NOTE

WHOSE MUSSELS CARRY THE BURDEN?: PUBLIC LAW STANDARD CONFORMITY UNDER THE CISG

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I. INTRODUCTION

To date, there has been a strong contrast in decisions by various arbitration tribunals and courts of various jurisdictions regarding whether

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a seller should be liable for non-conformity under Article 35 of the Convention on the International Sale of Goods (CISG) if the goods do not comply with the public law standards in the buyer's country. In today's economy, international trade is ever-increasing and parties of various levels of sophistication engage in international commercial transactions. Therefore, the implications of this particular issue further increase uncertainty and transaction costs involved in international business transactions.

Part I of this Note provides a general introduction to the CISG and discusses when the CISG applies to a particular transaction. Part II introduces the CISG's provision for issues regarding non-conformity. Part III outlines the various remedies that the buyer can receive for non-conformity under the CISG. Part IV introduces the relevant conflicting case law and arbitration decisions regarding the issue of the seller's obligation to conform to public law standards in the buyer's country. Finally, Part V proposes a new provision to the CISG that clearly states the default position, carves out the exceptions to this rule, and specifies who has the burden of proof regarding this issue of non-conformity.

A. *Introduction to the CISG*

After the demise of communism, many countries started participating in the free market economy and forming new trading alliances.[1] Concerned with preventing another variation on the cold war, many governments and independent international commercial law agencies sought to harmonize and codify international law worldwide.[2] To achieve this goal, governments and agencies made a concerted effort to create a uniform set of international commercial rules for the international business community.[3] Today, the international business community has access to several legally binding international private law conventions and non-mandatory rules and principles to guide the terms governing their transactions.[4] This entire body of law governing international trade

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1. Edita Ubartaite, *Application of the CISG in the United States*, 7 EUR. J.L. REFORM 277, 278 (2005).

2. *Id.*

3. *See id.* at 279–80 (giving more information about the history of the progression of codifying international commercial law).

4. *Id.* at 278; United Nations Convention on Contracts for the International Sale of Goods, Apr. 11, 1980, 1489 U.N.T.S. 3 [hereinafter CISG]; International Institute for the Unification of Private Law [UNIDROIT], *UNIDROIT Principles of International Commercial Contracts*, UNIDROIT, Rome (2010), http://www.unidroit.org/english/principles/contracts/principles2010/integralversionprinciples2010-e.pdf. *See* INTERNATIONAL CHAMBER OF COMMERCE [ICC], INCOTERMS 2010, ICC RULES FOR THE USE OF DOMESTIC AND INTERNATIONAL TRADE TERMS (8th ed. 2011) (giving examples of these conventions and non-mandatory rules and principles).

is often referred to as Lex Mercatoria.[5]

One of the most successful international private law conventions for unifying international private law is the U.N. Convention on Contracts for the International Sale of Goods (CISG).[6] Today, the CISG is "recognized as the most genuine expression of general rules and principles of international commercial law and as the best source to determine prevailing trade usage."[7] Adopted by the United Nations in 1980, the CISG aims to "provide a modern, uniform and fair regime for contracts for the international sale of goods."[8] Most notably, the CISG has provided the international business community with further "certainty in commercial exchanges and decreas[ed] transaction costs."[9]

As of September 26, 2014, the U.N. Commission on International Trade Law (UNCITRAL) reports that eighty-three countries have adopted the CISG as the governing substantive law for transactions within the scope of the CISG.[10] Commentators have even suggested that the CISG is now accepted worldwide as the substantive law governing international commercial transactions.[11] As one of the "main promotors during the drafting and ratification of the CISG,"[12] the United States ratified the CISG on December 11, 1986, and it became a part of U.S. substantive law on January 1, 1988.[13] Because the President enacted it with the consent of a super-majority of the U.S. Senate, the CISG is a

5. Ubartaite, *supra* note 1, at 279.

6. CISG, *supra* note 4.

7. Ubartaite, *supra* note 1, at 277.

8. *See United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980),* UNCITRAL, http://www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG.html (last visited Feb. 18, 2016) [hereinafter UNCITRAL].

9. *See id.*

10. *See United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980),* UNCITRAL, http://www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG_status.html (last visited Feb. 18, 2016). (reporting that the following States had adhered to the Convention: Albania, Argentina, Armenia, Australia, Austria, Bahrain, Belarus, Belgium, Benin, Bosnia-Herzegovina, Brazil, Bulgaria, Burundi, Canada, Chile, China, Colombia, Congo, Croatia, Cuba, Cyprus, Czech Republic, Denmark, Ecuador, Egypt, Estonia, Finland, France, Gabon, Georgia, Germany, Greece, Guinea, Honduras, Hungary, Iceland, Iraq, Israel, Italy, Kyrgyzstan, Latvia, Lesotho, Lithuania, Luxembourg, Madagascar, Mauritania, Mexico, Mongolia, Montenegro, Netherlands, New Zealand, Norway, Paraguay, Peru, Poland, Republic of Korea, Republic of Moldova, Romania, Russian Federation, Saint Vincent and the Grenadines, San Marino, Serbia, Singapore, Slovakia, Slovenia, Spain, Sweden, Switzerland, Syrian Arab Republic, The Former Yugoslav Republic of Macadonia, Turkey, Uganda, Ukraine, United States of America, Uruguay, Uzbekistan, Bolivarian Republic of Venezuela, and Zambia).

11. Peter Schlechtriem, *Introduction* to PETER SCHLECHTRIEM & INGEBORG SCHWENZER, COMMENTARY ON THE UN CONVENTION ON THE INTERNATIONAL SALE OF GOODS (CISG), 1 (2d ed. 2005).

12. Ubartaite, *supra* note 1, at 277.

13. *See* UNCITRAL, *supra* note 8.

self-executing treaty.[14] Because of the self-executing nature of the CISG, as long as the transaction is within the scope of the provisions of the CISG, U.S. courts will apply the CISG as the substantive law governing the transaction instead of the Uniform Commercial Code (UCC).[15] For a particular transaction to be within the scope of the CISG, the transaction must meet the specifications.[16] Article 6 of the CISG specifically authorizes parties to opt-out of the CISG's application even if a particular transaction meets these specifications.[17]

Despite the CISG's "non-mandatory nature,"[18] parties may only opt-out of the CISG's application by expressly opting out of the CISG.[19] This requirement to specifically opt-out becomes particularly burdensome when parties mistakenly believe that they have adopted the law of a particular state and then the adjudicating body subsequently applies the substantive law of the CISG to resolve the parties' dispute.[20] For example, even if the parties adopt a "choice-of-law" or "governing law" provision that specifically states that New York law applies to any disputes that arise out of or relate to the particular transaction, the court will still apply the substantive law of the CISG in its resolution of the dispute between the parties. This occurs because, as discussed previously, the CISG is a self-executing treaty.[21] Therefore, the law of New York includes the substantive law of the CISG for international transactions. If the parties want the domestic law of a particular state to apply to a transaction within the scope of the CISG, the parties must specifically opt-out of the CISG for a court to construe the CISG as inapplicable to resolve any disputes between the parties.

A considerable number of the major U.S. trading partners have

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14. *See Ex parte Medellin*, 223 S.W.3d 315, 325 (Tex. Crim. App. 2006); *see also* Richard E. Speidel, *The Revision of UCC Article 2, Sales in Light of the United Nations Convention on Contracts for the International Sale of Goods*, 16 NW. J. INT'L L. & BUS. 165, 166 (1995) ("In the United States, CISG is a self-executing treaty with the preemptive force of federal law.").

15. *See Medellin*, 223 S.W.3d at 325; Speidel, *supra* note 14, at 166.

16. *Supra* Part I.A.

17. CISG, *supra* note 4, art. 6.

18. Thomas J. Drago & Alan F. Zoccolillo, *Be Explicit: Drafting Choice of Law Clauses in International Sale of Goods Contracts*, PACE LAW SCHOOL INSTITUTE OF INTERNATIONAL COMMERCIAL LAW, http://www.cisg.law.pace.edu/cisg/biblio/zoccolillo1.html (last updated July 26, 2002).

19. *See* Christopher C. Kokoruda, *The UN Convention on Contracts for the International Sale of Goods - It's Not Your Father's Uniform Commercial Code*, 85 FLA. B.J. 103, 103 (2011); CISG, *supra* note 4, art. 1(1)(a), 6; BP Oil Int'l, Ltd. v. Empresa Estatal Petroleos de Ecuador, 332 F.3d 333, 335 (5th Cir. 2003) (holding that simply stating that Ecuadorian law applies does not exclude the CISG because Ecuadorian law includes the CISG and requiring parties to expressly exclude the CISG by stating that it does not apply and state what law should govern contract).

20. Drago & Zoccolillo, *supra* note 18.

21. *See* Medellin, 223 S.W.3d at 325; Speidel, *supra* note 14, at 166.

adopted the CISG, including Canada, China, France, Germany, Japan, Mexico, and many countries in Latin America and in the European Union.[22] Therefore, unbeknownst to many U.S. buyers and sellers, the CISG applies automatically to a substantial number of U.S. transactions.[23] The primary reason that the default application of the CISG in international commercial transactions is particularly troublesome for U.S. attorneys and parties to the transaction is that there are "numerous significant legal distinctions between the CISG and the UCC."[24] A few examples of these differences include the CISG's lack of both "statute-of-frauds" provisions and the "perfect tender rule" as well as differences regarding offer and acceptance.[25] Because "export or import transactions are often entered into by parties who do not possess equal bargaining power and who operate in quite different socio-economic contexts,"[26] ignorance of these legal distinctions can be highly detrimental to both sophisticated and unsophisticated parties to a transaction.[27] Therefore, awareness of these differences and the ramifications of the ambiguity that results from these differences[28] is highly relevant for international commercial transactions in the United States.

B. *When the CISG Applies*

For various policy reasons, the CISG limits its application to certain types of transactions.[29] For the CISG to apply to a contract, the contract must meet specifications related to the place of business of the contracting parties, type of contract, subject of the contract, and type of goods involved.[30] First, and most importantly, the CISG limits its application to transactions that involve two parties whose places of business are in different countries.[31] One way for the CISG to apply is if both parties are from different countries that are signatories to the CISG (Contracting States).[32] Another way is if the adjudicating body's application of international choice-of-law rules leads to the application of

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22. *See* Kokoruda, *supra* note 19, at 103.
23. *Id.*
24. *Id.*
25. Drago & Zoccolillo, *supra* note 18.
26. C. MASSIMO BIANCA ET AL., COMMENTARY ON THE INTERNATIONAL SALES LAW: THE 1980 VIENNA SALES CONVENTION 3 (1987).
27. *See* Kokoruda, *supra* note 19, at 103.
28. *Id.*
29. CISG, *supra* note 4, arts. 1–6.
30. *See id.* art. 1.
31. *Id.* art. 1(1).
32. *Id.* art. 1(1)(a).

the law of a Contracting State, under Article 1(1)(b).[33] However, if a Contracting State wishes to limit application to situations in which both parties are from Contracting States, it can opt out of Article 1(1)(b)[34] by making an Article 95 declaration.[35] Thus, to determine if the CISG applies the adjudicating body must determine the place of business of each party, consult the forum court's choice-of-law rules, and determine whether either party's place of business is in a Contracting State that made an Article 95 declaration. Under a third scenario, the CISG can still apply despite not meeting the two prior conditions if the parties contractually opt for the CISG to apply.[36]

In addition to the parties' place of business, the CISG also limits its application to contracts involving the sale of goods. First, a preponderant portion of the seller's obligations under the contract cannot involve the seller supplying labor or other services.[37] As the name of the Convention itself suggests, the CISG intentionally limited itself to transactions that pertain primarily to the supply of goods.[38] The buyer also cannot supply a substantial part of the materials to the seller for manufacturing or production.[39] Nor can the subject matter of the contract pertain to any "sale-like" transactions such as auctions or sales conducted by execution or otherwise by authority of law.[40]

Moreover, unlike the UCC, the CISG normally does not apply to consumer transactions in which the goods were purchased for "personal, family or household use," unless the seller was unaware or had no reason to know of the goods' use for household use.[41] The CISG also specifically excludes its application to transactions that involve certain types of personal property such as stocks, negotiable instruments, money, ships, aircraft, and electricity.[42] Finally, because the CISG favors freedom of contract and party autonomy,[43] Article 6 also permits parties to "exclude the application of this Convention or, subject to Article 12, derogate from

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33. *Id.* art. 1(1)(b).
34. CISG, *supra* note 4, art. 1(1)(b).
35. *Id.* art. 95.
36. *See* UNCITRAL, *supra* note 8.
37. CISG, *supra* note 4, art. 3(2).
38. *Id.*
39. *Id.* art. 3(1).
40. *Id.* art. 2.
41. *Id.*
42. *Id.*
43. *See* M.J. BONELL, ARTICLE 6, IN COMMENTARY ON THE INTERNATIONAL SALES LAW: THE 1980 VIENNA SALES CONVENTION 51, 51 (C.M. Bianca & M.J. Bonell eds., 1987); M.J. BONELL, ARTICLE 7, IN COMMENTARY ON THE INTERNATIONAL SALES LAW: THE 1980 VIENNA SALES CONVENTION 65, 80 (C.M. Bianca & M.J. Bonell eds., 1987); ROLF HERBER, ARTICLE 7, IN COMMENTARY ON THE UN CONVENTION ON THE INTERNATIONAL SALE OF GOODS (CISG) 59, 67 (Peter Schlechtriem ed., Geoffrey Thomas trans., 2d ed. 1998).

or vary the effect of any of its provisions."[44]

In addition to limits on the types of transactions governed by the CISG, the CISG limits its scope to certain types of disputed issues.[45] The CISG expressly excludes the application of the Convention from issues relating to "the validity of the contract or any of its provisions or of any usage"[46] or with "the effect which the contract may have on the property in the goods sold."[47] Therefore, the CISG is not applicable to any disputes regarding unconscionability, fraud, mistake, duress, capacity, illegality, undue influence, impossibility, and public policy.[48]

Beyond validity issues, the CISG also excludes its application from issues regarding "the liability of the seller for death or personal injury caused by the goods to any person."[49] The CISG likely excludes its application from these issues because death and personal injury claims can implicate significant domestic policy considerations.[50] If applied, the CISG could potentially collide with domestic law rules[51] and lead to differences in results.[52]

Consequently, if neither the particular type of transaction nor the type of disputed issue is excluded and the parties do not expressly exclude the application of the CISG, the CISG governs all types of disputes covered by the CISG arising out of or relating to the particular transaction.[53]

II. ARTICLE 35: NON-CONFORMITY PROVISION

Although disputes under the CISG can arise for various reasons, such as late delivery, late payment, or lost or damaged goods, disputes

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44. CISG, *supra* note 4, art. 6.

45. *See* Mather, *supra* note 43, at 156.

46. CISG, *supra* note 4, art. 4(a).

47. *Id.* art. 4(b).

48. Helen Elizabeth Hartnell, *Rousing the Sleeping Dog: The Validity Exception to the Convention on Contracts for the International Sale of Goods*, 18 YALE J. INT'L L. 1, 62, 71–72, 87 (1993).

49. CISG, *supra* note 4, art. 5.

50. ANJA HELENA HORNSHOJ, PRODUCT LIABILITY UNDER THE CISG AND CONCURRING TORT LAW CLAIMS 3 (2012), http://law.au.dk/fileadmin/Jura/dokumenter/forskning/rettid/2012/afh26-2012.pdf.

51. Peter Schlechtriem, *The Borderland of Tort and Contract – Opening a New Frontier?*, 21 CORNELL INT'L L.J. 467, 467 (1988).

52. CISG Advisory Council [CISG-AC], Liability of the Seller for Damages Arising Out of Personal Injuries and Property Damage Caused by Goods and Services Under the CISG, CISG-AC Opinion No. 12 (Jan. 20, 2013), http://www.cisg.law.pace.edu/cisg/CISG-AC-op12.html#3 ("The understanding at the Diplomatic Conference was that, without Article 5, different results with respect to applicable law would arise depending upon the characterization of 'product liability' claims under domestic laws.").

53. *See* Mather, *supra* note 43, at 156.

frequently concern the goods' non-conformity to the contract because of a difference in quantity or quality of the goods.[54] Articles 35–44 of the CISG specifically relate to conformity issues that may arise in an international commercial transaction.[55] The CISG provides the buyer with a variety of reasons to conclude that goods are non-conforming to the contract and the right to seek remedies from the seller.[56] Most fundamentally, Article 35(1) requires that the seller deliver goods that first "are of the quantity, quality and description required by the contract,"[57] second "possess the qualities of goods which the seller has held out to the buyer as a sample or model,"[58] and third "are contained or packaged in the manner required by the contract."[59] Although Article 35(1) does not refer to these as express warranties, [60] these obligations are analogous to an express warranty under Article 2 of the Uniform Commercial Code (UCC).[61]

Also similar to Article 2 of the UCC,[62] Article 35(2) of the CISG obligates the seller to provide goods that conform to certain implied requirements beyond the expressly stated requirements found in the contract.[63] The CISG's implied warranties include the implied warranty that the goods are fit for their ordinary purpose[64] and that the goods are fit for the 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."[65] Finally, Articles 41 and 42 of the CISG establish that there is an implied requirement of the seller to provide goods that are both "free from any right or claim of a third party"[66] and "free from any right or claim of a third party based on industrial property or other intellectual property."[67]

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54. Stefan Kroll, *[UN Convention on Contracts for the International Sale of Goods, 1980] The Burden of Proof for the Non-Conformity of Goods Under Art. 35 CISG*, 59 BELGRADE L. REV. 162, 162 (2011) ("In practice, disputes about the conformity of the goods are probably the most frequent single cause for legal actions.").

55. CISG, *supra* note 4, art. 35–44.

56. *Id.*

57. *Id.* art. 35(1).

58. *Id.* art. 35(2)(c).

59. *Id.* art. 35(1).

60. *Id.*

61. U.C.C. § 2-313 (2014).

62. *Id.*

63. *Compare* U.C.C. § 2-313 (2014) *with* CISG, *supra* note 4, art. 35(2).

64. *Id.* art. 35(2)(a).

65. *Id.* art. 35(2)(b).

66. *Id.* art. 41.

67. *Id.* art. 42.

III. BUYER'S REMEDIES FOR NON-CONFORMITY

Unfortunately for the seller, the consequences of an adjudicating body finding the goods non-conforming under the CISG can be extremely costly.[68] In the event of a non-conformity, adjudicating bodies have many options to cure non-conformity. The adjudicating body can (1) compel the seller to perform the contract,[69] (2) require the seller to provide substitute goods,[70] (3) require the seller to repair the goods,[71] (4) avoid the contract entirely[72] (if the breach is fundamental),[73] (5) reduce the price of the goods,[74] and (6) award the buyer damages for the seller's breach of contract.[75] It is also important to note that the CISG does not confine adjudicating bodies to resorting to one particular remedy; rather, they can choose to combine remedies to cure a defect.

IV. RELEVANT CASE LAW AND ARBITRATION DECISIONS

Despite the CISG's desire to create uniform rules for international sales, application of the CISG has not led to uniform decision-making.[76] Because the CISG encompasses Contracting States from a wide variety of domestic legal cultures, outcomes tend to vary around the world.[77] In fact, no courts are dedicated to or specialized in resolving CISG cases.[78] Regular courts with proper jurisdiction or arbitral tribunals chosen by the parties apply the CISG.[79] Even though the creators of the CISG intended those applying the CISG to interpret its provisions by resorting to the international character of the CISG and the CISG's guiding principles, most Contracting States refer to their own domestic law when applying the CISG. Because of this tendency, outcomes do not have the level of predictability that the CISG's creators desired. Because each country has its own distinct legal background, outcomes are not always consistent

68. *Id.* arts. 25–28, 45–52, 61–65, 77–78, 81–88.
69. *Id.* art. 46(1).
70. *Id.* art. 46(2).
71. *Id.* art. 46(3).
72. *Id.* art. 81.
73. *Id.* art. 49(1).
74. *Id.* art. 50.
75. *Id.* art. 74.
76. Harry M. Flechtner, *Conformity of Goods, Third Party Claims, and Buyer's Notice of Breach Under the United Nations Sales Convention ("CISG"), with Comments on the "Mussels Case," the "Stolen Automobile Case," and the "Ugandan Used Shoes Case"* (Univ. of Pittsburgh Sch. of Law Working Paper Series, Working Paper No. 64, 2007), http://law.bepress.com/pittlwps/papers/art64.
77. *Id.*
78. *Id.*
79. *Id.*

with one another.[80] This inconsistency can lead to significant legal uncertainty for contracts governed by the CISG.[81]

One type of dispute related to non-conformity that has been particularly troublesome for adjudicating bodies is whether Article 35(2)(a) of the CISG obligates the seller to provide goods that conform to the public law standards of the buyer's country.[82] Because public law standards regarding health, safety, and environmental concerns can affect a good's fitness for a particular purpose, the burden of conformity has significant implications.[83] Unfortunately, the CISG does not specifically speak to this issue,[84] and arbitrational tribunals and courts in various jurisdictions have been split on this issue.[85] For instance, in the *New Zealand Mussels Case*, the German court held that sellers cannot normally be expected to observe regulatory requirements of the buyer's state.[86] Arbitration tribunals and courts of other jurisdictions, however, have decided otherwise and applied the regulations of the buyer's state.[87]

A. *Seller Not Obligated to Conform to Buyer's Public Laws and Regulations*

The most infamous case on this issue is the *New Zealand Mussels Case*.[88] In 1995, the German Federal Court of Justice held that a seller is not obligated to conform to the buyer's public law and regulations under Article 35(2).[89] In this case, a German buyer purchased New Zealand mussels from a Swiss seller.[90] After the seller delivered the goods to the storage facility, a veterinary agency took samples of the goods to examine them.[91] The veterinary agency declared that the cadmium content of the mussels rendered the goods "not harmless."[92] This cadmium content was subsequently found to be non-compliant with German health authorities'

80. *Id.*

81. *Id.*

82. *See* CISG, *supra* note 4, art. 35(2)(a).

83. *See* Larry A. DiMatteo et al., *The Interpretative Turn in International Sales Law: An Analysis of 15 Years of CISG Jurisprudence*, 24 NW. J. INT'L L. & BUS. 299, 395–96 n.590 (2004).

84. *See* Peter Schlechtriem, Commentary, *Compliance with Local Law; Seller's Obligations and Liability: Annotation to German Supreme Court Decision of 2 March 2005 [VIII ZR 67/04]* (June 2005), http://www.cisg.law.pace.edu/cisg/biblio/schlechtriem7.html.

85. *See* discussion *infra* Parts IV.A, IV.B.

86. BGH Mar. 8, 1995, VIII ZR 159/94, http://cisgw3.law.pace.edu/cases/950308g3.html [hereinafter New Zealand Mussels Case].

87. *See* discussion *infra* Part IV.B.

88. BGH Mar. 8, 1995, VIII ZR 159/94.

89. *Id.*

90. *Id.*

91. *Id.*

92. *Id.*

recommendations.[93] The public law requirements in Switzerland, however, permitted such cadmium content.[94] The fundamental issue in this case was whether the cadmium content of the mussels rendered the mussels non-conforming to the contract.[95]

Despite their cadmium content, the court found the goods conforming to the contract because the mussels were still edible[96] and therefore still fit for the ordinary purpose to which mussels are typically used (*i.e.*, eating) under Article 35(2).[97] The German Court of Justice ruled that a seller is generally not obligated to supply goods that conform to public laws and regulations enforced at the buyer's place of business.[98] The Court reasoned that because buyers are typically in a much better position to know the registration requirements of their own country, sellers should not be obligated to observe the regulatory requirements of the buyer's state.[99] To reach this conclusion, the German Court relied heavily on authoritative commentary.[100] The court also created three exceptions to this general principle:

> (1) if the public laws and regulations of the buyer's state are identical to those enforced in the seller's state; (2) if the buyer informed the seller about those regulations; or (3) if due to "special circumstances," such as the existence of a seller's branch office in the buyer's state, the seller knew or should have known about the regulations at issue.[101]

In 2000, the Austrian Supreme Court in the *Machines Case* reached a similar result.[102] In this case, a German seller sold used machines to an Austrian buyer.[103] Prior to the disputed transaction, the two parties had already engaged in numerous prior dealings with one another.[104] In all of their previous transactions, the seller had never delivered machines marked with the "CE" mark.[105] For this particular transaction, however, the buyer refused payment because the machines delivered by the seller

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93. *Id.*
94. *Id.*
95. *Id.*
96. *Id.*
97. *See* CISG, *supra* note 4, art. 35(2).
98. BGH Mar. 8, 1995, VIII ZR 159/94.
99. *Id.*
100. *See* DiMatteo et al., *supra* note 83, n.590.
101. BGH Mar. 8, 1995, VIII ZR 159/94.
102. Oberster Gerichtshof [OGH] [Supreme Court], Apr. 13, 2000, 2 Ob 100/00w, (Austria), http://cisgw3.law.pace.edu/cases/000413a3.html [hereinafter Machines Case].
103. *Id.*
104. *Id.*
105. *Id.*

lacked the "CE" mark.[106] A "CE" mark indicates that the product conforms to all applicable European Community directives, such as safety, health, and environmental requirements.[107] Both EC Directive 89/392 and German law required the "CE" mark for both machines imported from outside the European Economic Area and significantly altered machines.[108] Because of this requirement, the court of first instance found the goods non-conforming and entitled the buyer to retain the price of the goods.[109] On appeal, both the Court of Appeal and the Supreme Court applied Article 35 of the CISG to determine whether the machines conformed to the contract.[110]

The Austrian Supreme Court held that courts should determine whether goods are fit for the purposes for which goods of the same description would ordinary be used under Article 35(2)[111] based on the standards in the country of the seller.[112] The Austrian Supreme Court reasoned that "[a] seller cannot be expected to know all special rules of the buyer's country or the country of usage."[113] The court went on to say that "[i]t is rather for the buyer to observe her country's public law provisions and specify these requirements—either according to Art. 35(1) or (2)(b) CISG — in the sales contract."[114]

Like the *New Zealand Mussels Case*,[115] the court provided three exceptions of when the court should take into account the requirements of the buyer's country.[116] These exceptions include: "if they also apply in the seller's country, in they are agreed on, or if they are submitted to the seller at the time of the formation of the contract, according to Art. 35(2)(b)."[117] The Austrian Supreme Court remanded the case to the court of first instance to determine which provisions and standards applied and whether the goods complied with the applicable provisions and standards.[118]

B. *Seller Obligated to Conform to Buyer's Public Laws and Regulations*

The rule regarding conformity that emerged from the *New Zealand*

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106. *Id.*
107. *Id.*
108. *Id.*
109. *Id.*
110. *Id.*
111. *See* CISG, *supra* note 4, art. 35(2).
112. Oberster Gerichtshof [OGH] [Supreme Court], Apr. 13, 2000, 2 Ob 100/00w, (Austria).
113. *See* DiMatteo et al., *supra* note 83, n.590.
114. *Id.*
115. BGH Mar. 8, 1995, VIII ZR 159/94.
116. *See* DiMatteo et al., *supra* note 83, n.590.
117. *Id.*
118. *Id.*

Mussels Case,[119] however, has not been met with universal approval. Commentators have criticized it for not "completely do[ing] justice to the problems resulting from the diverging standards established by public law."[120] The *Frozen Pork Case*[121] differed from the *New Zealand Mussels Case*[122] by creating an additional exception to the general rule. In the *Frozen Pork Case*, a German buyer purchased pork from a Belgian company.[123] Soon after the seller delivered the pork to the buyer, it became public knowledge that there was a suspicion that Belgian pork was contaminated by dioxin.[124] In fact, the Belgian Government issued an order that required the confiscation of any products derived from animals slaughtered in 1999 from January 15th to July 23rd, until the safety of these products could be proven.[125]

Because the case involved the possibility of goods having a health-threatening condition, the court reasoned that the suspicion of the harmful condition was enough to be regarded as a non-conformity.[126] The court decided to distinguish from prior cases regarding the seller's burden of conforming to public standards because the *Frozen Pork Case* involved health issues, rather than security and standardization rules.[127] Because pork's ordinary use is consumption, the court reasoned that contaminated pork did not fit the usual purpose of the good.[128] Consequently, the court held the pork non-conforming under Article 35(2).[129]

In particular, the court focused on the ability to resell the goods and reasoned that while still consumable, bad publicity would prevent the buyer from reselling the goods.[130] Because resale was an ordinary use of the good in the trade, the suspicion that the goods were contaminated made them non-conforming to the contract. [131] In fact, the court did not find it necessary to even ascertain whether the goods were actually contaminated by dioxin.[132] Rather, the mere suspicion of the

119. BGH Mar. 8, 1995, VIII ZR 159/94.

120. Peter Schlechtriem, Case Commentary, *Conformity of the Goods and Standards Established by Public Law: Treatment of Foreign Court Decision as Precedent*, http://cisgw3.law.pace.edu/cases/990517u1.html (last updated Dec. 2003).

121. BGH Mar. 2, 2005, VIII ZR 67/04, http://cisgw3.law.pace.edu/cases/050302g1.html [hereinafter Frozen Pork Case].

122. BGH Mar. 8, 1995, VIII ZR 159/94.

123. BGH Mar. 2, 2005, VIII ZR 67/04.

124. *Id.*

125. *Id.*

126. *Id.*

127. *Id.*

128. *Id.*

129. *Id.*

130. *Id.*

131. *Id.*

132. *Id.*

contamination was sufficient to find the goods non-conforming.[133]

This case is particularly interesting in that it involved a public law requirement that was issued after the time that the risk of loss passed from the seller to the buyer.[134] In addition to lowering its standard for non-conformity to mere suspicion of contamination, the court also denied the seller's allegation that the goods were conforming at the time the risk of loss passed to the buyer.[135] The court held that goods can be non-conforming under Article 35(2) of the CISG "even if the suspicion of contamination arises after the risk has passed . . . but is based on facts that existed before the passage of risk."[136] Instead, the court assumed that the goods did not conform at the time of the passage of risk.[137] The court held that to overcome this assumption of non-conformity, according to Article 36 of the CISG,[138] the seller has the burden of proving that the Belgian Government's suspicion was unfounded.[139] Clearly, this case went well beyond the scope of the general rule set out in the *New Zealand Mussels Case*.[140] If the court had adhered to the rule in the *New Zealand Mussels Case*, the court would have found that the frozen pork conformed to the contract.[141] The German Federal Court of Justice likely created an exception to the rule set out in the *New Zealand Mussels Case*[142] because the *Frozen Pork Case* posed a concern for public health.[143] This case is also particularly troublesome for sellers because mere suspicion after the conclusion of a contract can now lead to courts finding goods non-conforming. This lack of predictability further increases uncertainty and transaction costs involved in international business transactions.

In 1999, the U.S. District Court for the Eastern District of Louisiana claimed to uphold the exceptions listed in the *New Zealand Mussels Case*[144] in *Medical Marketing International, Inc. v. Internazionale Medico Scientifica S.r.l.*[145] However, this case actually departed significantly from the *New Zealand Mussels Case*.[146] In this case, the court upheld an arbitral award holding an Italian seller of radiology

133. *Id.*

134. *Id.*

135. *Id.*

136. CISG, *supra* note 4, art. 35(2).

137. *Id.*

138. *Id.* art. 36.

139. BGH Mar. 2, 2005, VIII ZR 67/04.

140. *Id.*; BGH Mar. 8, 1995, VIII ZR 159/94.

141. BGH Mar. 2, 2005, VIII ZR 67/04; BGH Mar. 8, 1995, VIII ZR 159/94.

142. BGH Mar. 8, 1995, VIII ZR 159/94.

143. BGH Mar. 2, 2005, VIII ZR 67/04.

144. BGH Mar. 8, 1995, VIII ZR 159/94.

145. Med. Mktg. Int'l, Inc. v. Internazionale Medico Scientifica, S.R.L., No. CIV. A. 99-0380, 1999 WL 311945, at *2 (E.D. La. May 17, 1999).

146. *Id.*; BGH Mar. 8, 1995, VIII ZR 159/94.

materials liable because the goods did not comply with the U.S. Governmental Safety Regulations.[147] The court reasoned that the seller knew or should have known of the regulations at issue due to exceptional circumstances.[148] This case cited the three exceptions[149] to the general rule that emerged from the *New Zealand Mussels Case.*[150] Although the court stated that the situation fit within one of the exceptions listed in the *New Zealand Mussels Case*,[151] this decision was actually a departure from *New Zealand Mussels Case* because both the arbitration tribunal and the court automatically applied the safety regulations in the buyer's country without making a real determination of whether there were any exceptional circumstances that would suggest the seller knew or should have known about the regulations.[152]

Similar to the *Medical Marketing International, Inc.* court,[153] in 1995 the French Court of Appeal in *Caito Roger v. Société française de Factoring* automatically applied the public law standards of the buyer.[154] The court reasoned that because of the parties' extensive prior dealings, the seller should have known that the goods were to be sold in the French market.[155] Therefore, the seller should have known that the goods would need to comply with France's marketing regulations.[156] The court consequently found the goods to be non-conforming under Article 35 of the CISG[157] because the seller failed to mark the composition of the goods on the packaging.[158]

In 1996, the French Supreme Court came out with a similar decision to its Court of Appeal.[159] In this case, the court automatically applied the legal standards from the buyer's country regarding the amount of authorized sweetening of red wine.[160] The consequences of this application of public law standards were severe for the seller.[161] Because the court applied this standard, it found that the goods were not only non-

147. Med. Mktg. Int'l, Inc., 1999 WL 311945, at *2.

148. *Id.*

149. *Id.*

150. BGH Mar. 8, 1995, VIII ZR 159/94.

151. Med. Mktg. Int'l, Inc., 1999 WL 311945, at *2.

152. *Id.*

153. *Id.*

154. Cour d'appel [CA] [regional court of appeal] Grenoble, Sept. 13, 1995, 93/4126. JCP 1996, IV, 712, (Fr.).

155. *Id.*

156. *Id.*

157. CISG, *supra* note 4, art. 35.

158. Cour d'appel [CA] [regional court of appeal] Grenoble, Sept. 13, 1995, 93/4126. JCP 1996, IV, 712, (Fr.).

159. Cour de Cassation [Cass.] [supreme court for judicial matters], Jan. 23, 1996, Bull. civ. I, No. 38 (Fr.).

160. *Id.*

161. *Id.*

conforming, but also "unfit for consumption."[162] The court reasoned that the goods were non-merchantable, and therefore the seller's delivery constituted a fundamental breach.[163] As illustrated in Article 46 of the CISG,[164] the consequences of a finding of a fundamental breach are significant because they can allow for an entire avoidance of the parties' contract.[165] These deviations from the general rule and exceptions laid out in the *New Zealand Mussels Case*[166] create uncertainty for how future courts and arbitration tribunals will interpret Article 35(2).[167] The lack of precedent set by any of these adjudicating bodies further complicates the possibility of future deviations on this issue.[168]

V. IMPORTANCE OF CERTAINTY REGARDING CONFORMITY

Because a finding of non-conformity under Article 35 can lead to very costly remedies,[169] it is important that sellers know whether they are required to deliver goods that comply with the local public law requirements in the buyer's country under Article 35 of the CISG.[170] This burden allocation on the seller leads to a significant increase in the risk and costs involved in engaging in international transactions. In addition to incurring costs due to a finding of non-conformity, sellers may also incur costs in attempting to comply with the buyer's local public law requirements because they fear a court may impose the buyer's standards on the seller. Because compliance costs can be expensive, certainty regarding which public law standards apply to a particular transaction can result in cost savings before any breach occurs.

In most cases, a seller likely knows where the buyer intends to use the goods and will naturally cater the goods for use in that place. However, many cases involve arms-length negotiations where the parties have no prior dealings and the seller is unaware of the buyer's intended use for the goods. The laws, regulations, and public law standards differ greatly from one country to another. Even within one country there can be great variation between states or providences regarding these standards.

162. *Id.*

163. *Id.*

164. CISG, *supra* note 4, art. 46(1).

165. *See supra* Part III.

166. BGH Mar. 8, 1995, VIII ZR 159/94.

167. Peter Schlechtriem, *Uniform Sales Law in the Decisions of the Bundesgerichtshof*, *translated in* 50 YEARS OF THE *BUNDESGERICHTSHOF* [FEDERAL SUPREME COURT OF GERMANY] A CELEBRATION ANTHOLOGY FROM THE ACADEMIC COMMUNITY, http://cisgw3.law.pace.edu/cisg/biblio/schlechtriem3.html.

168. *See infra* Part IV.

169. *See supra* Part III.

170. CISG, *supra* note 4, art. 35.

Moreover, with advances in technology and the global economy moving as rapidly as it does today, these standards are subject to change far more frequently than ever before. It would, therefore, be extremely onerous for the seller to be forced to bear this burden of compliance. With this obligation, the seller would be presumed to know and supply goods that conform to every public law standard in each of its buyer's countries.[171] Because we live in a world where many smaller enterprises engage in international trade, this presumption is misguided and will likely suppress smaller enterprises from successfully conducting business abroad.[172]

Although many export–import contracts clearly allocate the risk associated with public law regulation compliance, courts will consult Article 35(2) in the absence of a "clear party agreement."[173] Therefore, parties to a contract subject to the CISG should clearly discern who bears the risk of conforming to public law regulations and which public law regulations apply to the transaction.[174] This issue, however, is particularly concerning because the CISG's scope applies in transactions that involve unsophisticated parties[175] and parties that engage in transactions with buyers from many different countries. Unsophisticated parties are not likely to expressly state what public law standards determine the conformity of the goods in the contract, which leaves adjudicating bodies left to decide which standards are applicable. Therefore, this obligation would lead to a significant number of cases of non-conformity, increase transaction costs for the average seller, and discourage both small and large enterprises from engaging with international buyers. If the CISG aims to decrease uncertainty in international commercial transactions,[176] then the CISG should provide added clarity regarding this issue instead of leaving it to the discretion of arbitration tribunals and courts.

In addition to placing a burden on the seller, these legal uncertainties also impact the buyer.[177] If the buyer is unsure whether courts will require the seller to conform with the buyer's public law regulations, the buyer will be forced to clearly and unambiguously define and qualify the quality and characteristics of the goods in the contract to ensure a court's enforcement of its desired conformity.[178] Because buyers are often unsophisticated parties,[179] this legal uncertainty places a significant burden on the buyer. When sellers incur additional costs from compliance

171. *See* Schlechtriem, *supra* note 167.
172. *Id.*
173. *Id.*
174. *See id.*
175. BIANCA ET AL., *supra* note 26.
176. *See* UNCITRAL, *supra* note 8.
177. *See* Schlechtriem, *supra* note 167.
178. *See id.*
179. *See* BIANCA ET AL., *supra* note 26.

issues, the seller will pass this cost onto its buyers to avoid cutting their profits.

However, ultimately, it is the consumer that suffers from this legal uncertainty. Because legal uncertainty increases transaction costs involved in transactions,[180] the buyer will reflect this increase in costs in their prices to the ultimate consumer. Consequently, this legal uncertainty poses a significant barrier to the CISG's aim of reducing the uncertainty involved in international transactions and encouraging international trade.[181]

VI. PROPOSED TREATMENT

The CISG should not force courts and arbitration tribunals to resolve the legal uncertainty that arises regarding whose public law standards determine the conformity of goods in a contract governed by the CISG.Because of the nature of the international law system, no court or arbitration tribunal has authority outside its own domestic system.[182] Therefore, the most a court or arbitration tribunal can do is provide persuasive authority to fora outside its jurisdiction.[183] Precedential value is even further complicated when it involves a Contracting State that operates as a civil law system. In a civil law system, even prior decisions made in similar situations do not create precedential value for future courts.[184] Unlike the common law system in the United States, in a civil law system "the emphasis is on the code, the black-letter set of statutes or regulations or treaty language."[185] Any particular outcome of a case, therefore, is "less crucial in shaping civil law than the decisions of legislators and legal scholars who draft and interpret the codes."[186] In fact, "there is generally no comparable reliance on precedent along the lines the U.S. is accustomed to in civil law jurisdictions."[187] Therefore, none of the discussed civil law system decisions act as more than persuasive authority to any future adjudicating bodies. Because of this lack of precedent, even if there is a similar case or arbitral decision that lays out the general rule and the exceptions in a particular Contracting State, that decision does not bind any future adjudicating body.

180. *See supra* Part III.

181. *See* UNCITRAL, *supra* note 8.

182. Flechtner, *supra* note 76, at 8–9.

183. *Id.*

184. *The Common Law and Civil Law Traditions*, UNIV. OF CAL. BERKELEY SCH. OF LAW, https://www.law.berkeley.edu/library/robbins/CommonLawCivilLawTraditions.html (last visited Feb. 18, 2016).

185. Steven M. Richman, *International Contracts*, N.J. LAW., Dec. 2012, at 11.

186. *The Common Law and Civil Law Traditions*, *supra* note 184.

187. Richman, *supra* note 185, at 11.

Therefore, buyers and sellers cannot even completely rely on a prior decision within their jurisdiction to guide their transaction.

Because of this lack of predictability, the only way to ensure uniformity in this area is to revise the CISG. To accomplish this, Article 35(2) should state the default rule, carve out the exceptions to the default rule, and specify who has the burden of proof regarding conformity.

This Note suggests that Article 35(2) should contain the following subsection:

> Except where the parties have agreed otherwise, the goods do not conform with the contract unless they:
>
> . . . .
>
> (e) conform to public law standards in the seller's country, except in three limited circumstances, which the buyer must demonstrate apply to the particular transaction:
> (1) if the public laws and regulations of the buyer's state are identical to those enforced in the seller's state;
> (2) if the buyer informed the seller about those regulations; or
> (3) if due to special circumstances, the seller knew or should have known about the regulations at issue.

Even though critics may argue that a revision of the CISG is not a feasible solution because of the many complexities involved, it is the only solution that will actually produce any significant level of certainty for parties to an international business transaction governed by the CISG. Because of the complex nature of the international legal system, no matter how many arbitral decisions and court cases exist, future adjudicating bodies will likely not be bound by those decisions and will be free to apply whatever standard they see fit. Consequently, this issue will continue to perpetuate, and parties to transactions governed by the CISG will never know what public law standards apply to their transaction until an adjudicating body resolves the dispute. Therefore, the only way to create any certainty is to revise the CISG to meet modern needs in international commercial transactions.

A. *Default Rule: Seller Not Obligated to Conform to Buyer's Public Laws and Regulations*

Because of the ever-increasing globalization of trade, smaller enterprises engage in trade with buyers from all over the world. As many of these arrangements involve unsophisticated parties unfamiliar with the laws, regulations, and standards in every country, the CISG should not automatically obligate sellers to be aware of and conform to these standards. This default position would create a huge burden on parties that are ill-equipped to handle it. This position would effectively require sellers to engage in a significant amount of research on the laws, regulations, and standards in each of their buyer's places of business prior to engaging in any transaction for fear of being sued for non-conformity.

Not only would this research force the seller to incur a significant amount in costs, but it would also slow down the transaction. If buyers and sellers are forced to slow down their transactions to ensure compliance with applicable law standards, both parties may be forced to bear additional costs such as storage or deal with unforeseen market fluctuations that are not reflected in the purchase price of the goods. This halting effect could potentially persuade either party to not go through with the transaction because of the increased costs and decreased level of certainty regarding conformity. Because the original intention of the CISG's was to increase legal certainties, reduce transaction costs, and encourage trade between its Contracting States, forcing sellers to conform to every public law and regulation in each of its buyers' place of business does not correspond to the CISG's core aims.

After the outcome in the *Frozen Pork Case*,[188] the seller could even be liable for non-conformity with standards released after entering into a contractual relationship with the buyer. So not only would the seller have to be aware of any standards that exist at the time of the transaction, but the seller would also have to implement a monitoring system that would detect any changes in the public law standards in the buyer's country. Moreover, the seller would be expected to subsequently revise the product to conform to the newly changed standards, which could lead to unexpected costs that were not incorporated into the price of the goods and could result in a loss for the seller.

Because the buyer is much more familiar with its intended use for the goods and the laws, regulations, and standards of its own country, the buyer should be burdened with informing the seller of the standards it requires for the goods to be conforming and expressly contracting for compliance to these standards. Critics may argue that this could be potentially burdensome for a buyer if it does not have notice that conformity will be governed by the laws, regulations, and standards of the seller's place of business. However, buyers will be provided adequate notice of this requirement if Article 35(2) expressly states that sellers are not obligated to conform to the laws, regulations, and standards of the buyer's country.

With a default rule like this, a buyer could seek remedies, based on a failure to comply with its public law standards and regulations, when the

188. BGH Mar. 2, 2005, VIII ZR 67/04.

seller neither knew or had reason to know about the buyer's desire to comply with these standards. Forcing a seller to comply with such standards without adequate notice of the requirement would be fundamentally unfair to the seller. Because modern commercial transactions involve parties that conduct business all over the world and the fast-paced changes to legislation, sellers should not be forced to comply with standards without adequate notice.

To illustrate the ramifications of a default rule that obligates a seller to comply with the public laws and regulations of the buyer's place of business, it is necessary to consider a simple cross-border transaction involving the sale of goods. If an individual from Mexico is selling goods to someone in the United States (both Contracting States), the buyer and the seller could each unknowingly enter a transaction governed by the CISG (because they failed to expressly opt-out of the application of the CISG).[189] If the parties are unsophisticated, they would likely further fail to dictate the public law standards to which the goods must conform.

As a result, the seller may in good faith unknowingly produce goods that conform to the public law standards in Mexico, thinking that they would be suitable for resale in the United States. However, once the buyer receives the goods and tries to resell them in the United States, the buyer may realize that the goods do not conform to a particular regulation in the United States that prevents the buyer from reselling the goods. The buyer may then sue the seller for failure to deliver goods that conform to the contract under Article 35(2) of the CISG, and the adjudicating body may force the seller to (1) alter the goods to conform with the contract in performance of the contract,[190] (2) provide substitute goods,[191] (3) repair the goods,[192] (4) deal with avoidance of the entire contract[193] (if the breach is fundamental),[194] (5) reduce the price of the goods,[195] or (6) pay the buyer damages for breach of contract.[196] The adjudicating body could even combine these remedies, which could be extremely costly to the seller.

Because the seller produced the goods with the good-faith belief that it was producing goods that conformed to the contract, this default rule would cause the seller to unknowingly assume the risk of these very costly remedies. Consequently, even unsophisticated parties conducting international business transactions could feel the brunt of such a default

189. *See supra* Part I.A.
190. CISG, *supra* note 4, art. 46(1).
191. *Id.* art. 46(2)
192. *Id.* art. 46(3).
193. *Id.* art. 81.
194. *Id.* art. 49(1).
195. *Id.* art. 79.
196. *Id.* art. 74.

rule that could severely impact the profitability of their operations.

However, because the CISG focuses on the subjective intent of the parties, it would be unfair to have this default rule for every transaction. Therefore, to provide buyers with further certainty in transacting and to remain true to the CISG, it is necessary to also include exceptions to the rule that reflect the reasonable beliefs of the parties to the transaction.

B. *Exceptions*

Because it would be reasonable to require a seller to deliver goods that comply with the laws, regulations, and standards of the buyer's country when the seller is or should have been aware of them, the CISG should also include exceptions to the general principle in Article 35(2). To be fair to the buyer and ensure that the buyer receives goods that are of the quality that itreasonably expected, these exceptions should mimic those from the *New Zealand Mussels Case*.[197] Therefore, the CISG should provide an exception to the standard rule when (1) the buyer's state's public laws and regulations match those enforced in the seller's state, (2) the buyer informed the seller about such regulations, or (3) due to special circumstances, the seller knew or should have known about the regulations at issue.[198]

To continue the prior example, if (1) Mexico had the same regulation as the United States, (2) the United States buyer informed the seller that the regulation existed in the United States, or (3) due to special circumstances, such as the Mexican seller doing extensive business in the United States and having reason to know about the regulation, then it would be grossly unfair to allow the Mexican seller to escape the requirement of providing goods that conformed to the regulation. Therefore, the United States buyer could argue that any of these exceptions applies and demonstrate that the Mexican seller knew or had reason to know about the regulation and failed to comply with it. These exceptions, therefore, allow the adjudicating body to avoid a grossly unjust deprivation of the buyer's ability to seek remedies from a non-compliant seller.

By providing a "special circumstances" exception, the CISG allows foreign courts and arbitration tribunals to continue to have the discretion to decide based on the facts of the case at hand when a seller knew or should have known about the regulations. Thus, if the default rule would lead to the buyer receiving an inadequate remedy for the seller's failure to comply with public laws or regulations that the seller should have known about and complied with based on the circumstances, the

197. BGH Mar. 8, 1995, VIII ZR 159/94.

198. *See id.*

adjudicating bodies will have the discretion to ensure that the buyer is adequately compensated. While this suggested rule helps foster uniformity in the application of the CISG, this discretion still allows adjudicating bodies to achieve fair and just results and take their jurisdiction's public policy concerns into consideration in their decision-making. These exceptions, therefore, balance the need to provide parties more certainty with the value of independence in each Contracting State's public policy decisions.

C. *Burden of Proof*

Another issue relating to a buyer asserting non-conformity based on the seller's failure to deliver goods that comply with certain laws, regulations, and standards is who bears the burden of proof. If Article 35 included the suggested standard rule subject to the three exceptions, it would also need to include who bears the burden of proving (1) which particular standards apply to the particular transaction and (2) whether the goods comply with those standards.

The suggested default position is that the public law standards of the seller's country apply, therefore, the buyer should have the burden of proving that another set of standards apply to the transaction. Because the default position would essentially entitle a seller to reasonably believe that the goods are conforming when they conform to the seller's country's laws, the buyer must demonstrate that the seller was not reasonable in its belief that the goods were conforming. Therefore, the buyer should have the burden of proving that one of the three exceptions applies, and consequently the goods must comply with the public standards of the buyer's country to conform to the contract.

If the adjudicating body finds that one of the three exceptions to the general rule applies, the burden of proof should shift to the seller to prove that the goods complied with the standards. Because the buyer has already demonstrated that the seller either knew or should have known about the standards required for conformity, the seller should bear this burden. This burden of proof shift should occur because the seller is in a better position than the buyer to testify to the nature of the goods. This is true not only when the seller manufactured the goods, but also when the seller is merely reselling purchased goods. Unlike the buyer, the seller already has an established relationship with its seller and therefore can perform the due diligence required to determine whether the goods comply with the subject standards. To place this burden on the buyer would not only be unfair to the buyer, but would also prove costly because the buyer does not have the same access to the necessary contacts for making this determination that the seller has.

VII. CONCLUSION

To reduce the amount of legal uncertinties that occur regarding compliance with ever-changing laws, regulations, and standards, the CISG should be amended to state its default position, carve out exceptions to the default, and specify which party bears the burden of proof. If both buyers and sellers know with reasonable certainty which standards will be used to determine conformity, sellers will likely deliver goods that conform to the contract. With fewer disputes regarding conformity, parties will incur fewer unnecessary transaction costs. With lower costs involved in transacting business, parties will be encouraged to engage in international business transactions more frequently, and fewer costs will pass down to the consumer in the form of price increases. To remain consistent with the aims of the CISG to reduce uncertainties for parties engaging in international business and increase uniformity amongst international sales law, the CISG provide clarity on the burden of conforming to public standards.