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Djakhongir Saidov

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# ARTICLE 35 OF THE CISG: REFLECTING ON THE PRESENT AND THINKING ABOUT THE FUTURE

DJAKHONGIR SAIDOV\*

## I. INTRODUCTION

THE rules on the conformity of goods are not only an integral part of sales law, but they also lie at the core of the seller's primary obligations by being inextricably linked to its obligation to deliver the goods.<sup>1</sup> The goods are the very subject matter of a sales contract and the rules on conformity are what help define this subject matter.<sup>2</sup> Without these rules, it would often be impossible to say what it is that the seller has agreed to deliver. The rules on conformity are also essential in terms of the function of allocating commercial risks between the parties. Many buyers will complain about the conformity of the goods, allege a breach, and invoke remedies. It is essential, therefore, that there be fairly clear legal rules, particularly those applied by default, that are capable of allocating risks, thereby producing legal certainty and possibly reducing litigation.<sup>3</sup> However, the inevitably broad nature of these rules, together with their considerable conceptual and practical significance, still makes them one of the most frequently litigated issues.<sup>4</sup> All this leads to the conformity rules occupying a central place in any sales law, lying at the crossroads between the point where, on the one hand, the law enables the contract and parties' legal relationship to function and, on the other, determines whether the performance has gone astray, paving the way for a remedial route.

A look at this important issue can tell us much about the level of success and effectiveness of a sales law. With this in mind, this Article seeks to take a critical look at the rules on conformity in Article 35 of the United Nations Sales Convention (CISG or the Convention). The objective is to assess some aspects of the Convention's experience accumulated as a consequence of the application of this provision. This assessment will identify the Convention's emerging strengths and the areas that have given rise to controversy. This Article will present its author's views in re-

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\* Reader, University of Birmingham, United Kingdom.

1. See Handelsgericht [HG] [Commercial Court] Nov. 30, 2008, docket no. HG 930634/O (Switz.), available at <http://cisgw3.law.pace.edu/cases/981130s1.html> ("The seller's liability for the defect of goods follows from its primary obligations under the contract, i.e., delivery of the agreed goods.").

2. See U.C.C. § 2-313 cmt. 4 (1977) ("[T]he whole purpose of the law of warranty is to determine what it is that the seller has in essence agreed to sell . . ."); MICHAEL BRIDGE, *THE SALE OF GOODS* ¶ 7.11 (2d ed. 2009).

3. Cf. U.C.C. § 2-313 cmt. 7; BRIDGE, *supra* note 2, ¶ 7.02.

4. See, e.g., Stefan Kröll, *The Burden of Proof for the Non-Conformity of Goods Under Art. 35 CISG*, 3 BELGRADE L. REV. 162, 162 (2011); Clarence J. Morrow, *Warranty of Quality: A Comparative Survey*, 14 TUL. L. REV. 327, 327 (1940).

spect of how these issues need to be dealt with under the CISG. However, in light of the fast-changing realities, with their increasingly complex commercial transactions, practices, and continuous technological advances, a question may well be posed as to whether the CISG has exhausted itself and whether the time is ripe for a new sales law.<sup>5</sup> Therefore, this Article will also tentatively reflect on whether there is room for improving or reforming the Convention's structure and experience.

All of this reflection will be done in the context of the following issues. First, the seller is exempt from liability for breaching the Convention's default rules if the buyer knew or could not have been unaware of a lack of conformity. This provision, however, does not apply to the contractual provisions on conformity. It will be discussed whether the buyer's knowledge of a lack of conformity should also be relevant to contract interpretation. Second, the paper will explore whether there is a need for a quality standard or test to underpin the Convention's ultimate default rule and, if so, what that standard should be. Third, the Article will assess the Convention's experience in dealing with cases of non-compliance with public law regulations. Finally, it will examine the relationship between the application of the Convention's provisions on conformity and issues of proof.

## II. THE BUYER'S KNOWLEDGE OF A LACK OF CONFORMITY

Article 35(1) embodies the principle of the parties' freedom to contract by stating that "[t]he 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>6</sup> Where the parties have not agreed otherwise,<sup>7</sup> paragraph (2) of Article 35 provides for several rules, which are intended to determine the content and parameters of the seller's obligations in respect of the conformity of the goods. Once it is established that there was no agreement to depart from these default rules, the first question that needs to be asked is whether the goods "are fit for any particular purpose expressly or impliedly made known to the seller at the time of the conclusion of the contract."<sup>8</sup> This rule, contained in paragraph (2)(b), is preceded by another rule in paragraph 2(a), but it is widely acknowledged that because the paragraph 2(b) rule is more specific—in that it requires the determination of whether in the circumstances there is any *particular purpose* made known to the

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5. See, e.g., Olaf Meyer, *Constructive Interpretation—Applying the CISG in the 21st Century*, in CISG METHODOLOGY 319, 319–42 (André Janssen & Olaf Meyer eds., 2009).

6. U.N. Comm'n on Int'l Trade Law, United Nations Convention on Contracts for the International Sale of Goods art. 35(1), Apr. 11, 1980, 1489 U.N.T.S. 3 [hereinafter CISG], available at <http://www.uncitral.org/pdf/english/texts/sales/cisg/V1056997-CISG-e-book.pdf>.

7. See *id.* art. 35(2).

8. *Id.*

seller—it has priority over Article 35(2)(a).<sup>9</sup> The latter rule, in turn, is the ultimate fall-back rule according to which the goods are conforming if they “are fit for the purposes for which goods of the same description would ordinarily be used.”<sup>10</sup> Article 35(2) contains two other requirements: according to paragraph (c), the goods ought to “possess the qualities . . . which the seller has held out to the buyer as a sample or model”; paragraph (d) requires the goods to be “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 [them].”<sup>11</sup>

Paragraph (3) provides that “[t]he seller is not liable . . . for any lack of conformity of the goods if at the time of the conclusion of the contract the buyer knew or could not have been unaware of such lack of conformity.”<sup>12</sup> This provision, however, is expressly said to apply only to paragraph (2). The question that arises, therefore, is whether paragraph (3) needs to be extended to paragraph (1) and, even if not, whether the buyer’s knowledge, usually derived from having an opportunity of pre-contractual examination of the goods, should be relevant to deciding what conformity obligations were imposed on the seller by the contract.

There hardly seems to be any basis in the argument in favour of extending the application of paragraph (3) to paragraph (1). A specific statement of its applicability to paragraph (2) strongly points to the drafters’ intention not to do so. But this does not mean that the buyer’s knowledge of the actual state and condition of the goods prior to the conclusion of the contract is not relevant to interpreting the contract under Articles 35(1) and 8. It is arguable that if the buyer, having seen the goods, knows that the seller’s representation in respect of them is untrue, the buyer can hardly have a reasonable expectation that the representation will form part of the seller’s contractual obligations.<sup>13</sup> The buyer’s reliance on the seller’s representation is a powerful factor in favour of the parties’ intention to treat that representation as binding on the seller, and no such reliance is present where the buyer knows the statement to be untrue.

These points are too obvious for the Convention’s drafters not to have been aware of them, and their answer is that Article 35(1) does not concern the terms implied by default, but concerns what the contract itself

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9. See PETER HUBER & ALASTAIR MULLIS, *THE CISG: A NEW TEXTBOOK FOR STUDENTS AND PRACTITIONERS* 135 (2007); PETER SCHLECHTRIEM & INGEBORG SCHWENZER, *COMMENTARY ON THE UN CONVENTION ON THE INTERNATIONAL SALE OF GOODS (CISG)* art. 35, ¶ 12 (Ingeborg Schwenzer ed., 3d ed. 2010); *THE UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS: ARTICLE BY ARTICLE COMMENTARY* art. 35, ¶ 61 (Stefan Kröll, Loukas Mistelis & Maria del Pilar Perales Viscacillas eds., 2011) [hereinafter *ARTICLE BY ARTICLE COMMENTARY*].

10. CISG, *supra* note 6, art. 35(2)(a).

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

12. *Id.* art. 35(3).

13. See John E. Murray, Jr., “Basis of the Bargain”: *Transcending Classical Concepts*, 66 MINN. L. REV. 283, 294–95 (1982).

provides.<sup>14</sup> The buyer has the right to demand fully what the seller has agreed to do and the buyer's knowledge of the actual state of the goods cannot change the content of the seller's obligation. This argument is primarily targeted at the express provisions, which, in commercial contracts, are powerful evidence of the parties' intentions and agreement. It is much weaker when the terms are implied into the contract from the surrounding facts because the buyer's knowledge is part of these facts and hence cannot be ignored.<sup>15</sup>

The level of influence this factor exerts on contract interpretation depends on the particular circumstances. At times, the fact of the buyer's inspection is hardly relevant, as was the case where the contract required a pony to be "fully fit" and where the buyer had carried out a pre-sale veterinary examination, which, whilst adequate, revealed no signs of injury or health problems.<sup>16</sup> The correctness of the decision—holding the seller in breach—is evident by the express contractual stipulation, which was also preceded by the seller's representation of full fitness of the pony. In some other cases, in contrast, what has been fatal to the buyer's case is that it had actually seen the alleged lack of conformity and could be regarded as having given its unconditional consent to the receipt of those particular goods. This was the case where the buyer, before buying second-hand cars, inspected them and became aware of the defects, which were apparently referred to in the contract along with the requirement that the vehicles were to be in "good condition."<sup>17</sup> The latter was presumably not meant to indicate perfection but only a condition, which could reasonably be expected from a second-hand car that had been previously subjected to a normal use.<sup>18</sup>

A more complex case involved the sale of a textile (rotary printing) machine.<sup>19</sup> The contract referred to the "rapport equipment length 641 mm–1018 mm."<sup>20</sup> Before the contract was made, the buyer, a trader in textile machinery, had an opportunity to inspect the machine, which was not a new model (being fourteen years old) and was not capable of operating at a full rapport length.<sup>21</sup> Prior to the conclusion of the contract, the seller sent a fax to the buyer referring to the same rapport length as that

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14. See COMMENTARY ON THE INTERNATIONAL SALES LAW 273 (Cesare Massimo Bianca & Michael Joachim Bonell eds., 1987).

15. See CISG, *supra* note 6, arts. 8, 9.

16. See *Rettin i København* Oct. 19, 2007, m.nt. (Gustavsson/LRF N.V.) (Neth.), available at <http://cisgw3.law.pace.edu/cases/071019d1.html>.

17. S.T.S., Jan. 17, 2008 (J.T.S., No. 81) (Spain), available at <http://cisgw3.law.pace.edu/cases/080117s4.html>.

18. See *id.* ("[T]he particular damages known to the Buyer did not indicate any signs that the vehicles had been involved in accidents.").

19. See Bundesgericht [BGer] [Federal Supreme Court] Dec. 22, 2000, docket no. 4C.296/2000/rnd (Switz.), available at <http://cisgw3.law.pace.edu/cases/001222s1.html>.

20. *Id.*

21. See *id.*

included in the contract, stating that the machine was “complete and operating as viewed.”<sup>22</sup> After concluding the contract, the buyer also sent a purchase confirmation in which it declared that it would take over the machine “complete and operating as viewed.”<sup>23</sup> The buyer’s breach of contract claim that the stencil holders for a rapport length of 1018 mm were missing was dismissed on the ground that, being an expert, the buyer ought to have known that the machine would not conform to the latest technical specifications. Moreover, the seller “was entitled to expect that the Buyer had concluded the contract in full knowledge of the technical possibilities of the machinery and its equipment.”<sup>24</sup> In relation to contractual rapport length specification, the Swiss Supreme Court appears to have affirmed the decision of the Court of First Instance that “rapport equipment was meant as technical information in respect to the possible rapport length, which could be printed if the necessary equipment was used.”<sup>25</sup>

The Swiss Supreme Court faced a difficult dilemma. On the one hand, the contract appeared to have expressly required full rapport length. On the other hand, the surrounding factual evidence—an opportunity to inspect, the buyer’s expertise, the seller’s pre-contractual letter and the buyer’s confirmation of purchase—was overwhelmingly in the seller’s favour. The court interpreted the contractual clause restrictively by assigning purely an informative function to it. Faced with an imperfect fit between the contract and the surrounding facts, the court seemed to have done its best to achieve a fair result.

#### A. *Does Article 35(2)(a) Imply a Certain Level of Quality?*

##### 1. *Does Article 35(2)(a) Require an Inquiry Into the Notion of Quality?*

In fixing the ultimate default rule of conformity of the goods, many domestic legal systems rely on some notion of quality, such as “average,” “merchantable,” or “acceptable,” which is intended to indicate some level of quality that the buyer can expect. In some of these systems, “fitness for an ordinary or a common purpose” is merely one of the components that make up the notion of quality, or one of the questions to be asked in answering the question whether the goods meet the required standard of quality.<sup>26</sup> Against this background, the Convention’s default rule in Article 35(2)(a) appears narrow and limited in its content and scope. On its face, this provision does not rely on any notion of quality,<sup>27</sup> with the only relevant question seemingly being whether the goods are fit for “the pur-

22. *Id.*

23. *Id.*

24. *Id.*

25. *Id.*

26. See, e.g., Sale of Goods Act, 1979, c. 54, § 14(2)–(2)(B) (Eng.), available at <http://www.legislation.gov.uk/ukpga/1979/54>; U.C.C. § 2-314(2)(c) (1977).

27. See COMMENTARY ON THE INTERNATIONAL SALES LAW, *supra* note 14, at 280; see also FRITZ ENDERLEIN & DIETRICH MASKOW, INTERNATIONAL SALES LAW: UNITED

poses for which goods of the same description would ordinarily be used.”<sup>28</sup> In other words, the Convention only seems concerned with whether the goods are fit for their ordinary purposes and not with quality. Rather, quality is a broader notion that may include not only fitness for ordinary purposes, but a number of other aspects such as the goods’ physical state and condition, intrinsic qualities and features, safety, durability, appearance, finish, and freedom from minor defects.<sup>29</sup> However, fitness for purpose will often depend on quality, meaning that there is a close link between them.<sup>30</sup> Does this mean that there are cases where the inquiry into the level of quality is necessary?

It is difficult to conceive of a scenario where the fitness for ordinary purposes will be totally incapable of resolving a situation. However, some circumstances will require this test to embrace fully the particular facts. The type of case that is likely to pose challenges to this test is that involving goods of varying grades (e.g., different grades or classes of wheat) or levels of performance (e.g., the amount of fruits a juice-making machine can process within a certain time period). The delivered wheat may be capable for being processed into flour or the juice-making machine may be more than suitable for making a fruit juice, but the buyer may contend that to be fit for the ordinary purpose(s), the wheat had to be of a higher grade or the machine ought to be capable of processing more fruits per hour than it actually does.<sup>31</sup> Such a contention will not be justifiable if the ordinary purpose is construed in very simple and abstract terms, that is, whether the wheat can be processed or whether the machine is capable of making a fruit juice.

The test is only workable if the ordinary purpose(s) is (are) interpreted in light of the surrounding facts, such as where they point to a highly sophisticated nature of the buyer’s business and its strong reputation for high-end products, in which case the buyer may be entitled to demand goods of a higher grade or level of performance. To be workable, the ordinary purpose has to be interpreted not with reference to what are *generally* common or ordinary purposes, but to what can be reasonably regarded as ordinary in the *particular* circumstances of the buyer and the

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NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS ¶ 3.1 (1992).

28. See CISG, *supra* note 6, art. 35(2)(a).

29. See, e.g., Sale of Goods Act § 14(2)–(2)(B).

30. See ARTICLE BY ARTICLE COMMENTARY, *supra* note 9, art. 35, ¶ 73.

31. Such a contention may not be justifiable if the ordinary purpose is construed in very simple and abstract terms, that is, whether the wheat can be processed or whether the machine is capable of making a fruit juice. But if it is appropriate to interpret the ordinary purpose(s) in light of the surrounding factual setting, pointing to a highly sophisticated nature of the buyer’s business and its strong reputation for high-end products, it may demand goods of a higher grade or level of performance. The crucial question is whether the ordinary purpose is to be interpreted with reference to what is a *generally* common or ordinary purpose, or to what can be reasonably regarded as ordinary in the circumstances of the buyer and the seller.

seller. That said, if the Convention specified some general level of quality that buyers could normally expect, it could possibly provide greater clarity as to the content of the seller's duty.<sup>32</sup> If so, an inquiry into the notion of quality can supplement and facilitate the test of fitness for ordinary purposes, but it does not seem essential.<sup>33</sup>

## 2. *Different Quality Tests: The Debate*

Much of the discussion in cases and writings on the CISG seems to reflect a view different from that taken in the previous section, implying that the inquiry into the notion of quality is necessary. This discussion, in turn, makes it necessary to choose between various quality tests. In one well-known case, the buyer alleged non-conformity in oil condensate, known as Rijn Blend, due to a high level of mercury.<sup>34</sup> The buyer, a major player in the oil and gas business, contended that the levels of mercury made Rijn Blend unacceptable for further processing and sales.<sup>35</sup> The arbitration tribunal, applying Article 35(2)(a), identified three main approaches to quality.<sup>36</sup>

One approach, derived from the English common law, is the merchantable quality test which, in the tribunal's words, raises the question of whether "a reasonable buyer would have concluded contracts for Rijn Blend at similar prices if such a buyer had been aware of the mercury concentrations."<sup>37</sup> Relying on the evidence of the seller's resale of the condensate at reduced prices after the buyer's non-acceptance, the tribunal held that if this standard were applied, there would be a breach by the seller because "other buyers in the market for Rijn Blend were . . . unwilling to pay the price [sellers] had agreed with [buyer]."<sup>38</sup> Considering the second test of average quality used in some civil law jurisdictions, the tribunal held that the buyer had failed to meet its burden of proof as regards the issue of "whether there [was] a common understanding in the refining

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32. For a further discussion of the meaning of various quality tests, see *infra* notes 34–75 and accompanying text.

33. Some writers suggest that such an inquiry is needed even where the goods are fit for the ordinary purpose(s). See ARTICLE BY ARTICLE COMMENTARY, *supra* note 9, art. 35, ¶ 74; Clayton P. Gillette & Franco Ferrari, *Warranties and "Lemons" Under CISG Article 35(2)(a)*, 1 Internationales Handelsrecht 2, 7 (2010), available at <http://cisgw3.law.pace.edu/cisg/biblio/gillette-ferrari.html>. However, it is respectfully argued that a quality standard, in addition to the fitness for purpose standard, is unnecessary because, as explained in Article 35(2)(a), the Convention is not concerned with quality as such, but with fitness for purpose. See CISG, *supra* note 6, art. 35(2)(a). The suggestion that a further inquiry into quality is necessary even if the fitness of purpose has been established unjustifiably extends the scope of Article 35(2)(a), and transforms it into a test of quality, which it is not.

34. See Condensate Crude Oil Mix Case (Neth. v. U.K.), Case No. 2319 (Neth. Arb. Inst. 2002), available at <http://cisgw3.law.pace.edu/cases/021015n1.html>.

35. See *id.*

36. See *id.*

37. *Id.*

38. *Id.* (alterations in original).



industry what average quality for blended condensates (such as Rijn Blend) should have been and what levels of mercury [were] tolerable."<sup>39</sup> The buyer would thus not be liable if that test were applied. Having found no overwhelming support in cases or in writings for either of these two approaches, and noting their domestic law origins and the fact that the Convention's legislative history indicated the rejection of both standards, the tribunal held them not to be applicable.<sup>40</sup>

Instead, the standard of reasonable quality was applied.<sup>41</sup> In the tribunal's view, the standard was more in line with the Convention's international character and the need to promote uniformity in its application, as well as based on its general principle of reasonableness.<sup>42</sup> It was held that the seller was in breach of the reasonable quality standard for two reasons.<sup>43</sup> First, the tribunal once again noted that the contract price could not, in all likelihood, have been obtained from selling Rijn Blend if other buyers were informed about the levels of mercury.<sup>44</sup> The Rijn Blend with low levels of mercury was apparently valued more highly than that with increased mercury content.<sup>45</sup> Second, the parties have had a long-term business relationship and the buyer sufficiently established that when the condensate was delivered under the previous contracts, the condensate had not contained the increased level of mercury found in the delivery under the contested contract.<sup>46</sup> Therefore, the buyer "was entitled under the contracts to a constant quality level of the Rijn Blend corresponding to the quality levels that had been obtained during the . . . initial period of the Contracts and on which [buyer] and its customers could reasonably rely."<sup>47</sup>

The reasoning and the choice of a legal basis for the decision are far from flawless. The reasonable quality test was applied along the same lines as the merchantability test would have been, had it been used: that is, a critical point was the evidence that the Rijn Blend with a higher level of mercury could not have been sold to any other buyer, who was aware of the true level of mercury, at the same price as that fixed in the contract with the buyer.<sup>48</sup> Not only does this interpretation create confusion as to whether there are any differences between the two tests, but it also weakens the tribunal's case for the rejection of the merchantability test. Looking at the tribunal's reasoning, the relevance of Article 35(2)(a) also becomes doubtful. The possibility of selling the goods only at a reduced

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39. *Id.*

40. *See id.*

41. *See id.*

42. *See id.*

43. *See id.*

44. *See id.*

45. *See id.*

46. *See id.*

47. *Id.* (alteration in original).

48. *See* Gillette & Ferrari, *supra* note 33, at 8.

price and the delivery of the condensate with a low level of mercury under the previous contracts were the decisive factors leading to the seller's liability. However, these factors have little to do with the ordinary purposes test in Article 35(2)(a) and are primarily relevant for the purpose of contract interpretation under Article 35(1), in conjunction with Article 8, and possibly Article 9, if the parties' prior course of dealing amounted to a "practice" within the meaning of Article 9.<sup>49</sup>

Despite these shortcomings, the decision is helpful in several respects. It highlights several quality tests that can potentially be relevant to the application of Article 35(2)(a). It also demonstrates that although these tests are inherently vague, they may not be entirely devoid of distinct content and consequences, contrary to the view of some writers.<sup>50</sup> In fact, the decision illustrates how the tests, namely the merchantability and the average quality tests, can produce different results, which shows the possible significance of choosing between them.

Choosing between these standards is difficult. The merchantable quality standard does entail the danger of its strong association with some common law systems,<sup>51</sup> but it has the advantage of being based on a fairly clear and workable test: if the goods can be resold on a market without the abatement of the price,<sup>52</sup> the goods are of merchantable quality and the seller is not in breach. From the standpoint of economic considerations, the test has received some support<sup>53</sup> on the basis that, in contrast with the

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49. *See id.* at 9.

50. *See* P.S. ATIYAH, JOHN N. ADAMS & HECTOR MACQUEEN, *ATIYAH'S SALE OF GOODS* 166 (12th ed. 2010).

51. For a discussion of the development of this test in English law, which viewed the merchantability test as comprising more than just saleability on the same terms as those in the parties' contract (with description, fitness for purpose, and acceptance being other relevant aspects of merchantability), *see* BRIDGE, *supra* note 2, ¶¶ 7.42–.55.

52. A classic formulation of this version of the test was made in *Australian Knitting Mills Ltd. v Grant* (1933) 50 CLR 387, 413 (Austl.). In *Australian Knitting Mills*, the court held that:

[The goods] should be in such an actual state that a buyer fully acquainted with the facts and, therefore, knowing what hidden defects exist and not being limited to their apparent condition would buy them without abatement of the price obtainable for such goods if in reasonable sound order and condition and without special terms.

*Id.*

53. *See* Gillette & Ferrari, *supra* note 33, at 12. There are cases on the CISG that have explicitly interpreted Article 35(2)(a) as based on the merchantability test. *See* *Clothes Case* (Austl. v. China) (China Int'l Econ. & Trade Arb. Comm'n 2003), available at <http://cisgw3.law.pace.edu/cases/030603c1.html> (expressly stating that Article 35(2)(a) means that goods must be merchantable, in noting that "the goods delivered by the [seller] were [of] poor quality and . . . could not be resold even at a discounted price. Therefore, the goods delivered by the [seller] were not resalable") (alterations in original). Several additional cases were decided in common law jurisdictions where the courts simply read the merchantability test into the CISG with no attempt to explain the reasons for doing so. *See* *Fryer Holdings v Liaoning MEC Grp.* [2012] NSWSC 18 (Austl.), available at <http://www.globalsaleslaw.org/content/api/cisg/urteile/2325.pdf>; *Int'l*

other two tests, it does not give rise to any undesirable incentives for the seller because it refers to a measurable benchmark—a market price.<sup>54</sup> It also deals with the problem of informational asymmetry by signalling the quality and other features of the goods, as well as the seller's investment in the product:

Assuming relatively competitive markets, price should reflect the inputs that the seller invests in product quality, and thus it is likely to incorporate the seller's information concerning defect rates. Price also is likely to incorporate information that buyers have about the good. Buyers are unlikely to purchase a good that carries a price in excess of the buyer's expected value for it. When buyers agree to pay a particular price for a good, therefore, they have a set of expectations about the good's characteristics. Sellers who have superior information about the qualitative characteristics of the good reveal those features through the pricing mechanism. Price, in effect, serves as a substitute for a more detailed description of the goods that would constitute an express warranty of quality.<sup>55</sup>

The proponents of this position, resting on the supremacy of economic considerations, recognise some of the drawbacks of the merchantability test. One is its ability to distort the parties' negotiations by virtue of implicitly setting the price limit that the seller can charge: "[i]n effect, this test can be interpreted to transform price, standing alone, into a warranty."<sup>56</sup> Another is that the price may accommodate factors other than those relating to quality (for example, luxury goods, oligopolistic markets, or markets where the seller occupies a dominant market position), and this means that the goods' ability, or lack thereof, to command certain prices may be due not only to quality but to those other factors. That, in turn, means that in such cases, the merchantability test is not fully determinative of the quality of the goods. For this reason, those favouring this test have not advocated a firm application of the merchantable quality standard but have argued in favour of its presumption, which can be displaced upon demonstrating that the price was not fully reflective of quality.<sup>57</sup>

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*Housewares v SEB* (2003) CP 395 SD 01 (HC) (N.Z.), available at <http://www.cisg.law.pace.edu/cases/030331n6.html#term>; see also *Travelers Prop. Cas. Co. of Am. v. Saint-Gobain Technical Fabrics Can. Ltd.*, 474 F. Supp. 2d 1075 (D. Minn. 2007). This approach is clearly unacceptable, as it violates the Convention's international character.

54. For a further discussion on the advantages of the merchantable quality standard, see *infra* notes 55–57 and accompanying text.

55. Gillette & Ferrari, *supra* note 33, at 12.

56. *Id.* at 14.

57. See *id.* at 15.

The average quality test has also found some support.<sup>58</sup> This test can be viewed almost as a mathematical test as it implies a “middle belt of quality.”<sup>59</sup> This shows that it also has a discernible content and should therefore be workable. The test may also point to a balanced standard, particularly for the goods of variable quality, by being set in the middle between high and low quality levels. The test has, however, been criticised on the ground that it has the effect of making the products that are below average quality drop out of the market. That, in turn, will push the average quality upwards because the disappearance of quality below average changes the meaning of average quality, since what was the middle of the range becomes the bottom end of the range. As a result, average quality “becomes meaningless because of the constant change in the standard.”<sup>60</sup> Whilst this outcome may well logically follow as a matter of theory, it may be questioned whether there is evidence of this test actually producing such results in practice, considering that this test has been used in many domestic legal systems, some of which govern quality in highly developed markets and economic systems.<sup>61</sup>

Some have favoured the reasonable quality standard due to its relative neutrality. The standard has no association with the well-known quality tests in domestic legal systems, which can make it more conducive to promoting uniformity and the Convention’s international character. Similar to what has been stated in the arbitration decision discussed above, the standard has been praised for its flexibility and its consonance with the idea of reasonableness underlying the CISG. Flexibility is highly desirable, in some commentators’ view, because the fitness for the ordinary purposes may require a level of quality, which is higher or lower than average quality.<sup>62</sup>

Still, the standard has been criticised for creating the “lemons problem.”<sup>63</sup> Assume that there is a range of products, from low to high quality, all of which are fit for the ordinary purpose. Since reasonable quality does not fix and signal a level of quality with any precision, the buyers, who have no means of investigating the goods’ quality before receiving the delivery, will fear that what is presented to them as high quality goods are in fact goods of low quality. If it turns out that the goods are of low quality, the seller will not be held liable because those goods are still fit for the ordinary purpose. Faced with this prospect, buyers will treat all goods as

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58. See, e.g., Landgericht [LG] [District Court] Sept. 15, 1994, 52 S 247/94 (Ger.), available at <http://cisgw3.law.pace.edu/cases/940915g1.html> (“The goods must be of average quality, and it does not suffice that they can only just be traded.”).

59. U.C.C. § 2-314 cmt. 7 (1977).

60. Gillette & Ferrari, *supra* note 33, at 11.

61. See, e.g., INGBORG SCHWENZER, PASCAL HACHEM & CHRISTOPHER KEE, GLOBAL SALES AND CONTRACT LAW ¶¶ 31.127–.128 (2012).

62. See ARTICLE BY ARTICLE COMMENTARY, *supra* note 9, art. 35, ¶ 79.

63. See Gillette & Ferrari, *supra* note 33, at 10.

being of low quality and refuse to pay a higher price for higher quality goods. This will result in the high quality sellers being gradually driven out of the market.<sup>64</sup>

None of these standards emerges as a clear winner and this aspect of Article 35(2)(a) is likely to remain controversial in the foreseeable future. If the CISG is ever to be revised or if a new international sales law is ever adopted, some thought will need to be given to whether there is a need for an underlying quality standard. This is a question of policy. There have been instances where the CISG has been seen as a vehicle for promoting quality standards around the world and, if there is some truth in this position, it would point strongly to the need to articulate an underlying quality standard.<sup>65</sup> In that case, what minimum level of quality can reasonably be expected in international trade? At one end of the spectrum, there is a view that the lowest grade within the range of contractual description is sufficient,<sup>66</sup> whilst at the other end, some may believe that even such standards as average or satisfactory<sup>67</sup> quality, which tend to be associated with mediocrity,<sup>68</sup> are not good enough in the modern day of increasing consumers' expectations.

The merchantability standard is helpful in that the price will often be a powerful signal of a benchmark of quality, and consequently of fitness for the ordinary purposes, which the buyer can reasonably expect. The goods' ability or inability to be resold on a market at the same price as that in the parties' contract is a practically useful test. However, the suggestion that it should operate as a presumption seems to overstate its utility for several reasons. To begin with, there may not be a market for the goods to provide a reference point. What constitutes a market can also be a tricky question, as markets can be defined broadly or narrowly.<sup>69</sup> There are many variables affecting a market price in the particular circumstances—the need to transport the goods, location of a market, seasonal nature of the goods, time frames—and the direct price comparability between the contract price and the price obtainable on a market may not always be possible or fully reflective of quality.

In addition, the test's reference to a sale on a market may be more suitable for some goods than for others. For example, a market can be found more easily in respect of commodities than in the case of heavy and

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64. *See id.*

65. *See* Hof 's-Gravenhage Apr. 23, 2003, JOR 2003 (Rynpoort Trading & Transport NV et al./Meneba Meel Wormerveer B.V. et al.) (Neth.), *available at* <http://cisgw3.law.pace.edu/cases/030423n1.html>.

66. *See* HUBER & MULLIS, *supra* note 9, at 135.

67. *See* Sale of Goods Act, 1979, c. 54, § 14 (Eng.), *available at* <http://www.legislation.gov.uk/ukpga/1979/54>; U.C.C. § 2-314(2)(c) (1977).

68. *See* ATIYAH, ADAMS & MACQUEEN, *supra* note 50, at 159.

69. *See, e.g.*, Djakhongir Saidov, *The Present State of Damages Under the CISG: A Critical Assessment*, 13 VINDOBONA J. INT'L COM. L. & ARB. 197, 209–14 (2009).

highly specialised machinery.<sup>70</sup> It has also been suggested that the use of this test is more relevant where the goods are bought for resale, rather than use.<sup>71</sup> Yet another reason against the presumption relates to its likely consequence of interfering with the parties' bargain. The seller may have managed to bargain for a better price, which would not normally be obtainable for the goods at hand. Later holding this same seller liable on the basis that he or she should have delivered the goods of higher quality fails to respect and uphold the bargain that the parties struck. If the CISG is interpreted in this way, it will undermine the freedom of contract and turn the Convention into an instrument with a greater regulatory drive, closer to an extreme point of *caveat venditor* than it should be, considering it is a legal regime which is intended to encourage participation in international trade. Sellers would undoubtedly be discouraged by such a position and that would hamper trade and lead to the parties' excluding or derogating from the CISG, neither of which is in line with the Convention's aims.

Thus, if a choice had to be made, a flexible standard of reasonable quality may be the right way to move forward. To inject greater certainty into the standard, a key consideration should be that found in the merchantability test, that is, reliance on a market price and focus on whether the goods can be resold to a buyer with full knowledge of the goods' actual state and condition without any reduction in the price. Such a test would be both sufficiently flexible and certain. Without creating any presumption, it draws on the practicality and good sense underlying the merchantability test, while at the same time avoiding not only domestic law associations but, more importantly, the limitations of merchantability. For example, if there is no market to provide a reference price, or if a market price is not fully reflective of quality, the reasonable quality standard is flexible and broad enough to take account of other relevant considerations. It also does not presuppose a fixed benchmark, as is the case under the average quality test. The lack of a fixed benchmark under the reasonable quality standard is more in line with the ordinary purposes requirement: this requirement may refer, depending on the circumstances, to quality which is lower or higher than average.

With quality having to be reasonable, perfection, in the sense that the goods have to be flawless, would not, as a rule, be required.<sup>72</sup> However, in the case of mass produced and manufactured goods, there may justifiably be an expectation of a higher level of quality, not far from perfection,

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70. See *Bristol Tramways Carriage Co. v. Fiat Motors Ltd.* [1910] 2 K.B. 831, 840.

71. See *Bernstein v. Pamson Motors* (1987) R.T.R. 384 (Q.B.) at 387 (Eng.).

72. See *Pressure Sensors Case* (China v. Braz.) Arbitration Award, ¶ 144 (Arbitral Inst. of Stockholm Chamber of Commerce 2007), available at <http://cisgw3.law.pace.edu/cases/070405s5.html> (explaining that seller commits no breach if defects are minor and can easily be avoided by buyer or end user). There is much support for this view in the context of Article 35(2), even without any reference to the reasonable quality test. See CISG, *supra* note 6, art. 35(2).

because “modern manufactured goods are marketed and sold against a background of high expectations and quality control procedures.”<sup>73</sup> In this context, even minor defects may not be tolerated. The same may be the case if the goods are described in the contract as “new,” which almost naturally signals a greater expectation of high quality, bordering on perfection. That said, even a new product, such as a car and such goods as complex machinery or software,<sup>74</sup> will sometimes need a “teething,”<sup>75</sup> or an adjustment period. In this case, a minor defect, if it is normal or common for the goods in the initial stages of their operation, is unlikely to amount to a breach of reasonable quality and, consequently, of the fitness for the ordinary purposes test.

### III. COMPLIANCE WITH PUBLIC LAW REGULATIONS

A situation frequently occurring in international trade is one in which the buyer complains that the goods do not meet the requirements of public law regulations in the country where the goods are intended to be used or sold. Which of the two parties is to bear the risk of non-compliance with the relevant regulations? Although there is no absolute uniformity in cases on this matter, a position which has been gaining wider international acceptance<sup>76</sup> is the one set out in what has become known as the *New Zealand Mussels* case.<sup>77</sup> In the *New Zealand Mussels* case, the mussels deliv-

73. BRIDGE, *supra* note 2, ¶ 7.65.

74. See Rb Arnhem June 28, 2006, 82879 / HA ZA 02-105 (Silicon Biomedical Instruments B.V./Erich Jaeger GmbH) (Neth.), available at <http://cisgw3.law.pace.edu/cases/060628n1.html>. The court of first instance held that:

Although the Court finds that it has to be tolerated that new developed software may have “teething troubles” or “start-up problems” in the beginning—this is how the Court interprets Art. 7.1 of the contract which reads “Supplier does not warrant that operation of the Products will be error free or uninterrupted, or that all non-conformities can be corrected”—it must be possible to use the software in a normal way from the beginning on. The testimonies proved that this was not the case, as there were frequent interferences and as data could not be found or loaded without consulting a technical clerk.

*Id.*; see also BENJAMIN’S SALE OF GOODS ¶ 11-069 (Michael Bridge ed., 8th ed. 2010) (suggesting, in context of fitness for purpose test in English law, that there should be no strict liability for non-conformities in software).

75. *Bernstein*, R.T.R. 384 (Q.B.) at 390 (“minor teething troubles . . . could be expected in any new motor car”).

76. See, e.g., Oberster Gerichtshof [OGH] [Supreme Court], Apr. 13, 2000, docket No. 2 Ob 100/00w (Austria), available at <http://cisgw3.law.pace.edu/cases/000413a3.html>; RJ & AM Smallmon v Transp. Sales Ltd. (2011) CIV-2009-409-000363 (HC) 340 (N.Z.), available at <http://cisgw3.law.pace.edu/cases/100730n6.html>; Med. Mktg. Int’l, Inc. v. Internazionale Medico Scientifica, S.R.L., No. Civ. A. 99-0380, 1999 WL 311945, at \*1-3 (E.D. La. May 17, 1999) (affirming decision of arbitration tribunal that accepted approach in *New Zealand Mussels*, but holding that general rule did not apply due to presence of one of exceptions). But see Cour d’appel [CA] [regional court of appeal] Paris, Dec. 13, 1995 (Fr.), available at <http://cisgw3.law.pace.edu/cases/951213f1.html>.

77. Bundesgerichtshof [BGH] [Federal Supreme Court] Mar. 8, 1995, VIII ZR 159/94 (Ger.), available at <http://cisgw3.law.pace.edu/cases/950308g3.html>.

ered by a Swiss seller to a German buyer did not comply with a recommendation of the German health authorities as to their cadmium content. The German Supreme Court stated that the seller could not be held liable for non-compliance with the regulations in the buyer's country unless: (1) the regulations were the same in the seller's country; (2) the buyer specifically drew the seller's attention to the regulations; or (3) the seller had a good reason to know about them, such as where the seller had a branch in the buyer's country, had a long-established business relationship with the buyer, often previously exported the goods to that country, or promoted them in that country. Because none of these circumstances were present, the seller was deemed not to have had a duty to comply with the recommendation of German authorities.

The issue of non-compliance with public law regulations highlights a major challenge in the application of default rules on conformity. On the one hand, the rules' broad formulation and need to be defined with reference to the surrounding context unequivocally dictates that they must be applied on a case-by-case basis. On the other hand, a lack of any general guidelines would create uncertainty in this important area of sales law and give rise to an argument that the rules lack any content and meaning. This is undesirable because an effective sales law is one that not only promotes a reasonable degree of predictability, but also signals and enhances a coherent set of objectives, values, and policies. A balance thus needs to be struck between formulating a meaningful guideline, based on the Convention's policies, and responding to the particularities of all relevant circumstances of the case.

It is submitted that the approach of the *New Zealand Mussels* case manages to strike this balance. As a starting point, the court's clear position as to which of the parties is to bear the risk promotes legal certainty. However, this position is neither a fixed rule nor a presumption, and is merely a general guideline.<sup>78</sup> Providing for special circumstances is a way of ensuring that the Convention is fully responsive to the particular circumstances and that the seller will bear the risk where there are good reasons for doing so. The next question is whether, as a matter of principle, it is right to allocate the risk to the buyer. It is suggested that it is both fair and efficient to allocate the risk to the party who is in a better position to access the relevant information, to insure against this risk, or to avoid it. Subject to the special circumstances listed in *New Zealand Mussels*, the buyer is generally in a better position than the seller to know about the regulations in the country where the goods will be used or sold. The buyer can reduce the risk of non-compliance by drawing those regulations to the seller's attention, or by including the need to comply with them

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78. Cf. JOHN O. HONNOLD, *UNIFORM LAW FOR INTERNATIONAL SALES UNDER THE 1980 UNITED NATIONS CONVENTION* 335 (Harry M. Flechtner ed., 4th ed. 2009) (suggesting that no starting point should be adopted).



into the contract.<sup>79</sup> It is also, as a rule, cheaper for the buyer to carry out the necessary investigations. Making the buyer bear the burden of investigating avoids higher costs, which would otherwise have to be incurred if this burden were borne by the seller. If sellers were put in the position of being compelled to investigate the relevant regulations in order to alleviate the risk of being held liable in the future, the prices for the goods would also have to rise because sellers would have to spread that additional cost and risk of liability to buyers. That would only hinder commerce by making trade more expensive. In short, allocating this risk to the buyer promotes economic efficiency.

*New Zealand Mussels* seems to represent a rare achievement on the part of the CISG. Even those legal systems which attempt to formulate the rules on conformity in a way which is more detailed and precise than that found in Article 35(2) recognize that more specific content and meaning of these rules can only emerge through layers of interpretations given in cases. *New Zealand Mussels* has presented rational and fair treatment of a frequently arising scenario involving both paragraphs (a) and (b) of Article 35(2). It has struck a good balance between flexibility and clarity. Clarity in the Convention's position has been advanced considerably thanks to this case gaining prominence by having influenced other CISG cases. In the Convention's international spirit, this case has paved a way for a uniform direction in dealing with cases of non-compliance with public law regulations. This direction is based on a coherent framework, which, at the same time, preserves fairness and avoids automaticity of outcomes. If a new international sales law is ever adopted, these cases must not be forgotten, but also must be built upon. There may be something to be said in favour of introducing a provision, formulated along the lines set out in *New Zealand Mussels*, dealing specifically with cases of non-compliance with public law regulations.

#### IV. PROOF

##### A. *Burden of Proof*

The legal issues flowing from the need to prove a claim arise in every area of sales law. The rules on conformity are by no means an exception and have, in fact, proved to be a fertile ground for dealing with issues of proof under the CISG. The first point to be addressed is that of burden of proof. It is now increasingly recognised that burden of proof is a matter governed by the CISG.<sup>80</sup> One relevant general principle under the CISG is that a party who asserts a right must prove the necessary preconditions

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79. See Gillette & Ferrari, *supra* note 33, at 7; CLAYTON P. GILLETTE & STEVEN D. WALT, *SALES LAW: DOMESTIC AND INTERNATIONAL* 363–64 (2d ed. 2009).

80. See, e.g., Handelsgericht [HG] [Commercial Court] Sept. 9, 1993, HG930 138.U/HG93 (Switz.), available at <http://cisgw3.law.pace.edu/cases/930909s1.html>.

for the existence of that right.<sup>81</sup> This means that under Article 35(2)(b), for example, the buyer bears the burden of proving that a particular purpose has been duly communicated to the seller.<sup>82</sup> In the same vein, a party who invokes the exception to the other party's right must prove the necessary preconditions for the existence of that exception. The buyer's right to rely on the seller's obligation to ensure the goods' fitness for a particular purpose is available unless there was no actual or reasonable reliance by the buyer. The reliance provision is, in other words, an exception to the buyer's entitlement to the goods fit for a particular purpose, and the burden of proof of the preconditions for that exception lies with the seller. If the seller does not raise the issue of reliance, the goods' fitness under Article 35(2)(b) will be presumed. The burden of proof includes the burden of adducing the relevant evidence and the burden of persuasion.<sup>83</sup>

The "rule and exception" principle of the allocation of burden of proof may not always be applied strictly in practice because the burden of adducing evidence is sometimes placed on a party who simply has better access to evidence but who would not otherwise bear this burden on strict principles of the allocation of burden of proof.<sup>84</sup> This approach, known as "proof proximity," is sometimes justified on the grounds of equity.<sup>85</sup> Although those decisions which have taken this approach may have done so on the basis of their domestic law,<sup>86</sup> some commentators argue in favour of developing the general principle of proof proximity within the CISG,<sup>87</sup> drawing support from the drafting history of Article 25:

Originally Art. 25, which at the time was Art. 9 provided that a breach was fundamental if "it results in a substantial detriment to the other party *and* the party in breach foresaw or had reason to foresee such a result." The "and" was in the end replaced by the present "unless" as it would be very difficult for the non-breaching party to prove that the breaching party did not foresee the result or could not have foreseen it. As the breaching party was much closer to the fact the burden of proof was imposed on it.<sup>88</sup>

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81. See, e.g., Tribunal Cantonal Valais [Appellate Court], Apr. 27, 2007, C1 06 95 (Switz.), *available at* <http://cisgw3.law.pace.edu/cases/070427s1.html>.

82. See Handelsgericht [HG] [Commercial Court] Sept. 9, 1993, HG930138.U/HG93 (Switz.) (taking this position not specifically in context of Article 35(2)(b), but Article 35 in general).

83. See ARTICLE BY ARTICLE COMMENTARY, *supra* note 9, art. 35, ¶¶ 188-94.

84. See Tribunal Cantonal Valais [Appellate Court], Apr. 27, 2007, C1 06 95 (Switz.) ("If the buyer rejects the goods by invoking their non-conformity the seller must prove that the goods are in conformity with the contract; if the buyer already accepted the goods the buyer would have to prove their non-conformity.").

85. See ARTICLE BY ARTICLE COMMENTARY, *supra* note 9, art. 35, ¶ 171.

86. See Tribunal Cantonal Valais [Appellate Court], Apr. 27, 2007, C1 06 95 (Switz.).

87. See ARTICLE BY ARTICLE COMMENTARY, *supra* note 9, art. 35, ¶ 170.

88. *Id.* ¶ 171.

There are undeniably differences in legal cultures, procedural environments, and views of the purpose of judicial proceedings—that is, whether they are strictly adversarial or aim to establish the truth at all costs—which have a direct impact on the way evidence is taken. Therefore, a degree of non-uniformity can be expected in matters of taking evidence and more broadly in allocating burden of proof. It is suggested, however, that legal predictability should not be undermined any further by the introduction of the proof proximity principle into the CISG. As already alluded to, proof proximity can easily contravene the rule and exception principle, and its introduction necessitates a choice between the two, either as a matter of general principle or in the particular case. That, in turn, gives rise to an additional layer of complexity and unpredictability. Reaching a substantial degree of international agreement on the rule and exception principle is a hard-earned achievement, which has potential to promote legal certainty in all areas falling within the Convention's scope. From this standpoint, recognising proof proximity as the Convention's general principle would be an unwelcome development.

### B. *Standard of Proof*

In contrast, using the Convention's general principles to develop a standard of proof does have the advantage of promoting uniformity. The standard of proof concerns the amount of evidence and the degree of precision flowing from it that are sufficient to prove the existence of a legal right.<sup>89</sup> There is a close connection between the burden and standard of proof,<sup>90</sup> and having the former governed by the CISG and the latter by domestic law makes the Convention's scope piecemeal, inconsistent, and incoherent. More importantly, a standard of proof has a direct impact on the *exercise* of the innocent party's rights. The Convention's goal of promoting uniformity in its application is hardly achievable if the rights, established by the Convention, cannot be exercised in the same way due to the different standards of proof used by domestic legal systems. It is thus submitted that a standard of proof should be regarded as a matter falling within the CISG, and therefore domestic legal systems should have no role to play in formulating the applicable standard. There is now increasing support for the view that the Convention's general principle of reasonableness,<sup>91</sup> together with the fact that absolute precision in proving the preconditions of the existence of a legal right are not always achievable, can lead to the development of the principle that such preconditions

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89. See, e.g., Djakhongir Saidov, *Standards of Proving Loss and Determining the Amount of Damages*, 22 J. CONT. L. 1, 5 (2006) (explaining standard in context of proving losses).

90. See SCHLECHTRIEM & SCHWENZER, *supra* note 9, art. 35, ¶ 56.

91. See Albert H. Kritzer, *Reasonableness*, CISG DATABASE, <http://www.cisg.law.pace.edu/cisg/text/reason.html#schl> (last updated Jan. 23, 2001) ("Reasonableness is specifically mentioned in thirty-seven provisions of the CISG and clearly alluded to elsewhere in the Uniform Sales Law.").

only need to be proved with a reasonable degree of certainty.<sup>92</sup> It is suggested, therefore, that, like all other issues falling within the CISG, the preconditions for the buyer's rights under Article 35 and for the exceptions available to the seller, such as the provision on reliance on its skill and judgement in paragraph (2)(b), need to be established with reasonable certainty.

### C. *Admissibility of Evidence*

The evaluation and admissibility of evidence are often treated as falling into the procedural law realm,<sup>93</sup> which is outside the scope of the CISG,<sup>94</sup> a substantive law instrument. In contrast with a standard of proof, which may be classed as an issue of substantive or procedural law depending on the applicable legal regime, the admissibility of evidence appears, at first sight, to fall more clearly into the procedural law realm. Therefore, it would seem that the applicable procedural law should govern this matter. However, in some domestic systems, the admissibility of evidence may possibly be regarded as a matter of substantive law. In one case,<sup>95</sup> the buyer's evidence, which was based on testimony of a German inspection company to support its claim that charcoal was non-conforming under Article 35(2) of the CISG, was held inadmissible. It was so held because the buyer did not follow a procedure fixed under Article 476 of the Argentine Commercial Code according to which in order to contest the quality of the goods, the buyer ought to appeal to expert arbitration.<sup>96</sup> The Argentine appellate court reasoned that the CISG did not "contain any rule—[or] general [principle]—concerning the procedure to follow in order to determine the quality of goods" and ruled that because "the buyer did not determine the quality of the charcoal in accordance with the expert arbitration procedures required by Article 476 of the Argentine Commercial Code, his evidence consisting of a testimony of a German witness, the qual-

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92. For similar arguments in the context of damages, see, for example, Saidov, *supra* note 89, at 5–6, 56, 70; Int'l Sales Convention Advisory Council, *Calculation of Damages Under CISG Article 74*, Advisory Council Opinion No. 6 (2006), available at <http://www.cisg.law.pace.edu/cisg/CISG-AC-op6.html>.

93. In most jurisdictions, the admissibility of evidence is treated as a procedural law issue. See, e.g., RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 138 (1971); SCHLECHTRIEM & SCHWENZER, *supra* note 9, art. 11, ¶ 4.

94. See SCHLECHTRIEM & SCHWENZER, *supra* note 9, art. 35, ¶ 50, art. 74, ¶ 66.

95. Cámara Nacional de Apelaciones en lo Comercial [CNCom., sala E] [Second Instance Court of Appeal], 24/4/2000, "Mayer Alejandro c. Onda Hofferle" (Arg.), available at <http://cisgw3.law.pace.edu/cases/000424a1.html#ii>.

96. For a detailed explanation of the nature and purpose of an expert arbitration under Article 476 of the Commercial Code of Argentina, see Anthony J. McMahon, Note, *Differentiating Between Internal and External Gaps in the U.N. Convention on Contracts for the International Sale of Goods: A Proposed Method for Determining "Governed By" in the Context of Article 7(2)*, 44 COLUM. J. TRANSNAT'L L. 992, 1020–23 (2006).

ity of the charcoal could not be determined.”<sup>97</sup> A similar decision was subsequently reached in another Argentine case.<sup>98</sup>

Whilst the requirement regarding the referral of a matter of a lack of conformity to expert arbitration may seem to be procedural in nature,<sup>99</sup> some writers point out that the fact that this requirement is contained in the Argentine Commercial Code, as opposed to the Code of Civil Procedure, suggests the possibility that the admissibility of evidence was treated as a matter of substantive law.<sup>100</sup> If so, does the fact that the admissibility of evidence may be a substantive law issue in some domestic systems mean that the Convention should now be regarded as governing this issue for the same reasons as those advanced in respect of the standard of proof? These Argentine cases reaffirm the point that the distinction between the procedural and substantive law issues is relative<sup>101</sup> and in itself it cannot constitute an appropriate basis for deciding what falls within or outside the Convention’s scope. This does not necessarily mean that the admissibility of evidence can be regarded as a matter governed by the CISG. The issue requires careful consideration of issues going beyond the scope of this Article. Therefore, only some tentative and general observations will be made.

As illustrated by the Argentine cases, the admissibility of evidence does endanger a uniform application of the Convention’s conformity provisions because in a number of other jurisdictions the expert witness’s report may well have been admissible. A universally agreed approach to the question of the admissibility of evidence would certainly be a significant

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97. Cámara Nacional de Apelaciones en lo Comercial [CNCom., sala E] [Second Instance Court of Appeal], 24/4/2000, “Mayer Alejandro c. Onda Hofferle” (Arg.).

98. See Cámara Nacional de Apelaciones en lo Comercial [CnCom., sala E] [Second Instance Court of Appeal], 21/7/2002, “Cervecería y Maltería Paysandú S.A. c. Cervecería Argentina S.A.” (Arg.), available at <http://cisgw3.law.pace.edu/cases/020721a1.html>. In *Cervecería y Maltería Paysandú S.A. c. Cervecería Argentina S.A.*, the Argentine appellate court held that:

[T]he [Buyer]’s demand has ignored the procedure fixed imperatively by article 476 of the Commercial Code, according to which the buyer who refutes the quality of the goods should appeal to the know-how by arbitration . . . . [E]xpert arbitration is the road legally contemplated to settle this type of controversy as regards commercial sales of goods . . . . [The analysis by a German laboratory] does not replace the trial of expert arbitrators—without which [Buyer]’s allegations are not proven.

*Id.* (final alteration in original).

99. See McMahon, *supra* note 96, at 1028–29.

100. See Cámara Nacional de Apelaciones en lo Comercial [CNCom., sala E] [Second Instance Court of Appeal], 24/4/2000, “Mayer Alejandro c. Onda Hofferle” (Arg.).

101. See, e.g., Chiara G. Orlandi, *Procedural Law Issues and Uniform Law Conventions*, 5 UNIF. L. REV. 23, 30 n.29 (2000) (“[T]here exists no systematic abstract criterion that would enable a given case to be classified unequivocally and rationally as being either of a ‘procedural’ or a ‘substantive’ nature.”); Ingeborg Schwenzer & Pascal Hachem, *The CISG—Successes and Pitfalls*, 57 AM. J. COMP. L. 457, 471–72 (2009).

step in promoting the Convention's uniform application. There are provisions which can, conceivably, be used to develop a relevant general principle that the CISG takes a liberal approach to admitting evidence, meaning that all relevant evidence is to be admitted. Article 11 of the CISG provides that a contract "need not be . . . evidenced by writing . . . [,] is not subject to any other requirement as to form," and "may be proved by any means, including witnesses."<sup>102</sup> Article 8(3) requires that in interpreting the parties' statement and conduct, "all relevant circumstances" need to be taken into consideration and can therefore be seen as "based on the principle of the admissibility of all evidentiary materials for the interpretation of the parties' declarations."<sup>103</sup>

That said, there is still a strong sense that for the CISG to deal with the admissibility of evidence outside the parameters of Articles 11 and 8 is to stretch its scope beyond that intended by the drafters. It has been suggested that these two provisions were included to make it clear that there is no place in the CISG for the common law doctrines of parol evidence and statute of frauds.<sup>104</sup> Had the drafters intended the CISG to embrace fully an issue as broad in its reach as the admissibility of evidence, they would have, surely, indicated that with much greater clarity. More so, because the admissibility of evidence is *usually* regarded as a procedural matter, many countries would be surprised to discover that the CISG displaces their procedural law regimes, if the Convention is held to deal with this issue. It is highly likely that that was not the understanding the countries had in deciding to ratify the CISG.<sup>105</sup> Considering that any general principle that can be potentially developed will be inherently general and incapable of matching the level of detail of domestic rules on evidence, such an approach may also deter the ratification by other countries.

It is also doubtful whether the CISG is capable of governing and embracing this matter in all its complexity. The relevant domestic rules on the admissibility of evidence are based on a variety of policies and considerations emanating from different spheres, many of which are outside a contract law instrument like the CISG.<sup>106</sup> Many such policies will undoubtedly be worthy of legal protection whilst the CISG will be incapable

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102. CISG, *supra* note 6, art. 11.

103. SCHLECHTRIEM & SCHWENZER, *supra* note 9, art. 11, ¶ 13.

104. See McMahon, *supra* note 96, at 1026.

105. See *id.* at 1026–28.

106. See IAN DENNIS, *THE LAW OF EVIDENCE* 86–87 (4th ed. 2010). The common law of evidence, for example, includes rules: against hearsay evidence; on expert witnesses (who can only give opinion on matters requiring their expertise without expressing views on the ultimate issues of the case); against evidence of bad character; on protecting confidential communications between lawyer and client; against evidence which might be injurious to public interest (the public interest immunity doctrine). Each of these rules is based on its particular rationale. See *id.* Perhaps, what all different types of rationale may have in common is that they "will represent a judgment that the 'costs' of the type of evidence in question are sufficiently great to justify a general rule of restriction." *Id.* at 87. Some of these types of rationale may also be based on the "need to protect certain rights of par-

of catering to all those policies. Finally, it can also be argued that it is best to leave the admissibility of evidence to domestic legal systems for the reasons of efficiency, speed, and practical convenience. As explained in the commentary on Section 138 of the U.S. Restatement (Second) of Conflict of Laws, the "trial judge must make most evidentiary decisions with dispatch if the trial is to proceed with celerity. The judge should therefore, as a general rule, apply the local law of his own state."<sup>107</sup> All of these arguments point in favour of the admissibility of evidence being entirely outside the CISG, making the outcomes in the Argentine cases correct.

These arguments notwithstanding, uncertainty as regards the Convention's relationship with the domestic rules on the admissibility of evidence has led to the emergence of more flexible approaches. In the context of Article 11 it has been contended that what is decisive is not how a rule is characterised in a given domestic jurisdiction, but its function. If a domestic rule substantially undermines a party's evidentiary position, the rule should be classed as a rule of substantive law and therefore displaced by Article 11. If the evidence in question "merely makes it easier to prove matters," the domestic rule on the admissibility of evidence, usually being classified as a procedural rule, should apply as such.<sup>108</sup> By analogy, it can be argued that what is decisive in cases, such as the Argentine cases above, is whether the buyer's evidentiary position, and consequently its ability to establish its rights under Article 35(2) of the CISG, would be substantially undermined by the domestic rules on the admissibility of evidence. If so, the admissibility of evidence should be treated as part of the substantive law regime that ought to be displaced by Article 35(2). Underlying this position is the view that the recourse to domestic evidence rules "must be the exception, not the rule" in order to avoid undermining the Convention's uniform application.<sup>109</sup> If this standpoint is taken, the decision in the Argentine case would be wrongly decided because it deprived the buyer of an opportunity to rely on the inspection company's report to prove a lack of conformity—a piece of evidence which would probably be acceptable in many other jurisdictions.

#### D. *Concluding Observations*

This excursion into matters of proof highlights several areas of uncertainty as to how far the scope of a substantive law instrument should be stretched. This work has presented its tentative suggestions in respect of how these matters should be treated under the CISG. But if we were once again to imagine a new international sales law, it would be desirable to see clearer and more definitive guidance as regards the burden, standard,

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ties to litigation or the need to ensure legitimacy of decision in the adjudication." *Id.* Apart from these, every rule pursues different objectives and policies. *See id.*

107. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 138 cmt. a (1971).

108. *See* SCHLECHTRIEM & SCHWENZER, *supra* note 9, art. 11, ¶ 13.

109. *See* Orlandi, *supra* note 101, at 28.

evaluation, and admissibility of proof. As explained, all these areas have a great influence on the exercise of rights available under the substantive law regime. The more the international instruments are treated as governing these matters, the greater the potential for their uniform application. However, before extending their scope in that way, the drafters need to ensure that the international sales law is capable of governing the issues of proof. It has been shown that even an instrument like the CISG, which says very little on matters of proof, is capable of governing the issue of the burden and standard of proof in principle. In relation to the admissibility of evidence, domestic law is a preferred option. Even then, for the sake of legal certainty, an international instrument should still explain its relationship with the applicable domestic law.

## V. CONCLUSION

The Convention's rules on conformity are broad and concise. This is understandable, considering that trade involves a nearly infinite number of goods and equally infinite sets of circumstances surrounding sales contracts. Nevertheless, the Convention's considerable practical experience has now exposed that the simplicity of its rules is deceptive and there are a number of questions that have no clear answers or are surrounded by controversy. One such question is whether there is really a need to search for a quality standard, which can underpin the ultimate default test of the fitness for ordinary purposes. This Article's position is that a quality standard is not essential because the fitness for the ordinary purposes test will be capable of resolving all cases unless it is interpreted in abstract terms, without regard for the parties' particular circumstances. If this is correct, the significance of the debate about the right quality standard may seem, to some extent, irrelevant. However, in some cases, such as those involving goods of different grades or varying levels of performance, a quality standard may be able to provide greater clarity as to the content of the seller's obligation, facilitating the application of the fitness for the ordinary purposes test. Also, if the Convention's rules are viewed not only as tools of contract interpretation and of the allocation of risk, but also as a vehicle for promoting some benchmark of quality around the world, there may be a more pressing need to articulate an underlying quality standard.

The rules on conformity are extremely fact-sensitive, which means that every case is to be decided on the basis of its particular circumstances. That, together with the general nature of the rules, leaves parties with very little guidance about how risks are likely to be allocated in a given case. Certainty is just as important a part of justice as flexibility, and therefore there is much to be said for promoting those solutions that have so far received greater acceptance. The approach in *New Zealand Mussels* represents one such solution, which, in addition to its relative prominence, strikes a good balance between certainty and openness to the individual facts. To an extent, a similar point can be made in respect of the courts'



acceptance that the buyer's knowledge of a lack of conformity is a relevant factor in interpreting the contract under paragraph (1) of Article 35, despite paragraph (3) explicitly treating the buyer's knowledge as relevant only to default rules in paragraph (2). Whether the buyer was in the position to be aware of a lack of conformity at the time of the contract cannot be ignored in the face of the Convention's contextual rules of contract interpretation.

It has long been evident that the issues of proof have considerable impact on substantive law rights. No consistency in the exercise of the rights available under the CISG can be expected if the issues of proof are treated differently. It is for this reason that much work has been done to advocate bringing the burden and standard of proof into the Convention's scope. There is, however, a limit on how far the Convention's reach can be extended. It has been argued that the CISG is not capable of dealing adequately with the admissibility of evidence.

All in all, there is little doubt that the Convention has proved to be capable of resolving the issue of conformity of the goods. But, if a new international sales law ever replaces the CISG, several questions are worth thinking about in drafting the new provisions on conformity. First, would it be useful to introduce an overarching quality standard? Second, should the rules be more detailed by giving guidance for certain specific cases, such as that given in *New Zealand Mussels*? Finally, to what extent should a sales law instrument govern the matters of proof, such as burden and standard of proof, and the evaluation and admissibility of evidence?