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# Ethical standards in CISG contracts

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Ingeborg Schwenzer\*

## Abstract

In today's world of international sales contracts ethical standards become more and more important. Consumers today are ready to pay a higher price for ethically produced and fairly traded goods. This article discusses in the first place, how ethical standards become part of a sales contract that is governed by the CISG, be it by specific contractual stipulations, trade usages, or subsidiarily, by relying on the provisions of the CISG. Once ethical standards have become part of the contract, special problems arise with regard to possible remedies when these standards are not complied with. After a short discussion of the remedies of specific performance and avoidance, the article focuses on the remedy of damages, and on how to ascertain loss in these cases. It is argued that the CISG is flexible enough to adequately deal with the new developments in the area of ethical standards.

## I. Introduction

In September 2015, class actions were initiated against Nestle USA and Mars Chocolate North America in the US District Court Northern District of California, respectively, for violation of California Consumer Protection Laws.<sup>1</sup> Allegedly, both respondents were aware that the worst forms of child labour were used to produce the cocoa beans used to make their chocolate products. The Bureau of International Labor Affairs of the US Department of Labor had reported that children from the Côte d'Ivoire, as well as migrant children from Benin, Burkina Faso, Guinea, Mali, Nigeria, and Togo, were working under conditions of forced labour on Ivoirian cocoa farms.<sup>2</sup> Both respondents being members of the UN Global Compact explicitly forbid child and slave labour in their supplier codes.<sup>3</sup> However, it was alleged by the claimants that neither of the respondents disclosed to consumers at

\* Professor (em.) for Private Law, University of Basel, Switzerland. Tel: + 41 61 267 25 40; Email: ingeborg.schwenzer@unibas.ch. The author is deeply indebted to Fernando Tafur for editing the footnotes.

<sup>1</sup> *Hodsdon v Mars, Inc, et al*, ND Cal, 28 September 2015; *McCoy v Nestle USA, Inc et al*, ND Cal, 28 September 2015.

<sup>2</sup> Bureau of International Labor Affairs, *2015 Findings on the Worst Forms of Child Labor: Côte d'Ivoire*, 2 <<https://www.dol.gov/sites/default/files/images/ilab/child-labor/CotedIvoire.pdf>> accessed 14 November 2016.

<sup>3</sup> Mars Inc, *2014 Mars Supplier Code of Conduct*, 3 <<http://www.mars.com/docs/default-source/Policies-and-Practices/supplier-code-of-conduct/supplier-code-of-conduct-english.pdf?sfvrsn=4>> accessed 14 November 2016; Nestlé Ltd, *The Nestlé Supplier Code* (2013) 2 <<http://www.nestle.com/asset-library/documents/library/documents/suppliers/supplier-code-english.pdf>> accessed 14 November 2016.

the point of purchase the likelihood that its chocolate products were made from cocoa beans produced by Ivorian children engaged in the worst forms of child labour. Allegedly, this resulted in deceiving consumers into buying products they would not have otherwise and, thereby, unwittingly supporting child and slave labour.

In these cases, the chocolate producers bought the cocoa from one of the world's largest cocoa producers and grinders seated in Switzerland, which boasts 'working to ensure a sustainable chocolate and cocoa supply chain is an imperative, not an option'.<sup>4</sup> The sales contracts between the US class action respondents and the Swiss cocoa producer may have been governed by the CISG if the parties did not exclude it.

In March 2016, these class actions were dismissed,<sup>5</sup> but solely on the ground that the respondents disclosed on their websites that the involvement of child labour could not be excluded. Still, they are an excellent example for the importance of ethical standards in many of today's markets. Besides chocolate, there are hundreds of other products where ethical standards have raised issues during the last few years—to name but a few: smartphones, sport shoes, apparels, diamonds, gold, and many more. The question here is: who is to bear the risk that the goods do not live up to the required ethical standards of the markets where they are sold?

It has been argued that in all of these cases it is not goods but, rather, emotions that are sold.<sup>6</sup> However, it cannot be overlooked that these emotions have a very real economic value. In all of these cases—although there may be no difference in the physical features of the goods concerned—consumers are ready to pay a higher price for the goods compared to goods that are not produced or traded in this way, thus, there is a distinctive market with higher prices for ethically produced goods.<sup>7</sup>

In regard to the above-mentioned ethical features of the goods in comparison with traditional physical features, some specific problems arise when determining conformity of the goods with the contract and the buyer's possible remedies in case of non-conformity.

## II. Ethical standards as part of a CISG contract

Let me first discuss the question of whether and how ethical standards may become part of a United Nations Convention on Contracts for the International Sale of Goods (CISG) contract.<sup>8</sup>

<sup>4</sup> Barry Callebaut Group, Sustainable Sourcing Policy Ingredients (2016) 2 <[https://www.barry-callebaut.com/system/files/download/sustainable\\_sourcing\\_policy\\_-\\_ingredients\\_0.pdf](https://www.barry-callebaut.com/system/files/download/sustainable_sourcing_policy_-_ingredients_0.pdf)> accessed 14 November 2016.

<sup>5</sup> *Hodsdon v Mars, Inc, et al, N.D. Cal, 17 February 2016; McCoy v Nestle USA, Inc et al, N.D. Cal, 29 March 2016.*

<sup>6</sup> Christina Ramberg, 'Emotional Non-Conformity in the International Sale of Goods, Particularly in Relation to CSR-Policies and Code of Conduct' in Ingeborg Schwenzer and Lisa Spagnolo (eds), *Boundaries and Intersections, 5th Annual MAA Schlechtriem CISG Conference* (Eleven International Publishing The Hague 2015), 71.

<sup>7</sup> See for example OLG Munich, 13 November 2002, CISG-Online 786 = <<http://cisgw3.law.pace.edu/cases/021113g1.html>> accessed 14 November 2016. In this case the court held that organically produced barley is more than twice as expensive as normal barley.

<sup>8</sup> Convention on Contracts for the International Sale of Goods (1980) 1489 UNTS 3 (CISG).

## 1. Contractual stipulations

It is first and foremost up to the parties themselves to stipulate in their contract as to which ethical standards have to be met and how these must be proven. Certificates of origin are often explicitly named in the contract or in a letter of credit.

Many companies nowadays have explicit supplier codes of conduct that are prominently displayed on their websites and more often than not translated into many languages.<sup>9</sup> The question then arises as to how terms contained on a website become part of the contract.<sup>10</sup> Usually, however, they are referenced in the contract, and, thus, there are no questions about their incorporation.<sup>11</sup> Thus, for example, according to a 2016 survey, 84 per cent of the multinational apparel companies—selling under 308 brands—have a code of conduct prohibiting the use of child labour by suppliers,<sup>12</sup> and 86 per cent include their code of conduct in their supplier contracts.<sup>13</sup>

If such express terms have been agreed to by the parties, they circumscribe the quality or description of the goods in the sense of Article 35(1) of the CISG.<sup>14</sup> If the goods do not live up to these specifications, there are no problems in finding non-conformity in the sense of Article 35(1) of the CISG.

## 2. Trade usages

Even in cases where such express terms are absent, contract interpretation and supplementation may well yield similar results to those reached with express incorporation. First of all, trade usages may call for certain ethical standards. According to Article 9(1) of the CISG, the parties are bound by any usage to which they have agreed and by any practice they have established between themselves. Furthermore, according to Article 9(2) of the CISG, the parties are considered to have impliedly made applicable to their contract any international trade usages. In many instances, such trade usages can be found.

A prominent example is the Kimberley Process Certification Scheme,<sup>15</sup> an international certification scheme for rough diamonds. Participants of this scheme must ensure that any diamond originating from the country does not

<sup>9</sup> See the supplier codes of conduct in various languages, eg, for Unilever, *Responsible Sourcing* (June 2016) <<https://www.unilever.com/sustainable-living/the-sustainable-living-plan/enhancing-livelihoods/fairness-in-the-workplace/advancing-human-rights-with-suppliers/implementing-our-approach.html>> accessed 14 November 2016; Hershey Company, *Supplier Code of Conduct* <[https://www.thehersheycompany.com/en\\_us/responsibility/good-business/responsible-sourcing.html](https://www.thehersheycompany.com/en_us/responsibility/good-business/responsible-sourcing.html)> accessed 14 November 2016.

<sup>10</sup> CISG-AC Opinion no 13, *Inclusion of Standard Terms under the CISG*, Rapporteur: Sieg Eisel (20 January 2013) para 3.4, <<http://www.cisgac.com/cisgac-opinion-no13/>> accessed 14 November 2016.

<sup>11</sup> *Ibid* para 5ff.

<sup>12</sup> Gershon Nimbalkar, Jasmin Mawson and Claire Harris, *2016 Australian Fashion Report: The Truth behind the Barcode* (Behind the Barcode 2016) 35, <<https://baptistworldaid.org.au/wp-content/uploads/2016/05/2016-Australian-Fashion-Report.pdf>> accessed 14 November 2016.

<sup>13</sup> *Ibid* 37.

<sup>14</sup> Paulo Nalin, 'International Fair Trade (Fair Trade in International Contracts and Ethical Standard)' in Ingeborg Schwenzer (ed), *35 Years CISG and Beyond* (Eleven International Publishing 2016) 333.

<sup>15</sup> Kimberley Process <<https://www.kimberlyprocess.com/en>> accessed 14 November 2016.

finance a rebel group (so-called blood diamonds), that every diamond export be accompanied by a Kimberley Process certificate, and that no diamond is imported from, or exported to, a non-member of the scheme.<sup>16</sup> Thus, in the diamond trade, the Kimberley Process Certification Scheme nowadays certainly amounts to such a trade usage.<sup>17</sup> If one party from a member country enters into a contract with a party from another member country, trade usage calls for the necessary certificates without them being explicitly referred to in the contract.

In many trade sectors, private initiatives can be found that require minimum ethical standards such as the prohibition of child labour, setting a maximum number of working hours, and prescribing humane treatment, such as, for example, the Electronic Industry Code of Conduct.<sup>18</sup> On the global international level, the UN Global Compact has to be specially highlighted as one of the most successful private initiatives.<sup>19</sup> The UN Global Compact covers the protection of basic human rights, labour, environment, and anti-corruption.<sup>20</sup> Since its official launch in 2000, the initiative has grown to more than 12,000 participants.<sup>21</sup> Whereas, in the beginning, mostly multinational companies participated in this initiative, recently more and more small and medium enterprises from all over the world are joining.

Although the respective provisions of these codes of conduct are rather broad and unspecified, there can be no doubt that minimum ethical standards are to be safeguarded. Thus, at least between parties who belong to the trade concerned or who are members of such initiatives, minimum ethical standards become part of their contract as an international usage.<sup>22</sup>

It has been argued that it is one thing to generally participate in and sponsor a UN initiative and to contractually agree that a party is entitled to remedies if an ethical standard is not met.<sup>23</sup> However, one has to consider that in many parts of the world legal and compliance risk, which encompasses risks related to unethical behaviour, is now outweighing any other business risks.<sup>24</sup> This is clearly

<sup>16</sup> Kimberley Process, *KPCS Core Document*, 6 <<https://www.kimberleyprocess.com/node/1122>> accessed 14 November 2016.

<sup>17</sup> Cf Ingeborg Schwenzer and Benjamin Leisinger, 'Ethical Values and International Sales Contracts' in Ross Cranston, Jan Ramberg and Jacob Ziegler (eds), *Commercial Law Challenges in the 21st Century: Jan Hellner in Memoriam* (Iustus Förlag 2007) 265.

<sup>18</sup> This code is available at <[http://www.eiccoalition.org/media/docs/EICCCodeofConduct5\\_1\\_English.pdf](http://www.eiccoalition.org/media/docs/EICCCodeofConduct5_1_English.pdf)> accessed 14 November 2016.

<sup>19</sup> According to its website, the UN Global Compact Initiative is the world's largest corporate sustainability initiative. For more information, see <<https://www.unglobalcompact.org/what-is-gc>> accessed 14 November 2016.

<sup>20</sup> See the ten principles of the UN Global Compact <<https://www.unglobalcompact.org/what-is-gc/mission/principles>> accessed 14 November 2016.

<sup>21</sup> See all UN Global Compact participants listed online at <<https://www.unglobalcompact.org/what-is-gc/participants>> accessed 14 November 2016.

<sup>22</sup> Petra Butler, 'The CISG- A Secret Weapon in the Fight for a Fairer World?' in Schwenzer (n 14) 304; Schwenzer and Leisinger (n 17) 265.

<sup>23</sup> Ramberg (n 6) 80.

<sup>24</sup> According to the *UN Global Compact-Accenture Strategy CEO Study 2016*, 97% of the chief executive officers believe that sustainability is important to the future success of their business. *UN Global Compact-Accenture Strategy CEO Study 2016* <<https://www.accenture.com/us-en/insight-unglobal-compact-ceo-study>> accessed 14 November 2016.

evidenced by the class action cases referred to in the beginning of this article. Given this growing importance of minimum ethical standards, a party that holds itself out adhering to these standards should be bound.

Thus, via Article 9 of the CISG, minimum ethical standards impliedly may become in many cases part of the contract in the sense of Article 35(1) of the CISG.

### 3. *Fitness for particular or ordinary purpose*

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

First of all, the goods must be fit for any particular purpose according to Article 35(2)(b) of the CISG. In this context, one might first think of a buyer purchasing goods to sell them in specific markets such as one specializing in fair trade.<sup>25</sup> However, this particular purpose must be made known to the seller at the time of the conclusion of the contract, be it expressly or impliedly.<sup>26</sup> This requirement may be fulfilled in cases where the buyer's firm—that is, the company's name—contains information in this regard or where its reputation is widely known in the trade sector concerned.<sup>27</sup> A particular purpose may also arise from the sheer fact that the buyer intends to use the goods in a certain country.

The second prerequisite laid down in Article 35(2)(b) of the CISG, namely that the buyer must reasonably rely on the seller's skill and judgment, should not cause too many problems in these cases.<sup>28</sup> Although the buyer may conduct ethical audits, he or she simply cannot monitor the seller's production process all of the time.<sup>29</sup> It is only the seller who can make sure that ethical standards are adhered to.

If a particular purpose cannot be established, it might be questionable whether goods in these circumstances are not fit for the ordinary purpose such goods are used for (Article 35(2)(a) of the CISG). Ordinary purpose primarily means that the goods must be fit for commercial purposes. In the resale business, this simply means that it must be possible to resell them.<sup>30</sup> If no special country or trade sector where the goods are to be sold can be discerned, it will be hard for the buyer to allege non-conformity if they can be sold at least in some markets. Thus, it is

<sup>25</sup> Schwenzer, Ingeborg Schwenzer (ed), *Schlechtriem and Schwenzer Commentary in the UN Convention on the International Sale of Goods (CISG)* (4th edn, OUP 2016) art 35, para 21; Ramberg (n 6) 86.

<sup>26</sup> *Ibid* para 22; Nalin (n 14) 334.

<sup>27</sup> Schwenzer and Leisinger (n 17) 267; Nalin (n 14) 334; Simon Wilson, 'Ethical Standards in International Sales Contracts: Can the CISG Be Used to Prevent Child Labour?' LLB thesis, Victoria University of Wellington (2015) 36 <<http://researcharchive.vuw.ac.nz/xmlui/bitstream/handle/10063/4622/thesis.pdf?sequence=2>> accessed 14 November 2016.

<sup>28</sup> Schwenzer and Leisinger (n 17) 267.

<sup>29</sup> Wilson (n 27) 38.

<sup>30</sup> High Court of New Zealand, 31 March 2003, CISG-Online 833 <<http://cisgw3.law.pace.edu/cases/030331n6.html>> accessed 14 November 2016; Schwenzer (n 25) art 35, para 15.

certainly of special importance to the buyer to be able to establish a particular purpose in the sense of Article 35(2)(b) of the CISG.

#### **4. Buyer's knowledge of non-conformity (Article 35(3) of the CISG)**

However, it cannot be overlooked that in many instances, despite affirmations to the contrary, buyers will be complicit in violation of basic human rights. They may know about such violations, or they may turn a blind eye upon auditing their suppliers. Most importantly, the pricing may be indicative for such violations.<sup>31</sup> In such a case, according to Article 35(3) of the CISG, the seller is not liable for the non-conformity if at the time of the conclusion of the contract the buyer knew, or could not have been unaware, of such lack of conformity.

### **III. Remedies of the buyer**

#### **1. General**

In the case of non-conforming goods, the buyer may resort to the usual remedies, namely specific performance, avoidance of the contract, damages, and price reduction; all these remedies, however, are raising particular questions in connection with non-physical features of the goods.

#### **2. Examination and notice**

In the first place, if the goods are non-conforming, the buyer must notify the seller in accordance with Articles 38 and 39 of the CISG. This will be relatively easy in cases of missing or non-conforming documents that are necessary to label the goods in a certain way, to obtain administrative approval of the goods, or just to sell them on in a specific market.<sup>32</sup> However, where the non-conformity simply results from the way in which the goods are manufactured or processed, any eventual examination of the goods themselves will not reveal this fact.<sup>33</sup> Thus, notification can only be required from the buyer after he or she has actually learned about the violation of such standards.<sup>34</sup> Such knowledge may, however, be inferred from missing certificates relating to the manufacturing process or the origin of the goods.

#### **3. Specific performance**

Since we are dealing here with the non-conformity of the goods, specific performance may be asked for in the form of delivery of substitute goods (Article

<sup>31</sup> Ramberg (n 7) 84; Schwenger and Leisinger (n 17) 265.

<sup>32</sup> OLG Munich, 13 November 2002, CISG-Online 786 <<http://cisgw3.law.pace.edu/cases/021113g1.html>> accessed 14 November 2011; Schwenger and Leisinger (n 17) 268.

<sup>33</sup> Schwenger and Leisinger (n 17) 268. Ramberg (n 7) 86 agrees 'that it is practically difficult for the buyer to make an examination of the productions methods'. However, she argues that if the buyer uses expensive and extensive auditing procedures to ascertain that suppliers and sub-suppliers adhere to the buyer's codes of conduct, the buyer's duty to examine the goods may expand to include examination of production methods.

<sup>34</sup> Ibid 268.

46(2) of the CISG) or in the form of repair (Article 46(3) of the CISG). If the necessary documents, such as documents of origin, are missing, they may be supplied by the seller; a third person, or the buyer, if he or she is able to do so, may also get them. The buyer may then ask for the costs incurred by way of damages. However, if the goods have been produced by violating ethical standards, repair is not conceivable.<sup>35</sup> Rather, the buyer may rely on delivery of substitute goods if the violation of the ethical standards amounts to a fundamental breach. Thus, the same threshold is required as for avoidance.

#### 4. Avoidance

Avoidance of the contract is possible only in cases where the non-conformity amounts to a fundamental breach of contract (Article 49(1)(a) of the CISG). This presupposes a substantial deprivation of what the buyer is entitled to expect under the contract (Article 25 of the CISG).<sup>36</sup> Such deprivation can be ascertained, in the first place, from the terms of the contract itself.<sup>37</sup> If the parties stipulate that certain standards have to be adhered to, the parties, thereby, have sufficiently made clear that compliance is of special interest to the buyer, and, therefore, such deprivation can be assumed in the event of a breach.<sup>38</sup>

If it is clear to both parties that the buyer cannot make any use of the goods as intended, a fundamental breach can easily be ascertained, too.<sup>39</sup>

In other cases, it is decisive whether the buyer can reasonably be expected to use or sell the goods in another market where their general marketability is not endangered.<sup>40</sup> However, it has to be taken into account that, at least in certain parts of the world, there are fewer and fewer markets where goods that have been produced in violation of minimum ethical standards can be marketed at all. The chocolate case is a prominent example for this. In cases of specialized buyers, such as those specializing in fair trade, for example, turning to another market cannot be expected. Likewise, these buyers do not have to sell the goods with a discount to their usual customers as this might be harmful to their reputation.<sup>41</sup>

#### 5. Damages

The easiest way for the buyer to obtain financial redress in case of non-conformity due to non-physical features of the goods is where the parties have agreed upon a

<sup>35</sup> Cf. Ramberg (n 7) 87–8.

<sup>36</sup> Ulrich Schroeter, in Ingeborg Schwenzer (n 25) art 25, para 21.

<sup>37</sup> Ibid paras 9, 21–2.

<sup>38</sup> Ibid para 28.

<sup>39</sup> CISG-AC Opinion no 5, *The Buyer's Right to Avoid the Contract in Case of Non-Conforming Goods or Documents*, Rapporteur Ingeborg Schwenzer (7 May 2015) para 4.2 <<http://www.cisgac.com/cisgac-opinion-no-5/>> accessed 14 November 2016. Schroeter (n 36) para 5ff.

<sup>40</sup> CISG-AC Opinion no 5 (n 39) para 4.3.

<sup>41</sup> OLG Koblenz, 21 November 2007, CISG-Online 1733 <<http://cisgw3.law.pace.edu/cases/071121gl.html>> accessed 14 November 2016; Schroeter (n 36) para 55; Schwenzer and Leisinger (n 17) 268; Nalin (n 14) 336.

liquidated damages clause or a contractual penalty, whereby the latter generally functions as both a compensatory remedy as well as a deterrent.<sup>42</sup> Such a clause releases the buyer from his or her—maybe difficult—obligation of proving whether or not he or she suffered loss at all and, if so, in what amount.<sup>43</sup> However, the parties may not think of such a clause, or the buyer may not be in a position to force such a clause on the seller, or a penalty clause functioning as a deterrent may not be valid in the legal system governing the contract's validity. Therefore, it is important to examine what can be considered to be a recoverable loss within the meaning of the CISG.

In the first place, if the goods have not been sold before the non-conformity is discovered, lost profits will be likely to occur.<sup>44</sup> This may be because the goods are not resalable at all—such as goods without the necessary certificates—or because the buyer decides not to resell them and cannot be expected to resell them under the given circumstances.<sup>45</sup> The same holds true where after discovering the non-conformity the buyer is obliged to take back the goods from its customers. In such a case, further costs may be recoverable, such as litigation costs arising from proceedings with customers or costs of a necessary recall of the goods.<sup>46</sup>

If the goods have already been resold prior to discovering the breach, damage in the form of loss of reputation may furthermore come into play.<sup>47</sup> Since the CISG recognizes the principle of full compensation, there is no question that loss of goodwill can be recovered.<sup>48</sup> It might, however, be difficult to financially quantify a loss of goodwill in an individual case.<sup>49</sup> In assessing the amount, due regard is to be given to the standing of the individual buyer in the market.<sup>50</sup> A company firmly dedicated to ethical standards and fair trade will sustain a greater loss to reputation than one that just occasionally deals in this trade sector. A possible calculation may be based on the expense incurred by the aggrieved buyer in regaining his or her reputation and credibility and creating new customer networks.

Problems arise, however, where all goods have been resold and the non-conformity has never become public knowledge.<sup>51</sup> Although, even in such a

<sup>42</sup> Ingeborg Schwenzer, in Schwenzer (n 25) art 74, paras 60–1.

<sup>43</sup> Schwenzer and Leisinger (n 17) 269.

<sup>44</sup> *Ibid* 269.

<sup>45</sup> Ramberg (n 7) 92; Wilson (n 27) 44.

<sup>46</sup> OLG Koblenz, 10 September 2013, CISG-Online 2472 <<https://beck-online.beck.de/?vpath=bibdata/ents/beckrs/2013/cont/beckrs.2013.16570.htm&pos=4&hlwords=#xhllhit>> accessed 14 November 2016; Schwenzer (n 42) art 74, para 28.

<sup>47</sup> Schwenzer and Leisinger (n 17) 270.

<sup>48</sup> BGer, 28 October 1998, CISG-Online 413 <<http://cisgw3.law.pace.edu/cases/981028s1.html>> accessed 14 November 2016; CISG-AC Opinion no 6, *Calculation of Damages under CISG Article 74*, Rapporteur John Y Gotanda (2006) para 7.2 <<http://www.cisgac.com/cisgac-opinion-no6/>> accessed 14 November 2016. Nils Schmidt-Ahrendts and Mark André Czarnecki, in Christoph Brunner (ed), *UN-Kaufrecht—CISG: Kommentar zum Übereinkommen der Vereinten Nationen über Verträge über den internationalen Warenkauf von 1980* (2nd edn, Stämpfli Verlag 2014) art 74, para 21.

<sup>49</sup> CISG-AC Opinion no 6 (n 48) para 7.3.

<sup>50</sup> Schwenzer (n 42) art 74, para 36; Schwenzer and Leisinger (n 17) 270.

<sup>51</sup> Schwenzer and Leisinger (n 17) 270.



case, one might argue that there is a loss of goodwill that could perhaps materialize in some future sale of the business itself—for example, during due diligence proceedings in which the loss becomes more and more elusive.

The crucial question here is how the non-performance loss can be assessed. If a market exists for the goods contracted as well as a market for the non-conforming goods, an easy way for the buyer to calculate damages is according to the difference of the respective market prices. Problems arise if no such market for non-conforming goods exists. Is there a market for t-shirts fabricated by 10 year olds under inhumane conditions? In these cases, another method of calculating damages is called for if one does not want to allow the seller to get off scot-free. One possibility could be to assess the decrease in the value of the goods on an abstract level.<sup>52</sup> The purchase price always reflects the costs of producing the goods and a profit for the seller. If the seller, by violating ethical standards, substantially reduces the costs in production and, thus, respectively maximizes his or her own profit, the equilibrium of the contract has become unbalanced. One may well argue that the real value of the goods is decreased by the amount of the reduced production costs.<sup>53</sup> This is not a non-pecuniary loss, as has been argued by some authors, but a real economic loss.<sup>54</sup> The buyer may claim this margin as minimum damages.

The seller cannot argue that the buyer received the full purchase price and, thus, ultimately did not sustain any financial loss at all as this would contravene the principle of full compensation and the nowadays accepted aim of the law of damages, namely prevention and not just compensation.<sup>55</sup> The same result can also be reached by damages based on a disgorgement of profit. Although this might in the end appear to be a windfall profit for the buyer, any other solution would give the very same windfall profit to the seller who has breached the contract.

## 6. Price reduction

Finally, the possibility of a price reduction exists. The mechanism of establishing the lower value of the non-conforming goods equals the one just discussed in relation to damages. Thus, the buyer may reduce the purchase price in proportion to the lower value that the goods actually delivered had at the time of the delivery.<sup>56</sup>

<sup>52</sup> Ibid 278.

<sup>53</sup> Nils Schmidt-Ahrendts, 'Disgorgement of Profits under the CISG' in Ingeborg Schwenzer and Lisa Spagnolo (eds), *State of Play: the 3rd Annual MAA Schlechtriem CISG Conference* (Eleven International Publishing 2012) 101.

<sup>54</sup> Djakhongir Saidov, 'Damages to Business Reputation and Goodwill under the Vienna Sales Convention' in Djakhongir Saidov and Ralph Cunningham (eds), *Contract Damages: Domestic and International Perspectives* (Hart Publishing 2008) 393; Kristian Maley 'The Limits to the Conformity of Goods in the United Nations Convention on Contracts for the International Sale of Goods (CISG)' (2009) 12 *International Trade and Business Law Review* 94; Ingeborg Schwenzer and Pascal Hachem, 'CISG Provisions on Damages' in Saidov and Cunningham, *ibid*, 98.

<sup>55</sup> Schwenzer (n 42) art 74, para 6; Schwenzer and Hachem (n 54) 101.

<sup>56</sup> Nalin (n 14) 338; Ramberg (n 7) 90; Schwenzer and Leisinger (n 17) 271.

## IV. Conclusion

Ethical standards and non-physical features of the goods become more and more important in international trade. This certainly has been an enormous and probably not expected development since the elaboration of the CISG more than 35 years ago. However, as we can see, the CISG is flexible enough to adequately deal with these new developments. Leaving these central questions to be dealt with by the otherwise applicable domestic law would undermine the uniformity reached by the CISG and must be prevented.

On the level of defining conformity of the goods in the sense of Article 35 of the CISG, international trade usages as well as the criterion of fitness for the particular purpose are of the utmost importance. On the level of remedies, fundamental breach and the calculation of damages are in the centre of the discussion.