

## Suspicion on the Non-conformity of the Goods as a Foundation of Breach of International Sales Contract

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**Abstract:** The aim of the research is to analyze the breach of international sales contract based on suspicion on non-conformity of the goods in regards to United Nations Convention on Contracts for the International Sale of Goods (CISG). This study is normative legal research. The types of approach used are the legislative approach, case approach, and conceptual approach. The analysis technique uses syllogistic methods through deductive thinking patterns. The result of the study indicates that the appropriate reason of suspicion of non-conformity of the goods under Article 35 of the CISG is the effect of suspicion on the usability of the goods rather than the existence of suspicion itself. It is required the most influence factor in having adverse effect on the function of the goods to be categorized as non-conformity of the goods in regards to a breach of contract. Suspicion could be removed by ensuring that the goods are functional. Finally, the burden of proof towards the suspicion on the non-conformity of the goods could be liable by the parties, especially the seller.

**Keywords:** Breach of Contract; CISG; Contract; International Sales Contract; Conformity of the Good

### 1. Introduction

In international sale of goods, the fundamental reason that drives a buyer to complete a sale contract is the desire to receive a certain product in exchange for a certain price.<sup>1</sup> There are several cases that were questioned the conformity of goods which is often not paid attention by the parties who are contracting in international trade<sup>2</sup>. The issue of conformity of goods to the contract always plays a central role in buying and selling transactions both nationally and internationally because this is the core of the contractual relationship.<sup>3</sup>

Considering the importance of ensuring the conformity between the characteristics described in the contract and the final product, legal systems around the world always stipulate provisions concerning to the specifications of goods considered to be in

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<sup>1</sup> Eyal Zamir, "Toward a General Concept of Conformity in the Performance of Contracts," *Louisiana Law Review* 52 (1991), <https://digitalcommons.law.lsu.edu/lalrev/vol52/iss1/5>.

<sup>2</sup> Roland Djieufack. "Conformity of goods to the contract of sale under the OHADA Uniform Act on General Commercial Law." *Uniform Law Review* 20, No. 2-3 (2015): 271-295.

<sup>3</sup> Teija Poikela, "Conformity of Goods in the 1980 United Nations Convention of Contracts for The International Sale of Goods," *Nordic Journal of Commercial Law* 2003, No. 1 (2003): 1.

accordance with the contract, namely the rules of international sales contract law called “*United Nations Convention on Contracts for the International Sale of Goods*”, hereinafter referred to as CISG.<sup>4</sup> Even so, the issue of conformity of goods still does not have complete regulations following the development of international trade which has an impact on the interpretation of the issue of non-conformity goods that leads to the breaching of international sales contracts.<sup>5</sup>

One of the problems in the interpretation of breaching a contract for the non-conformity of goods is the recognition of the suspicion on non-conformity of the goods as the basis for the breach of contract.<sup>6</sup> The non-conformity of goods in this case of suspicion is found without any obvious physical defects in the goods but is supported by reasonable facts so that they can be used as the basis for breaching a sale contract. Therefore, the suspicion of the non-conformity of goods carries an enormous burden of proof which must be confirmed by the suspicion itself. This suspicion is only supported by reasonable facts that are sufficient to make the goods deemed defective.<sup>7</sup>

The reason why courts can depend on the suspicion of non-conformity of the goods as a foundation for the non-conformity of goods because it is not always possible to claim a breach of contract based on the physical features of goods anymore.<sup>8</sup> Hence, due to the possibility of breach of the sale contract, the convention governing the contract must be well equipped with complete rules to compensate buyers and sellers in all circumstances in order to see any possibility which can lead to a breaching of contract. The aim of this way is not to provide any better advantage to one party, but to make sure the accountability and adherence of conformity of goods to the contract terms. Meanwhile, in practice, the general way to prove breach of contract is by making any physical evidence which resulted from examination and notification regarding the non-conformity of goods that obviously do not comply with the terms required by the contract.<sup>9</sup> However, referring to the interpretation of Article 35 of the CISG, provides an advanced method of proving breach of contract by means of suspicion on defects which result in the non-conformity of goods. These provisions open the new ways to determine the conformity

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<sup>4</sup> United Nations Convention on Contracts for International Sale of Goods, Apr. 11, 1980, U.N. Doc. A/Conf. 97/18 (hereinafter CISG). See also: Mojtaba Sadeghi Moghadam, “The Buyer’s Right to Avoid the Contract Due to Non-Conformity of the Goods under the CISG,” *International Journal of Law* 2 (2016): 2455–2194, <http://www.cisg.law.pace.edu/cisg/countries/cntries.html>.

<sup>5</sup> Peter Schlechtriem, “Subsequent Performance and Delivery Deadlines - Avoidance of CISG Sales Contracts Due to Non-Conformity of the Goods,” *Pace International Law Review* 18, No. 1 (April 1, 2006): 83, <https://doi.org/10.58948/2331-3536.1073>.

<sup>6</sup> Andrew J Kennedy, “Recent Developments: Nonconforming Goods Under the CISG - What’s a Buyer to Do?,” *Dickinson Journal of Internal of International Law* 16, No. 2 (1998).

<sup>7</sup> I. Schwenzer and D. Tebel, “Suspicious, Mere Suspicious: Non-Conformity of the Goods?,” *Uniform Law Review - Revue de Droit Uniforme* 19, No. 1 (March 1, 2014): 152–68, <https://doi.org/10.1093/ulr/unt042>.

<sup>8</sup> Michael Bridge, “Avoidance for Fundamental Breach of Contract under the Un Convention on the International Sale of Goods,” *International and Comparative Law Quarterly* 59, No. 4 (October 2010): 911–40, <https://doi.org/10.1017/S0020589310000473>.

<sup>9</sup> Yasutoshi Ishida, “Identifying Fundamental Breach of Article 25 and 49 of the CISG: The Good Faith Duty of Collaborative Efforts to Cure Defects - Make the Parties Draw a Line in the Sand of Substantiality,” *Michigan Journal of International Law*, No. 41.1 (2020): 63, <https://doi.org/10.36642/mjil.41.1.identifying>.

of contract terms and develop any valuation regarding various rights, obligations and remedies which can be given to the parties.<sup>10</sup>

The issue of suspicion on non-conformity of the goods is interesting to be examined since of its urgency in contributing to the development of international trade, the development of the coverage and renewal of the CISG and it is hoped that it can become a reference for Indonesia if it faces similar legal problems in international trade activities when Indonesia became the contracting state to the CISG. Even now, Indonesia has not ratified the CISG. It is known from the list of countries that have become CISG contracting parties as of the last renewal date, which is 28 September 2020.<sup>11</sup> Although Indonesia has not ratified the CISG - the convention that regulates international sales contracts containing rights and obligations, as well as remedies - Indonesia has been a member of UNIDROIT since 2009<sup>12,13</sup> and apply the UNIDROIT Principles of International Commercial Contract 2010 or commonly called the UNIDROIT Principles 2010. This principle is a supplementary principle of the CISG which is a neutral regime for contracting parties which is used in general. So far, there is no research regarding to addresses the issue of suspicion over the non-conformity of goods. The facts have shown that legal issues on this matter are still very little being discussed and studied.

Several studies on the non-conformity of goods within the framework of CISG have not reached yet the suspicious on non-conformity of goods. One can mention, for example, the research from Poikela who studied the conformity of goods in general under the CISG and how CISG was adopted by the UK and Finland. The results of the study concluded that there are no uniform rules between the UK and Finland regarding various categories of the lack of conformity of goods which in turn could cause legal uncertainty in international trade activities.<sup>14</sup> In addition, the research conducted by Luca examined the conformity of the goods to the contract under Article 35 of the CISG by tracing the history of the drafting of Article 35 of the CISG, including how this Article guarantees the allocation of responsibility between the seller and the buyer. Furthermore, Luca also studied on how the European Union adopted Article 35 of the CISG in the European Union Directive 1999/44 on certain aspects of the sale of consumer goods and associated guarantees.<sup>15</sup>

The aim of the research is not only discussed whether the suspicion on the non-conformity of the goods can be counted as the non-conformity of the goods only, but more than that, this study discusses whether this could lead to the breach of contract as well. Broadly speaking, it is hoped that this research could provide a view for Indonesia

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<sup>10</sup> Joshua D H Karton and Lorraine De Germiny, "Has the CISG Advisory Council Come of Age?," *Berkeley Journal of International Law* 27, No. 1 (2009), [http://www.uncitral.org/uncitral/en/uncitral\\_texts/](http://www.uncitral.org/uncitral/en/uncitral_texts/).

<sup>11</sup> Institute of International Commercial Law, "CISG: List of Contracting States," *Institute of International Commercial Law*, May 5, 2022, <https://iicl.law.pace.edu/print/30180>.

<sup>12</sup> International Institute for the Unification of Private Law, "Membership of UNIDROIT," International Institute for the Unification of Private Law, 2022.

<sup>13</sup> Suradiyanto and Dinny Wirawan Pratiwie, "Kajian Yuridis Unidroit Dalam Hukum Kontrak di Indonesia," *Jurnal Ilmu Hukum* 148, No. 66 (2020), <https://doi.org/10.24903/yrs.v12i1.1378>.

<sup>14</sup> Teija Poikela, "Conformity of Goods in the 1980 United Nations Convention of Contracts for The International Sale of Goods." *Nordic Journal of Commercial Law* 2003, No. 1 (2003): 1.

<sup>15</sup> Villy de Luca, "The Conformity of the Goods to the Contract in International Sales," *Pace International Law Review* 27, No. 1 (May 22, 2015): 163, <https://doi.org/10.58948/2331-3536.1350>.

to carry out CISG accessions in order to overcome legal barriers that exist in the implementation of international trade. In order to achieve the aim, this article is divided into several chapters. After the Introduction and Method in Chapters 1 and 2, Chapter 3 presents a study of the provision regarding the conformity of the goods under Article 35 of the CISG and its interpretation, accompanied by cases that arise in relation to the implementation of Article 35 of the CISG. Chapter 4 provides the analysis of the concept of suspicion that can be categorized as a reasonable suspicion and can be counted as the non-conformity of the goods.

## 2. Method

It is a normative legal research using primary and secondary legal materials. While the primary legal materials consist of all the international agreement related to the topic of research, namely the sale of goods and conformity of goods, and the secondary ones included the references, including books, journal articles as well as conference papers and other documents having correlation with the issues. The technique of analysis data used legal interpretation.

## 3. Conformity of the Goods under Article 35 United Nations Convention on Contract for the International Sale of Goods (CISG) and Its Interpretation

Article 35 of the CISG regulates the conformity of goods. According to John Felemegas by quoting Rene Franz Henschel in his writing entitled "*Conformity of Goods in International Sales: An Analysis of Article 35 in the United Nations Convention on the International Sale of Goods (CISG)*", Article 35 consists of three parts.<sup>16</sup> *First*, regarding the conformity of goods in accordance with the terms and conditions of the contract which consists of the primary rule to determine the conformity of goods. *Second*, when the parties are unable to explain the terms and conditions and their representation or agreement in the contract, the secondary rule will provide an interpretation of a set of positive assumptions that are reflected in the terms of the contract. *Third*, Article 35(3) which emphasizes the responsibility of the seller for the non-conformity of goods from the knowledge or awareness of the buyer regarding the non-conformity of goods.<sup>17</sup>

According to the opinion of Rene Franz Henschel, Article 35 CISG cannot be expected to lead to a fully harmonized law before either the general international contract law which lies behind it is harmonized completely, or the provisions of the Convention are amended by the fully consent of the contracting states.<sup>18</sup> In connection with the interpretation of Article 35 itself, it has not been able to provide a uniform interpretation, so further explanation is needed regarding Article 35 of the CISG which is explained in CISG-AC

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<sup>16</sup> René Franz Henschel, "Conformity of Goods in International Sales Governed by CIGS Article 35: Caveat Venditor, Caveat Emptor and Contract Law as Background Law and As a Competing Set of Rules," *Nordic Journal of Commercial Law*, No. 1 (2004).

<sup>17</sup> Peter Schlechtriem, "Subsequent Performance and Delivery Deadlines - Avoidance of CISG Sales Contracts Due to Non-Conformity of the Goods.;" V Susanne Cook, "The U.N. Convention on Contracts for the International Sale of Goods: A Mandate to Abandon Legal Ethnocentricity," *Journal of Law and Commerce* 257, No. 64 (1996).

<sup>18</sup> Rene Franz Henschel, "Conformity of Goods in International Sales Governed by CIGS Article 35: Caveat Venditor, Caveat Emptor and Contract Law as Background Law and As a Competing Set of Rules."

Opinion No. 19 regarding the “Standards and Conformity of the Goods under Article 35 CISG”.<sup>19</sup> The Advisory Council from CISG explained the things implied by the explanation of Article 35 of the CISG. Further elaboration of the sound of Article 35 (1) (2) (3) is as follows.

### 3.1 Interpretation of Article 35 (1) of the CISG

Article 35 (1) of the CISG states that: “*The seller must deliver goods which are of the quantity, quality and description required by the contract and which are contained or packaged in the manner required by the contract*”.<sup>20</sup> This Article focuses on the agreement between the contracting parties which is explicitly or implicitly explained in the contract. CISG-AC describes the standards of conformity of goods in Article 35 through CISG-AC Opinion No. 19 where the interpretations of these points are interrelated as follows.<sup>21</sup>

- a. The conformity of goods is determined by many factors, not only their quantity, quality, description, or packaging which stated by Article 35 (1), but also by compliance with the standards that affecting the use of the goods, such as public law regulations, industry codes, conformity to the documentation and certification (include disclosure of required information).
- b. The relevant standards that should be complied are those which required at the time of the conclusion of the contract.
- c. Based on Article 35 (1), the seller must deliver the goods which comply with the standards expressly or impliedly agreed upon.

Based on this interpretation, there are many cases that could be examined. The first relevant case is Organic Barley Case, decided in Germany by Oberlandesgericht München (Court of Appeal Munich) on 13 November 2002, Case Number: 27 U 346/02 (Organic Barley Case):<sup>22</sup>

*“[Buyer] demands compensation from Respondent [Seller] of the sales contract regarding the delivery of organic barley (barley or organic jali) used for brewing. Plaintiff [Buyer] cannot use barley because of doubts about its origin. Established in fact the appeal of the Landgericht [District Court, Court of First Instance]. Under the shipping and supplement contract, regarding the shipment of barley dated July 14/31 2000, [Buyer] purchased 150 tonnes of organic barley from [Seller]. Delivery will be made in August / September 2000.*

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<sup>19</sup> Michael Bridge et al., “Standards and Conformity of the Goods under Article 35 CISG” (Alborg Denmark, November 25, 2018), <http://www.iso.org/iso/home/standards.htm>.

<sup>20</sup> Michael Bridge et al., “Standards and Conformity of the Goods under Article 35 CISG” (Alborg Denmark, November 25, 2018), <http://www.iso.org/iso/home/standards.htm>.

<sup>21</sup> Michael Bridge et al., “Standards and Conformity of the Goods under Article 35 CISG” (Alborg Denmark, November 25, 2018), <http://www.iso.org/iso/home/standards.htm>.

<sup>22</sup> Marcelo Markus Teixeira, Henrique Rotava, and Tainá Rafaela Bigaton, “The Codes of Conduct as a Tool of Compliance for Conformity in the application of Article 35 of the CISG,” *Brazilian Journal of Development* 5, No. 10 (2019): 21164–79, <https://doi.org/10.34117/bjdv5n10-278>.

With regard to quality, the parties agree that: “Goods will meet the requirements under Council Regulation EEC No. 2092/91 on the production of organic agricultural products, country of origin Germany”.

Based on the excerpt from the contract on this case, the buyer expects the seller to comply with the production standards for agricultural products under Council Regulation EEC No. 2092/91 on organic production of agricultural products and indications referring thereto on agricultural products and foodstuffs,<sup>23</sup> from the country of origin of Germany. This is in line with the interpretation of Article 35 (1) of the CISG which is further explained by CISG-AC in CISG-AC Opinion No.19 regarding the quality of goods that must be met according to the standards agreed in the contract.<sup>24</sup> If it is found that the “organic barley” goods are not in accordance with the applicable standards, the seller can be said to have breached the contract.

Furthermore, the non-conformity of the goods in this case is strengthened by the citation of the facts of the case as follows:

*The organic barley shipment consists of 6 shipments. The last shipment was dated 20 December 2000, [Buyer] received a certificate certifying that the last delivered goods complied with the standards of Council Regulation EEC No 2092/91. However, on the previous five shipments of goods, [Buyer] did not receive certificates related to standards such as last shipment.*

Reading the factual quotation on this case it can be understood that a certificate is needed in every shipment of goods (organic barley) as a condition for meeting the conformity standard of goods. The absence of certificates for the five previous shipments of goods raised doubts about the quality of the goods which were expected to be organic and in accordance with the standards of Council Regulation EEC No 2092/91. If five shipments of organic barley turn out to be conventional barley, there is a price difference because organic barley is more valuable in the market. Based on these facts, it was decided by Landgericht (District Court, Court of First Instance) that the five deliveries of barley did not conform the quality stated in the contract. This is also based on the interpretation of Article 35 (1) of the CISG.

To summarize the discussion of the case above, with the terms and conditions communicated in the contract regarding the standards of Council Regulation EEC No. 2092/91 which must be strengthened by the existence of a certificate as a statement of conformity of goods, the organic barley is questionable or suspected did not conform. Based on this, the suspicion of non-conformity of goods is included in the interpretation of Article 35 (1) where 5 previous deliveries of barley are suspected of being inorganic because they are not given a certificate of statement that meets the standards of Council Regulation EEC No 2092/91.

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<sup>23</sup> “Council Regulation (EEC) No 2092/91 of 24 June 1991 on Organic Production of Agricultural Products and Indications Referring Thereto on Agricultural Products and Foodstuffs Official,” *Journal of Law* 198 (n.d.): 1–15.

<sup>24</sup> Michael Bridge et al., “Standards and Conformity of the Goods under Article 35 CISG” (Aalborg Denmark, November 25, 2018), <http://www.iso.org/iso/home/standards.htm>.

### 3.2 Interpretation of Article 35 (2) of the CISG

Article 35 (2) CISG states that:

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

- a. are fit for the purposes for which goods of the same description would ordinarily be used;*
- b. are fit for any particular purpose expressly or impliedly made known to the seller at the time of the conclusion of the contract, except where the circumstances show that the buyer did not rely, or that it was unreasonable for him to rely, on the seller's skill and judgement;*
- c. possess the qualities of goods which the seller has held out to the buyer as a sample or model;*
- d. are contained or packaged in the manner usual for such goods or, where there is no such manner, in a manner adequate to preserve and protect the goods.<sup>25</sup>*

CISG-AC further explains the conditions that describe the sound of Article 35 (2) of the CISG as follows.<sup>26</sup>

*In assessing whether, under Article 35(2) CISG, the seller must deliver goods that comply with a certain given standard, the following factors may be considered:*

- a. The parties' statements (seller and buyer) which conduct before and after the conclusion of the contract;*
- b. Whether the buyer has drawn the seller's attention to the standard that should be fulfilled;*
- c. Whether the seller has expressed a public commitment to the standard that should be fulfilled;*
- d. Any prior dealings between the parties which happened in a certain of time;*
- e. how much the extent of the buyer's involvement in designing the goods and advising the seller as to the manufacturing or production process of the goods;*
- f. How good are the parties' expertise in relation to the goods;*
- g. How big are the business identity, characteristics, standing and size of the seller and the buyer;*
- h. Whether the parties are in the same industry, sales, organization, association or initiative that has adopted or follows the standard and how is compliance with the standard is required or expected;*
- i. The price for the goods;*
- j. The nature, complexity and prominence of the required standard for the goods;*

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<sup>25</sup> Michael Bridge et al., "Standards and Conformity of the Goods under Article 35 CISG" (Alborg Denmark, November 25, 2018), <http://www.iso.org/iso/home/standards.htm>.

<sup>26</sup> Michael Bridge et al., "Standards and Conformity of the Goods under Article 35 CISG" (Alborg Denmark, November 25, 2018), <http://www.iso.org/iso/home/standards.htm>.

- k. *The accessibility of information regarding the standard that should be fulfilled;*
- l. *Whether the standard is incorporated in the seller's code of conduct or the buyer's code of conduct for suppliers, the standard should be publicly available;*
- m. *How are the existence of competing standards;*
- n. *Any relevant sales usage that is not based on the standard in question that can be considered.*

Second Case is Used Component Placement Machines Case, decided in Austria by Oberster Gerichtshof (Austrian Supreme Court) on 13 April 2000, Case Number: 2 Ob 100/00w (Used Component Placement Machines Case):<sup>27</sup>

*"The German plaintiff (seller) sold four used machines to the Austrian defendant (buyer), who has a long business relationship with the seller which happened in a certain of time. In the past, it turns out that the machines that was delivered to the buyer were not under the European Community "CE" mark, which indicates that the product did not comply with the applicable European Community directives. This time, the buyer refuses to pay the remaining purchase price on the grounds that the four machines, one of which is alleged to have been imported from the Czech Republic or Slovakia, do not have this kind of "CE" mark directive certification that should be complied under the applicable European Community directives."*

Based on case quotes, it was found that the machines sold by sellers to buyers did not meet the standards in the "CE" mark certification in the European Community even though the parties had long had a business relationship. This resulted in the buyer refusing to pay the remaining payment for the four machines he bought from the seller on the basis of non-conformity standards that the seller had not met. This fact is reinforced by the following court findings:

*"The court of first instance found that all four machines should have been certified. In accordance with EC Directive 89/392 with respect to German law on machinery, CE marking is required not only for machines imported from outside the European Economic Area (EEA), but also for machines that have changed significantly. The buyer has been convinced to be able to sell the machine on the market within the EEA. The court found that the requirements for certification of the "CE" mark have not been fulfilled by the seller and the buyer has given notice regarding the lack of conformity to the contract within the appropriate time limit so that the buyer has the right to withhold payment".*

The court found several facts that reinforce the machine's incompatibility, namely the existence of EC Directive 89/392 which is a public law from Germany which requires certification of "CE" marking for certain goods in the European Economic Area (EEA). Due to this fact, the court decided that the seller did not fulfil his obligation to deliver the appropriate goods. This is because Germany is a country that should be subject to EC Directive 89/392 but has neglected to deliver goods in accordance with local regulations in order to meet sales standards in the European Economic Area (EEA).

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<sup>27</sup> United Nations Commission on International Trade Law, *UNCITRAL Digest of Case Law on the United Nations Convention on the International Sale of Goods* (United Nations, 2000).



*“Supreme Court affirms the implementation of the CISG. The Court noted that under Article 35 of the CISG, the seller must deliver goods whose quantity, quality and description required by the contract and which are contained or packaged in the manner required by the contract. If the contract does not specify the conditions according to the standard of Article 35 (1) then Article 35 (2) CISG becomes relevant to apply. The condition in Article 35 (2) is that the goods are suitable for the intended use of goods with the same description will be decided based on the standards in the country of the seller; goods need to meet the importing country's security, certification and production standards. The buyer needs to consider these requirements and to enter into a contract under Article 35 (1) or Article 35 (2) (b) of the CISG. The court stated that the terms applicable to the parties are based on the agreement of the buyer and seller, or have been agreed by the parties or notified to the seller in accordance with Article 35 (2) (b) of the CISG. Therefore, the Supreme Court directed the Court of First Instance to determine which terms and standards should be applied and whether the machines meet those requirements”.*

In connection with the case explanation above, it can be seen that the seller does not fulfil the implied obligations in Article 35 (2) (b), namely “*fit for particular purpose*” in relation to the standard “CE” marking in the European Economic Area (EEA). It is communicated in a manner implied in the contract because it is public law which can be recognized by Germany as the selling country.

Overall, the above case is also related to several factors that have been explained in the implied meaning interpreted by CISG-AC Opinion No. 19, namely the factor in point (c) whether the seller has communicated or expressed a public commitment to the standard that should be fulfilled i.e. evidenced by Germany (the seller) is subject to EC Directive 89/392; point (d) there has been a previous transaction between the parties in a certain time which should have made the seller aware of the standards in the buyer’s country that must be met; and point (h) whether the parties are in the same industry, sales, organization, association, or initiative that have adopted or adhered to the standard and whether it conforms to the required or expected standard proven by the status that both of the parties are belong to the European Economic Area (EEA) trading area. It can be concluded that the seller’s implied obligations are not fulfilled from the factors described above accompanied by the fact that the emergence of awareness by the buyer of the non-conformity of goods is notified to the seller within the notification grace period in accordance with the CISG rules so that the buyer has the right to withhold payment for the machine he purchased.

Apart from the example of case above, there are several cases which also relate to the implicit interpretation of Article 35 (2). One of the cases that can provide an overview of Article 35 (2)(b) is related to a particular purpose, namely *the Inflatable Triumphant Arch Case*<sup>28</sup> where the buyer relies on his skills, knowledge and judgment to the seller which ends in a non-conformity of the goods where the goods are declared defective. This case further provides an understanding of the suspicion that the goods can prove to be incompatible with their defects.

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<sup>28</sup> Fabrizio Cafaggi and Paola Iamiceli, “Contracting in Global Supply Chains and Cooperative Remedies,” *Uniform Law Review* (Oxford University Press, August 1, 2015), <https://doi.org/10.1093/ulr/unv016>.

### 3.3 Interpretation of Article 35 (3) of the CISG

Article (3) of the CISG states that:

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

This Article explains that the seller is not responsible for the conditions described in points (a) - (d) in Article 35 (2) of the CISG relating to the non-conformity of the goods that occurred at the time of closing of the contract, the buyer has known or is aware of the non-conformity of the goods. CISG-AC further explains the conditions that describe the sound of Article 35 (3) of the CISG as follows.

5.1 *The seller may have an obligation to deliver goods which comply with local standards such as follows:*

- (a) applicable at the place of the goods will be used if, at the time of the conclusion of the contract, the seller knew or could not have been unaware of that place required local standards;*
- (b) in any other case, should be applicable at the buyer’s place of business required local standards.*

5.2 *In assessing whether such standards are to be complied with, the following factors should be considered in addition to those in Rule 4 (the factors which have been mentioned as the interpretations of Article 35 (2)):*

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

Third relevant case is Used Caterpillar Bulldozer Case, decided in Switzerland by Tribunal Cantonal du Valais/Kantonsgericht Wallis (Court of Appeal Canton Valais) on 28 October 1997, Case Number: CI 97 167 (Used Caterpillar Bulldozer Case):<sup>29</sup>

*“[Italian seller] and [Swiss buyer] verbally signed a contract for the sale of Caterpillar Bulldozer. The parties agree that prior to delivery, the seller will replace the three parts of the defective bulldozer, which the buyer has tested at the seller’s premises before the contract is concluded. The parties also agree that a partial prepayment will be made after the seller issues the invoice, and the remaining price will be paid in two installments on a specified date after delivery. The buyer pays an advance payment of partial payments two weeks after the issuance of the invoice by the seller. The bulldozer was shipped with new spare parts, but the buyer refused to pay the remaining price and took action against the seller who demanded compensation for the lack of conformity of the goods.”*

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<sup>29</sup> Silvia Ferreri, “Remarks Concerning the Implementation of the CISG by the Courts,” *Journal of Law and Commerce* 25, No. 223 (2005).

Based on the facts of the case above, there is an agreement verbally by the parties in terms of replacing the three damaged bulldozer subsections that have been tested by the buyer where it was agreed that before the bulldozer was sent, the three parts were replaced. This illustrates the absence of application of Article 35 (1), namely an explicit and implicit agreement between the parties regarding goods being traded even though it has been agreed upon orally. In this case the buyer knows and is aware of a shortage or defect of the goods and provides notification to the seller regarding the damage by requesting replacement before delivery of the goods. However, in the course of the case it turned out that the bulldozer was delivered without replacing the three parts of the bulldozer which was damaged even though the buyer was given the new parts by seller. Due to this fact the buyer claims that the seller sent the unsuitable bulldozer and did not carry on the remaining payment. In response to this, the seller argues that the buyer knows for sure the damage to three parts of the item as described in the following case quote.

*“The buyer has tested the bulldozer and the court concluded that Article 36 of the CISG does not apply to the seller and that the buyer's good faith principle is questioned by not paying the remaining payment, the assumption that someone who buys goods even though it is clearly a defect is intended to accept the seller's offer. Furthermore, the buyer has not provided notification or official notification of the alleged lack of conformity of goods (Article 39 CISG).”*

Through the explanation and decision of the case above, the court applied Article 35 (3) and Article 36 because the court found the fact that the damage to the three parts of the bulldozer in question was inappropriate and was recognized by the buyer at the closing of the contract so that the seller was not responsible for it. The non-conformity that occurs in the goods, namely the bulldozer that has been sent. Based on the facts of the case discussed in the previous paragraph even though the buyer has an agreement in writing, Article 35 (3) still cannot make the seller responsible on the grounds that the bulldozer does not comply with the contract based on Article 35 (1) in order to make the seller responsible for the replacement of three bulldozer parts which have been verbally agreed on the damage to the seller when the buyer tests the bulldozer before the closing of the oral contract, which means that the buyer has carried out an examination and notification process in accordance with Article 38 and Article 39 of the CISG. This is because according to the court Article 35 (3) does not cover the implicit obligations in Article 35 (1).

It is shown that the Article 35(3) of the CISG does not apply in connection with Article 35(1) of the CISG or can also be said it is not applied under the general rules of contractual interpretation. Based on the general rules of priority, the parties must be assumed to have communicated expressly their wishes and intentions by the terms and conditions which stated in their written agreement. If the seller has drafted the terms of the contract, then any lack of clarity will be construed against him.<sup>30</sup>

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<sup>30</sup> Henschel, “Conformity of Goods in International Sales Governed by CISG Article 35: Caveat Venditor, Caveat Emptor and Contract Law as Background Law and As a Competing Set of Rules.”

## 4. Suspicion on Non-conformity of Goods as a Reason for Breaching International Sales Contracts

Suspicion of non-conformity of goods can be recognized as a basis for breaching of international sales contracts. So far, the statement regarding the legal issue is still considered controversial because of the pros and cons of the legal issue. The pros and cons are not only because of the differences views from the perspective of interpretation by each expert but also from differences views through the legal system approach, namely countries adhering to Common Law and Civil Law. Therefore, further analysis is needed both looking at the rules of international law, specifically the CISG which is limited in scope based on related legal issues, looking at the analysis of relevant case law decisions and looking at legal concepts so that they can find appropriate insight based on legal issues.

### 4.1 Suspicion of Non-conformity of Goods Judging from Non-Physical Non-conformity of Goods

The discussion in this part is more to look for the concept of suspicion that can be categorized as a reasonable suspicion and can be counted as a non-conformity of goods. If it can be determined a concept that can provide a limit of suspicion that can be recognized as a non-conformity of goods, then the fulfillment of implicit obligations from the seller can also be determined. Furthermore, it is needed to provide the concept of fundamental suspicion that cannot be physically proven to be counted as a non-conformity of goods that has an impact on breaching of international sales contracts.<sup>31</sup> So far, this concept of suspicion can be recognized as a breaching of international sales contracts because there are supporting factors implied by the buyer to the seller which are known through judges' decisions in the courts of several countries such as Austria, Switzerland, and mostly in Germany where legal cases of suspicion over the non-conformity of this item is disputed. Due to the absence of an absolute concept regarding the suspicion of the non-conformity, it is necessary to elaborate the statement of a legal expert in a case that has been decided and has permanent legal force as a view in finding the interpretation of the concept of suspicion of the of goods non-conformity which is appropriate.

The non-conformity of the goods cannot only be evaluated on the physical features anymore particularly in international trade and issues concerning the suspicions on non-conformity of the goods. Therefore, this matter should be evaluated on the legal and factual relations of the goods to their surroundings as the non-physical features of the goods.<sup>32</sup> It is further explaining and strengthening that the concept of suspicion over the non-conformity is not only examined based on its physical features but also other aspects, namely non-physical aspects such as legal aspects and factual conditions of goods related

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<sup>31</sup> Monica Kilian and M A Currently, "Article 3 2000 Part of the Common Law Commons, Comparative and Foreign Law Commons, International Law Commons, and the Jurisdiction Commons Recommended Citation Recommended Citation Kilian," *Florida State University Journal of Transnational Law & Policy* 10, No. 2 (2000), <https://ir.law.fsu.edu/jtlp> Available at: <https://ir.law.fsu.edu/jtlp/vol10/iss2/3>.

<sup>32</sup> I. Schwenzer and D. Tebel, "Suspicious, Mere Suspicious: Non-Conformity of the Goods?," *Uniform Law Review - Revue de Droit Uniforme* 19, No. 1 (March 1, 2014): 152–68, <https://doi.org/10.1093/ulr/unt042>.

to their condition and the surroundings. In more detail, several things can be categorized which will be explained in the following case discussion.

The case that could be examined based on this concept is Frozen Pork Case, decided in Germany by German Federal Supreme Court (Bundesgerichtshof) on 02 March 2005, Case Number: VIII ZR 67/04 (Frozen Pork Case):<sup>33</sup>

*“[Seller] argued that in April 1999, [Buyer] ordered a large quantity of pork from [Seller]. The goods are sent directly from [Buyer] to [Buyer] customers, and from there in turn distributed to a trading company in Bosnia-Herzegovina / Republic of Srpska. Deliveries were carried out in stages, namely April 15, April 27 and May 7, 1999. [Seller] gave invoices to [Buyer] for the above shipments for Deutsche Mark [DM] 49.106.20, DM 29.959.80 and DM 49.146.75, referring to on the date of delivery, and the bill is not later than June 25, 1999, and accompanied by a so-called certificate of eligibility for consumption.”*

Based on the factual quotation on the case, the seller said that all meat shipments were accompanied by a health clearance certificate which was a complete documentation of the goods included in the criteria for determining the suitability of the goods.<sup>34</sup> However, the following facts were found:

*“Starting June 1999, suspicions arose in Belgium and Germany that pork produced in Belgium was contaminated with dioxins. As a result, in Germany, regulations for consumer protection of Belgian pork were issued (effective 11 June 1999) where the meat was declared non-marketable, as long as there was no certificate stating that the meat was free from dioxin contaminants. In this regard, the European Union issued regulations on the need for a certificate of eligibility for consumption to confirm dioxin-free goods.”*

The suspicion that the meat sent by the seller was contaminated by dioxins caused the meat to be hindered by the prohibition of trade in the European Union (public law regulation) so that, the meat was secured at the customs of the country of consumption, namely Bosnia-Herzegovina. This causes the buyer, as the party who sends the meat to the customer, in the following difficult position.

*“[Buyer] claims that the purchased pork is being placed in a customs storage facility, and a statement confirming that the meat is free of dioxins was requested for customs in Bosnia-Herzegovina at the end of June 1999. On 1 July 1999, notification was received from Bosnia- Herzegovina which prohibits the sale of shipped goods. After receiving notification of a sale ban, [Buyer] requests repeatedly for [Seller] to produce a health certificate or a certificate of fitness for consumption stating that meat is free from dioxins. Because [Seller] did not provide such a certificate, the goods in the customs were destroyed in the end.”*

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<sup>33</sup> Yara Naser Aldin, “CISG. Frozen Pork Case I, No. VIII ZR 67/04 (Bundesgerichtshof (German Supreme Court),” 2005.

<sup>34</sup> Sandra Fišer Šobot, “Calculation of Price Reduction in International Sale of Goods Contracts,” *Lexonomica* 9, No. 2 (2017): 109–24, [https://doi.org/10.18690/18557147.9.2.109-124\(2017\)](https://doi.org/10.18690/18557147.9.2.109-124(2017)).

Based on the facts of the case above, the meat suspected to be contaminated with dioxins due to not being accompanied by a consumption eligibility certificate reinforces the suspicion that the goods are incompatible on non-physical factors that result in the meat being destroyed at customs because it does not pass the standard requirements for health documents (certification) and is not suitable for sale (does not meet the principle of resale ability).<sup>35</sup> The meat was declared non-conform because it could be counted as meeting the limits of reasonable suspicion, namely in the absence of complete documentation so that it affected the use of goods that could not be traded. More specifically, the concept of suspicion is explained in the following two points.

### **Point 1: Suspicion as a Relevant Criterion for the Conformity of Goods**

According to Civil Law, the approach to assessing non-conformity of goods is through the valuation of the physical features of goods, for example, such as goods that do not comply with the specifications in the contract and experience defects, contaminated food and are not suitable for human health, such as Organic Barley Case and Frozen Pork Case which has been discussed in discussion above. Meanwhile, according to Common Law, the approach used is more flexible, which focuses on market reactions. For example, the value of the principle of resale ability when there are factors that cause market changes, it results in a non-conformity of goods such as Frozen Pork Case. Related to the resale ability of meat that is traded and also documentation of items that were not included.<sup>36</sup>

In any case, the Common Law approach is an approach that is more often used in determining suspicion, including as a relevant criterion for determining the conformity of goods in international trade practices. This is because with the development of trade that is increasingly broad and global, an approach is needed that can follow these developments through non-physical factors in the form of market relations with the principle of resale ability and completeness of documentation.

### **Point 2: Suspicion Affects the Use of Goods**

Suspicion affects the usefulness of the goods, especially the ability to resell the item. There are two determining factors, the first is the relevance that does not meet the requirements of the consequences of suspicion. In this case, not all suspicions lead to the non-conformity of goods so it is often necessary that suspicions are '*based on concrete facts*' or '*clear*' or only suspicions that directly affect health can be counted as non-conformity of goods according to Civil Law.<sup>37</sup>

However, the most appropriate and used approach in international practices is the Common Law approach which stated that suspicion can affect the market's reaction of the goods (in connection with the resale ability principle) and thus it can hinder the intended use of the goods. Then whether this market reaction is reasonable or rational

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<sup>35</sup> Michael Joachim Bonell, "The CISG, European Contract Law and the Development of a World Contract Law," *The American Journal of Comparative Law* 56, No. 1 (2018): 1–28.

<sup>36</sup> I. Schwenzer and D. Tebel, "Suspicious, Mere Suspicious: Non-Conformity of the Goods?," *Uniform Law Review - Revue de Droit Uniforme* 19, No. 1 (March 1, 2014): 152–68, <https://doi.org/10.1093/ulr/unt042>.

<sup>37</sup> I. Schwenzer and D. Tebel, "Suspicious, Mere Suspicious: Non-Conformity of the Goods?," *Uniform Law Review - Revue de Droit Uniforme* 19, No. 1 (March 1, 2014): 152–68, <https://doi.org/10.1093/ulr/unt042>.

hence it is relevant to determine the conformity of goods that can be known by the reaction in the place of the use of the goods. Regardless of how unwarranted this suspicion is, the seller is responsible for goods which are inappropriate in their effect on utility, in particular for resale.<sup>38</sup> Second, there are features agreed in the contract that are not fulfilled. The contradiction between the agreed features and the usefulness of the items in this discussion occurs when there are unforeseen circumstances that are not considered by the parties in the contract. Therefore, in such a case, the determinants of the usefulness of the good will prevail over the features approved by way of exclusion.

Based on several cases above, it can be concluded that the concept of suspicion of the non-conformity of the goods should have a reasonable justification. One of the examples of the justification for suspicion that can support the non-conformity of the goods are incomplete documentation related to the certain standard certifications and the fulfillment of the principle of resale ability as well, both of them are the non-physical feature of the goods. Even in practice, it can be argued that the non-physical features are more important, at least in the world of international trade, compared to the physical features of the goods. The other example is related to the manufacturing practice guidelines and when the seller does not have documentation to prove that he has complied with these practice guidelines, then the goods he sells could be categorized as the non-conformity goods even if these goods are physically perfect.

Through the explanation of the discussion above, a chronology of thinking is required in determining the suspicion on the non-conformity of the goods as non-physical feature for the non-conformity goods that has an impact on violations of international trade contracts. The reason is in accordance with what happened in the Frozen Pork Case. This case is one of the most frequently discussed cases related to the concept of the suspicion on the non-conformity of the goods. This case shows that suspicious could not be justified without a clear reason. Basically, the requirement for the buyer is to fully establish suspicion based on reasonable facts so that it can be convincing. It is because not every suspicion can be a reason for the non-conformity of the goods.

## 5. Conclusion

Under the jurisprudence of several court decisions and guided by the implicit interpretation of Article 35 of the CISG, what makes the real justification of suspicion of non-conformity of the goods is not the existence of suspicion itself but the effect of the suspicion on the usability of the goods. It is because suspicion may exist in most cases of conformity of goods. However, to achieve non-conformity resulting in a breach of contract, it is needed the factors to have an influence in such a way that it has an adverse effect on the function of the goods. Although may be there is no effect, it can cause a potential threat or defect that in itself makes the goods unfit for use. Suspicion can only be removed by ensuring that the goods are functional. So, there is a burden of proof on the buyer to provide supporting facts to create suspicion that is as strong as for the seller to remove it by ensuring facts to the contrary.

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<sup>38</sup> I. Schwenzer and D. Tebel, "Suspicious, Mere Suspicious: Non-Conformity of the Goods?" *Uniform Law Review - Revue de Droit Uniforme* 19, no. 1 (March 1, 2014): 152–68, <https://doi.org/10.1093/ulr/unt042>.

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