetical Lawsuit', *University of Colorado Law Review*, Vol. 79, 2008, pp. 701 *et seq.*
 - 6 See R. D. Mariani & F. Valenti, *Working Conditions in the Bangladeshi Garment Sector: Social Dialogue And Compliance*, available from <www.fairwear.org/ul/cms/fck-uploaded/documents/countrystudies/bangladesh/WorkingconditionsintheBangladeshigarmentsectorSocialdialogueandcompliance.pdf> (last accessed 23 May 2015).
 - 7 29 of the world's largest economies are companies (Paul de Grauwe, Filip Cameraman 'How Big Are Multinational Companies') available from <<http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.416.369&rep=rep1&type=pdf>> (last accessed 4 June 2015). In 2000, the world's largest multinational by values added was ExxonMobil. Its revenue was larger than the GDPs of Pakistan, New Zealand, Hungary and Viet Nam (B. Roach, *Corporate Power in a Global Economy*, Tufts University Global Development and Environment Institute, Medford, 2007, p. 5, available from <www.ase.tufts.edu/gdae/education_materials/modules/corporate_power_in_a_global_economy.pdf>).
 - 8 B. Roach, 2007, *supra* note 7, pp. 11 *et seq.*; P. Rodriguez, D. S. Siegel & A. Hillman *et al.*, 'Three Lenses on the Multinational Enterprise: Politics, Corruption, and Corporate Social Responsibility', *Journal of International Business Studies*, Vol. 37, 2006, p. 733; see, already, J. Nye, 'Multinational Corporations in World Politics', *Foreign Affairs*, Vol. 53, 1974, p. 153.
 - 9 J. Ruggie, *Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development Protect, Respect and Remedy: A Framework for Business and Human Rights*, Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, Human Rights Council, A/HRC/8/5, Agenda Item 3, 7 April 2008. See the proposal for an *International Arbitration Tribunal on Business and Human Rights* available from <www.14bb.org/news/IntlArbTribunal25Feb2014.pdf> (last accessed 26 May 2015).

Various attempts have been made to prevent corporate human rights abuses and emphasize corporate social responsibility, including through soft law instruments,¹⁰ voluntary initiatives, like UN Global Compact,¹¹ and the establishment of a UN Human Rights Council working group tasked with creating a binding instrument that imposes human rights obligations on corporations at international law.¹² These different initiatives, in addition to a heightened awareness on the parts of consumers in regard to fair trade,¹³ have resulted in some progress being made to achieving comprehensive protection of human rights.

This paper will explore the possibility of using the CISG as an additional means of encouraging and regulating corporate ethical conduct. It is particularly appropriate to explore whether – and if so how – the CISG can play a part in helping to build a future where human rights of all are respected and human rights abuses are minimized since those questions were first explored by Professor Schwenzer in an article co-authored with Benjamin Leisinger in 2007 with the title ‘Ethical Values and International Sales Contracts’.¹⁴

To evaluate whether the CISG can be another tool in the ‘fight’ for a better future, this paper concentrates on whether the conformity requirements in Article 35 CISG can be used to require goods to conform to certain *ethical* standards, even when this is not expressly required by the contract.

Professor Paulo Nalin explores in Chapter 4.3 what remedies might be available if a breach due to non-ethical production of the good is established.

The inquiry in this paper will concentrate on Article 35(1) CISG and whether the conformity requirement can extend to ethical standards. The role Article 35(2) CISG can play in helping to uphold ethical standards and issues arising in supply chains (which undoubtedly holds some interesting challenges) are beyond the scope of this paper.

10 Such as the United Nations *Guiding Principles on Business and Human Rights*, available from <www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf> (last accessed 24 May 2015), and the OECD Guidelines for Multinational Enterprises, available from <www.oecd.org/corporate/mne/> (last accessed 25 May 2015).

11 Such as the United Nations Global Compact, available from <www.unglobalcompact.org/> (last accessed 25 May 2015); the Electronics Industry Code of Conduct, available from <www.eiccoalition.org/standards/code-of-conduct/> (last accessed 25 May 2015), and the Kimberley Process, available from <www.kimberleyprocess.com/> (last accessed 25 May 2015).

12 <www.ohchr.org/EN/Issues/Business/Pages/WGHRandtransnationalcorporationsandotherbusiness.aspx> (last accessed 25 May 2015). R. Dumbuya, *Corporate Responsibility to Respect Human Rights: Is the UN Guiding Principles on Business and Human Rights up to the Task or Is There a Need for a Treaty on Business and Human Rights?*, LLM Paper, University of Dundee, 2014, p. 5, at p. 7

13 S. Castaldo *et al.*, ‘The Missing Link between Corporate Social Responsibility and Consumer Trust: The Case of Fair Trade Products’, *Journal of Business Ethics*, Vol. 84, 2009; S. Lyon, ‘Fair Trade Coffee and Human Rights in Guatemala’, *Journal of Consumer Policy*, Vol. 30, Issue 3, 2007, pp. 241-261; E. MacBride, ‘Jens Hainmueller: Will Consumers Actually Pay For Fair Trade?’, *Stanford Business Insides*, 8 April 2015; EU Commission ‘Attitudes of EU Consumers To Fair Trade Bananas’ (EU Commission 1997, available from <http://ec.europa.eu/public_opinion/archives/ebs/ebs_116_en.pdf> (last accessed 27 May 2015).

14 Schwenzer & Leisinger, 2007, *supra* note 4, pp. 249 *et seq.*

However, before conformity under Article 35 CISG is discussed, this paper explores the importance of Article 7 to the issue.

18.2 ARTICLE 7 CISG – THE CISG AS PART OF INTERNATIONAL LAW

Article 7(1) CISG refers to the CISG's international character.¹⁵ This 'self-reference' to its international character is the crucial underlying core notion for the overall thesis advanced in this paper: the CISG as part of the international legal order has to take account of universally accepted obligations stipulated by that order.

The CISG is an international treaty like, for example, the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958) or the Convention on Biological Diversity (1992) and as such part of international law. International law also comprises human rights treaties.¹⁶ Those human rights conventions build the international framework within which international institutions operate but they also inform and influence states' domestic law.¹⁷ The International Bill of Rights (Universal Declaration, Convention on Civil and Political Rights, Convention on Economic, Social and Cultural Rights) is like a domestic constitution, and like a domestic constitution, the International Bill of Rights sets the parameters in which non-human rights treaties like the CISG operate. And even though international treaties bind their member states rather than individuals, their implementation may have a direct effect on the individual.¹⁸ It follows that the International Bill of Rights determines the scope and the limits of party autonomy of parties contracting under international devised contract law, like the CISG.

Article 38 of the Statute of the International Court of Justice identifies additional sources of international law as, *inter alia*, customary law derived from the practice of states and general principles of law recognized by civilized nations.¹⁹

15 CISG, Art. 7(1): "In the interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade."

16 There are 9 core human rights treaties: ICERD, ICCPR, ICESCR, CEDAW, CAT, CRC, ICMW, CPED, CRPD, ICESCR-OP, ICCPR-OP1, ICCPR-OP2, OP-CEDAW, OP-CRC-AC, OP-CRC-SC, OP-CRC-IC, OP-CAT, OP-CRPD, available from <www.ohchr.org/EN/ProfessionalInterest/Pages/CoreInstruments.aspx> (last accessed 28 May 2015).

17 See T. Pegram, 'Governing Relationships: The New Architecture in Global Human Rights Governance', *Millennium Journal of International Studies*, Vol. 43, 2015, pp. 618 *et seq.*

18 See M. Shaw, *International Law*, 7th edn, CUP, Cambridge, 2014, pp. 188-189.

19 See Shaw, 2014, *supra* note 18, pp. 53-65; C. Greenwood, 'Sources of International Law: An Introduction', available from <http://legal.un.org/avl/pdf/ls/Greenwood_outline.pdf> (last accessed 25 May 2015), who indicates that the list enumerated in Art. 38 (1) of the Statute of the International Court of Justice is not thought to be complete anymore. See also A. da Rocha Ferreira *et al.*, 'Formation and Evidence of Customary International Law', *UFRGS Model United Nations Journal*, 2013, p. 182, at p. 184.

Customary international law refers to a ‘general practice accepted as law’.²⁰ Practices which are so important in the international (or domestic) arena that every state, even states that have not signed (any of) the human rights conventions, will have to adhere to them (in accordance with Article 38 of the Vienna Convention 1969). In order for a practice to become customary international law, there must be duration, consistency and generality of practice, as well as *opinio juris*.²¹ It is generally recognized that a number of fundamental principles of human rights, especially the rights enshrined in the International Bill of Rights, are part of customary international law.²² An example of a right not explicitly enshrined in the International Bill of Rights but accepted as a customary human right, and one which is especially at risk to be violated in regard to the production of goods, is the prohibition of child labour.²³ Child labour is explicitly prohibited by the UN Convention on the Rights of the Child (UNCRC),²⁴ which has 194 state parties,²⁵ making it the most widely adopted of all international conventions.²⁶ The right of children to be free from child labour is also enshrined in the ILO Convention on the Minimum Age for Admission to Employment and Work²⁷ and the ILO Convention on the Worst Forms of Child Labour,²⁸ which have been ratified by 167 and 179 states, respectively.²⁹ In addition, Article 25(2) of the Universal Declaration of Human Rights affords children ‘special care and assistance’, the Preamble to the International Covenant on Economic, Social and Cultural Rights in Article 10 recognizes that children should be protected from ‘economic and social exploitation’, and Article 24 of the Convention of the Rights of the Child stipulates that

every child shall have, without any discrimination as to race, colour, sex, language, religion, national or social origin, property or birth, the right to such

20 ICJ Statute Art. 38(1)(b).

21 J. Crawford, *Brownlie's Principles of Public International Law*, 8th edn, Oxford University Press, Oxford, 2012, pp. 24–25. *Opinio juris* has been defined as the assertion of a legal right or the acknowledgment of a legal obligation, see C. Greenwood, ‘Sources of International Law: An Introduction’, available from <http://legal.un.org/avl/pdf/ls/Greenwood_outline.pdf> (last accessed 25 May 2015).

22 Crawford, 2012, *supra* note 21, p. 642.

23 A clear definition of child labour is lacking, and there is some controversy around the edges of what child labour entails. For the purpose of this contribution, child labour refers to the worst form of child labour.

24 CRC Art. 32.

25 Including the Holy See – the only states that are not parties are the USA, Somalia and Sudan. See <https://treaties.un.org/pages/viewdetails.aspx?src=treaty&mtdsg_no=iv-11&chapter=4&lang=en-entitle=UNTC-publisher=>> (last accessed 03 August 2015)

26 See list of human rights treaties on <<https://treaties.un.org/Pages/Treaties.aspx?id=4&subid=A&lang=en>> (last accessed 25 May 2015); J. Muncie & B. Goldson, ‘Youth Justice: In a Child’s Best Interests?’, in J. Simon & R. Sparks (Eds.), *The SAGE Handbook of Punishment and Society*, SAGE Publications Ltd, London, 2013, p. 345.

27 ILO Convention 138.

28 ILO Convention 182 and recommendation 190.

29 <www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11300:0::NO:11300:P11300_INSTRUMENT_ID:312327:NO> (last accessed 26 May 2015).

measures of protection as are required by his status as a minor, on the part of his family, society and the State.³⁰

Moreover, most states, in compliance with international standards, have in place child protection laws, including the prohibition of child labour.³¹ The prohibition of child labour is not only generally but *universally* practiced by states and is also accepted as being binding at international law.³² It is a rule of customary international law.³³ The same is now arguably true for the right to a sustainable environment.³⁴ If the customary international law analysis is not adopted, the right to be free from child labour as well as the right to a sustainable environment can arguably be conceptualized as general principles of law recognized by civilized nations.³⁵

Freedom to contract is also a protected human right (domestically and internationally). The right encompasses the right of parties to conclude contracts with parties of their choice and to negotiate the content of the contract free from any constraints.³⁶ The CISG recognizes

30 See also European Convention on Human Rights, Art. 5(1)(d); African Charter on Human and People's Rights, Art. 29(1); American Convention on Human Rights, Art. 19.

31 See country reports on the ILO website <www.ilo.org/ipecc/Regionsandcountries/lang--en/index.htm> (last accessed 25 May 2015). It has to be noted that the ratification of UNCRC and/or the ILO Conventions and national legislation prohibiting child labour does not mean that child labour is not practised in that country. See ICJ in the *Nicaragua* case: "In order to deduce the existence of customary rules, the Court deems it sufficient that the conduct of States should in general be consistent with such a rule; and that instances of State conduct inconsistent with a given rule should generally have been treated as breaches of that rule, not as indications of the recognition of a new rule." ICJ in *Nicaragua* ICJ Reps, 1986, at p. 98.

See also F. Humbert, *The Challenge of Child Labour in International Law*, Cambridge University Press, Cambridge, 2009, pp. 110 *et seq.*

32 Humbert, 2009, *supra* note 31, p. 110 who argues that child labour has not become customary international law yet since it is still practised.

33 H. Cullen, *The Role of International Law in the Elimination of Child Labor*, Martinus Nijhoff, Leiden, 2007, pp. 266 *et seq.* Even if the reader does not agree with the analysis that the prohibition of child labour is customary international law, the paper should be read as that being the hypothetical premise.

34 See S. Glazebrook, 'Human Rights and the Environment', (2009) *VUWLR: Human Rights in the Pacific* 293; P. Taylor, 'From Environmental to Ecological Human Rights: A New Dynamic in International Law?' *Georgetown International Environmental Law Review*, Vol. 10, 1997, p. 309.

35 Humbert, 2009, *supra* note 31, p. 110 *et seq.* who argues that the prohibition of child labour is better analysed as a 'general principle'.

36 Cf. *Chicago, Burlington & Quincy RR Co v McGuire* 219 US 549, 567 (1911); BVerfGE 8, 274. 328; BVerfGE 89, 214, 231; D. N. Mayer, *Liberty To Contract: Rediscovering A Lost Constitutional Right*, Cato Institute, Washington, 2011, pp. 1-10; D. Weber, 'Restricting the Freedom of Contract: A Fundamental Prohibition', *Yale Human Rights and Development Journal*, Vol. 16, 2013, pp. 51 *et seq.*; P. Webster, 'Contract Law and Human Rights', in E. Reid & D. Visser, *Private Law and Human Rights: Bringing Rights Home in Scotland and South Africa*, Edinburgh University Press, Edinburgh, 2013, p. 290; S. Laing & D. Visser, 'Principles, Policy and Practice: Human Rights and the Law of Contract', in E. Reid & D. Visser (Eds.), *Private Law and Human Rights: Bringing Rights Home in Scotland and South Africa*, Edinburgh University Press, Edinburgh, 2013, p. 330, pp. 334 *et seq.*; L. Fastrich, 'Human Rights and Private Law', in K. Ziegler (Ed.), *Human Rights and Private Law: Privacy as Autonomy*, Bloomsbury, London, 2007, III A.

the parties' freedom to contract in Article 6.³⁷ Unlike the UNIDROIT Principles of International Commercial Contracts (PICC) and the Principles of European Contract Law (PECL),³⁸ the CISG does not explicitly state that party autonomy is limited by mandatory rules. Some commentators have taken this to mean that party autonomy under Article 6 is not limited by any mandatory rules that relate to matters within the CISG's scope.³⁹ In their view, only mandatory rules relating to matters outside the scope of the CISG apply to contracts governed by the convention.⁴⁰

According to Article 4, "the rights and obligations of the seller and the buyer arising from [the] contract" are within the CISG's scope.⁴¹ Therefore, under the above view, party autonomy under Article 6 is not limited by mandatory rules that determine these obligations. However, the view does not take account of the position Article 7(1) places the CISG in within the international framework as set out earlier. The right of the parties to contract freely has to be weighed against rights enshrined in international treaties but more importantly against rights which are accepted as customary international law.

The position that the CISG is part of international law is also in accordance with Article 31(2)(c) of the Vienna Convention. Customary human rights standards, like the prohibition of child labour and the right to a sustainable environment, as part of international law therefore set a limit to party autonomy under the CISG in the sense that those customary human rights standards have to be taken into account when interpreting the provisions of the CISG.⁴²

37 CISG, Art. 6 states "the parties may exclude the application of this Convention or, subject to Article 12, derogate from or vary the effect of any of its provisions".

M. Fogt, 'Contract Formation under the CISG: The Need for a Reform', in L. DiMatteo (Ed.), *International Sales Law: A Global Challenge*, Cambridge University Press, Cambridge, 2014, p. 184.

38 UNIDROIT Principles of International Commercial Contracts 2010, Arts. 1.1.3 and 1.4; The Principles of European Contract Law 2002, Art. 1:103.

39 U. Schroeter, 'Freedom of Contract: Comparison Between Provisions of the CISG (Article 6) and Counterpart Provisions of the PECL', *The Vindobona Journal of International Commercial Law and Arbitration*, Vol. 6, 2002, p. 257, at p. 262; F. Enderlein & D. Maskow, *International Sales Law: United Nations Convention on Contracts for the International Sale of Goods – Convention on the Limitation Period in the International Sale of Goods: Commentary*, Oceana, New York, 1992, p. 49.

40 Schroeter, 2002, *supra* note 39, p. 257, at p. 262.

41 Article 4 reads: "This Convention governs only the formation of the contract of sale and the rights and obligations of the seller and the buyer arising from such a contract. In particular, except as otherwise expressly provided in this Convention, it is not concerned with: (a) the validity of the contract or of any of its provisions or of any usage; (b) the effect which the contract may have on the property in the goods sold."

42 The argued mandatory rules through customary law have to be distinguished from domestic public law regulations or mandatory rules that condemn certain behaviour. Domestic mandatory rules or public regulations that concern the validity of the contract do not fall under the CISG (Article 4(a)). It is an issue to be decided in accordance with the applicable domestic law to the contract.

18.3 CONFORMITY UNDER ARTICLE 35(1)

In the following section, this paper will discuss how the CISG, particularly Article 35(1), must be interpreted in the light of existing customary law. Article 35(1) requires the seller to deliver 'goods which are of the quantity, quality and description required by the contract'.

18.3.1 *General*

18.3.1.1 **Minimal Ethical Standards**

How do generally accepted human rights standards affect the conformity of goods?

Schwenzer and Leisinger argued already in 2007 that goods had to conform to 'minimal ethical standards'.⁴³ Article 7(1) and the CISG's position within the international realm require that goods have to adhere to ethical standards which meet the requirements of customary international human rights, like 'child labour free' and 'produced in a sustainable way'.

The fact that human rights are violated in the manufacturing of goods alone does not affect their physical features. Jurisprudence and academic commentary agree that under Article 35(1), 'quality' includes not only the physical condition of the goods but also 'all factual and legal circumstances concerning the relationship of the goods to their surroundings'.⁴⁴

However, the issue that arises is what constitutes child labour or what is sustainable production in the particular case? How do those rights translate into concrete frameworks which can be enforced between contractual parties? What a customary right entails is a question for the human rights jurisprudence and the academy to define. Only clearly defined rights can impose standards between parties.⁴⁵ In regard to the prohibition of child labour, Article 3 of ILO Convention No. 182 stipulates concrete enough norms.⁴⁶ Hazardous

43 Schwenzer & Leisinger, 2007, *supra* note 4, pp. 249 *et seq.*

44 I. Schwenzer, 'Art. 35 Para. 9', in I. Schwenzer (Ed.), *Commentary on the UN Convention on the International Sale of Goods (CISG)*, 3rd edn, Oxford University Press, Oxford, 2010.

45 A comprehensive discussion of the issue of the ascertainment of the content of a right for the purposes of being an enforceable standard in regard to Article 35(1) is beyond the scope of this article.

46 Art. 3 ILO 1999 No. 182 reads:

"for the purposes of this Convention, the term the worst forms of child labour comprises:

(a) all forms of slavery or practices similar to slavery, such as the sale and trafficking of children, debt bondage and serfdom and forced or compulsory labour, including forced or compulsory recruitment of children for use in armed conflict;

(b) the use, procuring or offering of a child for prostitution, for the production of pornography or for pornographic performances;

(c) the use, procuring or offering of a child for illicit activities, in particular for the production and trafficking of drugs as defined in the relevant international treaties;

work is defined as ‘work that jeopardises the physical, mental or moral well-being of a child, either because of its nature or because of the conditions in which it is carried out’.⁴⁷ The law is not foreign to amorphous concepts. The CISG itself uses concepts like ‘reasonable’.⁴⁸ The public policy exception in the New York Convention⁴⁹ and the analogous concept in most domestic private international law regimes are also ‘amorphous’ and can be clarified and substantiated through jurisprudence and academic commentary.

18.3.1.2 Non-Minimal Ethical Standards

What about ‘non-minimal’ ethical standards, in the following referred to as NME standards, *i.e.* rights like adequate working conditions or corruption that do not (yet) meet the threshold of a customary human right or a general principle?

Express inclusion is the easiest and most certain way to require a seller to deliver goods produced in accordance with other ethical standards, like fair working conditions or production without corruption. However, if no clear express term is included in the contract, can ethical standards be implied? The question becomes whether the contract can be interpreted in line with Articles 8 and 9, so as to require the seller to deliver goods produced in an NME manner and for the buyer, for example, not to use the payment of the purchase price for money laundering purposes.

18.3.2 Can a Term Producing NME Goods Be Established from the Circumstances? Article 8 Inquiry

Article 8 CISG sets out

- (1) For the purposes of this Convention statements made by and other conduct of a party are to be interpreted according to his intent where the other party knew or could not have been unaware what that intent was.
- (2) If the preceding paragraph is not applicable, statements made by and other conduct of a party are to be interpreted according to the understanding that a reasonable person of the same kind as the other party would have had in the same circumstances.
- (3) In determining the intent of a party or the understanding a reasonable person would have had, due consideration is to be given to all relevant circumstances of the case including the negotiations, any practices which the parties

(d) work which, by its nature or the circumstances in which it is carried out, is likely to harm the health, safety or morals of children.”

⁴⁷ ILO No. 182, 1999, Art. 3(d).

⁴⁸ *E.g.*, CISG, Art. 39(1) ‘reasonable time’; Art. 8(3) ‘reasonable person’.

⁴⁹ NY Convention, Art. 5V2(b).

have established between themselves, usages and any subsequent conduct of the parties.

Article 8 sets out how to conduct an inquiry to establish whether NME standards that have not been explicitly agreed upon between the parties have become contractual standards. NME standards can be incorporated through the parties' contractual negotiations. It will be a matter of a factual inquiry in accordance with Article 8 whether a reasonable person in the shoes of the seller and/or buyer agreed to certain NME standards to be adhered to in the production of the goods and the payment of the purchase price. Of particular importance in that inquiry are whether the parties participated in a voluntary initiative, the incorporation of NME standards or obligations through standard terms, or whether there is a trade usage in accordance with Article 9(1)⁵⁰ between the parties.

18.3.2.1 Mutual Participation in a Voluntary Initiative

If both parties participate in a private initiative prohibiting certain NME behaviour such as the UN Global Compact, it can be argued that they have agreed to adhere to the NME standards. "[I]f both parties have agreed to certain standards on a broader scale, they must, consequently, be deemed to have, at least implicitly, agreed to such standards in their individual contracts".⁵¹ On the other hand, as it has been argued:

It is one thing to generally participate and sponsor a United Nation initiative. It is another thing to contractually agree that a contractual party is entitled to contractual remedies if an ethical standard is not met.⁵² Signatories to voluntary initiatives make certain commitments, and most voluntary initiatives require reporting on the compliance with the espoused principles.⁵³ In other words, signatories 'cannot have their cake and eat it, too'. If both parties are parties to the same initiative, even a reasonable third person would understand that the NME standards set out in the respective initiative will be adhered to by both parties. That means, a seller who has expressed a commitment to upholding the principles of a *voluntary* initiative, has also impliedly agreed to be contractually bound by NME principles in every international sales contract it enters into with other participants to the same initiative.

50 CISG, Art. 9(1): "The parties are bound by any usage to which they have agreed and by any practices which they have established between themselves".

51 Schwenger & Leisinger, 2007, *supra* note 4, p. 249, at p. 264.

52 C. Ramberg, *Emotional Non-Conformity in the International Sale of Goods, Particularly in Relation to CSR Policies and Codes of Conduct*, research paper, Stockholm University, 2014, pp. 13-14.

53 See reporting in regard to Global Compact available from <www.unglobalcompact.org/COP/index.html> (last accessed 27 May 2015).

18.3.2.2 Incorporation of Standard Terms without Explicit Reference: Buyer's Code of Conduct

A code of conduct sets out the social and environmental standards that a corporation expects its suppliers to abide by.⁵⁴ Codes of conduct are widespread.⁵⁵ Where a buyer has a code of conduct requiring suppliers to adhere to certain ethical standards, this code can be incorporated into the contract as a set of standard terms.⁵⁶ One of the recurrent problems in regard to standard terms is whether or not the terms which are usually not the object of specific bargaining have been included in the agreement between the parties. The CISG does not specifically deal with the issue of the incorporation of standard terms. The issue is governed mainly by Article 8(2), *i.e.* where a party is not aware of the intent that the other party had with a specific statement, that statement must be interpreted according to the understanding of the NME obligations that a reasonable person of the same kind as the other party would have had in the same circumstances. In addition, in accordance with Article 9, trade usage between the parties can also be determinative. Whether or not the other party had and have to have the opportunity to take notice of the standard terms is one of the contested issues.⁵⁷

18.3.2.3 Article 9(1) CISG

Parties are free to establish explicitly or impliedly a trade usage or practice⁵⁸ between themselves. That particular trade usage or practice will be applicable between them whether or not they have explicitly referred to it in their contract.⁵⁹ However, parties are also free

54 M. Andersen & T. Skjoett-Larsen, 'Corporate Social Responsibility in Global Supply Chains', *Supply Chain Management: An International Journal*, Vol. 14, Issue 2, pp. 75-86, at p. 78.

55 See, for example, Rio Tinto Code of Conduct, available from <www.riotinto.com/documents/The_way_we_work.pdf> (last accessed 29 May 2015); The Nestle Supplier Code, available from <www.nestle.com/asset-library/documents/library/documents/suppliers/supplier-code-english.pdf> (last accessed 29 May 2015); Kraft Code of Conduct, available from <www.kraftfoodsgroup.com/SiteCollectionDocuments/pdf/investor/KraftCodeofConduct.pdf> (last accessed 29 May 2015).

56 See in regard to a definition of 'standard term' in regard to the CISG: CISG-AC Opinion No. 13, *Inclusion of Standard Terms under the CISG*, Rapporteur: Professor Sieg Eiselen, University of South Africa, Para. 1; see also UNIDROIT Principles of International Commercial Contracts 2010 (UNIDROIT Principles) Art. 2.1.19(2).

57 See CISG-AC Opinion No. 13, *supra* note 56, Paras. 2.1 *et seq.*

58 See UNCITRAL, *Digest of Case Law on the United Nations Convention on Contracts for the International Sale of Goods*, United Nations, New York, 2012, Art. 9 Para. 6; cf. Art. 1.9(1) UNIDROIT Principles.

59 P. Perales Viscasillas, 'Art. 9 Para. 11', in S. Kröll, L. A. Mistelis & P. Perales Viscasillas (Eds.), *UN Convention on Contracts for the International Sale of Goods (CISG) Commentary*, Beck/Hart, Munich, 2011; cf. M. Schmidt-Kessel, 'Art. 9 Para. 6', in I. Schwenzer (Ed.), *Commentary on the UN Convention on the International Sale of Goods (CISG)*, 3rd edn, Oxford University Press, Oxford, 2010; C. Pamboukis, 'The Concept and Function of Usages in the United Nations Convention on the International Sale of Goods', *Journal of Law and Commerce*, Vol. 25, p. 107, p. 112, p. 113; OGH (21 March 2000) 10 Ob 344/99g, available from <www.cisg.law.pace.edu> (Wood case).

to explicitly depart from the trade usage or previously established practice.⁶⁰ Trade usages under Article 9(1) do not have to be internationally accepted.⁶¹

For a practice to be established, the parties have to repeatedly and with sufficient frequency and duration institute custom which creates a justified expectation that the parties will proceed correspondingly in the future.⁶² Contrary to a practice established by the parties, a usage has to be observed by at least one branch of industry.⁶³ However, the distinction between a practice and a trade usage under Article 9(1) is rather academic since the core idea under Article 9(1) is the agreement of the parties in regard to the use and incorporation of certain standardized terms and conditions.⁶⁴

For the purpose of this paper, it is important to note that it will be a factual inquiry in accordance with Article 8, whether the parties have established a trade usage or practice among them in regard to their ethical behaviour.

18.3.2.4 Summary

An Article 8 inquiry can lead to the finding that parties have impliedly agreed that goods have to be produced in NME. A more interesting question is in which circumstances is an industry-based trade usage established that requires the production of NME goods?

18.3.3 *In Which Circumstances Is an Industry-Based Trade Usage Established that Requires the Production of NME Goods?*

By virtue of Article 9(2),⁶⁵ trade usages do not need to be expressly agreed upon by the parties if they are so widely recognized and observed that the parties' reliance on them is presumed unless they express otherwise.⁶⁶ Article 9(2) does not require *universal* knowledge

60 CLOUT case No. 579.

61 CLOUT case No. 579; OGH (15 October 1998) 2 Ob 191/98x, available from <www.cisg.law.pace.edu> (*Timber case*).

62 See CLOUT case No. 750; Perales Viscasillas, 2011, *supra* note 59, Art. 9 Para. 8; Schmidt-Kessel, 2010, *supra* note 59, Art. 9 Para. 8; cf. §1-205 (1) UCC; P. Schlechtriem & P. Butler, *UN Law on International Sales*, Springer, Heidelberg, 2009, Para. 60.

63 UNCITRAL, *Digest of Case Law on the United Nations Convention on Contracts for the International Sale of Goods*, United Nations, New York, 2012, Art. 9 Para. 7.

64 So arguably, too, Perales Viscasillas, 2011, *supra* note 59, Art. 9 Paras. 15-16. Examples of trade usages often agreed upon by parties (in accordance with Art. 9(1)): USP 600, INCOTERMS.

65 CISG, Article 9(2) states: "The parties are considered, unless otherwise agreed, to have impliedly made applicable to their contract or its formation a usage of which the parties knew or ought to have known and which in international trade is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade concerned."

66 UNCITRAL, *Digest of Case Law on the United Nations Convention on Contracts for the International Sale of Goods*, United Nations, New York, 2012, Art. 9 Para. 9; S. Seppälä, *The Responsibilities and Rights of Both Buyer and Seller in International Trade Concerning the Conformity of the Goods and Additional Contractual Requirements*, LL.M. Thesis, University of Lapland, 2013, p. 23.

or observance of the trade usage.⁶⁷ It is sufficient that the usage is recognized and observed by the *majority* of persons doing business in the particular industry in question.⁶⁸

This raises interesting issues in the context of this paper: are there already widely recognized practices in particular industries or even globally that amount to trade usages that oblige the manufacturing of NME goods. If so, this prohibition forms an implied term in any CISG contract to which the usage applies. The inquiry is therefore two-fold – does a global trade usage already exist and/or are there any particular industry trade usages.

To be clear, this paper advances the argument that minimum ethical standards determine the characteristics of the goods under Article 35(1) due to the CISG being part of the international law canon. To find a global trade usage in regard to ‘minimum ethical standards’ is an alternative. Allocating the analysis of ‘minimum ethical standards’ as overarching principles that have to be taken into account when interpreting the provisions of the CISG in accordance with Article 7(1), means that parties cannot exclude ‘minimum ethical standards’ and that the parties’ performance has to comply with those minimum ethical standards. The establishment of ‘NME standards’ as a global trade usage means that businesses would be more human rights sensitive than states. If ethical standards as *global* trade usages do not exist, the issue arises as to whether particular industry trade usages exist that incorporate minimum and NME standards.

18.3.3.1 Globally Applicable Trade Usage?

18.3.3.1.1 Ethical Behaviour Globally Demanded?

Schwenzer and Leisinger assert that the observance of ‘minimum ethical standards’ can be regarded as an international trade usage, thus forming an implied term in *every* international sales contract.⁶⁹ Private initiatives such as the UN Global Compact, the Principles for Responsible Investment⁷⁰ and the Initiative Social Accountability 8000 International Standard⁷¹ suggest a general business condemnation of unethical business practices, even wider than ‘minimum ethical standards’.

Others have argued that while the prohibition on ‘minimum ethical standards’ may be *theoretically* accepted worldwide, it is not observed by the majority of contracting parties

67 Schmidt-Kessel, 2010, *supra* note 59, Art. 9 Paras. 11, 16 and 18.

68 OGH (21 March 2000) 10 Ob 344/99g, available from <www.cisg.law.pace.edu> (Wood case); CLOUT case No. 175; UNCITRAL, *Digest of Case Law on the United Nations Convention on Contracts for the International Sale of Goods*, United Nations, New York, 2012, Art. 9 Para. 11; Schmidt-Kessel, 2010, *supra* note 59, Art. 9 Paras. 16 and 18.

69 Schwenzer & Leisinger, 2007, *supra* note 4, p. 249, at p. 249, p. 264, p. 266 and p. 273.

70 “PRI” the PRI has more than 1325 signatories, and the total assets under management total more than US \$45 trillion: <www.unpri.org/> (last accessed 27 May 2015).

71 ‘SA8000’, which is a voluntary standard requiring companies to adhere to certain requirements relating to workplace conditions and workers’ rights. See <www.sa-intl.org/index.cfm?fuseaction=Page.ViewPage&PageID=937> (last accessed 27 May 2015).

in practice.⁷² The observance of minimum ethical standards may be widely acknowledged in developed states, but cannot yet be adhered to by parties in developing countries.⁷³ Global Compact and the SA8000 Standard companies, for example, represent only a small percentage of the total firms involved in the international sale of goods. It could be argued that their participation is irrelevant in terms of determining the existence of a trade usage in the international goods trade. Furthermore, participants are not evenly distributed throughout the world. For example, while there are 951 business participants from France and 1231 from Spain, there are only 199 and 307 from China and the USA (the world's two biggest manufacturers), respectively, 18 from India, 55 from Pakistan, 33 from Russia and 26 from Bangladesh.⁷⁴ Thus, while the Global Compact indicates an observance of this standard by many corporations in some countries, its utility in terms of demonstrating a truly *global* trade usage in regard to more general ethical standards is limited

On the other hand though, the corporations that are signatories to those voluntary initiatives generate the most trading volume.⁷⁵ Angel *et al.* have argued, in regard to environmental standards, 'globally' should not be understood in the sense of geographical global but rather as a global network. That means, the standard or practice reaches further than where it is located. That reach is achieved, for example, through trade, investment and global production networks.⁷⁶

UN Global Compact has more than 12,000 corporate participants across 145 countries, large corporations are adhering to those minimal ethical standards even if they are not part of any voluntary organization and that, for example, re-insurers like the Münchener Rück will not re-insure projects that do not conform, *inter alia*, with accepted sustainability principles.⁷⁷ In addition, international law firms like Freshfields⁷⁸ and Clifford Chance⁷⁹ are advising their clients on human rights compliance in their commercial dealings including contracts. Codes of conduct comprise ethical standards based on UN Global

72 See P. Schlechtriem, 'Non-Material Damages – Recovery under the CISG?', *Pace International Law Review*, Vol. 19, 2007, p. 89, at p. 98; K. Mitkidis, 'Sustainability Clauses in International Supply Chain Contracts: Regulation, Enforceability and Effects of Ethical Requirements', *Nordic Journal of Commercial Law*, Vol. 1, 2014, pp. 14-15.

73 Seppälä, 2013, *supra* note 66, pp. 24-25; see Enderlein & Maskow, 1992, *supra* note 39, Para. 70.

74 <www.unglobalcompact.org/participants/search> (last accessed 20 May 2015).

75 Global Compact signatories comprise, *inter alia*, Nestle, Kraft, Rio Tinto, Shell, Rosneft, Petro China, BP, see <www.unglobalcompact.org/ParticipantsAndStakeholders/index.html> (last accessed 20 May 2015).

76 D. P. Angel, T. Hamilton & M. T. Huber, 'Global Environmental Standards for Industry', *Annual Review of Environment and Resources*, Vol. 32, 2007, p. 295, at pp. 299-300.

77 <www.munichre.com/corporate-responsibility/en/strategy-challenges/strategy/our-guiding-principles/index.html> (last accessed 27 May 2015).

78 <www.freshfields.com/en/insights/Business_rights_and_human_rights/> (last accessed 27 May 2015)

79 <www.cliffordchance.com/briefings/2014/05/business_and_humanrightsemergingissuesfo.html> (last accessed 27 May 2015).

Compact which demand, especially in supply chains, their adherence.⁸⁰ And organizations, like the European Ethics Network,⁸¹ or conferences, like the Responsible Business Summit,⁸² indicate that the need to behave ethically has become a mainstream concern for businesses. Most importantly, since UN Global Compact and concepts like social corporate responsibility have become ‘sexy’, the global number of children in child labour has declined by one third since 2000.⁸³

Specifically Angel *et al.* have defined a global environmental standard as a measure of performance to which a firm or industry is bound. Such environmental standards can take the form of an external regulatory mandate, but they can also take the form of an environmental performance standard that a firm applies to its own activities and to those of its suppliers, or a requirement that an investor group imposes on a firm as a condition of financing.⁸⁴ A standard that has arguably met the threshold of global reach is ISO 14001.⁸⁵ ISO 14001 is an environmental management standard. It defines the characteristics of a certified environmental management system, rather than a specific standard of environmental performance.⁸⁶

In addition to private initiatives that set a variety of ethical standards, there are now recent international and regional initiatives to devise frameworks that are designed to compel businesses to behave ethically.⁸⁷ The UN Guiding Principles on Business and Human Rights set out three overarching principles in regard to the implementation of human rights in business dealings:⁸⁸

- (a) States’ existing obligations to respect, protect and fulfil human rights and fundamental freedoms;
- (b) The role of business enterprises as specialized organs of society performing specialized functions, required to comply with all applicable laws and to respect human rights;
- (c) The need for rights and obligations to be matched to appropriate and effective remedies when breached.

80 See, for example, Rio Tinto, *The Way We Work* (Rio Tinto, 2011) 14 available from <http://procurement.riotinto.com/documents/Rio_Tinto_Procurement_principles_EN.pdf> (last accessed 23 May 2015).

81 <www.eben-nct.org/> (last accessed 22 May 2015).

82 <<http://events.ethicalcorp.com/rbs/>> (last accessed 22 May 2015).

83 <www.ilo.org/global/topics/child-labour/lang-en/index.htm> (last accessed 27 May 2015).

84 Angel, Hamilton & Huber, 2007, *supra* note 76, p. 295, at p. 299.

85 At the end of December 2008, there were over 188,000 organizations globally that had been issued ISO 14001 certificates. A total of 155 countries had organizations participating in the scheme, see <www.iso14001.com.au/iso-14001-standard.html> (last accessed 27 May 2015).

86 <www.iso14001.com.au/iso-14001-requirements.html> (last accessed 27 May 2015).

87 OECD, *OECD Guidelines for Multinational Enterprises*, 2011 edn, OECD Publishing, Paris, 2011.

88 United Nations, *UN Guiding Principles on Business and Human Rights*, HR/PUB/11/04 (2011) 1.

Those principles apply to all states and to all business enterprises, transnational or otherwise, regardless of their size, sector, location, ownership and structure. The European Union has incorporated the UN Guiding Principles into its Corporate Social Responsibility strategy.⁸⁹ The EU expects its member states to develop national action plans to implement the UN Guiding Principles.⁹⁰ The United Kingdom was the first state to implement UN Principles through its National Action Plan.⁹¹ The National Action Plan initiated, *inter alia*, an amendment to section 172 of the Companies Act 2006. Section 172 of the 2006 Act now requires

(1) ...directors to act in the way he considers, in good faith, would be most likely to promote the success of the company for the benefit of its members as a whole, and in doing so have regard (amongst other matters) to – [...] (d) the impact of the company's operations on the community and the environment, [...]

Another measure that is set to affect change is procurement requirements⁹² since government spending in procurement of goods and services is a major component of the overall global economy.⁹³ The OECD has also issued a set of guiding principles (amended in the light of the UN Guiding Principles on Business and Human Rights) that assist its member states to implement measures that enhance their businesses' compliance with human

89 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *A renewed EU strategy 2011-14 for Corporate Social Responsibility*, COM(2011) 681 final (25 October 2011) 4.8.2.

90 *Id.*

91 Secretary of State for Foreign and Commonwealth Affairs, *Good Business: Implementing the UN Guiding Principles on Business and Human Rights*, CM8695 (4 September 2013).

92 *Supra* note 89, 4.4.2; implementation of the UN Guiding Principles includes devising procurement requirements that ensure that businesses that do not meet the human rights standards are excluded from the process, *see*, for example, *supra* note 91.

93 Across OECD countries, public procurement accounts for an average of 12% of GDP (excluding procurement by state-owned utilities: OECD iLibrary, Size of public procurement market: <www.oecd-ilibrary.org/sites/gov_glance-2011en/09/01/index.html?contentType=%2fns%2fStatisticalPublication%2c%2fns%2fChapter&itemId=%2fcontent%2fchapter%2fgov_glance-2011-46-en&mimeType=text%2fhtml&containerItemId=%2fcontent%2fserial%2f2214399&accessItemIds=>> (last accessed 20 December 2014). The United States government, for example, spends approximately \$350 billion dollars annually in federal procurement alone (Mission Statement, Office of Management and Budget, <www.whitehouse.gov/sites/default/files/omb/procurement/mission.html> (last accessed 13 January 2015). In the European Union, around one fifth of GDP is spent on procurement, including procurement by public utilities *see* <http://ec.europa.eu/internal_market/publicprocurement/docs/implementation/20121011-staff-working-document_en.pdf> (last accessed 14 January 2015). Essential Elements of State National Action Plans for Implementation of the UN Guiding Principles on Business and Human Rights Expert Workshop organized by the UN Working Group on Business and Human Rights (7 May 2014, Geneva).

rights.⁹⁴ OECD and EU investment guidelines incorporate human rights principles and complement businesses' human rights obligations.⁹⁵

In sum, ethical business behaviour today is already required through a multitude of global private and government initiatives. Even though all these initiatives prohibit unethical behaviour, such prohibitions are limited in scope. These initiatives only prohibit behaviours contrary to minimum ethical standards, *i.e.* behaviour required by customary international human rights law. There is no universal consensus as to what amounts to NME behaviour. Therefore, at this point in time, those initiatives do not go far enough to prove that, other than in regard to minimum ethical standards, there is a developed globally accepted trade usage to produce ethical goods.

18.3.3.1.2 *Minimum Ethical Standards as a 'Rule'?*

Schmidt-Kessel points out that Article 9 is 'not concerned with the acknowledgment of legal norms, but rather with the determination of the content of the parties' agreement'.⁹⁶ However, for a trade usage to become part of the parties' contract, its content has to be definite. As stated above, even though one could argue that there is a global agreement that 'minimum ethical standards' should be observed between the parties, the question arises whether those standards are determinative enough to become part of a contract. For a 'minimum ethical standard' to be a trade usage which is universally part of every contract under the CISG, the standard has to refer to a reference point, *i.e.* the standard has to be clear and unambiguous. Certain provisions of the INCOTERMS and USP 600 are regarded as trade usages under Article 9(2).⁹⁷ Those are clear and unambiguous rules hardly open to interpretation. Even ISO 14001 which specifies the requirements for an environmental management system would not satisfy the requirements of a trade usage since it only sets out a framework for managing good environmental practice rather than setting concrete

94 OECD Due Diligence Guidance for Responsible Supply Chains for Minerals from Conflict Affected and High Risks Areas, see <www.oecd.org/corporate/mne/GuidanceEdition2.pdf> (last accessed 10 May 2015); OECD, Risk Awareness Tool for Multinational Enterprises in Weak Governance Zones, see <www.oecd.org/daf/inv/corporateresponsibility/36885821.pdf> (last accessed 10 May 2015); OECD, Voluntary Principles for Security and Human Rights, <www.voluntaryprinciples.org/> (last accessed 10 May 2015); OECD, Human Rights Training Toolkit for Oil and Gas Industry, see <www.international-alert.org/resources/publications/csbp-extractive-industries-en> (last accessed 10 May 2015); Guide Conflict Sensitive Business Practice: Guidance for Extractive Industries (International Alert 2006), see <www.ipieca.org/publication/human-rights-training-toolkit-3rd-edition> (last accessed 10 May 2015).

95 OECD, *Guidelines for Multinational Enterprises*, "Declaration on International Investment and Multinational Enterprises" available from <www.oecd.org/corporate/mne/> (last accessed 25 May 2015); Council of the European Union, *EU Strategic Framework and Action Plan on Human Rights and Democracy*, 11855/12 (25 June 2012) 11.

96 Schmidt-Kessel, 2010, *supra* note 59, Art. 9 Para. 2.

97 *Id.*, Art. 9 Para. 26.

expectations.⁹⁸ This analysis is not contrary to the analysis advanced in regard to the interpretation of ‘characteristic’ under Article 35(1). For a trade usage to be established, there has to be agreement in regard to the specific usage in question. The trade usage has to be so concrete in its terms that it is applicable to an international sales contract without the parties particularly negotiating its content. Trade usages in that regard are like standard terms. The characteristics of the goods on the hand are always part of the *essentialia negotii* (Article 14), *i.e.* they are always subject to the individual negotiation of the parties. Within those negotiations, there is room for interpretation.

18.3.3.1.3 Summary

It is tempting to find a global trade usage implying a term into every international sale of goods contract for ‘ethical’ produced goods. However, the existence of a trade usage is determined according to actual evidence. At this point in time – other than for minimum ethical standards – no general global trade usage in regard to the production of ethical goods exists. However, even in regard to ‘minimum ethical standards’ for a trade usage, those ‘minimum ethical standards’ are probably not prescribed concretely enough to be a trade usage.

18.3.3.2 Trade Usage in Particular Industries?

Even if a global trade usage cannot be established at this point in time, trade usages in particular industries requiring ethical behaviour might be established. This paper will look at the electronics and the apparel industries as examples.

18.3.3.2.1 Electronics Industry

The Electronic Industry Citizenship Coalition (EICC) Code of Conduct sets out standards relating to social, environmental and ethical issues in the electronics industry supply chain.⁹⁹ EICC members are required to publically commit to the code of conduct and ensure that this commitment is spread to their supply chains (at a minimum, members must require that all tier one suppliers adhere to the code).¹⁰⁰ Members are held accountable for their conduct and that of their suppliers through audits and are required to identify and self-audit high-risk facilities.¹⁰¹ Members must also implement Corrective Action Plans to remedy any non-compliance with the code of conduct by suppliers and prevent

98 See also ISO 2600:2010, which provides guidance rather than requirements, so it cannot be certified to unlike some other well-known ISO standards. Instead, it helps clarify what social responsibility is, helps businesses and organizations translate principles into effective actions and shares best practices relating to social responsibility, globally. It is aimed at all types of organizations regardless of their activity, size or location. Available from <www.iso.org/iso/home/standards/iso26000.htm>.

99 <www.eiccoalition.org/standards/code-of-conduct/> (last accessed 20 May 2015).

100 <www.eiccoalition.org/standards/accountability/> (last accessed 20 May 2015).

101 <www.eiccoalition.org/standards/accountability/> (last accessed 20 May 2015).

reoccurrence.¹⁰² The EICC Code of Conduct prohibits, for example, the use of child labour in any stage of manufacturing.¹⁰³

The EICC comprises around 100 electronics companies with a total combined revenue of almost US \$2.6 trillion.¹⁰⁴ These companies employ more than 5.5 million people and have thousands of tier one suppliers.¹⁰⁵ Moreover, over 3.5 million people from 120 countries are involved in the manufacture of members' products.¹⁰⁶ EICC members include most of the major multinational electronics companies, such as Apple, Acer, Blackberry, IBM, Microsoft, Samsung, Sony and Oracle. Thus, the powerhouse of the electronics industry is comprised of EICC members, who are all committed to eliminating child labour from both their own activities and (at least) those in the thousands of companies which make up their next-tier suppliers. The requirement that companies take responsibility for their tier one suppliers is also only a minimum standard, and many companies take it upon themselves to ensure that the code of conduct standards are enforced throughout their supply chains.¹⁰⁷ Furthermore, a survey of 39 major multinational electronics companies conducted in 2014 found that 85% of the companies surveyed had codes of conduct prohibiting the use of child labour, and of those companies, two thirds included their codes of conduct in their supplier contracts.¹⁰⁸

Child labour undoubtedly still exists in some electronics industry supply chains. For example, both Apple and Samsung have come under fire recently for the use of child labour in their suppliers' facilities.¹⁰⁹ Apple has discovered 349 child labourers in its supply chain since 2006 through audits of its suppliers.¹¹⁰ However, the fact that child labour does still exist in companies' supply chains does not mean it is tolerated by those companies. In

102 <www.eiccoalition.org/standards/assessment/> (last accessed 20 May 2015).

103 EICC Code of Conduct v 5.0 at A (2).

104 <www.eiccoalition.org/about/members/> (last accessed 20 May 2015).

105 <www.eiccoalition.org/about/members/> (last accessed 20 May 2015).

106 <www.eiccoalition.org/about/members/> (last accessed 20 May 2015).

107 See, for example, Philips, which addresses conflict mineral issues 7 tiers or more down its supply chain available from <www.philips.com/about/company/businesses/suppliers/conflict_minerals.page> (last accessed 20 May 2015).

108 G. Nimbalkar, C. Cremen & Y. Kyngdon *et al.*, *The Truth Behind the Barcode: Electronics Industry Trends*, 2014, p. 16 available from <www.baptistworldaid.org.au/assets/BehindtheBarcode/Electronics-Industry-Trends-Report-Australia.pdf>.

109 <www.chinalaborwatch.org/newscast/172/>; <www.chinalaborwatch.org/report/90/>; <<http://qz.com/183563/what-happens-when-apple-finds-a-child-making-your-iphone/#>>; <www.theguardian.com/technology/2013/jan/25/apple-child-labour-supply>; <<http://goodelectronics.org/news-en/samsung-halts-business-with-supplier-in-china-on-child-labor-concern>>; <www.nytxaminer.com/2012/02/empire-apples-sordid-business-practices-are-even-worse-than-you-think/> (last accessed 23 May 2015).

110 <<http://qz.com/183563/what-happens-when-apple-finds-a-child-making-your-iphone/#>>; J. Garside, 'Child Labour Uncovered in Apple's Supply Chain', *The Guardian*, 25 January 2013 available from <www.theguardian.com>.

Apple's case, suppliers found to be using child labour are placed on probation, and in the most serious cases, the business relationship is terminated.¹¹¹

The widespread condemnation of child labour by the majority of major players in the electronics industry worldwide, as well as these corporations' commitment to expunging child labour from their supply chains, leads to the conclusion that the prohibition of child labour constitutes an international trade usage within the electronics industry.

18.3.3.2.2 *Apparel Industry*

Unlike the electronics industry, the apparel industry does not currently have a central, quasi-regulatory initiative like the EICC. However, voluntary initiatives such as the Cotton Pledge, the Better Cotton Initiative, the Fair Labor Association and the Fair Wear Foundation all indicate efforts in the apparel industry to combat forced and child labour at multiple levels of the supply chain.

The Fair Labour Association (FLA), for example, is a collaborative initiative of businesses, universities and NGOs committed to protecting workers' rights by promoting adherence to international labour standards.¹¹² The FLA has a Workplace Code of Conduct, which affiliated companies are responsible for implementing throughout their entire supply chains.¹¹³ The Workplace Code of Conduct prohibits child labour. While the FLA covers several industries, most of its participants are garment and textile brands and manufacturers. Participating companies include Adidas, H&M, Hanes, Hugo Boss, Kathmandu, New Balance, Nike and Puma, as well as a multitude of garment and textile manufacturers.¹¹⁴

18.4 CONCLUSION

At a minimum level, there are some industries like the electronics industry and the apparel industry where trade usages prohibit at least the use of child labour. There is a strong argument to be made that minimum ethical standards like the prohibition on child labour and sustainability (sustainable production) are global usages. However, that they are not concrete enough to be a trade usage in accordance with Article 9(2), customary human rights like the prohibition on child labour and sustainability determine the characterization of the goods under Article 35(1).

111 Apple progress report 2014 at 14; an example of the relationship being terminated is when auditors discovered in 2012 that Guangdong Real Faith Pingzhou Electronics hired 74 child workers – see <<http://qz.com/183563/what-happens-when-apple-finds-a-child-making-your-iphone/#>> (last accessed 20 May 2015).

112 <www.fairlabor.org/affiliates> (last accessed 20 May 2015).

113 <www.fairlabor.org/our-work>; <www.fairlabor.org/our-work/labor-standards> (last accessed 20 May 2015).

114 <www.fairlabor.org/affiliates/participating-companies> (last accessed 20 May 2015).