

The Conformity Assessment for International Sale of Goods Contracts



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Resumé

Formålet med nærværende speciale er at undersøge retsgrundlaget for mangelsvurderingen i internationale løsørekontrakter efter den internationale købelov (CISG), og i den forbindelse også at klarlægge eventuelle uklarheder der er forbundet med retsgrundlaget. Specialet er derfor baseret på reglerne om varernes kontraktmæssighed i den internationale købelov.

Specialet anvender den retsdogmatiske metode og søger at tydeliggøre den nugældende retstilstand, *de lege lata*, vedrørende mangelsvurderingen i internationale løsørekontrakter. Det stillede forskningsspørgsmål søges besvaret ved anvendelse af en fortolkning af den engelske autentiske ordlyd af den internationale købelov, relevante forarbejder til den internationale købelov, litteratur og i særdeleshed international retspraksis. Det skal dog bemærkes, at der er en særlig risiko for fortolkningsfejl ved anvendelse af international retspraksis - bl.a. fordi domstole og voldgiftsretter er tillagt et konkret skøn i hver enkelt sag.

Mangelsvurderingen efter den internationale købelov er i hovedtræk reguleret af Artikel 35, men også lovens generelle fortolkningsbestemmelser såsom Artikel 7, Artikel 8 og Artikel 9, udgør en essentiel del af det relevante retsgrundlag, da disse bestemmelser har direkte eller indirekte betydning for fortolkningen og anvendelsen af Artikel 35.

Artikel 35 indeholder overordnet tre forskellige bestemmelser der alle relaterer sig til mangelsvurderingen. Specialet vil undersøge disse bestemmelser særskilt med inddragelse af betydningen af den internationale købelovs generelle fortolkningsbestemmelser. Først undersøges det kontraktuelle retsgrundlag i medfør af Artikel 35(1) for varernes kontraktmæssighed og særlig vægt lægges på forskellen mellem aftalens udtrykkeligt fastsatte krav og aftalens indirekte fastsatte krav. Dernæst undersøges Artikel 35(2) som indeholder udfyldende retsregler for varernes kontraktmæssighed, som finder anvendelse ved manglende eller uklar aftale. Specialet tilsigter at klarlægge samspillet mellem de to bestemmelser samt relevansen af at adskille de to bestemmelser. Slutteligt vil specialet undersøge hvorledes andre faktorer såsom køberens kendskab til mangler efter Artikel 35(3) og bevisbyrderegler spiller ind i relation til retsgrundlaget for mangelsvurderingen. Overordnet set belyser specialet det gældende retsgrundlag for mangelsvurderingen samt på hvilke områder retstilstanden vedrørende varernes kontraktmæssighed i internationale løsørekontrakter er uklar og som dermed kan besværliggøre parternes navigering af retsgrundlaget.

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1. Introduction

For a long period of time sellers and buyers from different countries have been trading with each other. Nowadays, trade cross-border includes a variety of transactions, including both smaller transactions, and also, to an increasing extent by reason of the constant technological and societal progress, larger and more complex transactions. When a buyer and a seller have their places of business in different countries, a certain complex of legal problems arises. The domestic laws often have their own national characteristics and the legal systems and traditions differ. Therefore, the need for a uniform sales legislation is unmistakable, since such legislation provides the parties to a transaction for international sale of goods with clarity and predictability of the rules governing the contract.

The attempts and efforts at making a uniform sales legislation began back in the late 1920s, where Ernst Rabel made the first groundwork in 1928.¹ Ernst Rabel's work was made in connection with the International Institute for the Unification of Private Law (hereinafter UNIDROIT), which later at the Hague Conference in 1964 led to the adaptation of the Hague Conventions on the sale of goods; Uniform Law on the International Sale of Goods of 25 April 1964 (hereinafter ULIS) and Uniform Law on the Formation of Contracts for the International Sale of Goods of 25 April 1964 (hereinafter ULF).² However, ULIS and ULF were not successful as uniform sales legislation since they were only implemented by nine states.³ Nonetheless, the influence and importance of ULIS and ULF must not be underestimated. The United Nations Commission on International Trade Law (hereinafter UNCITRAL) used ULIS and ULF as the basis for developing a more detailed and uniform sales legislation.⁴

The United Nations Convention on Contracts for the International Sale of Goods⁵ (hereinafter the Convention or the CISG) was prepared by UNCITRAL and governs the sphere of application, the formation of contracts, and the substantive rights and obligations of the buyer and seller in international sale of goods contracts.⁶ The Convention was adopted in Vienna 11 April 1980 and

¹ Schlectriem/Schwenzer, *Commentary*, p. 1, introduction; Brunner/Gottlieb, *Commentary*, p. 2.

² Schlectriem/Schwenzer, *Commentary*, p. 1, introduction; Brunner/Gottlieb, *Commentary*, p. 2.

³ Schlectriem/Schwenzer, *Commentary*, p. 1, introduction; Lookofsky, *CISG*, p. 4.

⁴ Schlectriem/Schwenzer, *Commentary*, pp. 1-2, introduction; Brunner/Gottlieb, *Commentary*, pp. 2-3.

⁵ United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980), 1489 UNTS 3.

⁶ Explanatory note, pp. 33-34.

entered into force 1 January 1988.⁷ As of the beginning of June 2021 the CISG has 94 Contracting States,⁸ which account for a substantial majority of the world's trade.⁹ In fact, more than 80% of the world's trade in goods is potentially governed by the Convention.¹⁰ This emphasizes that the CISG has won acceptance worldwide,¹¹ and that the Convention therefore plays an important and needed role as a uniform sales legislation.

The purpose of the Convention is described in the Preamble. The purpose is to promote friendly relations among States, to contribute to the removal of legal barriers in international trade, and to promote the development of international trade. In order to achieve this purpose, the CISG is designed as a neutral set of uniform rules that takes the different social, economic and legal systems into account.¹² However, the attempt on creating a uniform set of rules is not without challenges. One of the biggest challenges is the mindset of judges and arbitrators, who often tend to rely on domestic law, since taking into account case law from different jurisdictions is more difficult and burdensome.¹³

The Convention applies to international sale of goods contracts and in order to provide an overview of the specified contracts to which the CISG applies, the relevant rules governing the sphere of application of the Convention will be reviewed. The rules concerning the sphere of application are found in Chapter I of the Convention.

According to Art. 1 CISG, the Convention applies to contracts of sale of goods between parties whose places of business are placed in different States (a) when the States are Contracting States, or (b) when the rules of private international law lead to the application of the law of a Contracting State.

⁷ Ferrari, *Applicability*, pp. 7-8; Explanatory note, pp. 33-34; Lookofsky, *CISG*, p. 1.

⁸ Status: United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980) (CISG), https://uncitral.un.org/en/texts/salegoods/conventions/sale_of_goods/cisg/status (last visited 01 June 2021).

⁹ Honnold, *Uniform Law*, p. 3; Lookofsky, *CISG*, p. 1.

¹⁰ Schlectriem/Schwenzer, *Commentary*, p. 1, introduction.

¹¹ Lookofsky, *CISG*, p. 1; Schlectriem/Schwenzer, *Commentary*, p. 1, introduction.

¹² Schlectriem/Schwenzer, *Commentary*, p. 16.

¹³ Andersen et al., *Practitioner's guide*, Introduction, p. xviii.

Furthermore, the subject of the transaction must concern goods. However, the Convention does not explicitly define goods in the meaning of the Convention.¹⁴ Goods are usually identified as tangible and movable things.¹⁵ It has been discussed as to what extent intangible goods are governed by the CISG. For instance, computer software is governed by the Convention but the sale of know-how is not.¹⁶ It is suggested that the interpretation of “goods” has to be made suitable of the rules on the conformity of goods in Art. 35 CISG.¹⁷ Art. 2 CISG exhaustively lists six specific situations where the Convention does not apply, among these are sales of goods bought for personal, family or household use, and sales by auction. Characteristic for the exclusions listed in Art. 2 CISG is that they are based on either the nature of the goods, the intended use of the goods or the nature of the transaction.¹⁸

It follows from Art. 3(1) CISG that as a general rule the Convention applies for contracts for the supply of goods that are to be manufactured or produced. Only in situations where the buyer provides a substantial part of the materials necessary for the production or manufacture, the transaction does not fall under the sphere of the CISG. Also, Art. 3(2) CISG states that the Convention does not apply to contracts in which the preponderant part of the obligations of the party who furnishes the goods consists in the supply of labour or other services. Thus, when the seller has a service obligation and the contract is a so-called mixed contract, the CISG applies as long as the service obligation of the seller is not preponderant.¹⁹

If the requirements for the application of the Convention by virtue of Art. 1 to 3 CISG are fulfilled, the CISG will apply as the international sales law of the Contracting States. The rules of the Convention apply as default rules, cf. Art. 6 CISG. Therefore, the Convention applies if the parties have not agreed to exclude the Convention as a whole or to the extent where the parties have agreed on excluding the applicability of the Convention in part.

The Convention has rules on the conformity of goods, which can be found in Art. 35 CISG. A great majority of conflicts regarding the international sale of goods concerns the question of

¹⁴ Lookofsky, *CISG*, pp. 16-17.

¹⁵ Andersen et al., *Practitioner's guide*, p. 34; Lookofsky, *CISG*, p. 17.

¹⁶ Schlectriem/Schwenzer, *Commentary*, pp. 34-35; Andersen et al., *Practitioner's guide*, p. 34.

¹⁷ Schlectriem/Schwenzer, *Commentary*, pp. 33.

¹⁸ Andersen et al., *Practitioner's guide*, p. 34.

¹⁹ Andersen et al., *Practitioner's guide*, p. 43.

whether or not the goods conform to the contract between the parties and the requirements in Art. 35 CISG.²⁰ Therefore, the conformity assessment of the goods is a particularly relevant topic as the outcome of the assessment determines whether or not the seller is in breach of one of his most prominent contractual obligations.

²⁰ Henschel, *Conformity*, p. 23; Lookofsky, *CISG*, p. 75; Honnold, *Uniform Law*, p. 222.

2. Aim of the thesis and research question

Knowingly, the conformity assessment of goods is first and foremost governed by the parties' contract, and in lack of sufficiency thereof, gap-filling rules of both national and international character. The practical relevance of the conformity assessment in international sale of goods contracts is unmistakable since it is of utmost importance for the parties to know their legal status and to have predictability of the rules governing the contractual relationship. When the CISG applies, both parties are legally placed in a more advantageous situation in relation to the transparency of the rules governing the contract, since the purpose of the Convention is to provide the parties with a uniform sales legislation. By application of the CISG, the parties avoid having to make themselves acquainted with both the rules and legal traditions of other countries as well as they avoid the uncertainties unfamiliar legislation may entail. However, when the Convention does not provide the parties with enough certainty as to their legal status, the uniformity is hindered, and the purpose of the Convention is therefore not achieved.

The Convention is applicable if the conditions therefore are met, cf. Art. 1 to 3 CISG, and to the extent that the parties have not excluded the rules of the Convention according to Art. 6 CISG. It is the contract between the parties that is the starting point for establishing the rights and obligations of the parties, including the conformity of goods. The rules of the Convention are default rules that apply if the contract is silent on specific matters. Art. 35 CISG provides rules on how to assess the conformity of goods in both situations in respectively Art. 35(1) CISG and Art. 35(2) CISG. Thus, the interplay between the contract and the default rules of the Convention is relevant for the assessment of the conformity of goods.

On the basis of the above-mentioned introductory considerations, the following research question is asked for the purpose of academic exercise:

What is the legal framework of the conformity assessment for international sale of goods contracts?

The aim of this thesis is to examine the current legal framework of the conformity assessment under the CISG and to examine the interplay between the contractual framework and the default legal framework of the Convention - and thereby also to tease out any legal uncertainties that may taint the conformity assessment and complicate the parties' navigation of the framework.

3. Sources of law and interpretation

The research question inquires the present state of law relating to the conformity assessment of goods in international contracts focusing on Art. 35 CISG. Therefore, the legal dogmatic method is applied. The aim of this method is to describe and analyse the present state of law, *de lege lata*.²¹ The legal dogmatic method requires the inclusion and application of relevant sources of law and interpretation.²² The included sources will be elaborated in this section.

The primary source of law is the law. Considering the research question at hand, the relevant law is the Convention, and in particular Art. 35 CISG, since this project will examine the conformity assessment of goods in the perspective of the Convention. Other relevant provisions in the CISG will be included to the extent it has an influence - either directly or indirectly - on the interpretation of Art. 35 CISG which will be addressed in the following.

3.1. Rules of the Convention and their interplay with the interpretation of Art. 35 CISG

First of all, it must be determined to which extent the Convention is applicable for a given matter. This is relevant because the application of the CISG is not mandatory for contracts that fall under the Convention's sphere of application. If the contract falls under the sphere of application of the CISG, the Convention applies as default if the parties have not agreed otherwise.²³ In addition, Art. 6 CISG provides the parties a way of "contracting out" of the CISG by either excluding the application of the CISG as a whole or derogating from or varying the effect of any provisions in the Convention.²⁴ This means that besides excluding the CISG as a whole, the parties have the opportunity to agree on rules which replace, modify or supplement the rules of the Convention.²⁵ A way of implicitly derogating from provisions of the CISG is the use of standard terms.²⁶ It requires a mutual agreement between the parties in order to exercise the rights of the provision in Art. 6 CISG.²⁷ This rule is an expression of the principle of party autonomy, also known as the principle of freedom of contract, which means that the contractual

²¹ Munk-Hansen, *Retsvidenskabsteori*, pp. 64 & 204.

²² Munk-Hansen, *Retsvidenskabsteori*, pp. 64 & 204.

²³ Schlechtriem/Schwenzer, *Commentary*, p. 102; Lookofsky, *CISG*, p. 25, footnote 102.

²⁴ Lookofsky, *CISG*, p. 25.

²⁵ Schlechtriem/Schwenzer, *Commentary*, p. 102.

²⁶ Andersen et al., *Practitioner's guide*, p. 65.

²⁷ Schlechtriem/Schwenzer, *Commentary*, p. 102.

agreements are to be prioritised over the rules in the CISG dealing with a similar matter.²⁸ The principle of party autonomy is recognized by the Convention in Art. 6 CISG,²⁹ and it is stated by courts and commentators that the CISG is in fact based upon the general principle of party autonomy.³⁰

The first part of the conformity assessment in Art. 35 CISG relates to the requirements set forth in the contract between the parties, cf. Art. 35(1) CISG. The second part of the conformity assessment is the rules set forth in Art. 35(2) CISG, which apply unless the parties have agreed otherwise. Thus, Art. 35 CISG itself emphasizes the interplay between the contract and the default rules. The examination of the research question will focus on the legal framework for the conformity assessment in Art. 35 CISG and the possible uncertainties attached to the legal framework. Taking into consideration the scope of this thesis, the examination of the different aspects of Art. 35 CISG will be limited accordingly. In order to make this examination, it must also be established to which extent the CISG governs the different matters of the conformity assessment.

According to Art. 4 CISG, the Convention only governs the formation of the contract of sale and the rights and obligations of the parties arising from the contract. Furthermore, Art. 4 CISG states that the Convention does not govern contract validity nor the effect which the contract may have on the property in the goods sold. The obligations of the parties are contained in Part III CISG. This thesis focuses on the obligation of the seller in Art. 35 CISG to deliver goods in conformity with the contract and the Convention. Standard terms in relation to the conformity assessment will be subject to the examination. Standard terms are encompassed by the term “*the formation of the contract*” in Art. 4 CISG and therefore governed by the Convention.³¹ The effect of this matter on the conformity assessment will be examined in section 4.2.1.2. Furthermore, the Convention is not applicable to the liability of the seller for death or personal injury caused by the goods to any person, cf. Art. 5 CISG. Situations where non-conformities of goods cause such fatal consequences will therefore not be examined. If a certain matter is not governed by

²⁸ Schlectriem/Schwenzer, *Commentary*, p. 105.

²⁹ Explanatory note, p. 35.

³⁰ Ferrari, *Applicability*, pp. 153-154; Schlectriem/Schwenzer, *Commentary*, p. 105; Germany, Landgericht Stendal (District Court), 12 October 2000; Italy, Tribunale di Rimini (District Court), 26 November 2002.

³¹ Schlectriem/Schwenzer, *Commentary*, p. 78.

the CISG it must be resolved by applying the conflict of law rules of the forum in order to determine the applicable domestic law.³²

If a specific matter is governed by the Convention, it must be determined whether the matter is also expressly settled by the Convention. This is determined by looking at the text of the Convention and making an interpretation thereof. The matter is settled by the CISG if the matter is resolved by the express terms of the Convention text.³³ The Convention provides rules regarding the standards of interpretation in Art. 7 CISG. However, the Convention does not establish the legal methods to be used for the interpretation of the text.³⁴

In case a matter is governed and settled by the Convention, attention must be paid to Art. 7(1) CISG, which requires interpretation of the Convention to be in accordance with the following aspects: (1) the international character of the CISG, (2) the need to promote uniformity, and (3) the observance of good faith. Thus, when interpreting the provisions in the Convention, the interpretation of the provisions must be made in accordance with the interpretation standards in Art. 7(1) CISG. It is in this regard important to take into account the development of international trade and to make a dynamic interpretation of the Convention in the light of this development.³⁵ However, the applicability of Art. 7(1) CISG does not extend to the interpretation of the individual contracts.³⁶

If a matter is governed but not expressly settled by the Convention the relevant provision is Art. 7(2) CISG, which provides rules for gap-filling of the Convention.³⁷ For this reason, these matters are usually referred to as internal gaps.³⁸ Art. 7(2) CISG stipulates that such internal gaps must be settled in accordance with the general principles on which the Convention is based. Only in situations where such general principles cannot be found, these matters are to be settled in accordance with the law applicable by virtue of the rules of private international law.³⁹ This can

³² Schlectriem/Schwenzer, *Commentary*, p. 76.

³³ Lookofsky, *CISG*, p. 39; Schlectriem/Schwenzer, *Commentary*, p. 121.

³⁴ Schlectriem/Schwenzer, *Commentary*, p. 129; Eiselen, *Literal Interpretation*, pp. 61 & 74.

³⁵ Henschel, *Conformity*, p. 45.

³⁶ Schlectriem/Schwenzer, *Commentary*, p. 121.

³⁷ Schlectriem/Schwenzer, *Commentary*, p. 132; Viscasillas, *UPICC*, pp. 293-294.

³⁸ Schlectriem/Schwenzer, *Commentary*, p. 132.

³⁹ Flechtner et al., *Drafting Contracts*, p. 79; Honnold, *Uniform Law*, p. 138.

be either the domestic law, international law, or any soft law rules chosen by the parties,⁴⁰ such as the UNIDROIT Principles on International Commercial Contracts⁴¹ (hereinafter UPICC). However, UPICC may generally serve as a gap-filler of the Convention, but scholars disagree to what extent.⁴² It is argued that the reliance on external principles on its own is not enough to make an adequate interpretation of the Convention.⁴³ The purpose of the provision in Art. 7(2) CISG is to minimize the application of domestic law in order to ensure an autonomous and uniform interpretation of the CISG.⁴⁴ Therefore, the domestic law is only applicable as the very last resort, *ultima ratio*.⁴⁵ An example of a matter which - according to the prevailing view among scholars - is governed but not expressly settled by the Convention is the burden of proof.

All in all, Art. 7 CISG is a so-called compromise which requires an autonomous and uniform interpretation of matters governed by the Convention, but also to a lesser extent allows for certain matters to be settled by virtue of domestic law.⁴⁶

Art. 8 CISG concerns the interpretation of statements and other conduct made by the parties. Art. 8(1) CISG gives primacy to a “subjective interpretation”; the statement of a party must be interpreted in accordance with his intent if the other party knew or could not have been unaware what the intent was.⁴⁷ Art. 8(2) CISG stipulates an “objective interpretation” of the statements in accordance with the understanding that a reasonable person of the same kind would have had in the same circumstances.⁴⁸ Due to the practical barriers of proving the intentions under Art. 8(1) CISG, most interpretation issues will be solved by applying the interpretation standard in Art. 8(2) CISG.⁴⁹ When making either the subjective or objective interpretation, all relevant circumstances of the case must be taken into consideration, cf. Art. 8(3) CISG.

According to Art. 9(1) CISG, the parties are bound by any usage to which they have agreed and by any practices established between them. Unless the parties have agreed otherwise, they are

⁴⁰ Viscasillas, *UPICC*, p. 288.

⁴¹ UNIDROIT Principles of International Commercial Contracts 2016 (UPICC).

⁴² Viscasillas, *UPICC*, pp. 296-298; Schlectriem/Schwenzer, *Commentary*, pp. 137-138.

⁴³ Schlectriem/Schwenzer, *Commentary*, pp. 137-138.

⁴⁴ Henschel, *Conformity*, p. 45.

⁴⁵ Schlectriem/Schwenzer, *Commentary*, p. 141; Viscasillas, *UPICC*, pp. 294-295.

⁴⁶ Henschel, *Conformity*, p. 37.

⁴⁷ Schlectriem/Schwenzer, *Commentary*, p. 149; Honnold, *Uniform Law*, p. 156.

⁴⁸ Schlectriem/Schwenzer, *Commentary*, p. 149; Honnold, *Uniform Law*, p. 156.

⁴⁹ Schlectriem/Schwenzer, *Commentary*, pp. 149-150; Honnold, *Uniform Law*, p. 156.

considered to have impliedly made applicable a usage of which (1) the parties knew or ought to have known and (2) in international trade is widely known and regularly observed by parties to contracts of the type involved in the particular trade concerned, cf. Art. 9(2) CISG. Based on the default-regime of the CISG, which derives from both Art. 6 and 9 CISG, such trade usages and practices predominate the interpretation of the Convention's provisions.⁵⁰ In fact, Art. 9 CISG is considered to supplement the contract between the parties.⁵¹ The examination of the research question will take into consideration whether - and to which extent - Art. 9 CISG has an impact on the conformity assessment in Art. 35 CISG.

In conclusion, when determining the obligations of the parties to a CISG contract and the precedence of these obligations, regard must be had to the Convention hierarchy.⁵² First and foremost the Convention hierarchy gives primacy to the obligations set forth in the contract between the parties.⁵³ This is in accordance with the widely accepted principle of party autonomy and Art. 6 CISG. Second in the Convention hierarchy you find the obligations that can be derived from prior practices between the parties and usages of trade agreed upon, cf. Art. 9 CISG.⁵⁴ At the bottom of the hierarchy you find obligations based upon the provisions of the CISG, which emphasizes the gap-filling role of the Convention providing default rules.⁵⁵ The Convention hierarchy corresponds with the rules under domestic sale law regimes.⁵⁶

3.2. The interpretation of Art. 35 CISG

When interpreting the Convention, the first step is to make a literal interpretation of the black letter wording of the respective provision.⁵⁷ The Convention text is written and accessible in six original languages which are all equally authentic; Arabic, Chinese, English, French, Russian and Spanish.⁵⁸ Obviously, the wording of these original versions may differentiate and discrepancies can arise. Nonetheless, it has been stated that the English version of the

⁵⁰ Lookofsky, *CISG*, p. 45; Schlechtriem/Schwenzer, *Commentary*, p. 188.

⁵¹ Schlechtriem/Schwenzer, *Commentary*, p. 134.

⁵² Lookofsky, *CISG*, p. 72; Schlechtriem/Schwenzer, *Commentary*, p. 594; Henschel, *Conformity*, p. 147; Neumann, *Features of Art. 35 CISG*, p. 81; Bernstein, *CISG Europe*, p. 70.

⁵³ Lookofsky, *CISG*, p. 72; Schlechtriem/Schwenzer, *Commentary*, p. 594; Henschel, *Conformity*, p. 147; Bernstein, *CISG Europe*, p. 70.

⁵⁴ Lookofsky, *CISG*, p. 72; Bernstein, *CISG Europe*, p. 70.

⁵⁵ Lookofsky, *CISG*, p. 72; Schlechtriem/Schwenzer, *Commentary*, p. 594; Bernstein, *CISG Europe*, p. 70.

⁵⁶ Lookofsky, *CISG*, p. 72; Schlechtriem/Schwenzer, *Commentary*, p. 594.

⁵⁷ Schlechtriem/Schwenzer, *Commentary*, p. 129; Eiselen, *Literal Interpretation*, p. 76.

⁵⁸ Testimonium of the Convention text; Schlechtriem/Schwenzer, *Commentary*, p. 129.

Convention text prevails, essentially because the drafting committee used English.⁵⁹ Preferably, the wording of all language versions would be taken into consideration in the examination of the research question. However, it is not possible to do so efficiently nor sufficiently due to the scope of this thesis as well as the existing language barriers. The wording of all six authentic versions will therefore not be included in the interpretation of the Convention text in this thesis. On the basis of the above-mentioned considerations, only the English authentic version of the Convention text and its wording will be applied.

Generally, it is of great importance to involve other sources of law when interpreting the Convention text. This is because a mere interpretation of the wording of the text, which can be and often is ambiguous, may lead to absurd results.⁶⁰ For this reason also other widely accepted sources of law such as legislative history, case law and scholarly literature are included and contribute to the interpretation of the Convention, cf. Art. 7(1) CISG.⁶¹ The so-called secondary sources of CISG law mentioned above and their inclusion in this thesis will be elaborated below.

Since the Convention was created by UNCITRAL, the connected legislative history, *travaux préparatoires*, is to be found in the detailed Official Records,⁶² including different documents of the Vienna Conference. There is no official commentary for the CISG.⁶³ However, the Official Records includes a Secretariat Commentary to the preliminary 1978 draft of the Convention,⁶⁴ which can be helpful when interpreting the Convention text. Nonetheless, the Secretariat Commentary does not provide a conclusive authority.⁶⁵ Today, the Convention text is more than 40 years old. Therefore, the development of sales law over this period of time must be taken into consideration when relying on the *travaux préparatoires*.⁶⁶ In this thesis the legislative history of the Convention will be included wherever relevant guidance for the research question is provided and will be further supported by other sources of law.

⁵⁹ Schlectriem/Schwenzer, *Commentary*, p. 129; Eiselen, *Literal Interpretation*, pp. 76-77.

⁶⁰ Lookofsky, *CISG*, p. 30.

⁶¹ Lookofsky, *CISG*, pp. 30-36; Schlectriem/Schwenzer, *Commentary*, pp. 123-126 & 129-132.

⁶² Official Records - UN DOC. A/CONF. 97/19.

⁶³ Lookofsky, *CISG*, p. 31.

⁶⁴ Secretariat Commentary - UN DOC. A/CONF. 97/5 Part II.

⁶⁵ Lookofsky, *CISG*, p. 31.

⁶⁶ Schlectriem/Schwenzer, *Commentary*, pp. 129-130.

CISG Case Law has become a more significant secondary source of Convention interpretation.⁶⁷ Nowadays, courts and arbitral tribunals more extensively refer to and cite case law from foreign countries.⁶⁸ This is in consonance with the interpretation standards in Art. 7(1) CISG. When making a decision or an arbitral award, the courts and arbitral tribunals must take into account prior decisions of courts and awards of arbitral tribunals - and not only from their own country but from other Contracting States and Institutions as well. Thus contributing to promote the uniformity of the application and keeping in mind the international character of the Convention.⁶⁹ However, this is more difficult than it seems as there is no international Supreme Court competent to decide on the correct interpretation of the Convention text in case of divergence nor to create precedent for future cases.⁷⁰

There are different CISG Case Law databases and tools available. In 1993 UNCITRAL established the system of Case Law on UNCITRAL texts (CLOUT) where a selection of court decisions and arbitral awards relating to the Convention - as well as other UNCITRAL texts - are published.⁷¹ National correspondents collect relevant court decisions and arbitral awards, and prepare abstracts of the cases which are then translated by the Secretariat and published in all six original languages of the Convention.⁷² On the basis of the large number of cases published in the CLOUT system, UNCITRAL originated the Digest of Case Law on the CISG, of which the latest edition is from 2016.⁷³ The CISG Case Law Digest contains case law from the different Contracting States sorted by the different provisions of the Convention. Furthermore, case law relating to the Convention is available on CISG-Online⁷⁴, which provides a database of the available case law that has interpreted and applied the Convention.⁷⁵ As of the beginning of June 2021 the CISG-Online database has a coverage of 5517 decisions - counting court decisions from 67 jurisdictions and arbitral awards.⁷⁶ CISG Case Law is also available on the

⁶⁷ Lookofsky, *CISG*, p. 32.

⁶⁸ Lookofsky, *CISG*, p. 32; Henschel, *Conformity*, p. 38.

⁶⁹ Schlectriem/Schwenzer, *Commentary*, p. 123; Lookofsky, *CISG*, p. 32; Andersen et al., *Practitioner's guide*, Introduction, p. xvii.

⁷⁰ Schlectriem/Schwenzer, *Commentary*, second edition, p. 97; Lookofsky, *CISG*, pp. 33-34.

⁷¹ Case Law on UNCITRAL Texts (CLOUT), <https://www.uncitral.org/clout/> (last visited 01 June 2021).

⁷² Case Law on UNCITRAL Texts (CLOUT), https://uncitral.un.org/en/case_law (last visited 01 June 2021); Schlectriem/Schwenzer, *Commentary*, second edition, p. 98.

⁷³ CISG Case Law Digest.

⁷⁴ CISG-Online, <https://cisg-online.org/Home> (last visited 01 June 2021).

⁷⁵ CISG-Online, <https://cisg-online.org/Home> (last visited 01 June 2021).

⁷⁶ CISG-Online, <https://cisg-online.org/Home> (last visited 01 June 2021).

database UNILEX⁷⁷, which includes abstracts of chosen case law regarding the Convention and the UPICC.⁷⁸ All of the above mentioned databases and tools will be applied in the research for relevant case law to be included in the examination of the research question.

The CISG Case Law that is included in this thesis has been chosen on the basis of a search of cases concerning Art. 35 CISG in the abovementioned databases as well as cases mentioned in the CISG Case Law Digest. Nonetheless, no case law databases nor tools, or even all these combined, covers all case law regarding the Convention. Thus, it is not possible to take all existing CISG Case Law into consideration. Inspiration for the chosen case law has also been found within the legal literature and in particular the table of cases in Schwenzer/Schlechtriem, *Commentary*, from 2016.⁷⁹ Taking into consideration the scope of this thesis, it is limited to what extent the relevant case law will be included in the examination of the research question. The chosen case law has therefore been subject to a preceding selection based on relevance, the content of the particular court decision or arbitral award, and the reasoning made by the court or the arbitral tribunal. Court decisions and arbitral awards are generally available in the language of the country in which the court decision or arbitral award was decided. Furthermore, some court decisions and arbitral awards are, as mentioned above, published in the different CISG Case Law databases in an English abstract. Due to the scope of this thesis, the existing language barriers, and the risk of misinterpretation when translating case law by application of various translating tools, it is in general only case law which is available in the original language in either English, Danish or German or where an English abstract is available that has been included in the examination of the research question. If certain case law, which only is available in other languages, has been of utmost importance, the case law has been included nevertheless.

The chosen case law in this thesis is based upon an intention to compare the different circumstances which the courts and arbitral tribunals take into account when assessing the conformity of goods. The inclusion of CISG Case Law plays an important role in the examination of the legal framework of the conformity assessment. This is due to the fact that the courts and arbitral tribunals are conferred with a discretion of the conformity assessment within the limits

⁷⁷ UNILEX on UPICC & CISG, <http://www.unilex.info> (last visited 01 June 2021).

⁷⁸ About Unilex, <http://www.unilex.info/main/about> (last visited 01 June 2021).

⁷⁹ Schlechtriem/Schwenzer, *Commentary*, table of cases, pp. 35-92.

imposed by Art. 35 CISG. Therefore, the interpretation of Art. 35 CISG made by courts and arbitral tribunals will be ascertained by an examination of case law regarding the provision.

Normally, cases are subject to the *stare decisis*⁸⁰ as they are to be weighed according to the hierarchical level of the court as well as the type of court.⁸¹ However, many scholars advocate that the weight of the arguments should prevail over the court instance.⁸² If a decision is found to be well-reasoned, persuasive and sound, the decision should therefore be taken into consideration regardless of the court instance as long as the case has not been overturned by a higher instance.⁸³ Contrary, one must take into account that reasonings of lower court instances often are upheld by higher court instances. Nonetheless, certain case law have greater precedence than other case law; for instance, if a particular court decision is followed in subsequent court decisions from various jurisdictions, which the well-known court decision rendered by the German Supreme Court in 1995 - also known as the *New Zealand Mussels Case* - is a good example of.⁸⁴ The decision concerned the compliance of the goods with public law regulations and is examined in section 4.3.1. The approach of the German Supreme Court is still followed to date. The reason might be that the decision was made by a high-ranking and respected court, and that the approach was fair and not favouring any particular homeward trend.⁸⁵ In CISG terminology, the homeward trend is interpretation of the Convention in the light of particular domestic laws,⁸⁶ which hinder the uniformity of the CISG.

In order to compare and systematize the legal framework of the conformity assessment and which circumstances the courts and arbitral tribunals take into consideration when assessing the conformity of goods, the chosen and examined case law has been divided into subjects according to the provisions of Art. 35 CISG and according to certain chosen issues relating to Art. 35 CISG.

⁸⁰ The doctrine of precedent.

⁸¹ Henschel, *Conformity*, p. 39.

⁸² Henschel, *Conformity*, p. 39; Schlectriem/Schwenzer, *Commentary*, pp. 123-124; Lookofsky, *CISG*, p. 34; Andersen et al., *Practitioner's guide*, Introduction, p. xx.

⁸³ Schlectriem/Schwenzer, *Commentary*, pp. 123-124; Lookofsky, *CISG*, p. 34; Andersen et al., *Practitioner's guide*, Introduction, p. xx.

⁸⁴ Germany, Bundesgerichtshof (Supreme Court), 08 March 1995.

⁸⁵ Flechtner, *Decisions on Conformity*, pp. 178-182.

⁸⁶ Ferrari, *Homeward Trend*, pp. 173-174.

It is important that one bears in mind that each court decision and arbitral award is an expression of a concrete discretion related to the concrete circumstances in the particular case. When dividing case law into certain categories it involves a risk of interpretation errors. Such errors may occur when comparing cases in order to establish a general rule of the present state of law. It is therefore of great significance to take a critical stance regarding each individual case. Also, the risk of court decisions and arbitral awards favouring any homeward trends must be borne in mind. Furthermore, it is a well-known challenge that courts and arbitral tribunals rarely elaborate on the reasoning behind their decision. When examining case law in order to find the reasoning or the possible reasoning of a decision it also involves a risk of interpretation errors due to this uncertainty. Furthermore, it is unknown - unless apparent from the premises of a decision or an arbitral award - to what extent the chosen case law includes decisions or arbitral awards where the parties have exercised their contractual freedom defined in Art. 6 CISG in relation to Art. 35 CISG, which might explain a different navigation of the provision. This may entail interpretation errors as well. The above-mentioned factors must be taken into consideration while reading and weighing the result of this thesis.

Legal literature is another important secondary source of CISG law that must be taken into consideration when interpreting the Convention.⁸⁷ The importance of legal literature as an interpretation tool cannot be overstated.⁸⁸ Scholarly writings are acknowledged by courts and arbitral tribunals, and in recent years the writings have had an impact on decisions regarding the Convention.⁸⁹ When conferring legal literature it is important to keep in mind that every scholarly writing often reflects the opinion of only one or two authors.⁹⁰ The CISG Advisory Council (hereinafter CISG-AC) publishes opinions on particular issues relating to the Convention, and represents collective opinions of multiple authors.⁹¹ The purpose of the CISG-AC is to support the understanding of the Convention and to promote and ensure its uniformity.⁹² Opinions of the CISG-AC have gained persuasive authority and have been referred to by courts and arbitral tribunals.⁹³ In this thesis, the CISG-AC Opinion no. 19, *Standards and Conformity of the Goods under Article 35 CISG*, has been included. Similar to the case law, the scope of

⁸⁷ Henschel, *Conformity*, p. 39.

⁸⁸ Felemegas, *International Approach*, pp. 17-18.

⁸⁹ Lookofsky, *CISG*, p. 35.

⁹⁰ Lookofsky, *CISG*, p. 35.

⁹¹ Lookofsky, *CISG*, p. 35; Schlectriem/Schwenzer, *Commentary*, p. 124.

⁹² CISG-AC Opinion no. 19, p. 1 in footnote 1; Schlectriem/Schwenzer, *Commentary*, p. 124.

⁹³ Lookofsky, *CISG*, pp. 35-36; Schlectriem/Schwenzer, *Commentary*, p. 124.

this thesis and language barriers means that only legal literature in English or Danish has been included.

In this thesis legal literature has been included in order to supplement case law and to take into account the views of various acknowledged scholars. Furthermore, legal literature has been applied to find inspiration for relevant case law as well as comments and conclusions drawn from case law.

4. Examination of the legal framework of the conformity assessment under Art. 35 CISG

4.1. Introduction to the legal framework and the examination

This thesis will examine the legal framework of the conformity assessment for the international sale of goods contracts. The relevant provision is found in Art. 35 CISG, which provides rules concerning the seller's obligations regarding the conformity of goods.

Art. 35 CISG has the following wording:

Article 35

(1) The seller must deliver goods which are of the quantity, quality and description required by the contract and which are contained or packaged in the manner required by the contract.

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

(a) are fit for the purposes for which goods of the same description would ordinarily be used;

(b) are fit for any particular purpose expressly or impliedly made known to the seller at the time of the conclusion of the contract, except where the circumstances show that the buyer did not rely, or that it was unreasonable for him to rely, on the seller's skill and judgement;

(c) possess the qualities of goods which the seller has held out to the buyer as a sample or model;

(d) are contained or packaged in the manner usual for such goods or, where there is no such manner, in a manner adequate to preserve and protect the goods.

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

Art. 35 CISG is a uniform approach of the conformity assessment,⁹⁴ where differences in quantity and quality as well as delivery of an *aliud*⁹⁵, and defects in packaging are included.⁹⁶ This uniform approach means that the Convention differs from the conformity assessment in most domestic laws, which often make “*subtle distinctions*”.⁹⁷ Therefore, the interpretation of the provisions in Art. 35 CISG must not be made in accordance with any homeward trend because it will hinder the uniform approach of the conformity assessment.⁹⁸

Art. 35 CISG consists of three parts; Art. 35(1) CISG defines the contractual framework, Art. 35(2) CISG defines the default legal framework, which applies in lack of an express agreement, and finally Art. 35(3) CISG that provides a limitation of the liability of the seller.

The examination of the conformity assessment will follow the structure of Art. 35 CISG. First, the conformity assessment under Art. 35(1) CISG regarding the contractual framework will be reviewed, including examination of where contractual requirements for the conformity of the goods ensue from. Next, the different parts of Art. 35(1) CISG will be examined; (1) quantity, (2) quality, (3) description and (4) package and containers. Secondly, the default legal framework in Art. 35(2) CISG and its sphere of application will be reviewed. The different parts of Art. 35(2) CISG will be examined as well, including: (a) ordinary purposes, (b) particular purposes, (c) samples or models, and (d) the usual or adequate packaging of the goods. Finally, it will be reviewed which factors may result in the seller not being liable for a non-conformity, cf. Art. 35(3) CISG.

This division is first and foremost made in order to follow the structure of the provision in Art. 35 CISG and more importantly in order to examine how the legal framework of the conformity assessment is to be understood and navigated by the parties. The examination will include an analysis of relevant case law in contemplation of establishing how the courts and arbitral tribunals understand and navigate the legal framework and to enlighten any uncertainties for the parties that may occur when navigating the legal framework. Furthermore, the examination will be made by reference to relevant scholarly works.

⁹⁴ Schlectriem/Schwenzer, *Commentary*, third edition, p. 593; Honnold, *Uniform Law*, p. 328; Ferrari, *Applicability*, pp. 186-187.

⁹⁵ *Aliud* is Latin and means the delivery of a different thing.

⁹⁶ Schlectriem/Schwenzer, *Commentary*, second edition, p. 411.

⁹⁷ Schlectriem/Schwenzer, *Commentary*, second edition, p. 411.

⁹⁸ Lookofsky, *CISG*, p. 29; Ferrari, *Homeward Trend*, pp. 173-174.

One may argue that the division of Art. 35 CISG into the contractual framework in Art. 35(1) CISG and the default legal framework in Art. 35(2) CISG is not of any greater importance; no matter if the goods are rendered conforming or non-conforming according to either Art. 35(1) CISG or Art. 35(2) CISG, it will lead to the same result. However, one very important factor of the conformity assessment is proving - or disproving - the existence of a non-conformity. The matter of burden of proof in relation to Art. 35 CISG will be analysed in section 4.5. Therefore, the examination will also take into consideration the impact of the burden of proof relating to the legal framework of the conformity assessment as well as any uncertainties in this connection. Hence, this thesis will also try to establish whether the division of the conformity assessment into the contractual framework in Art. 35(1) CISG and the default legal framework in Art. 35(2) CISG is of relevance or not.

If the goods are rendered non-conforming according to any provision in Art. 35 CISG, the seller has failed to perform his contractual obligations. This failure to perform entitles the buyer to remedies in accordance with the rules in Section III in Chapter II of the CISG,⁹⁹ provided that the buyer has examined the goods and given notice of any lack of conformity to the seller within reasonable time, cf. Art. 38 and Art. 39 CISG. This thesis does not consider the obligations of the buyer set forth in Art. 38 and Art. 39 CISG. Throughout the thesis, it is therefore assumed that the buyer has examined the goods and given notice of any lack of conformity to the seller within reasonable time. Furthermore, this thesis does not consider the remedies available for the buyer in case of a non-conformity. Also, the analysis of the legal framework of the conformity assessment does not differentiate between different ranks of non-conformities. This is because Art. 35 CISG itself does not distinguish between insignificant and significant non-conformities; even possible so-called insignificant non-conformities fall under the scope of Art. 35 CISG and in this regard the Convention stands out from what applies in multiple domestic laws.¹⁰⁰ Furthermore, it will not be underlined if a certain non-conformity amounts to a fundamental breach of the contract, cf. Art. 25 CISG, which has an impact on the remedies available for the buyer, since an examination of Art. 25 CISG lies outside the scope of the research question.

⁹⁹ “*Remedies for breach of contract by the seller*” - Articles 45 to 52 CISG.

¹⁰⁰ Henschel, *Conformity*, pp. 180-182.

Art. 35 CISG does not draw a distinction between the seller's breach of obligations and the seller's breach of warranties.¹⁰¹ In certain domestic laws this distinction is however of great importance, because emphasis is given when a warranty is breached.¹⁰² Under the Convention this distinction is irrelevant, which must be taken into consideration when assessing the conformity of goods in order to avoid domestic contract interpretation. If the goods are rendered non-conforming, the seller has breached the contract under Art. 35 CISG no matter if the non-conformity is related to a "normal" obligation or an obligation which under certain domestic laws are referred to as a warranty. Therefore, the term "warranty" will not be applied nor given any weight under the examination of the conformity assessment in this thesis.

In order to conduct an adequate examination of the legal framework of the conformity assessment, the history and background of Art. 35 CISG must be taken into consideration. To a considerable extent, Art. 35 CISG is consistent with the provision in ULIS concerning the conformity of goods,¹⁰³ which can be found in Art. 33 ULIS. Nonetheless, there are important and noticeable differences that one must keep in mind when interpreting the obligations of the seller under Art. 35 CISG. The modifications of the provision express the inappropriateness in Art. 33 ULIS; thus, the differences should be included in any interpretation of the meaning and scope of Art. 35 CISG as being well-founded changes. First and foremost, the requirements set forth in the contract between the parties were not the general rule nor the starting point for the conformity assessment under Art. 33 ULIS. Instead, the rule regarding the contractual requirements for conformity of the goods was a subsidiary and so-called catch-all provision in Art. 33(1)(f) ULIS.¹⁰⁴ Hence, nowadays one should not make a conformity assessment without the contract being the starting point. Furthermore, a non-conformity of the goods lead to a failure of the seller's obligation to deliver, cf. Art. 33(1) ULIS, whereas a non-conformity of the goods has no influence on the delivery of the seller under Art. 35 CISG.¹⁰⁵ The wording of Art. 35 CISG is in general more simplistic and more precise than Art. 33 ULIS.¹⁰⁶ Art. 35(3) CISG regarding the limitation of the liability of the seller for non-conformities is based on Art. 36 ULIS, which however did not include sale by sample or model.

¹⁰¹ Schlectriem/Schwenzer, *Commentary*, p. 593; Bernstein, *CISG Europe*, pp. 76-77; Henschel, *Conformity*, p. 149.

¹⁰² E.g. in English law, cf. Schlectriem/Schwenzer, *Commentary*, p. 593.

¹⁰³ Schlectriem/Schwenzer, *Commentary*, p. 592.

¹⁰⁴ Schlectriem/Schwenzer, *Commentary*, p. 592.

¹⁰⁵ Schlectriem/Schwenzer, *Commentary*, p. 592.

¹⁰⁶ Schlectriem/Schwenzer, *Commentary*, p. 592.

4.2. The contractual framework – Art. 35(1) CISG

On the basis of the abovementioned introductory remarks, this section will concern an examination of the contractual framework of the conformity assessment for the international sale of goods contracts.

According to Art. 35(1) CISG, the seller must deliver goods of the quantity, quality and description as required by the contract as well as the goods must be contained or packaged as required by the contract. Thus, the provision governs the conformity of the contractual specifications and standards which the parties have agreed upon - and also emphasizes the “obvious”; that the seller must comply with the contract between the parties and that a subjective conformity assessment is to be made. Therefore, when assessing the conformity of goods, the primary source and starting point of the assessment is the contract between the parties.¹⁰⁷ This so-called subjective test of the conformity of the goods is also the natural starting point in most jurisdictions and in international sales law.¹⁰⁸

By reason of the principle of party autonomy in Art. 6 CISG, it is very different to what extent the goods involved are specified in the contract between the parties. Therefore, even in similar cases regarding the same type of goods, the standards and requirements of the goods are regulated to a very different extent in the contracts. Furthermore, the contracts vary according to their subject matter; the specific category of goods.¹⁰⁹ Even within each category of goods the requirements may further vary depending on the condition of goods, e.g. if the goods come directly from production or if the goods are being resold.¹¹⁰ When a contract has the character of routine and time is crucial, the parties often fail to make a sufficient stipulation of the requirements of the goods in the contract,¹¹¹ which then may entail problems if a possible non-conformity occurs. Even in situations where the parties have agreed upon contractual requirements as to the conformity of the goods, and are of the belief that these requirements are sufficiently stipulated in the contract, the parties do not always have a similar understanding

¹⁰⁷ Lookofsky, *CISG*, p. 76; Secretariat Commentary, section 33.1 no. 4; Schlechtriem/Schwenzer, *Commentary*, p. 594; Felemegas, *International Approach*, p. 167; Bernstein, *CISG Europe*, p. 75.

¹⁰⁸ Schlechtriem/Schwenzer, *Commentary*, p. 594; UPICC (2016) Art. 7.1.1; Henschel, *Conformity*, pp. 147-148.

¹⁰⁹ Henschel, *Conformity*, p. 27.

¹¹⁰ Henschel, *Conformity*, p. 27.

¹¹¹ Honnold, *Uniform Law*, p. 328.

of the content and the meaning of the stipulated requirements,¹¹² which may entail further uncertainties. All in all, the contractual requirements and the scope and accuracy hereof vary from contract to contract due to many different factors, some of which are mentioned above. Therefore, the determination of the contractual conformity of the goods is highly based on an interpretation of the contract as well as the surrounding circumstances.¹¹³

4.2.1. Where do contractual requirements ensue from?

Art. 35(1) CISG refers to the contract between the parties. Thus, the contractual requirements regarding the conformity of goods ensue from the contract. It is therefore necessary to determine the requirements for contractual performance set forth in the contract.¹¹⁴ This must be done by virtue of Art. 8 CISG concerning the interpretation of statements and other conduct made by the parties.¹¹⁵ Furthermore, Art. 9 CISG regarding trade usages and business practices between the parties may be taken into consideration as well.¹¹⁶

Art. 35(1) CISG includes both expressly and impliedly settled contractual requirements.¹¹⁷ Expressly settled requirements are usually requirements which may derive from the wording of the contract itself, advertisements and standard terms of the parties. An example is a requirement in the contract stipulating that the seller must deliver goods of a certain quality corresponding to a specific type or model.¹¹⁸ The inclusion of impliedly settled contractual requirements in Art. 35(1) CISG has as a result that a contractual requirement need not to take the form of words.¹¹⁹ Therefore, regard must also be had to other circumstances relating to the conclusion of the contract. Impliedly settled requirements often derive from previous business practices between the parties,¹²⁰ trade usages of the particular trade concerned,¹²¹ and samples

¹¹² Lookofsky, *CISG*, p. 77.

¹¹³ Henschel, *Conformity*, p. 27.

¹¹⁴ Felemegas, *International Approach*, p. 168.

¹¹⁵ Schlectriem/Schwenzer, *Commentary*, p. 595; Ferrari, *Applicability*, p. 188; Switzerland, Bundesgericht/Tribunal fédéral (Supreme Court), 22 December 2000; CISG Case Law Digest, p. 141.

¹¹⁶ Schlectriem/Schwenzer, *Commentary*, p. 595; CISG Case Law Digest, p. 141.

¹¹⁷ Schlectriem/Schwenzer, *Commentary*, p. 595; Ferrari, *Applicability*, p. 188; Henschel, *Conformity*, p. 161.

¹¹⁸ Czech Republic, Nejvyšší soud České republiky (Supreme Court), 29 March 2006.

¹¹⁹ Lookofsky, *CISG*, p. 77.

¹²⁰ Germany, Landgericht Ellwangen (District Court), 21 August 1995.

¹²¹ International Court of Arbitration, International Chamber of Commerce, August 1999, no. 9083; Schlectriem/Schwenzer, *Commentary*, p. 595; Henschel, *Conformity*, p. 164; Neumann, *Features of Art. 35 CISG*, p. 87.

or models of goods which the seller has held out to the buyer.¹²² The impliedly settled contractual requirements may be more difficult to establish and are sometimes not acknowledged by courts and arbitral tribunals who erroneously focus on the requirements that have been expressly agreed upon. This was the case in a court decision rendered by the German Supreme Court concerning the sale of cobalt sulphate.¹²³ The court found that the quality of the cobalt sulphate had not been expressly agreed in accordance with Art. 35(1) CISG. Nonetheless, the court still decided that the goods were non-conforming according to the contract but referred the non-conformity to Art. 35(2)(a) CISG, stating that the parties had agreed on goods of technical quality.

The issue of establishing the contractual requirements primarily relates to contract formation, which under the Convention is dealt with in Part II in Art. 14 to Art. 24 CISG. Thus, the determination of the contractual requirements depends on the rules on sales contract formation. Nonetheless, the formation of the contract is directly linked to and has a great influence on the conformity assessment under Art. 35(1) CISG. For the purpose of making an adequate examination of the research question, certain aspects relating to the contract formation will be reviewed in this section. These are aspects that may entail problems when assessing the conformity of goods and which may or may not - depending on the circumstances - form part of the contract between the parties. The chosen aspects concerning contract formation are advertisements of the seller, standard and other non-negotiated terms, and samples or models of the goods.

4.2.1.1. Advertisements

It is known that advertisements of the seller may form part of the contractual relationship between the parties, but it is on the other hand uncertain to what extent and thus when such advertisements are to be included in the conformity assessment under Art. 35(1) CISG.¹²⁴

In 2012, a German Court of Appeal decided that a seller's internet advertisement in relation to the sale of a used generator formed part of the contract between the parties.¹²⁵ The seller was located in Germany and the buyer was located in the Czech Republic. The internet

¹²² Austria, Oberlandesgericht Graz (Appellate Court), 09 November 1995; Henschel, *Conformity*, p. 164.

¹²³ Germany, Bundesgerichtshof (Supreme Court), 03 April 1996.

¹²⁴ Schlechtriem/Schwenzer, *Commentary*, p. 595; Schwenger/Hachem/Kee, *Global Sales*, p. 372.

¹²⁵ Germany, Oberlandesgericht Koblenz (Appellate Court), 19 December 2012.

advertisement was commissioned by a sales and trade agency, and according to the advertisement, the generator had an output of 300 KVA. However, the generator could in fact only produce an output of 250 KVA with the common electric supply in Europe. It was solely with the common electric supply in North America that the generator achieved an output of 300 KVA. The court found that the generator did not meet the expressly agreed requirements since the output was lower than advertised, and that the generator therefore was non-conforming in the sense of Art. 35(1) CISG. Furthermore, the court stated that the seller was unable to rely on the fact that the internet advertisement was made by a sales and trade agency - a third party. Thus, the seller was identified with the sales and trade agency engaged by him. In addition, the court emphasized that it was the advertisement and its content that formed the basis of the initial contractual negotiations, and that the content of the advertisement should be attributed to the seller. The seller failed to prove that the buyer became aware of the lower output with the European electric supply during the precontractual negotiations or the buyer's inspection of the generator pursuant to Art. 35(3) CISG.¹²⁶ Even though the court did not expressly state this, the content of the internet advertisement formed part of the contract by an application of Art. 8 CISG. Based on the reasoning of the court, advertisements by the seller may form part of the contractual relationship between the parties if the content of the advertisement forms the basis of the precontractual negotiations. An important aspect of the court decision is that the internet advertisement did not directly originate from the seller. Therefore, sellers must be aware when engaging third parties to advertise on their behalf. The facts of the case do not mention if the sales and trade agency mistakenly provided wrong information in the advertisement - for instance stipulating the output as being 300 KVA instead of 250 KVA. Nonetheless, since the seller is to be identified with such a third party, the assumption of this examination is that these types of mistakes made by a third party do not change the conformity assessment under Art. 35(1) CISG - the seller is liable irrespectively.

Advertisements and other sales materials that do not originate from the seller himself, do not form part of the contractual relationship between the parties, unless the seller knew or could not have been unaware that the buyer attached significance to a specific material in the understanding of the contract.¹²⁷ Thus, this is what applies when the seller is not identified with the potential third party. An example being when the seller is a distributor of another company's

¹²⁶ This aspect of the decision is reviewed in section 4.4. regarding Art. 35(3) CISG.

¹²⁷ Henschel, *Conformity*, p. 110.

products, and the company itself advertises the products. In general, it can therefore be assumed that specifications of goods emerging from an advertisement form part of the contract when the circumstances of the particular case give the buyer the impression that these specifications will be met - and the seller is aware of this.

Quality specifications of goods which derive from a sales catalogue of the seller may also form part of the contract. This has been established in the court decision rendered by the Court of Appeal in Barcelona in 2004 concerning the sale of transit covers.¹²⁸ The seller's sales catalogue specified that the transit covers had a resistance of up to 40 tonnes. Prior to the delivery of the goods the seller conducted a resistance test of the transit covers of which the result was a resistance of up to only 35 tonnes. Upon delivery, the buyer found the goods to be non-conforming and referred to the specifications in the sales catalogue. The court found the transit covers non-conforming based on the deviation in the cover's actual resistance and the resistance that clearly emerged from the sales catalogue. The court presumably referred this breach of contract to Art. 35(1) CISG. The court did not mention any conditions for the incorporation of sales catalogues into the contract. However, the circumstances of the case - including that the content of the catalogue ensued from the seller and that the catalogue formed the basis of the precontractual negotiations - are comparable to the circumstances of the court decision reviewed above made by a German Court of Appeal concerning the advertisements of the seller¹²⁹. Thus, the results of the two reviewed court decisions are essentially consistent.

4.2.1.2. Standard terms and other non-negotiated terms

The contractual requirements may ensue from individually negotiated terms which have been adjusted to fit the particular transaction, but the contractual requirements may also ensue from the standard terms of one or both parties as well as other non-negotiated terms.¹³⁰ Nowadays, the use of standard terms in international trade is of great importance,¹³¹ which is why an examination of standard terms in relation to the conformity assessment has been included in this thesis.

¹²⁸ Spain, Audiencia Provincial de Barcelona (Appellate Court), 28 April 2004.

¹²⁹ Germany, Oberlandesgericht Koblenz (Appellate Court), 19 December 2012.

¹³⁰ Schlectriem/Schwenzer, *Commentary*, p. 595; Schwenger/Hachem/Kee, *Global Sales*, p. 371.

¹³¹ Schlectriem/Schwenzer, *Commentary*, p. 289; Schwenger/Hachem/Kee, *Global Sales*, p. 164.

The Convention does not provide any specific rules regarding the incorporation of standard terms and other non-negotiated terms in the contract.¹³² Nonetheless, the Convention still governs the incorporation of standard terms and does provide tools which can be useful in the determination of whether or not specific standard terms and non-negotiated terms form part of a contract, including an interpretation of the contract in accordance with Art. 8 and 9 CISG.¹³³ Thus, the incorporation may follow from the circumstances of the negotiations between the parties, the existing trade usages between the parties, or international customs. The incorporation issue is however quite complex considering divergent results in CISG Case Law and the different opinions on the issue among scholars.¹³⁴ Therefore, there is no decisive answer to be derived from case law nor theory as to when such terms form part of a contract. The UPICC have rules on standards terms and other surprising terms,¹³⁵ which one may resort to as a tool of gap-filling of the Convention relating to standard terms pursuant to Art. 7(2) CISG.

Chosen examples of court decisions relating to the incorporation issue show that the following factors might be included in the determination of whether or not standard terms are incorporated in the contract: (1) if the content of the terms has been made available for the other party, (2) that the other party has been given a reasonable opportunity to become aware of the content of the terms, (3) the economic importance of the particular transaction, (4) the length of the terms, and (5) the language of the terms.¹³⁶

If standard or non-negotiated terms are found to be incorporated into the contract, then the content of these terms will be included in the conformity assessment under Art. 35(1) CISG whenever the terms contain relevant provisions concerning the conformity of the goods. On the other hand, relevant conformity stipulations in standard terms not forming part of the contractual relationship between the parties will not be included when assessing the conformity of goods pursuant to Art. 35(1) CISG. Examining the incorporation issue of standard and other non-

¹³² Flechtner et al., *Drafting Contracts*, p. 315; Schwenger/Hachem/Kee, *Global Sales*, p. 165; CISG Case Law Digest, p. 80; Schlectriem/Schwenger, *Commentary*, p. 290.

¹³³ Schlectriem/Schwenger, *Commentary*, p. 290; Lookofsky, *CISG*, p. 173; Flechtner et al., *Drafting Contracts*, pp. 315-316; CISG Case Law Digest, p. 80.

¹³⁴ Flechtner et al., *Drafting Contracts*, p. 315; CISG Case Law Digest, p. 80; Schlectriem/Schwenger, *Commentary*, pp. 290-291.

¹³⁵ UPICC (2016) Art. 2.1.19, Art. 2.1.20, Art. 2.1.21 & Art. 2.1.22.

¹³⁶ Germany, Bundesgerichtshof (Supreme Court), 31 October 2001; Austria, Oberster Gerichtshof (Austrian Supreme Court), 17 December 2003; Netherlands, Rechtbank Utrecht (District Court), 21 January 2009; USA, U.S. District Court for the Western District of Pennsylvania, 10 September 2013.

negotiated terms any further is beyond the scope of this thesis. It is, however, important that the parties are aware of the incorporation issue and the uncertainties attached, as such terms may or may not form part of the relevant legal framework under Art. 35(1) CISG. The significance of the incorporation issue on the conformity assessment is underlined by the fact the outcome often redounds to one party's advantage - and hence to the other party's disadvantage.

The possible impact of non-negotiated terms on the conformity assessment under Art. 35(1) CISG is illustrated in a court decision made by the Court of Appeal in Białystok, Poland, in 2017.¹³⁷ A German buyer and a Polish seller concluded multiple contracts regarding the sale of furniture. The contracts expressly stipulated that the goods - as well as the various materials used in the production of the goods - should meet the TL Technical Standards¹³⁸. One of the requirements of the TL Technical Standards is that the furniture is covered with melamine-resin foil. Upon delivery, the goods proved defective as the seller had used a finish foil instead of the melamine-resin foil. The court found that the furniture was non-conforming as it did not meet the TL Technical Standards as agreed upon in the contracts. Since the court referred to what had been agreed in the contracts between the parties, the non-conformity can be attributed to Art. 35(1) CISG, although the court did not expressly refer to this provision. The TL Technical Standards - which are non-negotiated terms - were incorporated in the contract and thus included in the conformity assessment. It is unknown whether the terms were expressly represented in the contracts or merely referred to. Besides referring to the TL Technical Standards, the court further emphasized that the furniture did not fit the particular purpose made known to the seller. The furniture was intended for the German army, directly delivered thereto and hence had to meet the TL Technical Standards, all of which the seller was aware of. At first glance, it may seem unnecessary that the court added comments regarding the particular purpose, since the furniture was already non-conforming when not meeting the specifications of the contracts. The court's use of the expression "particular purpose" suggests the application of Art. 35(2)(b) CISG. Particular purposes of the buyer are however not only exclusively relevant under Art 35(2)(b) CISG, but also as an implied contractual requirement under Art. 35(1) CISG.¹³⁹ Thus, the seller has a duty under both Art. 35(1) CISG regarding the contractual

¹³⁷ Poland, Sąd Apelacyjny w Białymstoku (Appellate Court), 18 April 2017.

¹³⁸ Technische Lieferbedingungen: A summary of technical and technical-organisational requirements which have to be fulfilled for defence materiel to be delivered or other technical supplies or services to be provided to the German army (Bundeswehr).

¹³⁹ Neumann, *Features of Art. 35 CISG*, p. 83; Henschel, *Conformity*, pp. 196-197.

framework and Art. 35(2)(b) CISG regarding the legal default framework to comply with the particular purpose of the buyer if such a purpose has been made known to the seller or the seller could not be unaware thereof pursuant to Art. 8 CISG.¹⁴⁰ Therefore, there is a sphere of application where Art. 35(1) CISG and Art. 35(2)(b) CISG is equivalent.¹⁴¹ The court did not expressly mention neither Art. 35(1) CISG or Art. 35(2)(b) CISG when addressing the particular purpose of the buyer. By not doing so, the court might have rendered the furniture non-conforming based on the obligation of the seller to comply with the particular purpose made known to him under both Art 35(1) CISG and Art. 35(2)(b) CISG. This is however unclear from the reasoning of the court's decision, which indicates that the court took both the non-compliance with the TL Technical Standards as well as the particular purpose into consideration on an equal basis. Another explanation might be that the court wanted to clarify that the goods were non-conforming no matter if the non-negotiated terms - the TL Technical Standards - were incorporated into the contract or not. The fact that the court did not distinguish between Art. 35(1) CISG and Art. 35(2)(b) CISG concerning the particular purpose is in line with a previous court decision rendered by a French Appellate Court.¹⁴²

4.2.1.3. Samples or models

Contractual requirements pursuant to Art. 35(1) CISG may also ensue from implied obligations of the seller derived from samples or models held out to the buyer, which is another way of describing the goods of the specific transaction.¹⁴³ This kind of contractual requirement is closely connected with the default requirement in Art. 35(2)(c) CISG.¹⁴⁴

Whenever a sample or model provided by the seller forms the basis of the contract between the parties, the specifications of the sample or model must be taken into consideration when assessing the conformity of the goods pursuant to Art. 35(1) CISG. This has been established in the court decision made by the U.S. Court of Appeals, 2nd Circuit in 1995.¹⁴⁵ The contract was based on a sample compressor which had been provided to the buyer by the seller. The seller delivered 10,800 compressors which were less efficient than the sample compressor and thus non-conforming to the contract.

¹⁴⁰ Neumann, *Features of Art. 35 CISG*, p. 83; Henschel, *Conformity*, pp. 196-197.

¹⁴¹ Neumann, *Features of Art. 35 CISG*, pp. 87-88.

¹⁴² France, Cour d'appel de Grenoble (Appellate Court), 13 September 1995.

¹⁴³ Schwenger/Hachem/Kee, *Global Sales*, p. 378.

¹⁴⁴ See section 4.3.3.

¹⁴⁵ USA, U.S. Court of Appeals (2nd Circuit), 06 December 1995.

However, it is not only samples or models provided by the seller that may impose an implied contractual obligation. Whenever the buyer provides the seller with a sample or model - e.g. in order to demonstrate the expected requirements of the goods - the characteristics of the sample or model form part of the contract according to Art. 35(1) CISG unless the seller points out to the buyer that he cannot or will not meet these characteristics.¹⁴⁶ This is also illustrated in case law,¹⁴⁷ including the decision rendered by COMPROMEX in 1996.¹⁴⁸ The seller was obliged to deliver boxes of tinned fruit to the buyer, who had provided the seller with sample boxes of packaging. Thus, the goods had to be packaged accordingly. After delivery, the buyer claimed that the goods were not packaged in the manner required by the sample boxes. COMPROMEX found that the goods were non-conforming pursuant to Art. 35 CISG. Albeit not directly referring to Art. 35(1) CISG, COMPROMEX stated that the seller had an obligation to dispatch goods contained or packaged in the manner required by the contract.

4.2.2. Quantity

The first part of the conformity assessment under Art. 35(1) CISG relates to the quantity of the goods required by the contract. Normally, the quantity of the goods is specified in the contract by for instance number, volume, weight or unit, but the quantity can be specified in any given way, e.g. by using broad phrases.¹⁴⁹ If the seller delivers more or less than the specified quantity it constitutes a non-conformity according to Art. 35(1) CISG.¹⁵⁰ On the surface and in most cases, the conformity assessment in relation to the quantity of the goods therefore seems fairly easy to make. As an illustration of the immediate simplicity, a non-conformity was established in a German court decision, where the seller delivered less than the quantity of 1,000 tonnes of fresh cucumbers as stipulated in the contract.¹⁵¹ However, depending on the type of goods and the quantity specification, a certain variance in the quantity may be allowed, e.g. an allowance of +/- 5% of the weight of the goods, and under these circumstances a variance within the allowed threshold does not constitute a lack of conformity pursuant to Art. 35(1) CISG.¹⁵² Whenever the parties stipulate the quantity of the goods by imprecise definitions such as

¹⁴⁶ Lookofsky, *CISG*, pp. 77-78.

¹⁴⁷ Austria, Oberlandesgericht Graz (Appellate Court), 09 November 1995.

¹⁴⁸ Mexico, Comisión para la Protección del Comercio Exterior de México (COMPROMEX) (Arbitration), 29 April 1996.

¹⁴⁹ Henschel, *Conformity*, p. 151; Schwenger/Hachem/Kee, *Global Sales*, p. 374.

¹⁵⁰ Schlectriem/Schwenger, *Commentary*, p. 595; Henschel, *Conformity*, p. 151.

¹⁵¹ Germany, Oberlandesgericht Düsseldorf (Appellate Court), 8 January 1993.

¹⁵² Schwenger/Hachem/Kee, *Global Sales*, p. 376; Brunner/Gottlieb, *Commentary*, p. 229.

“around”, “more or less”, etc., the conformity assessment is more difficult to make, and the determination of whether or not the delivered quantity is within the tolerance allowed must be decided by an interpretation of the contract pursuant to Art. 8 CISG.¹⁵³

The quantity of the goods is not only to be established by reference to the contract and an interpretation thereof in accordance with Art. 8 CISG. In some cases, the quantities are instead based on certain trade usages or practices established between the parties, which may allow for variances in the quantity.¹⁵⁴ Such trade usages between the parties must be interpreted in accordance with Art. 9 CISG.¹⁵⁵ Furthermore, discrepancies based on trade usages in a particular trade supersede any quantities agreed upon in the contract and thus do not constitute a lack of conformity.¹⁵⁶ This has been established by the ICC International Court of Arbitration in Vienna in a case concerning the sale of books.¹⁵⁷ First, the arbitral tribunal stated that trade usages must be taken into consideration when interpreting the contract. Regarding the particular case and branch of trade, the arbitral tribunal stated that up to 5% of discrepancies of the goods, books, are to be tolerated by the parties. In addition, the arbitral tribunal emphasized that these discrepancies especially must be accepted when the margin “*is made up within the overall delivery time by subsequent deliveries*”. From the decision it can be deduced that courts and arbitral tribunals will have a bigger tolerance for discrepancies in quantity in cases where there are subsequent deliveries in which the seller makes up for any previous smaller variances. Furthermore, the reasoning of the ruling and the view in theory on this matter, illustrates how impliedly settled contractual requirements form part of the legal framework under Art. 35(1) CISG on equal terms as expressly settled contractual requirements. Nonetheless, in the particular case there was an expressly settled requirement as to the quantity, and the arbitral tribunal found that the concerned trade usage overruled the express term agreed upon in the contract. This is indeed an uncertainty that parties must be aware of - especially taking into account that contractual specifications in theory are to be prioritised over trade usages.¹⁵⁸ It is therefore uncertain if buyers in certain branches of trade simply have to accept discrepancies in

¹⁵³ Schwenger/Hachem/Kee, *Global Sales*, p. 376; Schlechtriem/Schwenger, *Commentary*, p. 595.

¹⁵⁴ Schlechtriem/Schwenger, *Commentary*, p. 595; Henschel, *Conformity*, p. 151; Schwenger/Hachem/Kee, *Global Sales*, p. 376; Canada, Ontario Superior Court of Justice, 31 August 1999.

¹⁵⁵ Henschel, *Conformity*, p. 151; Schlechtriem/Schwenger, *Commentary*, p. 595; Brunner/Gottlieb, *Commentary*, p. 229.

¹⁵⁶ Schlechtriem/Schwenger, *Commentary*, p. 595; Brunner/Gottlieb, *Commentary*, p. 229; Henschel, *Conformity*, pp. 151-152.

¹⁵⁷ International Court of Arbitration, International Chamber of Commerce, August 1999, no. 9083.

¹⁵⁸ Lookofsky, *CISG*, p. 72.

deliveries by the seller if there are subsequent deliveries. The legal status appears blurry and it remains unclear how the parties should navigate this issue when trade usages seemingly supersede the expressly settled contractual requirements.

Cases of under-delivery fall under the scope of Art. 35(1) CISG and must be considered as constituting a non-conformity.¹⁵⁹ Therefore, under-delivery does not lead to a failure to deliver or a late delivery according to CISG terminology, which on the contrary is the scenario in some domestic systems.¹⁶⁰ There is nonetheless a lower limit, and in cases where no goods have been delivered at all - resembling an under-delivery of minus 100% - there is a failure to deliver and not a non-conformity regarding the quantity.¹⁶¹ Thus, the application of Art. 35(1) CISG on variances in quantity presumes that at least some goods have been delivered to the buyer.

4.2.3. Quality

The contractual requirements concerning the quality of the goods refer to both the physical condition of the goods as well as any relevant factual and legal factors.¹⁶² Therefore, the parties can agree on endless kinds of quality requirements. Examples of non-compliance with quality requirements concerning the goods' physical condition are chaptalized wine,¹⁶³ milk with a rancid taste,¹⁶⁴ and flanges of inferior quality.¹⁶⁵ Nowadays, non-physical quality requirements are of greater importance,¹⁶⁶ and these requirements often have an impact on the price of the goods, e.g. organically produced foods versus non-organically produced foods.¹⁶⁷ The inclusion of non-physical features in Art. 35(1) CISG means that goods can physically conform with the contract, but still be deemed non-conforming based on other contractual quality requirements such as ethical principles or public law regulations. Another relevant example of non-physical features is the origin of the goods.¹⁶⁸ There are many different reasons as to why the origin of the goods is of great importance for the buyer, including the avoidance of goods from conflict

¹⁵⁹ Schlectriem/Schwenzer, *Commentary*, p. 596; Henschel, *Conformity*, pp. 154-155; Schwenger/Hachem/Kee, *Global Sales*, p. 375; Brunner/Gottlieb, *Commentary*, p. 229.

¹⁶⁰ Henschel, *Conformity*, p. 154.

¹⁶¹ Henschel, *Conformity*, p. 155.

¹⁶² Schlectriem/Schwenzer, *Commentary*, p. 596; Henschel, *Conformity*, p. 156; Brunner/Gottlieb, *Commentary*, p. 230; Schwenger/Hachem/Kee, *Global Sales*, p. 377.

¹⁶³ France, Cour de Cassation (Supreme Court), 23 January 1996.

¹⁶⁴ Germany, Bundesgerichtshof (Supreme Court), 09 January 2002.

¹⁶⁵ Germany, Landgericht Wuppertal (District Court), Germany, 11 March 2020.

¹⁶⁶ Schwenger, *Physical Features on the Wane?*, pp. 103 & 112.

¹⁶⁷ Schwenger, *Physical Features on the Wane?*, p. 105.

¹⁶⁸ Schlectriem/Schwenzer, *Commentary*, p. 596; Schwenger/Hachem/Kee, *Global Sales*, p. 379.

zones,¹⁶⁹ the compliance with health regulations,¹⁷⁰ and the wish to support local farmers.¹⁷¹ The reason for the buyer's emphasis on the origin may or may not have been made clear to the seller, but regardless of the underlying reason, the seller has to comply with such requirements. In a German court decision rendered by the Appellate Court in Zweibrücken a seller's non-compliance with the agreed origin was considered.¹⁷² The seller was obliged to deliver components originating from a specific German manufacturer. However, because of a subsequent change in the specifications of the goods required by the buyer, the seller could not deliver components from the German manufacturer. Instead, the seller delivered components originating from Russian and Turkish manufacturers and failed to inform the buyer in this regard. At some point after the delivery, the buyer discovered the wrong origin of the goods. The court found that the goods were non-conforming pursuant to Art. 35 CISG. The result of the decision emphasizes the importance of non-physical features, and that sellers must be aware of such requirements, even in situations where subsequent changes to the contract requested by the buyer hinder the seller's delivery of goods of the original origin agreed upon.

When determining if the quality of the goods conforms to the contract, the only condition is that the quality of the goods differs from what has been agreed upon.¹⁷³ Thus, even in situations where goods of a higher quality are delivered, a non-conformity regarding the quality can be established.¹⁷⁴ It is not relevant whether any discrepancy in quality has an impact on the usability or value of the goods.¹⁷⁵ However, if variances in quality have such consequences, it will be of relevance to include these circumstances in the assessment of the conformity of the goods under the default legal framework in Art. 35(2) CISG - for instance, the examination in relation to Art. 35(2)(a) CISG concerning the ordinary use of goods.¹⁷⁶

Whenever the buyer has chosen the specific type of the goods, the influence of the particular choice made by the buyer on the quality and other circumstances will be included in the

¹⁶⁹ Schwenger/Hachem/Kee, *Global Sales*, p. 379.

¹⁷⁰ Schwenger, *Physical Features on the Wane?*, p. 103.

¹⁷¹ Schwenger/Hachem/Kee, *Global Sales*, p. 379.

¹⁷² Germany, Oberlandesgericht Zweibrücken (Appellate Court), 02 February 2004.

¹⁷³ Schlectriem/Schwenger, *Commentary*, p. 596; Henschel, *Conformity*, p. 159; Schwenger/Hachem/Kee, *Global Sales*, p. 377.

¹⁷⁴ Schlectriem/Schwenger, *Commentary*, p. 596; Henschel, *Conformity*, p. 159; Schwenger/Hachem/Kee, *Global Sales*, p. 377.

¹⁷⁵ Schlectriem/Schwenger, *Commentary*, p. 596; Henschel, *Conformity*, p. 158.

¹⁷⁶ Henschel, *Conformity*, p. 158.

conformity assessment. This has been decided by the Supreme Court of the Czech Republic in 2006.¹⁷⁷ The buyer ordered carpets of the “*ADOS type*”. The contract further specified the purposes for the intended use of the carpets. The Appellate Court found that the quality of the goods was expressly agreed upon in the contract by the reference to the exact business name of the carpets, the “*ADOS type*”, cf. Art. 35(1) CISG. The seller delivered the correct type of carpets. Nonetheless, after the carpets were laid down the buyer found them to be less durable and worn out due to defects in the quality and therefore non-conforming according to the contract. The Appellate Court stated, that if the specific type of carpets ordered by the buyer, was not durable by their own typology, this did not implicit mean that the seller had delivered non-conforming goods. Thus, the Appellate Court found the carpets to be conforming in relation to the quality requirements, cf. Art. 35(1) CISG. The buyer appealed the decision to the Supreme Court and further argued that the carpets were non-conforming in relation to Art. 35(2)(b) CISG as the seller was aware of the particular purpose for the use of the carpets. In this regard, the Supreme Court came to the result that Art. 35(2) CISG was not applicable. The seller could not be responsible for any defects regarding goods whose typology or parameters had been decided by the buyer. Therefore, at least as a starting point, in cases where a non-conformity relates to circumstances which the buyer himself has had the full influence on, such as choosing the specific type of the goods, the seller is not liable for non-conformities which can be ascribed to these circumstances. Furthermore, the inapplicability of Art. 35(2) CISG demonstrates - in line with the abovementioned introductory remarks on Art. 35(1) CISG - that the requirements of the contract are to be prioritised over the default rules in Art. 35(2) CISG. However, as previously stated in section 4.2.1.2., any particular purpose or intended use of the buyer may also be an implied contractual requirement under Art. 35(1) CISG.

Under certain circumstances the contractual quality requirements agreed upon by the parties can be set aside. If discrepancies in quality are allowed in a particular trade sector such trade usages overrule whatever has been stipulated as to quality in the contract. Therefore, when such quality discrepancies are allowed according to a particular trade usage, no non-conformities can be established on the basis of these.¹⁷⁸ This is in accordance with the interpretation rules under Art. 9 CISG.

¹⁷⁷ Czech Republic, Nejvyšší soud České republiky (Supreme Court), 29 March 2006.

¹⁷⁸ Schlectriem/Schwenzer, *Commentary*, p. 597; Brunner/Gottlieb, *Commentary*, p. 230.

4.2.4. Description

The contractual description of the goods is established by taking all circumstances of the contract into consideration.¹⁷⁹ Thus, it is not only the stipulations in the contract itself, but also other circumstances such as the intentions of the parties, cf. Art. 8(1) CISG, and the negotiations between the parties prior to the conclusion of the contract, cf. Art. 8(3) CISG.¹⁸⁰ Whenever the goods differentiate from the contractual description, there is a non-conformity according to Art. 35(1) CISG. As is also the case with the contractual quality requirements, there is no condition as to how obvious or extensive the variance in description has to be - the mere existence of a difference in the description constitutes a breach of the contract in the sense of Art. 35(1) CISG.¹⁸¹ Nonetheless, this is not without limitations; circumstances derived from either Art. 8 CISG or 9 CISG may allow for a difference in description, for instance on the basis of previous transactions between the parties.¹⁸² Also, whenever the express description is met, there may be an implied requirement as to the description as well. This is illustrated in a court decision rendered by a German District Court.¹⁸³ The seller delivered PVC granules with a less titanium dioxin level than previous deliveries but met the express requirements as to the description. However, the court found that the seller should have delivered PVC granules with a titanium dioxin level corresponding to the previous deliveries. The court merely referred to Art. 35 and did not mention Art. 8 CISG, although the decision must be interpreted as being made on the basis of Art. 8 CISG.

If the seller delivers goods that are different from the contractual description but not defective, the delivery of a so-called *aliud*¹⁸⁴, the seller breaches the contract in terms of Art. 35(1) CISG.¹⁸⁵ The Convention does not make a distinction between the delivery of different goods, an *aliud*, and the delivery of non-conforming goods,¹⁸⁶ and this view is also supported by court practice.¹⁸⁷

¹⁷⁹ Henschel, *Conformity*, p. 161.

¹⁸⁰ The last-mentioned was emphasized by the court in the following court decision: USA, U.S. District Court for the Northern District of Illinois, 27 October 1998.

¹⁸¹ Schlectriem/Schwenzer, *Commentary*, p. 597.

¹⁸² Henschel, *Conformity*, pp. 163-165.

¹⁸³ Germany, Landgericht Paderborn (District Court), 25 June 1996.

¹⁸⁴ *Aliud* is latin and means the delivery of a different thing.

¹⁸⁵ Brunner/Gottlieb, *Commentary*, p. 230; Schlectriem/Schwenzer, *Commentary*, p. 597; Schwenzer/Hachem/Kee, *Global Sales*, p. 383.

¹⁸⁶ Schlectriem/Schwenzer, *Commentary*, p. 598; Henschel, *Conformity*, pp. 149-150.

¹⁸⁷ Germany, Bundesgerichtshof (Supreme Court), 03 April 1996; Germany, Oberlandesgericht Düsseldorf (Appellate Court), 10 February 1994; Spain, Tribunal Supremo (Supreme Court), 17 January 2008.

Therefore, the delivery of an *aliud* is not to be considered a failure to deliver, but instead as a non-conformity pursuant to Art. 35(1) CISG. Taking into account the wording of Art. 35 CISG's predecessor, Art. 33 ULIS, which expressly referred to the delivery of different goods in Art. 33(1)(b) ULIS¹⁸⁸, it may at first glance seem erroneous that Art. 35(1) CISG should include the delivery of an *aliud* without such an express reference. The exclusion of the reference does however not exclude the coverage of the delivery of an *aliud*, because such deliveries still fall under the scope of Art. 35(1) CISG in terms of the description.¹⁸⁹ In situations where the delivered goods differ from the contractual description to a lesser extent, it still constitutes the delivery of an *aliud*. This has been established in a court decision rendered by the Court of Appeal in Düsseldorf, where the seller delivered textiles in the wrong colour.¹⁹⁰ The court found that this was not a failure to deliver, but instead a delivery of an *aliud*, leading to a partial non-performance by the seller.

In general, whenever a non-conformity relating to the description of the goods exists, a derived non-conformity relating to contractual quality requirements often exists simultaneously - if such quality requirements have been agreed upon. The fact that goods under these circumstances can be non-conforming according to both the description and quality at the same time, is correct since goods of the wrong description frequently have a derived impact on the quality of the goods. This is also confirmed by court practise. An example is a court decision rendered by a German District Court in 2020. The buyer ordered transition flanges of the material quality "P355N". When the seller delivered goods that did not correspond to the description "P355N" this also affected the quality. The goods were deemed non-conforming pursuant to Art. 35(1) CISG. Under circumstances similar to those of the reviewed case, it may be difficult to clearly distinguish between the description and the quality requirements. On the other hand, the seller's non-compliance with quality requirements, whenever the contract also withholds requirements concerning the description, does not implicitly derive a non-compliance with the description.

However, in some cases it is solely the differentiating description that deems the goods non-conforming without taking into account or assessing the possible effect of the different

¹⁸⁸ Art. 33(1)(b) ULIS states "*The seller shall not have fulfilled his obligation to deliver the goods where he has handed over goods which are not those to which the contract relates or goods of a different kind*".

¹⁸⁹ Schlectriem/Schwenzer, *Commentary*, p. 598; Henschel, *Conformity*, p. 171; Brunner/Gottlieb, *Commentary*, p. 230.

¹⁹⁰ Germany, Oberlandesgericht Düsseldorf (Appellate Court), 10 February 1994.

description on the quality. This is illustrated in a court decision from the Republic of South Korea.¹⁹¹ The contract stipulated that the seller should deliver goods of the following description: “*iPhone 5 Refurbish model No. FD298ZA/A*”. The description of the goods was of great importance as it referred to the country-code of Singapore. However, the seller delivered goods of the “*iPhone 5 Refurbish model No. FD297KH/A*” description, which referred to the Korean country-code. By delivering goods of another description, the seller had delivered non-conforming goods by virtue of Art. 35 CISG. Despite not referring to Art. 35(1) CISG, the court did assess whether the goods were conforming to the contract between the parties. Furthermore, the court referred to the duty of the seller to deliver goods of the quantity, quality and description required by the contract. Therefore, the non-conformity is related to contractual requirements, cf. Art. 35(1) CISG.

If a party enters into a contract where the description of the goods is written in another language than his own or the otherwise applied language of the negotiations, it is the interpretation of the words in the language that has been written that will apply.¹⁹² Therefore, the parties must be aware of the possible different meanings of specific words due to language barriers, which may have a decisive impact on the conformity assessment. This was the case in the decision rendered by the Danish Maritime and Commercial Court in 2002,¹⁹³ where the parties entered into a contract regarding the sale of mackerel based on a description of the goods in which the German term “*Bastardmakrele*” and the Latin term for the same were used. In the following confirmation of the order the English term “*mackerel*” was used without including the German or Latin terms. However, it appeared that the two descriptions of the goods had a very different meaning regarding the quality of the mackerel. Upon delivery, the goods were deemed unfit for human consumption. The buyer claimed that the goods were non-conforming to the contractual designation and therefore of inferior quality. The court stated that the parties in a prior dealing had used the Latin term. Furthermore, the use of Latin term corresponds to the trade usage of fish merchants. An interpretation of the Latin term leads to the meaning of fish which are of poorer quality than the English term “*mackerel*”, and that this quality of fish is used for animal feed.¹⁹⁴ Therefore, the delivered fish which was of the description “*Bastardmakrele*” and the Latin term was conforming to contract. The court did not refer to Art. 35(1) CISG, but the decision

¹⁹¹ Republic of South Korea, Appellate Court Seoul, 20 December 2016.

¹⁹² Henschel, *Conformity*, p. 107.

¹⁹³ Denmark, SØ- og Handelsretten (Maritime and Commercial Court), 31 January 2002.

¹⁹⁴ Henschel, *Conformity*, p. 107.

is in line with this provision. Furthermore, the inclusion of the trade usage corresponds with the interpretation rule set forth in Art. 9 CISG.

4.2.5. Containers and packaging

If the contract withholds any specifications regarding the manner of which the goods must be contained or packaged, the seller has a duty under Art. 35(1) CISG to comply with these specifications on an equal basis with the requirements regarding the quantity, quality and description of the goods.¹⁹⁵ In this regard the Convention differs from the rules in certain domestic laws, where the packaging of the goods is a supplementary duty.¹⁹⁶ A distinction between the main duties and supplementary duties must therefore be avoided while assessing the conformity of goods under Art. 35(1) CISG.

The wording of the provision is “*contained or packaged*”. Even though the use of two different words indicates that the meaning of the words differentiates, this cannot be established, and the words are to be considered as synonymous.¹⁹⁷ A relevant question is whether the labelling of the goods is encompassed in the phrase “*contained or packaged*”. The Appellate Court in Grenoble, France, considered this particular issue in 1995.¹⁹⁸ A French buyer bought cheese from an Italian seller. The packaging of the delivered cheese was not labelled which led to a dispute between the parties. Due to the missing labelling, the French buyer was unable to sell the goods since they did not meet the marketing regulations in France. There was no express contractual requirement concerning the labelling of the cheese. The court found that since the parties had been in an ongoing business relationship for some time, the seller knew that the cheese was destined for the French market and that the order should meet the marketing regulations of France. These facts imposed an implied obligation on the seller to comply with the market regulations of the French market pursuant to Art. 8(1) CISG. Therefore, the court rendered the goods non-conforming due to the missing labelling on the packaging. The court decision can be interpreted as the labelling being encompassed in the phrase “*contained or packaged*”. This interpretation of the decision is seemingly correct, as the labelling is usually an

¹⁹⁵ Schlectriem/Schwenzer, *Commentary*, p. 598.

¹⁹⁶ Schlectriem/Schwenzer, *Commentary*, p. 598; Henschel, *Conformity*, pp. 182-183; Schwenger/Hachem/Kee, *Global Sales*, pp. 383-384.

¹⁹⁷ Henschel, *Conformity*, p. 183.

¹⁹⁸ France, Cour d'appel de Grenoble (Appellate Court), 13 September 1995.

integrated part of packaging or containers.¹⁹⁹ However, the decision may also be interpreted in other ways, e.g. that the goods did not comply with the description, cf. Art. 8(1) CISG.

In general, the conformity assessment in relation to the manners in which the goods are contained or packaged deviates from the assessment regarding the quantity, quality and description in terms of the influence of previous transactions between the parties. If the goods in previous deliveries from the seller to the buyer were contained or packaged in a specific manner, this does not impose a duty on the seller to deliver the goods in the same manner regarding containers or packaging in any subsequent transactions between the parties.²⁰⁰ This follows from the court decision made by the German Appellate Court in Saarbrücken in 2007.²⁰¹ During the delivery, the goods had been damaged and the buyer claimed that the packaging of the goods was non-conforming to the contract under Art. 35 CISG. The parties had not expressly agreed on any contractual requirements regarding the packaging of the goods, but they had previously concluded transactions with each other. The court reasoned that “*The mere assertion that previous deliveries by [Seller] had been packaged in the same manner is not sufficient to assume an implied agreement of such packaging...*”. The reasoning of the court should however not be interpreted in a way where only expressly settled contractual requirements concerning containers and packaging of the goods constitute a non-conformity under Art. 35(1) CISG, and hence excluding any impliedly settled requirements. Instead, the decision should be interpreted in a way where such previous deliveries alone do not amount to an implied agreement between the parties. An example is when a seller provides the buyer with a sample, where the goods are contained in a specific manner. This could impose an implied duty on the seller to deliver the goods contained in the same specific manner.²⁰² Parties must however be aware of the fact that the scope of application of implied obligations concerning the containers and packaging of the goods is narrower than when it comes to requirements of the quantity, quality and description of the goods. The reason for this particular difference may be that courts and arbitral tribunals consider the duty of the seller to package and contain the goods as agreed as not being directly linked to the goods and therefore not equally as important. The inequality however seems unjustified since the containers and packaging of the goods may be an integral part of the goods and hence of equal importance as the content inside - this is for example the case concerning

¹⁹⁹ Henschel, *Conformity*, p. 187.

²⁰⁰ Schlectriem/Schwenzer, *Commentary*, p. 598.

²⁰¹ Germany, Oberlandesgericht Saarbrücken (Appellate Court), 17 January 2007.

²⁰² Mexico, Comisión para la Protección del Comercio Exterior de México (COMPROMEX), 29 April 1996.

goods such as perfume and food.²⁰³ Often, it is not even possible to clearly segregate the actual goods and the containers or packaging of the goods.²⁰⁴

In a recent court decision from 2019 concerning the sale of machine parts, the German Appellate Court in Hamburg found that the seller had not fulfilled his obligations as to the packaging of the goods.²⁰⁵ During the transportation overseas the machine parts were damaged by water which was ascribable to the fact that the goods had been packaged in an inadequate manner by the transportation company. The court referred to both Art. 35(1) CISG and Art. 35(2)(d) CISG.²⁰⁶ It seems unnecessary that the court referred to both sections of Art. 35 CISG. If the contractual requirements regarding the packaging of the goods - no matter if these requirements are expressly or impliedly agreed upon - lead to a non-conformity, there is no reason for the court to apply Art. 35(2)(d) CISG as well. This may indicate that courts and arbitral tribunals are reluctant when it comes to imposing certain implied obligations on the seller under Art. 35(1) CISG, which may be why the reference to Art. 35(2)(d) CISG was made.

4.3. The default legal framework – Art. 35(2) CISG

Based on the introductory remarks in section 4.1. this section will concern examination of the default legal framework of the conformity assessment for the international sale of goods contracts.

If the conformity of the goods cannot be assessed by the contractual framework pursuant to Art. 35(1) CISG because the contract does not include any relevant requirements - or because the contractual requirements are inadequate concerning the particular issue - the conformity must be assessed by applying the default legal framework in Art. 35(2) CISG.²⁰⁷ Contrary to Art. 35(1) CISG regarding the subjective conformity of the goods pursuant to the contract, Art. 35(2) CISG sets out objective standards for the conformity of goods.²⁰⁸ These objective standards supplement the contractual requirements in Art. 35(1) CISG and emphasize that international

²⁰³ Henschel, *Conformity*, p. 183.

²⁰⁴ Henschel, *Conformity*, p. 185.

²⁰⁵ Germany, Oberlandesgericht Hamburg (Appellate Court), 24 January 2019.

²⁰⁶ In the decision the court wrongly cites Art. 35(3)(d) CISG.

²⁰⁷ Schlectriem/Schwenzer, *Commentary*, p. 599; Brunner/Gottlieb, *Commentary*, p. 232; Schwenzer/Hachem/Kee, *Global Sales*, p. 385; Felemegas, *International Approach*, p. 168; Bernstein, *CISG Europe*, p. 83.

²⁰⁸ Schlectriem/Schwenzer, *Commentary*, p. 599; Brunner/Gottlieb, *Commentary*, p. 232.

buyers nowadays justifiably can expect goods which possess a certain minimum of fundamental specifications.²⁰⁹

According to the wording of Art. 35(2) CISG, the general standards apply “*except where the parties have agreed otherwise*”. The provision is therefore not mandatory and can be excluded by the parties in whole or in part, cf. Art. 6 CISG.²¹⁰ Nonetheless, the wording of this part of Art. 35(2) CISG is ambiguous and can be interpreted in different ways. It is therefore discussed by various scholars to what extent Art. 35(2) CISG applies in situations where the parties have an agreement regarding the conformity according to Art. 35(1) CISG - and thus, if such contractual agreement should be considered equivalent with the parties having “*agreed otherwise*”.²¹¹ There are generally two different views on this particular matter, which is governed by the rules of interpretation of the Convention.²¹² The first view is that Art. 35(2) CISG solely applies if the parties have no express agreement relating to the conformity at all - a so-called “either/or rule”.²¹³ The second view is that Art. 35(2) CISG is a gap-filling rule that applies cumulatively with the parties’ agreement - unless where the provision is *per se* excluded or in conflict with the contract pursuant to Art. 6 CISG.²¹⁴ The discussion of the scope of application also derives from different domestic legal systems. Some continental European courts are in favour of the first view where Art. 35(2) CISG does not apply at all if the parties have an agreement for the purpose of Art. 35(1) CISG.²¹⁵ On the other hand, American courts especially share the understanding of the cumulative view of Art. 35(2) CISG,²¹⁶ but also European courts and arbitral tribunals have applied Art. 35(2) CISG in this manner.²¹⁷ It appears that most scholars as well as courts and arbitral tribunals are in favour of the second view where Art. 35(2) CISG applies cumulatively with Art. 35(1) CISG, which hence is considered the prevailing view. Therefore, it is the second

²⁰⁹ Lookofsky, *CISG*, p. 84.

²¹⁰ CISG Case Law Digest, p. 141, para. 5.

²¹¹ Flechtner, *Decisions on Conformity*, p. 188.

²¹² CISG Case Law Digest, p. 141, para. 5.

²¹³ Flechtner, *Decisions on Conformity*, p. 188.

²¹⁴ Flechtner, *Decisions on Conformity*, p. 188. In support of this view: Schlectriem/Schwenzer, *Commentary*, pp. 599-600; Neumann, *Features of Art. 35 CISG*, p. 3; Lookofsky, *CISG*, p. 84.

²¹⁵ Schlectriem/Schwenzer, *Commentary*, p. 599; Czech Republic, Nejvyšší soud České republiky (Supreme Court), 29 March 2006; Germany, Landgericht Aschaffenburg (District Court), 20 April 2006; Germany, Oberlandesgericht Koblenz (Appellate Court), 21 November 2007; Germany, Bundesgerichtshof (Supreme Court), 08 March 1995; Germany, Landgericht Coburg (District Court), 12 December 2006.

²¹⁶ Schlectriem/Schwenzer, *Commentary*, p. 599; USA, U.S. District Court for the Western District of Pennsylvania, USA, 25 July 2008.

²¹⁷ Arbitration Institute of the Stockholm Chamber of Commerce (SCC), 05 June 1998; Denmark, Ad hoc Arbitral Tribunal, 10 November 2000; Austria, Oberster Gerichtshof (Supreme Court), 05 July 2019.

view that will be pursued further in this thesis. There is however no definite answer to the applicability-question of Art. 35(2) CISG. The miscellaneous use of Art. 35(2) CISG by the courts and arbitral tribunals hinders the uniformity of the Convention on this issue and hence the legal status of the provision's scope of applicability is uncertain.

Art. 35(2) CISG comprises four sub-provisions: (1) Art. 35(2)(a) CISG which requires that the goods are fit for ordinary purposes, (2) Art. 35(2)(b) CISG concerning the goods' compliance with a particular purpose of the buyer, (3) Art. 35(2)(c) CISG which requires that the goods correspond to any samples or models held out by the seller, and (4) Art. 35(2)(d) CISG prescribing that the goods must be contained or packaged in a usual or adequate manner. The four sub-provisions can be divided into two groups. Art. 35(2)(a) CISG and Art. 35(2)(d) CISG state obligations which apply to all contracts unless the applicability is excluded by the parties' agreement, whereas the obligations in Art. 35(2)(b) CISG and Art. 35(2)(c) CISG merely apply in transactions where certain facts are present and thus not to all contracts.²¹⁸

Under certain circumstances, it may occur that the different sub-provisions of Art. 35(2) CISG contradict one another, for instance when a particular purpose excludes the ordinary purposes of the goods. When such contradictions exist a hierarchy of the obligations under Art. 35(2) CISG must be determined. This hierarchy is essential and to be determined on the basis of the intentions of the parties, cf. Art. 8 CISG, and possible trade usages, cf. Art. 9 CISG.²¹⁹ However, as a general rule, the hierarchy of the sub-provisions is as follows: (1) Art. 35(2)(c) CISG, (2) Art. 35(2)(b) CISG, and (3) Art. 35(2)(a) CISG and Art. 35(2)(d) CISG, which applies consistently.²²⁰

4.3.1. Fitness for ordinary purposes

According to Art. 35(2)(a) CISG, the goods must be fit for the purposes for which goods of the same description would ordinarily be used. This fundamental rule is the most important sub-provision of Art. 35(2) CISG in practice since it establishes the obvious, but often implicit; that the goods must be fit for their ordinary purposes.²²¹ Consequently, the parties frequently fail to stipulate the intended - obvious - use of the goods, e.g. that charcoal should be used for grilling

²¹⁸ CISG Case Law Digest, p. 141, para. 6; Flechtner, *Decisions on Conformity*, p. 189.

²¹⁹ Schlectriem/Schwenzer, *Commentary*, p. 600.

²²⁰ Schlectriem/Schwenzer, *Commentary*, p. 600.

²²¹ Lookofsky, *CISG*, p. 84; Henschel, *Conformity*, p. 190; Felemegas, *International Approach*, p. 168.

food,²²² and that coffee machines should be used for making coffee.²²³ Therefore, Art. 35(2)(a) CISG entitles buyers to expect a certain minimum of usability of the goods and it is thus not necessary for the buyers to stipulate the use of the goods if this corresponds to the ordinary purposes.²²⁴ However, the unnecessariness does not mean that it is not a good idea for the parties to stipulate the use of the goods in the contract. Art. 35(2)(a) CISG corresponds to many rules in domestic laws on this specific issue and the provision is therefore widely accepted - and may even be considered as a codification of a basic principle in the international sale of goods.²²⁵

Art. 35(2)(a) CISG refers to goods “*of the same description*”. When courts and arbitral tribunals assess the conformity of goods in regard to the ordinary purposes, the description under which the goods belong to must therefore be determined. The determination is naturally dependent on the type of goods in question and how the goods are described in the contract.²²⁶ To illustrate the importance of the description, the ordinary purposes of a phone merely described as a “phone” is different from a phone described as a “smartphone” - however, this particular example may differ in the light of a dynamic interpretation of the Convention, cf. Art. 7(1) CISG, because the ordinary purposes of a “phone” today is quite different from the ordinary purposes 20 years ago.²²⁷ In general, the description of the goods is determined by an interpretation of the contract in accordance with Art. 8 and 9 CISG.²²⁸

When the description of the goods has been determined the next step is to establish the ordinary purposes of the goods of the particular description. The ordinary purposes of the goods are to be established objectively in the concerned trade sector - thus the parties’ beliefs and opinions about the ordinary purposes are insignificant.²²⁹ In an Argentine court decision from 2000 an Appellate Court determined the ordinary use of charcoal.²³⁰ The buyer argued that the quality of the charcoal was non-conforming to the contract and that the charcoal therefore could not be

²²² Argentina, Cámara Nacional de Apelaciones en lo Comercial (National Commercial Appellate Court), 24 April 2000.

²²³ Austria, Oberster Gerichtshof (Supreme Court), 23 May 2005.

²²⁴ Lookofsky, *CISG*, p. 84; Henschel, *Conformity*, p. 190.

²²⁵ Schlectriem/Schwenzer, *Commentary*, p. 600; Henschel, *Conformity*, pp. 190-191.

²²⁶ Henschel, *Conformity*, p. 195.

²²⁷ See section 3.1.

²²⁸ Henschel, *Conformity*, p. 197; Honnold, *Uniform Law*, p. 333.

²²⁹ Henschel, *Conformity*, p. 197; Schlectriem/Schwenzer, *Commentary*, p. 601.

²³⁰ Argentina, Cámara Nacional de Apelaciones en lo Comercial (National Commercial Appellate Court), 24 April 2000.

used for the intended purposes. The buyer's testimony of a witness regarding the quality of the charcoal was inadmissible, and therefore the quality of the charcoal as such could not be determined. However, the Appellate Court expressly stated that the testimony would not have had any conclusive influence on the conformity assessment. The Appellate Court determined that the ordinary use of charcoal included "gastronomical purposes" such as grilling food. No matter the outcome of the testimony regarding the quality, the charcoal could still be used for this gastronomic purpose, which is an ordinary purpose of goods of such description, and therefore the charcoal was in conformity, cf. Art. 35(2)(a) CISG. Additionally, the Appellate Court emphasized that the Convention does not contain any rules or procedures regarding the burden of proof of a non-conformity. From this decision it can be deduced that the court determined the ordinary purposes of "charcoal" as the overall category of goods. Furthermore, the court concluded that if goods can still be used for certain ordinary purposes - in this case the gastronomic purposes - the goods are still conforming, cf. Art. 35(2)(a) CISG. The quality of the goods might have been of a poorer quality than expected or agreed upon, which however was not proven in this case, but regardless of the quality of the goods, a non-conformity cannot be established under Art. 35(2)(a) CISG as long as the goods are still effective for some ordinary purposes.

A highly debated issue is whether or not the seller has an obligation under Art. 35(2)(a) CISG to deliver goods that comply with public law regulations in the country of the buyer or in the country where the goods are to be used. In 1995, the German Supreme Court came to a decision on this particular issue in the case known as the *New Zealand Mussels Case*.²³¹ A Swiss seller delivered New Zealand mussels to a German buyer. The mussels contained a cadmium content that exceeded the standards recommended by the federal public health agency in Germany. The court stated that as a general rule the seller has no obligation to deliver goods that comply with public law regulations of the buyer's country or the country of use. However, the approach of the Supreme Court withholds two exceptions to the general rule: (1) if the public law regulations exist in the seller's country as well and (2) if the buyer has informed the seller about the public law regulations and reasonably relied on the seller's skill and judgement pursuant to Art. 35(2)(b) CISG. Furthermore, the court raised the possibility that - as a third exception - "special circumstances" may lead to the seller's knowledge of the public law regulations in the country and thus an obligation for him to comply with these, including the following examples:

²³¹ Germany, Bundesgerichtshof (Supreme Court), 08 March 1995.

(1) the seller has a branch in the country, (2) the seller often exports to the country, (3) the seller promotes his products in the country, or (4) because the seller and the buyer have been in a business relationship for some time. Similar factors as the ones emphasized by the approach of the German Supreme Court have also been mentioned by the CISG-AC as being relevant for the obligations of the seller.²³² Additionally, the approach of the German Supreme Court is also supported by the UPICC in Art. 6.1.14, concerning the application for public permission.²³³ However, none of the exceptions applied in the particular case, and thus the German Supreme Court found the mussels conforming. The court further stated that it was not necessary to determine if the question of compliance with public law regulations was a matter to be referred to Art. 35(2)(a) CISG or Art. 35(2)(b) CISG.

The approach of the German Supreme Court has gained persuasive authority and continues to be followed. The court decision has status as a so-called leading case, which is a rare phenomenon in CISG jurisprudence.²³⁴ The approach of the German Supreme Court is for instance followed in a court decision rendered by the Federal Court of Australia in 2010 concerning a similar issue.²³⁵ An Italian seller sold explosion-proof junction boxes to an Australian distributor, the buyer. The distributorship had been on-going for several years until the seller terminated the contract due to the buyer's breach of his obligations under the agency agreement. The buyer raised a counterclaim that the goods were defective, not merchantable and unfit for the intended purpose because the goods did not pass a test administered by the Australian authority. The court stated that the buyer had proven that the explosion-proof junction boxes did not pass the test administered by *TestSafe Australia*²³⁶, but that this did not implicitly mean that the goods were unfit for the ordinary purposes, cf. Art. 35(2)(a) CISG. The court emphasized that the seller would have delivered goods of the same condition to any other wholesaler in the world. The problem in this specific case was that Australia had begun testing the goods in a way that they had not previously been tested. Therefore, the goods were in conformity according to Art. 35(2)(a) CISG. On the basis of the ruling it can be concluded that goods' non-compliance with public law regulations in the country of the buyer or where the goods are to be used, is not equal to the goods not being fit for their ordinary purposes in accordance

²³² CISG-AC Opinion no. 19, paras. 5.1.-5.7, pp. 17-20.

²³³ UPICC (2016) Art. 6.1.14.

²³⁴ Flechtner, *Decisions on Conformity*, pp. 178-181.

²³⁵ Australia, Federal Court, 13 August 2010.

²³⁶ *TestSafe* is an Australian regulatory authority.

with Art. 35(2)(a) CISG. The court emphasized that the issue was that the specific test was only conducted in Australia and not in other countries. Therefore, the outcome of the decision might have been different if the goods were subject to a similar testing regime in other countries as well. This also corresponds with the statement of the court that “*there might be a sense in which the failure of the products to cross the Australian bar, as it were, should be seen as giving rise to a contravention of Art 35(2)(a) CISG*”. If the same public law regulations apply in all the involved countries, e.g. the European Union and its legislation, the goods’ compliance with such legislation is usually an ordinary purpose of the goods.²³⁷ Thus, it cannot be ruled out that the goods’ passing of such a test under other circumstances may be subject to the conformity assessment pursuant to Art. 35(2)(a) CISG. The decision is also consistent with the approach in the *New Zealand Mussels Case*, including one of the exceptions, where the seller must comply with public law regulations of the buyer’s jurisdiction, if the same regulations apply in the seller’s jurisdiction. The Australian court did consider the special circumstances, i.e. that the parties had a business relationship for a long time, but this did not have any impact on the result - presumably because the ongoing business relationship of the parties did not have any influence on the assessment due to the new testing regime of Australia.

The decision made by the Federal Court of Australia is in line with certain scholars’ views and previous court decisions on similar issues, including the decision of the German Supreme Court in the *New Zealand Mussels Case*, where courts have stated that the ordinary purposes of the goods are to be decided on the basis of the standards in the country of the seller.²³⁸ Thus, if the buyer wants public law regulations from another country than those of the seller’s, i.e. his own country or the country in which the goods are to be used, to form part of the agreement between the parties, it is up to him to incorporate such requirements by either Art. 35(1) CISG or Art. 35(2)(b) CISG.²³⁹ In defiance of the seemingly clear state of law, there is no consensus regarding the issue as other scholars advocate that the seller must comply with the standards in the country of the buyer.²⁴⁰ A third view is that the standards should be determined on the

²³⁷ Schlectriem/Schwenzer, *Commentary*, p. 604; Henschel, *Conformity*, p. 200.

²³⁸ Germany, Bundesgerichtshof (Supreme Court), 08 March 1995; Austria, Oberster Gerichtshof (Supreme Court), 13 April 2000; Austria, Oberster Gerichtshof (Supreme Court), 25 January 2006; Germany, Oberlandesgericht Hamm (Appellate Court), 30 November 2010; Bianca, *Art. 35 CISG*, p. 274; Henschel, *Conformity*, pp. 199-206; Schlectriem/Schwenzer, *Commentary*, p. 605.

²³⁹ Schlectriem/Schwenzer, *Commentary*, p. 605.

²⁴⁰ Schlectriem/Schwenzer, *Commentary*, p. 603; Henschel, *Conformity*, p. 200.

basis of a specific assessment of the circumstances and a contract interpretation.²⁴¹ Therefore, it is uncertain on which basis the ordinary purposes are to be established. Nonetheless, the prevailing view is the standards in the country of the seller, since the seller should not be burdened with becoming aware of the standards in the buyer's country.²⁴² The issue regarding goods' compliance with national legislation may also be subject to the conformity assessment under Art. 35(2)(b) CISG, and will therefore be further examined in section 4.3.2.

Other ordinary purposes are for example re-saleability of the goods if the buyer is in a resale business,²⁴³ that food must be edible,²⁴⁴ and that durable goods must be durable for a certain period of time.²⁴⁵

Art. 35(2)(a) CISG does not apply in situations where the goods are not fit for purposes for which they are simply occasionally or rarely used - instead, this is an assessment of whether or not the goods comply with a particular purpose pursuant to Art. 35(2)(b) CISG.²⁴⁶ There is an interplay between these two sub-provisions since any particular purposes are dependent on the establishment of the ordinary purposes; a particular purpose is a purpose which falls outside the ordinary purposes.²⁴⁷ This interplay is often illustrated in case law where the courts and arbitral tribunals first assess the ordinary purposes and subsequently - if the goods are conforming to the ordinary purposes - assess the particular purposes if the conditions therefore are met.²⁴⁸

4.3.2. Fitness for particular purposes

The seller is obliged to deliver goods that comply with the particular purposes of the buyer if such purposes are expressly or impliedly made known to the seller at the time of the conclusion of the contract, cf. Art. 35(2)(b) CISG. However, it is a condition that the buyer reasonably relies

²⁴¹ Schlectriem/Schwenzer, *Commentary*, p. 603; Henschel, *Conformity*, p. 200.

²⁴² Schlectriem/Schwenzer, *Commentary*, pp. 604-605; Henschel, *Conformity*, p. 201; Bianca, *Art. 35 CISG*, p. 274.

²⁴³ Schlectriem/Schwenzer, *Commentary*, pp. 600-601; Lookofsky, *CISG*, p. 85; Switzerland, Kantonsgericht Glarus (Court of First Instance), 06 November 2008.

²⁴⁴ Schlectriem/Schwenzer, *Commentary*, p. 601; Spain, Audiencia Provincial de Murcia (Appellate Court), 25 May 2012.

²⁴⁵ Schlectriem/Schwenzer, *Commentary*, pp. 601-602; Lookofsky, *CISG*, p. 85; United Kingdom, High Court of Justice, Queen's Bench Division, 01 May 2012.

²⁴⁶ Schlectriem/Schwenzer, *Commentary*, p. 600; Henschel, *Conformity*, pp. 194-195.

²⁴⁷ Henschel, *Conformity*, p. 195.

²⁴⁸ Australia, Federal Court, 13 August 2010; Austria, Oberster Gerichtshof (Supreme Court), 13 April 2000; New Zealand, High Court of New Zealand, 30 July 2010.

on the seller's skill and judgement. Art. 35(2)(b) CISG is similar to the obligations of the seller under certain domestic law.²⁴⁹ The determination of whether or not goods are fit for a particular purpose is a combined objective and subjective test,²⁵⁰ since the particular purpose of the buyer is determined subjectively,²⁵¹ and thus Art. 35(2)(b) CISG differs from the other sub-provisions of the default legal framework under Art. 35(2) CISG, where the test is made solely objectively.

As stated in section 4.3.1. above, there is an interplay between the ordinary purposes pursuant to Art. 35(2)(a) CISG and the particular purposes pursuant to Art. 35(2)(b) CISG, and the two sub-provisions may have a certain scope of application where they overlap.²⁵² Therefore, as a starting point, in order for goods to be rendered non-conforming pursuant to Art. 35(2)(b) CISG, the particular non-conformity must be outside the scope of application of Art. 35(2)(a) CISG. Thus, a particular purpose might exist whenever the buyer intends to use the goods in a particular way, in which the goods are not ordinarily used.²⁵³

A particular purpose of the buyer must have been made known to the seller. Art. 35(2)(b) CISG is based on Art. 33(1)(e) ULIS²⁵⁴, but the provision differs from its predecessor since a particular purpose can be both expressly and impliedly made known, and there is no requirement to make the particular purpose clear in the contract.²⁵⁵ The scope of application of Art. 35(2)(b) CISG is therefore quite similar - if not equal - to Art. 35(1) CISG regarding quality and description of the goods, and it is difficult to clearly distinguish the two provisions from one another when it comes to the particular purposes of the buyer.²⁵⁶ Some scholars are of the opinion that the rule in Art. 35(2)(b) CISG may not have been necessary,²⁵⁷ which may be a correct assumption when it comes to particular purposes expressly agreed or made known. However, other scholars argue that the difference is possible to make in terms of the reliance placed on the seller by the buyer.²⁵⁸ Whenever the particular purpose of the buyer is a contractual requirement pursuant to

²⁴⁹ CISG Case Law Digest, p. 142, para. 10; Lookofsky, *CISG*, p. 87.

²⁵⁰ Schwenger/Hachem/Kee, *Global Sales*, p. 385.

²⁵¹ Schwenger/Hachem/Kee, *Global Sales*, p. 385.

²⁵² Lookofsky, *CISG*, p. 87; Flechtner et al., *Drafting Contracts*, p. 364.

²⁵³ France, Cour d'appel de Grenoble (Appellate Court), 26 April 1995.

²⁵⁴ Art. 33(1)(e) ULIS: "*The seller shall not have fulfilled his obligation to deliver the goods where he has handed over goods which do not possess the qualities for some particular purpose expressly or impliedly contemplated by the contract*".

²⁵⁵ Henschel, *Conformity*, p. 221; Schlectriem/Schwenger, *Commentary*, p. 607.

²⁵⁶ Henschel, *Conformity*, p. 226; Honnold, *Uniform Law*, p. 336.

²⁵⁷ Honnold, *Uniform Law*, p. 336.

²⁵⁸ Schwenger/Hachem/Kee, *Global Sales*, p. 386.

Art. 35(1) CISG, the buyer relies on the seller to deliver goods in compliance with the contractual requirement.²⁵⁹ But when the particular purpose is a default requirement pursuant to Art. 35(2)(b) CISG, the buyer relies on the seller to determine the features necessary to comply with the particular purpose.²⁶⁰ Furthermore, the difference of an implied particular purpose can be illustrated by the fact that under Art. 35(1) CISG the particular purpose has to be impliedly “agreed upon”, whereas under Art. 35(2)(b) CISG the particular purpose has to be impliedly “made known” to the seller. The term “made known” is less strict than the term “agreed upon”,²⁶¹ and the scope of application for Art. 35(1) CISG and Art. 35(2)(b) CISG is therefore different concerning the implied obligations of the seller. Furthermore, in relation to the difference between Art. 35(1) CISG and Art. 35(2)(b) CISG, the CISG-AC emphasizes that Art. 35(1) CISG is not a “lower threshold” for the liability of the seller since such terms need to be contractually incorporated.²⁶²

Whenever a particular purpose is expressly made known, e.g. by the buyer’s information on how he intends to use the goods,²⁶³ the seller must deliver goods that comply with this purpose unless he makes an objection in that regard.²⁶⁴ However, a relevant question is which particular purposes impliedly made known by the buyer, the seller should recognize and thus comply with. It is uncertain if the determination thereof is to be made subjectively based on the actual awareness of the seller, or objectively based on the awareness of a reasonable seller.²⁶⁵ However, the prevailing view is the objective test, among other factors taking into account that it would be difficult for the buyer to prove the actual knowledge of the seller.²⁶⁶ In 2002, the District Court in Munich assessed whether or not a particular purpose of the buyer was impliedly made known to the seller based on the objective test.²⁶⁷ Based on different facts, such as the buyer’s branches in different countries and the buyer’s wish to use the goods as permanent furnishings, the seller had an implied obligation to deliver goods that could be in operation for

²⁵⁹ Schwenger/Hachem/Kee, *Global Sales*, p. 386.

²⁶⁰ Schwenger/Hachem/Kee, *Global Sales*, p. 386.

²⁶¹ Schlectriem/Schwenger, *Commentary*, p. 607.

²⁶² CISG-AC opinion no. 19, para. 3.4., pp. 8-9.

²⁶³ Henschel, *Conformity*, p. 227.

²⁶⁴ Schlectriem/Schwenger, *Commentary*, p. 607.

²⁶⁵ Henschel, *Conformity*, pp. 228-229.

²⁶⁶ Schlectriem/Schwenger, *Commentary*, pp. 607-608; Henschel, *Conformity*, pp. 228-230.

²⁶⁷ Germany, Landgericht München I (District Court), 27 February 2002.

several years without defects, and thus comply with the particular purpose of the buyer pursuant to Art. 35(2)(b) CISG - even though the seller may not have been actually aware of this purpose.

It is a requirement that the buyer relies on the seller's skill and judgement and that it is reasonable for him to do so. When the seller is a specialist or an expert in manufacturing or trading the specific type of goods - or represents himself as being so - the buyer can usually reasonably rely on the seller's skill and judgement.²⁶⁸ The knowledge or expertise of the buyer in a given branch of trade does not implicitly mean that he cannot rely on the seller's skill and judgement.²⁶⁹ It is uncertain what applies in the situation where the parties have equal skill and whether it is required that there is a certain gap of skills between the parties, where the seller is more skilled. In court practice, the latter view is supported, stating that "*the buyer's reliance on the seller's skill and judgement seems not to be protectable if the buyer is able to estimate the usability of the goods in the same way*".²⁷⁰ Nonetheless, whenever the buyer's knowledge or expertise supersedes the seller's knowledge or expertise, there will be no such reliance.²⁷¹ The same applies for instance when the buyer orders goods of a particular brand or type, which was the case in the above-mentioned court decision made by the Supreme Court of the Czech Republic.²⁷² Whenever the seller informs the buyer (1) that he does not have any - or limited - expertise and knowledge concerning the specific type of goods and the particular purpose,²⁷³ (2) that the goods are in fact not fit for the particular purpose, or (3) refers the buyer to other experts,²⁷⁴ the seller will be free from liability because it would be unreasonable for the buyer to rely on the seller's skill and judgement or because the buyer simply did not rely on the seller's skill and judgement.²⁷⁵

The alleged non-conformity in the previously examined court decision by the Federal Court of Australia,²⁷⁶ was also subject to a conformity assessment under Art. 35(2)(b) CISG. This emphasizes the interplay between the ordinary purposes of the goods pursuant to Art. 35(2)(a)

²⁶⁸ Schlectriem/Schwenzer, *Commentary*, p. 608; Henschel, *Conformity*, p. 236; Schwenger/Hachem/Kee, *Global Sales*, p. 389.

²⁶⁹ Schlectriem/Schwenzer, *Commentary*, p. 608.

²⁷⁰ Germany, Landgericht Coburg (District Court), 12 December 2006.

²⁷¹ Schlectriem/Schwenzer, *Commentary*, p. 608; CISG Case Law Digest, p. 142, para.12.

²⁷² See section 4.2.3., Czech Republic, Nejvyšší soud České republiky (Supreme Court), 29 March 2006.

²⁷³ New Zealand, Court of Appeal of New Zealand, 22 July 2011.

²⁷⁴ New Zealand, Court of Appeal of New Zealand, 22 July 2011.

²⁷⁵ Schlectriem/Schwenzer, *Commentary*, p. 608; Schwenger/Hachem/Kee, *Global Sales*, p. 389.

²⁷⁶ See section 4.3.1. Australia, Federal Court, 13 August 2010.

CISG and the particular purposes pursuant to Art. 35(2)(b) CISG as well as the fact that a clear distinction is not always possible to make. The facts of the case illustrate that the buyer's particular purpose of the goods was not the goods' passing of the test, but the resale of the goods on the Australian market. The Federal Court stated that this particular purpose was at least impliedly made known if not even expressly made known to the seller. Thus, the goods were deemed non-conforming according to Art. 35(2)(b) CISG. The reasoning of the Australian Federal Court on this particular issue of the case is inconsistent with the approach and the result in the *New Zealand Mussels Case*,²⁷⁷ which was also subject to a conformity assessment under Art. 35(2)(b) CISG on an equal basis with Art. 35(2)(a) CISG. In the *New Zealand Mussels Case*, the court stated that as a general rule, the seller is not obliged to deliver goods that comply with the public law regulations of the buyer's country even if the seller was aware that the intended use of the buyer was to resell the goods there.²⁷⁸

4.3.3. Samples or models

According to Art. 35(2)(c) CISG, the goods must possess the qualities of goods which the seller has held out as a sample or model. Thus, the goods presented to the buyer as a sample or model becomes the agreed standard of the goods and will automatically be included in the conformity assessment - unless agreed otherwise by the parties.²⁷⁹ The provision in Art. 35(2)(c) CISG is closely connected with Art. 35(1) CISG due to the fact that a sample or model that has been held out by the seller may be included as a contractual requirement.²⁸⁰ Whenever such contractual requirement is established, the application of Art. 35(2)(c) CISG becomes superfluous. It is discussed whether a sample or model provided by the seller is even a default requirement at all, as it may seem difficult to draw a clear line between such implied contractual requirements and default requirements.²⁸¹

However, the contractual requirements and the qualities of the sample or model may conflict. Whenever such conflict exists, the contract and the facts of the case must be interpreted in order

²⁷⁷ Germany, Bundesgerichtshof (Supreme Court), 08 March 1995.

²⁷⁸ Flechtner, *Decisions on Conformity*, p. 179.

²⁷⁹ Schlectriem/Schwenzer, *Commentary*, p. 609; Henschel, *Conformity*, p. 243; Brunner/Gottlieb, *Commentary*, p. 241.

²⁸⁰ See section 4.2.1.3.; Henschel, *Conformity*, p. 240; Honnold, *Uniform Law*, p. 337; Bianca, *Art. 35 CISG*, p. 276.

²⁸¹ Schwenzer/Hachem/Kee, *Global Sales*, p. 385.

to determine which requirements to prioritise.²⁸² This is in line with a decision rendered by the Austrian Supreme Court.²⁸³ The seller had presented a model of a specifically milled frame for bicycles to the buyer and the parties discussed the success of bicycles with the particular frame in Germany. Subsequently, the buyer ordered bicycles from the seller. The contract between the parties did not stipulate anything concerning the frame of the bicycles. The seller delivered bicycles with another frame which however was in conformity with the contract. The buyer found the goods non-conforming because the frame of the bicycles did not correspond to the model. It was uncertain whether or not the contract or the specifications of the model should prevail, and the Supreme Court stated that the conflict should be resolved by an application of Art. 8 CISG, taking into account the statements and conduct of the parties. Whenever such conflicts exist, it may seem erroneous not at all times to let the contractual requirements prevail considering that Art. 35(2)(c) CISG is a default rule. When there is no such conflict between the requirements, the goods must correspond to both the contractual requirements, cf. Art. 35(1) CISG, and the characteristics of the sample or model, cf. Art. 35(2)(c) CISG. This has also been established in case law,²⁸⁴ and is supported in the view of this thesis concerning the cumulative view of the default legal framework in Art. 35(2) CISG.

A small deviance in the standard of the sample or model compared to the standard of the delivered goods may be allowed if the sample or model is presented as only an illustration of the approximate standard of the goods.²⁸⁵ This can be derived from a decision rendered by a Belgium Commercial Court in 2006.²⁸⁶ The buyer ordered doors of the type of wood called “Tulipwood” from the seller from whom the buyer had been provided with a sample. When the doors were delivered, the buyer found them to be non-conforming pursuant to Art. 35(2)(c) CISG because the colour of the doors differentiated. The court stated that the sample provided by the seller was too small in order for the buyer to derive from the sample that the colour would not deviate, and that the buyer could not expect the doors to be exactly as the sample. Furthermore, the court emphasized that the buyer was a specialist in the field. Therefore, the knowledge and experience of the buyer must be taken into account as well when assessing the conformity of goods under Art. 35(2)(c) CISG. Concerning the particular case, the type of wood, “Tulipwood”,

²⁸² Schlectriem/Schwenzer, *Commentary*, p. 609.

²⁸³ Austria, Oberster Gerichtshof (Supreme Court), 11 March 1999.

²⁸⁴ USA, U.S. Court of Appeals (2nd Circuit) (Appellate Court), 06 December 1995.

²⁸⁵ Brunner/Gottlieb, *Commentary*, p. 241.

²⁸⁶ Belgium, Rechtbank van Koophandel Hasselt (Commercial Court), 19 April 2006.

is known to have differences in colour, and therefore the buyer should have known that the goods would not - and could not - completely correspond to the sample.

The prevailing view is that the holding out of the model or sample itself is adequate in order for Art. 35(2)(c) CISG to apply - hence there is no requirement of an agreement either expressly or impliedly.²⁸⁷ However, in CISG Case Law goods have been rendered conforming even though they did in fact not possess the qualities of a sample or model held out by the seller, because the courts required at least an implied agreement as well.²⁸⁸ Taking into account that Art. 35(2)(c) CISG does not contain the same requirement as its predecessor, Art. 33(1)(c) ULIS²⁸⁹, under which the seller should expressly or impliedly give an understanding that the goods would comply with the sample or model, the court decisions requiring an agreement as well seem erroneous.²⁹⁰

4.3.4. Usual or adequate packaging of the goods

The seller has an obligation to deliver goods that are contained or packaged in a usual or adequate manner pursuant to Art. 35(2)(d) CISG. A similar provision was not incorporated in ULIS. This default rule of the Convention supplements Art. 35(1) CISG, according to which the goods have to be packaged or contained as required by the contract.

The usual or adequate manner of the packaging of the goods is determined by reference to the relevant branch of trade, cf. Art. 9 CISG.²⁹¹ An example being that the packaging of the goods in certain branches of trade must meet standards in order to be imported or exported,²⁹² which can concern the labelling of the goods.²⁹³ If there is no practice in the relevant branch of trade, the goods must be packaged or contained in a manner sufficient to protect the goods during the

²⁸⁷ Schlectriem/Schwenzer, *Commentary*, p. 609; Henschel, *Conformity*, pp. 242-243.

²⁸⁸ Germany, Landgericht Berlin (District Court), 15 September 1994; Germany, Landgericht Hamburg (District Court), 31 January 2001.

²⁸⁹ Art. 33(1)(c) ULIS: “*The seller shall not have fulfilled his obligation to deliver the goods where he has handed over goods which lack the qualities of a sample or model which the seller has handed over or sent to the buyer, unless the seller has submitted it without any express or implied undertaking that the goods would conform therewith*”.

²⁹⁰ Henschel, *Conformity*, pp. 241-243.

²⁹¹ Schlectriem/Schwenzer, *Commentary*, p. 611; Henschel, *Conformity*, p. 271; Brunner/Gottlieb, *Commentary*, pp. 241-242.

²⁹² Schwenzer/Hachem/Kee, *Global Sales*, p. 395.

²⁹³ France, Cour d'appel de Grenoble (Appellate Court), 13 September 1995.

transport to the buyer,²⁹⁴ which is also consistent with court practice.²⁹⁵ In a court decision made by a German District Court,²⁹⁶ the packaging of marble stone panels had been inadequate to protect the goods on the route of transport to the buyer. Furthermore, factors such as the nature of the goods, the climate, the duration and the type of transport, e.g. transport by truck or by ship, must be taken into consideration.²⁹⁷ Therefore, if the seller is obliged to deliver frozen food he must package the goods in a manner which is adequate to ensure that the food is still frozen upon delivery to the buyer.

The contractual legal framework, cf. Art. 35(1) CISG, also governs the containers and packaging of the goods. Thus, a distinction between the two provisions is required in order to ensure a correct and uniform application of the legal framework. Whenever the requirements ensue from previous business practices or any trade usages, they are to be considered contractual requirements according to Art. 35(1) CISG.²⁹⁸ However, it may be difficult to clearly distinguish when a usual or adequate manner of packaging in a particular branch of trade amounts to a trade usage, thus constituting a contractual requirement pursuant to Art. 35(1) CISG, or when the conformity of the packaging must be resolved by applying Art. 35(2) CISG. In the event of uncertainties concerning whether or not the parties have agreed anything, Art. 35(2)(d) CISG will apply.²⁹⁹ The fact that the distinction is difficult to make may cause uncertainties as to which provision of Art. 35 CISG a non-conformity relating to the packaging of the goods refers to. Whenever an international trade usage concerning the packaging exists, cf. Art. 9(2) CISG, a potential non-conformity will be governed by both Art. 35(1) CISG and Art. 35(2)(d),³⁰⁰ and thus a sphere of application of the two provisions is equivalent.

4.4. Awareness of the buyer – Art. 35(3) CISG

Art. 35(3) CISG provides a narrow limitation of the seller's liability for non-conformities under the default rules in Art. 35(2) CISG. The provision stipulates that the seller is not liable in cases where the buyer - at the time of the conclusion of the contract - knew or could not have been

²⁹⁴ Brunner/Gottlieb, *Commentary*, p. 242.

²⁹⁵ Mexico, Comisión para la Protección del Comercio Exterior de México (COMPROMEX) (Arbitration), 29 April 1996.

²⁹⁶ Germany, Oberlandesgericht Saarbrücken (Appellate Court), 17 January 2007.

²⁹⁷ Schlectriem/Schwenzer, *Commentary*, p. 611.

²⁹⁸ Henschel, *Conformity*, pp. 267-268.

²⁹⁹ Henschel, *Conformity*, pp. 267-268.

³⁰⁰ Henschel, *Conformity*, p. 268.

unaware of the particular lack of conformity. The purpose of the provision is according to Honnold “to finetune the rules in Art. 35(2) CISG to ensure that they operate as intended”.³⁰¹

According to the clear black letter wording of the provision, Art. 35(3) CISG cannot be applied to the seller’s liability under Art. 35(1) CISG. This is further supported by the Secretariat Commentary since such application was ruled out at the diplomatic conference in Vienna.³⁰² Nonetheless, Art. 35(3) CISG has been applied in relation to Art. 35(1) CISG in some court decisions,³⁰³ which of course blurs the otherwise clear legal status of this particular matter.³⁰⁴ Therefore, it is uncertain to what extent Art. 35(3) CISG applies to Art. 35(1) CISG - if such application is even possible at all. However, it must be noted that none of the CLOUT abstracts of the court decisions mention that the court made this application of Art. 35(3) CISG, which indicates the wrongful application of the provision by the court. Since the prevailing view is that Art. 35(3) CISG does not apply in relation to Art. 35(1) CISG,³⁰⁵ the legal position of the buyer is improved concerning the contractual requirements, since possible knowledge of the buyer does not - at least in the major part of cases - exclude the seller’s liability for non-conforming goods.

Art. 35(3) CISG applies to every sale of goods governed by the Convention, but the most obvious and relevant scope of application is the sale of second-hand goods where the buyer inspects a specified item and afterwards buys this item.³⁰⁶ It is important to keep in mind that the buyer’s awareness must refer to the particular non-conformity at dispute.³⁰⁷ In order to exemplify the application of the provision; the buyer’s awareness regarding the unusual packaging of the goods, cf. Art. 35(2)(d) CISG, does not exclude the seller’s liability for the goods not being fit for the ordinary purposes in accordance with Art. 35(2)(a) CISG.

³⁰¹ Honnold, *Uniform Law*, p. 338.

³⁰² Secretariat Commentary, p. 32, Art. 33, no. 14; Schlechtriem/Schwenzer, *Commentary*, pp. 614-615; Henschel, *Conformity*, p. 282; Bianca, *Art. 35 CISG*, p. 280.

³⁰³ Switzerland, Tribunal Cantonal du Valais/Kantonsgericht Wallis (Appellate Court), 28 October 1997; Switzerland, Tribunal Cantonal du Valais/Kantonsgericht Wallis (Appellate Court), 29 June 1998; Germany, Oberlandesgericht Köln (Appellate Court), 21 May 1996.

³⁰⁴ Neumann, *Features of Art. 35 CISG*, pp. 96-97.

³⁰⁵ Lookofsky, *CISG*, p. 88; Schlechtriem/Schwenzer, *Commentary*, p. 613; Honnold, *Uniform Law*, p. 338; Brunner/Gottlieb, *Commentary*, p. 243.

³⁰⁶ Honnold, *Uniform Law*, p. 338; Schlechtriem/Schwenzer, *Commentary*, p. 613; Henschel, *Conformity*, pp. 280-281.

³⁰⁷ Schlechtriem/Schwenzer, *Commentary*, p. 613.

The scope of the term “knew”, i.e. the knowledge of the buyer, goes without saying and does not entail any problems. The burden of proving the knowledge of the buyer is however quite another matter.³⁰⁸ It is discussed what the phrase “could not have been unaware of” implies. The Convention also applies the phrase “ought to have known”,³⁰⁹ which clearly differs from the phrase used in Art. 35(3) CISG, since the former phrase is considered to be stricter and to possibly impose a duty on the buyer to conduct an examination of the goods or at least to make inquiries regarding the goods.³¹⁰ Instead, the phrase “could not have been unaware” refers to facts that are before the eyes of one who can see - and it does not matter whether these facts reached the mind of the buyer or not.³¹¹ Therefore, the non-conformity must be somehow obvious, which also indicates that the buyer must act with gross negligence - possibly even more than that, but this is discussed in theory as well.³¹² Thus the scope of application of Art. 35(3) CISG is uncertain, and it is unclear what is expected of buyers in terms of what they should be aware of. The assessment of the buyer’s awareness is to be made on the basis of the circumstances seen from the buyer’s perspective.³¹³ In a court decision made by a Swiss Appellate Court,³¹⁴ the seller’s liability for a non-conformity was excluded, because the buyer had examined the second-hand bulldozer, and therefore could not have been unaware of the quality and condition of the bulldozer. On the other hand, in the decision reviewed in section XX rendered by a German Appellate Court,³¹⁵ the seller’s liability was not excluded, since the buyer could not have been aware of the lower output of the generator. Nothing in the particular internet advertisement implied that the generator could not have an output of 300 KVA. However, one important aspect of this particular case is that the court rendered the goods non-conforming according to Art. 35(1) CISG, but still made an assessment of whether or not the seller’s liability was excluded pursuant to Art. 35(3) CISG. This underlines the uncertainties relating to the scope of application of Art. 35(3) CISG.

³⁰⁸ See section 4.5.

³⁰⁹ See Art. 2(a), Art. 9(2), Art. 38(3), Art. 39(1), Art. 43(1), Art. 49(2)(b)(i), Art. 64(2)(b)(i), Art. 68, Art. 74 and Art. 79(4) CISG.

³¹⁰ Honnold, *Uniform Law*, pp. 338-339; Henschel, *Conformity*, pp. 292-293.

³¹¹ Honnold, *Uniform Law*, p. 339.

³¹² Schlectriem/Schwenzer, *Commentary*, p. 613; For an overview of the discussion and the positions of different scholars see Henschel, *Conformity*, pp. 293-295.

³¹³ Schlectriem/Schwenzer, *Commentary*, p. 613; Henschel, *Conformity*, p. 291.

³¹⁴ Switzerland, Tribunal Cantonal du Valais/Kantonsgericht Wallis (Appellate Court), 28 October 1997.

³¹⁵ Germany, Oberlandesgericht Koblenz (Appellate Court), 19 December 2012.

If the seller acts fraudulently and for instance hides defects, Art. 35(3) CISG is not applicable. In these situations, the seller is - obviously - the one to blame rather than a negligent buyer.³¹⁶

In general, under the rules of the Convention the buyer has no duty to examine the goods before concluding the contract.³¹⁷ This makes sense taking into consideration that the Convention governs international sale of goods contracts, which often means that long distances between the parties are involved. However, it is uncertain what the state of law is if the seller requests the buyer to examine the goods and thereby if such requests impose a duty on the buyer to examine the goods. In these situations the outcome depends on an assessment of the circumstances of each particular case, including for example the nature of the goods, the skills of the parties as well as the reasonableness of a possible examination.³¹⁸ It is argued that the duty to examine the goods depends on the type of goods involved; there is no such duty regarding the purchase of new or standard goods, whereas such a duty may exist when it comes to second-hand or specified goods.³¹⁹ The possible duty of the buyer to examine the goods paves the way for a whole lot of unanswered questions and uncertainties; for instance, even if the circumstances lead to such a duty for the buyer, it is uncertain how thorough an examination the buyer should conduct. And one may wonder if the seller's request for an examination of the goods is a way for the seller to limit his responsibility and force it on the buyer.

4.5. Burden of proof

A relevant aspect of the examination of the conformity assessment under the Convention is the burden of proof and how it affects the different sub-provisions of Art. 35 CISG.

In general, it is highly discussed to what extent the burden of proof falls within the scope of the Convention.³²⁰ There is no rule in the Convention regarding the burden of proof. The discussion is concerned with the question of whether the CISG governs the burden of proof - and thus allows for the internal gap to be filled by virtue of Art. 7(2) CISG by a general principle derived from the Convention or by application of domestic law - or if, on the other hand, the burden of

³¹⁶ Schlectriem/Schwenzer, *Commentary*, p. 614; Ferrari, *Applicability*, p. 201; Brunner/Gottlieb, *Commentary*, p. 243; Germany, Oberlandesgericht Köln (Appellate Court), 21 May 1996.

³¹⁷ Honnold, *Uniform Law*, p. 339; Schlectriem/Schwenzer, *Commentary*, p. 613; Henschel, *Conformity*, p. 293; Lookofsky, *CISG*, p. 88; Schwenger/Hachem/Kee, *Global Sales*, p. 398.

³¹⁸ Schlectriem/Schwenzer, *Commentary*, p. 614.

³¹⁹ Henschel, *Conformity*, p. 296.

³²⁰ Lookofsky, *CISG*, p. 39; Schlectriem/Schwenzer, *Commentary*, p. 84; Honnold, *Uniform Law*, pp. 86-92.

proof is not governed by the CISG at all.³²¹ The discussion will not be examined any further, but the most acknowledged position is that the burden of proof is governed by the Convention and that the internal gap is to be filled with the general principles of the Convention.³²² Therefore, this thesis will pursue this position. Nonetheless, the diverging views and approaches regarding the issue of the burden of proof result in a non-uniform application of the Convention which involves uncertainties as to the legal status and hence the foreseeability of the parties.

The non-conformity of the goods at the time of passing of risk is the object of proof pursuant to Art. 35 CISG.³²³ The party who bears the burden of proof has to prove both the existence of requirements under Art. 35 CISG as well as the non-compliance of the goods with these requirements.³²⁴ Thus, the burden of proof is generally two-tiered. In order to prove the existence of requirements under Art. 35 CISG, either requirements of the goods pursuant to the contractual framework in Art. 35(1) CISG or requirements pursuant to the default legal framework in Art. 35(2) CISG must be proven.³²⁵

The allocation of the burden of proving the compliance or non-compliance of the goods with the requirements in Art. 35 CISG follows from the principle of “the rule and exception” and the principle of proximity of proof, which are both general principles derived from the Convention.³²⁶ The principle of the rule and exception means that a party who claims a rule has to prove the existence of the prerequisites of the rule and that a party who claims an exception has to prove the prerequisites of the exception.³²⁷ The principle of proximity of proof means that facts within a party’s sphere of responsibility and with which that party is more familiar than the other party, have to be proven by that party.³²⁸ Based on these principles, courts have stated that the seller bears the burden of proving the compliance of the delivered goods with the contract before the

³²¹ Henschel, *Conformity*, pp. 111-112; Schlectriem/Schwenzer, *Commentary*, p. 84.

³²² Schlectriem/Schwenzer, *Commentary*, p. 619; Lookofsky, *CISG*, p. 39; Ferrari, *Applicability*, p. 203; Neumann, *Features of Art. 35 CISG*, pp. 89-90.

³²³ Schlectriem/Schwenzer, *Commentary*, p. 619; For the Convention’s rules regarding the time of the passing of the risk see Art. 36, 67, 68 and 69 CISG.

³²⁴ Schlectriem/Schwenzer, *Commentary*, p. 619.

³²⁵ Schlectriem/Schwenzer, *Commentary*, p. 619.

³²⁶ Schlectriem/Schwenzer, *Commentary*, pp. 84 and 619; Ferrari, *Applicability*, pp. 203-204; Honnold, *Uniform Law*, pp. 87 and 89.

³²⁷ Schlectriem/Schwenzer, *Commentary*, p. 84; Ferrari, *Applicability*, pp. 203-204; Honnold, *Uniform Law*, p. 87.

³²⁸ Schlectriem/Schwenzer, *Commentary*, p. 84; Honnold, *Uniform Law*, p. 89.

passing of risk where the goods are in the seller's area of control, whereas the burden of proof shifts to the buyer after the passing of risk where the goods are in the buyer's area of control.³²⁹

The party bearing the burden of proof - which, based on the allocation of the risk, most often is the buyer - may easily refer to the contract, standard terms, advertisements, etc., in order to prove the existence of expressly settled contractual requirements pursuant to Art. 35(1) CISG. Whenever a defect can be referred to an expressly settled contractual requirement, it will often be uncomplicated to prove the non-compliance of the goods with the particular requirement. This is illustrated in the court decision rendered by the Appellate Court in Barcelona,³³⁰ which is examined in section 4.2.1.1. The buyer proved the non-conformity of transit covers by referring to the specifications of the seller's sales catalogue and providing evidence that the goods did not meet these specifications. Thus, under these circumstances, the burden of proof is least difficult to sustain. Art. 35(1) CISG also includes impliedly settled contractual requirements and the question is therefore how the existence of such requirements are to be proven. As mentioned in section 4.2.1., not all courts acknowledge impliedly settled contractual requirements under Art. 35(1) CISG. Hence, it may be more difficult for the party bearing the burden of proof to provide evidence of the existence of such requirements. An example is establishing the existence of a sample or model and its characteristics.³³¹ If an impliedly settled contractual requirement is of great importance to one of the parties, it is advantageous that this requirement - to the extent possible - is included in the contract as an expressly settled contractual requirement since that would lighten the burden of proof in the view of the above-mentioned considerations. However, the problem is often that the parties are not aware of the importance of the particularly implied requirement before the conclusion of the contract.

Under Art. 35(2)(a) CISG, it is the buyer who bears the burden of proving that the goods are not fit for the ordinary purposes.³³² In the previously examined court decision rendered by an Argentine Appellate Court,³³³ the buyer did not sustain the burden of proof since the charcoal

³²⁹ Switzerland, Bundesgericht/Tribunal fédéral (Supreme Court), 13 November 2003; Switzerland, Handelsgericht des Kantons Zürich (Commercial Court), 30 November 1998; Germany, Oberlandesgericht Naumburg (Appellate Court), 24 April 2019.

³³⁰ Spain, Audiencia Provincial de Barcelona (Appellate Court), 28 April 2004.

³³¹ Mexico, Comisión para la Protección del Comercio Exterior de México (COMPROMEX) (Arbitration), 29 April 1996.

³³² Henschel, *Conformity*, p. 219.

³³³ See section 4.3.1., Argentina, Cámara Nacional de Apelaciones en lo Comercial (Appellate Court), 24 April 2000.

was still fit for ordinary purposes such as gastronomical purposes. If the buyer had a particular purpose of the goods in mind, then he should have stipulated the purpose in the contract or made the seller aware of the purpose pursuant to the prerequisites in Art. 35(2)(b) CISG, which takes priority over the ordinary purposes in Art. 35(2)(a) CISG,³³⁴ or included the particular purpose as a contractual requirement.

The burden of proof in relation to any particular purposes according to Art. 35(2)(b) CISG is three-tiered. The buyer has the burden of proving (1) that the goods are unfit for the particular purpose and (2) that the seller has been made aware of the particular purpose. If this is proven by the buyer, then the seller has the possibility to dismiss his liability by proving (3) that the buyer did not rely or that it was unreasonable for him to rely on the seller's skill and judgement.³³⁵ In the court decision rendered by the Appellate Court in New Zealand,³³⁶ the buyer had proved the particular purpose - being the use of the goods in Australia - as well as providing evidence that the particular purpose had been made known to the seller. However, the seller proved that it was unreasonable for the buyer to rely on the seller's skill and judgement, since the seller had referred the buyer to two experts, who could assist with the particular purpose, and informed the buyer about the limits of his own expertise and knowledge about the particular purpose. Thus, this case in relation to burden of proof illustrates that buyers must be aware of their reliance on the seller, and that it is advantageous to include the particular purpose as a contractual requirement.

The party who wants to rely on the qualities of a sample or model pursuant to Art. 35(2)(c) CISG has to prove that the goods were meant to possess these qualities.³³⁷ There is no burden of proving that the parties have agreed that the sample or model should be used as the standard of the goods.³³⁸ As stated in section 4.3.3. the holding out itself is generally sufficient to establish such a requirement and thus also sufficient to sustain the burden of proof in that regard. Furthermore, the buyer has to prove that the delivered goods do in fact not possess the qualities of the sample or model. In the previously examined court decision made by a Belgian Court,³³⁹

³³⁴ See section 4.3.

³³⁵ Schlectriem/Schwenzer, *Commentary*, p. 621; Henschel, *Conformity*, pp. 238-239.

³³⁶ New Zealand, Court of Appeal of New Zealand, 22 July 2011.

³³⁷ Schlectriem/Schwenzer, *Commentary*, p. 621; Henschel, *Conformity*, pp. 258-259.

³³⁸ Henschel, *Conformity*, p. 258.

³³⁹ Belgium, Rechtbank van Koophandel Hasselt (Commercial Court), 19 April 2006.

the buyer did not sustain the burden of proof in relation to the non-compliance of the goods with a sample provided by the seller. The sample was too small in order for the buyer to be able to derive a quality requirement concerning the colour of the doors.

If a party claims a right under Art. 35(2)(d) CISG, he must provide evidence that no agreement - or at least an insufficient agreement - under Art. 35(1) CISG has been made with respect to the packaging of the goods.³⁴⁰ Subsequently, the party has to prove what the usual or adequate packaging of the goods is, and that the goods were or were not packaged or contained accordingly.³⁴¹ In the previously examined court decision rendered by a German Appellate Court,³⁴² the contract did not contain any agreement of the manner of packaging, and the buyer proved that the goods were packaged inadequately, since the goods were damaged during the transport.

The burden of proving that the buyer knew or could not have been unaware of a certain non-conformity according to Art. 35(3) CISG lies with the seller.³⁴³ A Swiss court found that the seller had proved the buyer's awareness of non-conformities in a bulldozer.³⁴⁴ The buyer had tested the second-hand bulldozer and did not mention any defects before entering into the contract. The court found that the buyer could not have been unaware of the defects.

A relevant and disputed issue is whether or not it is sufficient for the buyer to prove a suspicion of a non-conformity in order to render the goods non-conforming. Nowadays, non-physical features of the goods are equally - if not even more - important as the physical features,³⁴⁵ and must also be included in the conformity assessment of goods. Therefore, as well as a different origin of the goods may affect the conformity,³⁴⁶ the same applies in relation to a suspicion of defect.³⁴⁷ A suspicion of a non-conformity renders the goods non-conforming if the following requirements are met: (1) that the suspicion affects the market's valuation of the goods, and (2)

³⁴⁰ Henschel, *Conformity*, p. 278.

³⁴¹ Henschel, *Conformity*, p. 278.

³⁴² See section 4.3.4. - Germany, Oberlandesgericht Saarbrücken (Appellate Court), 17 January 2007.

³⁴³ Schlectriem/Schwenzer, *Commentary*, p. 621; Henschel, *Conformity*, p. 300.

³⁴⁴ Switzerland, Tribunal Cantonal du Valais/Kantonsgericht Wallis (Appellate Court), 28 October 1997.

³⁴⁵ Schwenzer, *Suspicious*, p. 155.

³⁴⁶ Germany, Oberlandesgericht Zweibrücken (Appellate Court), 02 February 2004.

³⁴⁷ Schwenzer, *Suspicious*, pp. 155-156.

that the suspicion thus hinders the intended use of the goods.³⁴⁸ The buyer must therefore prove that a suspicion affects the usability of the goods in order to establish a non-conformity pursuant to Art. 35 CISG.³⁴⁹ The buyer may sustain the burden of proof by obtaining evidence such as governmental action and media reports.³⁵⁰ In CISG Case Law, suspicion of a non-conformity has previously been taken into account when assessing the non-conformity of the goods in the court decision rendered by the German Supreme Court in 2005.³⁵¹ A German buyer bought frozen pork from a Belgian seller. A suspicion arose that the Belgian pork was contaminated with dioxin. Therefore, governmental action was made, and if the seller could not dismiss the suspicion by providing certificates stating that the meat was in fact not contaminated, the meat would be declared unmarketable. The seller did not do so, and the Belgian frozen pork was destroyed. The court found the goods to be non-conforming in the sense of Art. 35(2)(a) CISG, since the goods were not fit for the ordinary purposes being human consumption and re-saleability. It is uncertain if the meat was in fact contaminated, but the buyer proved the consequences on the market's valuation as well as the intended use. Thus, it is possible for the buyer to establish a non-conformity by proving a suspicion - it is however uncertain to what extent suspicions are acknowledged by court and arbitral tribunals since the jurisprudence on the particular issue is scarce.

³⁴⁸ Schwenger, *Suspicious*, p. 157.

³⁴⁹ Schwenger, *Suspicious*, p. 162.

³⁵⁰ Schwenger, *Suspicious*, p. 162.

³⁵¹ Germany, Bundesgerichtshof (Supreme Court), 02 March 2005.

5. Conclusion

In the introduction the following research question was asked; What is the legal framework of the conformity assessment for international sale of goods contracts? The research question was asked for the purpose of academic exercise, and the aim of this thesis has been to clarify the legal framework of the conformity assessment according to the Convention as well as teasing out any uncertainties attached to the legal framework.

In overall terms, the legal framework of the conformity assessment is governed by the Convention when the rules in Art. 1-5 CISG concerning the sphere of application are met. Furthermore, regard must be had to Art. 6 CISG, which emphasizes the principle of party autonomy, whereupon the CISG applies to the extent the parties have not contracted out of the rules of the Convention. In particular, the conformity assessment for international sale of goods contracts is governed by Art. 35 CISG, but also the interpretation rules of the Convention pursuant to Art. 7, 8 and 9 CISG constitute a relevant part of the legal framework.

In particular, the research question has been answered by the application of CISG Case Law since courts and arbitral tribunals are left with a discretion within the limits imposed by the rules of the Convention. For this reason, the present state of law is most sufficiently inferred from court decisions and arbitral awards. It has therefore been of utmost importance to include CISG Case Law in order to sufficiently establish how the legal framework is to be navigated and whether or not any uncertainties exist.

Art. 35(1) CISG stipulates that the seller must deliver goods of the quantity, quality and description as required by the contract and that the goods must be contained or packaged as required by the contract. Thus, Art. 35(1) CISG represents the contractual framework referring to the contract between the parties. Art. 35(1) CISG includes both expressly as well as impliedly settled contractual requirements. The contractual requirements are highly based on an interpretation of the contract according to Art. 8 and 9 CISG. However, the implied requirements can be more difficult to establish, and they are not always acknowledged by courts and arbitral tribunals. The contractual framework consists not only of the parties' contract itself, but also of other elements which relate to the question of the formation of contract. Certain aspects of contract formation have been examined, and it can therefore be concluded that advertisements,

standard terms and other non-negotiated terms, and characteristics of goods provided as a sample or model, may form part of the contractual framework pursuant to Art. 35(1) CISG.

The quantity of the goods can be specified in any given way. If it is unclear what the agreed quantity of the goods is, this must be established by reference to Art. 8 CISG. However, practices established between the parties in particular branches of trade may allow for discrepancies of the quantity – even when an expressly settled contractual requirement stipulates otherwise, which is an uncertainty to be aware of.

When it comes to contractual quality requirements, these can be related to both physical and non-physical features, where the latter gains more and more importance. Any difference in the quality may render the goods non-conforming. However, when the buyer chooses the specific type of goods, the seller will not be liable for any non-conformities relating to the quality of the goods. Trade usages pursuant to Art. 9 CISG may also impose a quality requirement. Furthermore, particular purposes of the buyer may be included as contractual quality requirements, thus indicating a sphere of application where Art. 35(1) CISG and Art. 35(2)(b) CISG overlap.

Whenever the description of the goods varies, a non-conformity exists. However, the contractual requirements regarding the description of the goods may also be derived from Art. 8 CISG and Art. 9 CISG. When the description of the goods varies, this often has a derived impact on the quality requirements as well. If the seller delivers an *aliud* this is governed by Art. 35(1) CISG, as the Convention does not consider such deliveries as a failure to deliver. The description of the goods must be interpreted according to the language in which the description has been agreed.

The agreed packaging and containers of the goods also includes the labelling of the goods. However, contractual requirements concerning the packaging cannot alone derive from previous transactions between the parties, cf. Art. 9 CISG. Court decisions may indicate that the scope of application of implied obligations concerning the containers and packaging of the goods is narrower than when it comes to quantity, quality and description of the goods. This difference seems unjustified, as the packaging and containers of the goods often is an integral part of the goods, and therefore the hesitation of the courts and arbitral tribunals to impose such implied duties on the seller seems wrong.

Art. 35(2) CISG governs the default legal framework and sets out objective standards of the conformity assessment. It is uncertain to what extent Art. 35(2) CISG applies when the parties have agreed on contractual requirements pursuant to Art. 35(1) CISG, as the provision does not apply when the parties have agreed otherwise. However, most scholars, courts and arbitral tribunals favour the cumulative view where the two provisions exist cumulatively.

The goods must be fit for their ordinary purposes according to Art. 35(2)(a) CISG. The ordinary purposes are to be established on the basis of the description of the goods, which therefore is of great importance. The ordinary purposes must be established objectively in the concerned trade sector. A particularly relevant and debated issue is whether the seller is obliged to deliver goods in compliance with particular public law regulations in the country of the buyer or in the country where the goods are to be used. There is no consensus on this particular matter, but the prevailing view is based on the persuasive court decision known as the *New Zealand Mussels Case*, which sets out certain criteria for the existence of such an obligation. Generally, the seller is only obliged to comply with public law regulations in his own country.

Furthermore, the goods must be fit for any particular purposes of the buyer made known to the seller, cf. Art. 35(2)(b) CISG. In order for this provision to apply, the particular purpose must not be an ordinary purpose pursuant to Art. 35(2)(a) CISG. The particular purposes can be both expressly and impliedly made known to the seller. There may be a sphere of application where Art. 35(1) CISG and Art. 35(2)(b) CISG overlap. However, the provisions differ when it comes to implied obligations, as the particular purpose need only to be impliedly made known under Art. 35(2)(b) CISG. It is a requirement that the buyer reasonably relies on the seller's skill and judgement. There are different ways for the seller to free himself from liability for compliance of the goods with particular purposes, including referring the buyer to other experts.

According to Art. 35(2)(c) CISG, the goods must possess the qualities of goods held out as a sample or model to the buyer. The provision is closely connected with Art. 35(1) CISG, as the obligations of the seller based on samples or model can ensue from both provisions. The holding out of the sample or model itself is enough to impose an obligation on the seller. Whenever the characteristics of the sample or model conflict with any contractual requirements, it is uncertain which requirements prevail. The knowledge of the buyer must be taken into account under Art.

35(2)(c) CISG, and the buyer's knowledge may exclude the seller's liability when it comes to small discrepancies of the goods.

Goods must be packaged in the usual or adequate manner pursuant to Art. 35(2)(d) CISG, which as a starting point must be determined by reference to the relevant branch of trade, cf. Art. 9 CISG. As a minimum, the goods must be packaged in a manner sufficient to protect the goods during the transport. It is not always possible to make a distinction between Art. 35(1) CISG and Art. 35(2)(d) CISG, and it is sometimes uncertain which of these provisions a non-conformity should be referred to and a scope of the provisions' application may be equivalent.

Art. 35(3) CISG includes a limitation of the seller's liability when the buyer is aware of non-conformities. The wording of the provision excludes the provision's application to the seller's liability under Art. 35(1) CISG. However, the provision has been applied in relation to Art. 35(1) CISG multiple times, which creates an uncertain legal status. The buyer must act with gross negligence, but there is no duty to examine the goods. Furthermore, it is uncertain if the seller can limit his responsibility by requesting the buyer to examine the goods.

Finally, considerations relating to the burden of proof are of great relevance when it comes to the conformity assessment. The prevailing view is that the burden of proof is governed by the CISG but is an internal gap which is to be filled by virtue of Art. 7(2) CISG. The party bearing the burden of proof has to prove both the existence of requirements under Art. 35 CISG as well as the non-compliance of the goods with these requirements. Most often it will be the buyer who bears the burden of proof taking into consideration the rules on the allocation of the burden of proof. It is of great importance to which provision of Art. 35 CISG a non-conformity can be referred, as it is easier to sustain the burden of proving a non-conformity under Art. 35(1) CISG than it is to prove a non-conformity under Art. 35(2) CISG. Therefore, the division of the legal framework into the contractual framework in Art. 35(1) CISG and the default legal framework in Art. 35(2) CISG is of great relevance - because in the end, it all comes down to the question of proof.

All in all, the contractual framework and the default legal framework of the Convention have a certain sphere of application where they might overlap, and the conformity assessment and the interplay between the provisions is influenced by different uncertainties which do taint the conformity assessment.

6. Bibliography

6.1. Table of Statutes and Soft Law Instruments

United Nations Convention on Contracts for the International Sale of Goods, Vienna, 1980, 1489 UNTS 3 (referred to as CISG or the Convention).

UPICC UNIDROIT Principles of International Commercial Contracts 2016, International Institute for the Unification of Private Law (UNIDROIT), Rome, 2016 (referred to as UPICC).

6.2. Table of Authorities

Andersen, Camilla Baasch, Francesco G. Mazzotta, & Dr. Bruno Zeller, *A Practitioner's Guide to the CISG*, Juris, first edition, 2010 (referred to as Andersen et al., *Practitioner's Guide*).

Bernstein, Herbert and Joseph Lookofsky, *Understanding the CISG in Europe*, Kluwer Law International, second edition, 2003 (referred to as Bernstein, *CISG Europe*).

Bianca, Cesare Massimo, Article 35, in Bianca-Bonell *Commentary on the International Sales Law*, Giuffrè: Milan, 1987, pp. 268-283 (referred to as Bianca, *Art. 35 CISG*).

Brunner, Christoph and Benjamin Gottlieb, *Commentary on the UN Sales Law (CISG)*, Wolters Kluwer, first edition, 2019 (referred to as Brunner/Gottlieb, *Commentary*).

CISG-AC Opinion No. 19, *Standards and Conformity of the Goods under Article 35 CISG*, Rapporteur: Professor Djakhongir Saidov, King's College London, United Kingdom. Adopted by the CISG Advisory Council following its 25th meeting, in Aalborg Denmark, on 25 November 2018 (referred to as CISG-AC Opinion no. 19).

Commentary on the Draft Convention on Contracts for the International Sale of Goods prepared by the Secretariat ("Secretariat Commentary") / UN DOC. A/CONF. 97/5, pp. 14-66, contained in Official Records / UN DOC. A/CONF. 97/19 (referred to as *Secretariat Commentary*).

Eiselen, Sieg, *Literal Interpretation: The Meaning of the Words*, printed in CISG Methodology by André Janssen and Olaf Meyer, Sellier. european law publishers, 2009, pp. 61-90 (referred to as Eiselen, *Literal Interpretation*).

Felemegas, John, *An International Approach to the Interpretation of the United Nations Convention on Contracts for the International Sale of Goods (1980) as Uniform Sales Law*, Cambridge University Press, first edition, 2007 (referred to as Felemegas, *International Approach*).

Ferrari, Franco, *Contracts for the International Sale of Goods : Applicability and Applications of the 1980 United Nations Sales Convention*, Martinus Nijhoff Publishers, first edition, 2012 (referred to as Ferrari, *Applicability*).

Ferrari, Franco, *Homeward Trend: What, Why and Why Not*, printed in CISG Methodology by André Janssen and Olaf Meyer, Sellier. european law publishers, 2009, pp. 171-206 (referred to as Ferrari, *Homeward Trend*).

Flechtner, Harry M., *Decisions on Conformity of Goods Under Article 35 of the U.N. Sales Convention (CISG): The 'Mussels Case,' Evidentiary Standards for Lack of Conformity, and the 'Default Rule' vs. 'Cumulative' Views of Implied Conformity Obligations*, International Commerce and Arbitration, volume 15, Eleven International Publishing, 2014, pp. 177-194 (referred to as Flechtner, *Decisions on Conformity*).

Flechtner, Harry M., Ronald A. Brand and Mark S. Walter, *Drafting Contracts Under the CISG*, Oxford University Press, 2008 (referred to as Flechtner et al., *Drafting Contracts*).

Henschel, René Franz, *Conformity of Goods in International Sales*, Forlaget Thomson, first edition, 2005 (referred to as Henschel, *Conformity*).

Honnold, John O. and Harry M. Flechtner, *Uniform Law for International Sales under the 1980 United Nations Convention*, Wolters Kluwer, fourth edition, 2009 (referred to as Honnold, *Uniform Law*).

Huber, Peter & Alastair Mullis, *The CISG A new textbook for students and practitioners*, sellier. european law publishers, 2007 (referred to as Huber/Mullis, *CISG*).

Lookofsky, Joseph, *Understanding the CISG*, DJØF Publishing Copenhagen, fifth (worldwide) edition, 2017 (referred to as Lookofsky, *CISG*).

Munk-Hansen, Carsten, *Retsvidenskabsteori*, Jurist- og Økonomforbundets Forlag, second edition, 2018 (referred to as Munk-Hansen, *Retsvidenskabsteori*).

Neumann, Thomas, *Features of Article 35 in the Vienna Convention; Equivalence, Burden of Proof and Awareness*, 11 *Vindobona Journal of International Commercial Law and Arbitration* (1/2007), pp. 81-98 (referred to as Neumann, *Features of Art. 35 CISG*).

Schlechtriem, Peter and Ingeborg Schwenzer, *Commentary on the UN Convention on the International Sale of Goods (CISG)*, Oxford University Press, second (english), 2005 (referred to as Schlectriem/Schwenzer, *Commentary*, second edition).

Schwenzer, Ingeborg, Schlechtriem & Schwenzer, *Commentary on the UN Convention on the International Sale of Goods (CISG)*, Oxford University Press, fourth edition, 2016 (referred to as Schlectriem/Schwenzer, *Commentary*).

Schwenzer, Ingeborg, *Conformity of the Goods – Physical Features on the Wane?*, printed in Schwenzer/Spagnolo (ed.), *State of Play, The 3rd Annual MAA Peter Schlechtriem CISG Conference*, Netherlands, The Hague 2012, pp. 103-112 (referred to as Schwenzer, *Physical Features on the Wane?*).

Schwenzer, Ingeborg, Pascal Hachem and Christoffer Kee, *Global Sales and Contract Law*, Oxford University Press, first edition, 2012 (referred to as Schwenzer/Hachem/Kee, *Global Sales*).

Schwenzer, Ingeborg and David Tebel, *Suspicious, mere suspicions: non-conformity of the goods?*, printed in: 19 *Uniform Law Review*, 2014, pp. 152-168 (referred to as Schwenzer, *Suspicious*).

UNCITRAL, *Digest of Case Law on the United Nations Convention on Contracts for the International Sale of Goods*, United Nations, 2016 edition (referred to as *CISG Case Law Digest*).

United Nations Conference on Contracts for the International Sale of Goods, Vienna, 10 March - 11 April 1980, Official Records / UN DOC. A/CONF. 97/19 (referred to as Official Records - UN DOC. A/CONF. 97/19).

United Nations, *United Nations Convention on Contracts for the International Sale of Goods with Explanatory note by the UNCITRAL Secretariat on the United Nations Convention on Contracts for the International Sale of Goods*, United Nations Publication, 2010 (referred to as Explanatory note).

Viscasillas, Pilar Perales, *The Role of the UNIDROIT Principles and the PECL in the Interpretation and Gap-filling of CISG*, printed in *CISG Methodology* by André Janssen and Olaf Meyer, Sellier. european law publishers, 2009 (referred to as Viscasillas, *UPICC*).

6.3. Table of CISG Case Law

6.3.1. Court decisions

Argentina

2000-04-24 Cámara Nacional de Apelaciones en lo Comercial
(National Commercial Appellate Court)

Australia

2010-08-13 Federal Court of Australia

Austria

1995-11-09 Oberlandesgericht Graz (Appellate Court)
1999-03-11 Oberster Gerichtshof (Supreme Court)
2000-04-13 Oberster Gerichtshof (Supreme Court)
2003-12-17 Oberster Gerichtshof (Supreme Court)
2005-05-23 Oberster Gerichtshof (Supreme Court)
2006-01-25 Oberster Gerichtshof (Supreme Court)
2019-07-05 Oberster Gerichtshof (Supreme Court)

Belgium

2006-04-19 Rechtbank van Koophandel Hasselt (Commercial Court)

Canada

1999-08-31 Ontario Superior Court of Justice

Czech Republic

2006-03-29 Nejvyšší soud České republiky (Supreme Court)

Denmark

2002-01-31 Sø- og Handelsretten (Maritime and Commercial Court)

France

1995-04-26 Cour d'appel de Grenoble (Appellate Court)

1995-09-13 Cour d'appel de Grenoble (Appellate Court)

1996-01-23 Cour de Cassation (Supreme Court)

Germany

1993-01-08 Oberlandesgericht Düsseldorf (Appellate Court)

1994-02-10 Oberlandesgericht Düsseldorf (Appellate Court)

1994-09-15 Landgericht Berlin (District Court)

1995-03-08 Bundesgerichtshof (Supreme Court)

1995-08-21 Landgericht Ellwangen (District Court)

1996-04-03 Bundesgerichtshof (Supreme Court)

1996-05-21 Oberlandesgericht Köln (Appellate Court)

1996-06-25 Landgericht Paderborn (District Court)

2000-10-12 Landgericht Stendal (District Court)

2001-01-31 Landgericht Hamburg (District Court)

2001-10-31 Bundesgerichtshof (Supreme Court)

2002-01-09 Bundesgerichtshof (Supreme Court)

2002-02-27 Landgericht München I (District Court)

2004-02-02 Oberlandesgericht Zweibrücken (Appellate Court)

2005-03-02 Bundesgerichtshof (Supreme Court)

2006-04-20 Landgericht Aschaffenburg (District Court)

2006-12-12 Landgericht Coburg (District Court)
2007-01-17 Oberlandesgericht Saarbrücken (Appellate Court)
2007-11-21 Oberlandesgericht Koblenz (Appellate Court)
2010-11-30 Oberlandesgericht Hamm (Appellate Court)
2012-12-19 Oberlandesgericht Koblenz (Appellate Court)
2019-01-24 Oberlandesgericht Hamburg (Appellate Court)
2019-04-24 Oberlandesgericht Naumburg (Appellate Court)
2020-03-11 Landgericht Wuppertal (District Court)

Italy

2002-11-26 Tribunale di Rimini (District Court)

Mexico

1996-04-29 Comisión para la Protección del Comercio Exterior de México
(COMPROMEX)

Netherlands

2009-01-21 Rechtbank Utrecht (District Court)

New Zealand

2010-07-30 High Court of New Zealand
2011-07-22 Court of Appeal of New Zealand

Poland

2017-04-18 Sąd Apelacyjny w Białymstoku (Appellate Court)

Republic of South Korea

2016-12-20 Appellate Court Seoul

Spain

2004-04-28 Audiencia Provincial de Barcelona (Appellate Court)
2008-01-17 Tribunal Supremo (Supreme Court)
2012-05-25 Audiencia Provincial de Murcia (Appellate Court)

Switzerland

1997-10-28	Tribunal Cantonal du Valais/Kantonsgericht Wallis (Appellate Court)
1998-06-29	Tribunal Cantonal du Valais/Kantonsgericht Wallis (Appellate Court)
1998-11-30	Handelsgericht des Kantons Zürich (Commercial Court)
2000-12-22	Bundesgericht/Tribunal fédéral (Supreme Court)
2003-11-13	Bundesgericht/Tribunal federal (Supreme Court)
2008-11-06	Kantonsgericht Glarus (Court of First Instance)

United Kingdom

2012-05-01	High Court of Justice, Queen's Bench Division
------------	---

USA

1995-12-06	U.S. Court of Appeals (2nd Circuit)
1998-10-27	U.S. District Court for the Northern District of Illinois
2008-07-25	U.S. District Court for the Western District of Pennsylvania
2013-09-10	U.S. District Court for the Western District of Pennsylvania

6.3.2. Arbitral awards

1998-06-05	Arbitration Institute of the Stockholm Chamber of Commerce (SCC)
1999-08-00	International Court of Arbitration (ICC), no. 9083.
2000-11-10	Denmark, Ad hoc Arbitral Tribunal

6.4. Webpages

CISG Case Law Databases:

CISG-online: <https://cisg-online.org/>

UNILEX: <http://www.unilex.info>

CLOUT-database: <https://www.uncitral.org/clout/>

Other webpages:

Status: United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980) (CISG),

https://uncitral.un.org/en/texts/salegoods/conventions/sale_of_goods/cisg/status

(last visited 01 June 2021).

Case Law on UNCITRAL Texts (CLOUT), https://uncitral.un.org/en/case_law (last visited 01 June 2021).

About Unilex, <http://www.unilex.info/main/about> (last visited 01 June 2021).