

Chapter 13

Sustainable Development as a New Trade Usage in International Sale of Goods Contracts



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Abstract When one buys goods of a particular brand, one does not simply buy a physical object; one buys a lifestyle. When buying a car, one buys *jinba ittai*, (Mazda); when buying shoes, one wants to *just do it*, (Nike); when buying coffee, one wants it to be ‘100 percent ethically sourced’, (Starbucks). What this means is that the goods contain for the buyer an emotional dimension. This is referred to as the *brand*. A brand can carry with it many emotional attributes, several of which may be associated with ethical values. It is not uncommon for such values often to relate to *sustainable development*. To some, however, it may seem counterintuitive for global brands—and the multinational corporations behind them—and ethical values to go hand-in-hand. After all, the lack of evident interrelation between business and ethics has been famously summed up by Milton Friedman’s statement that ‘the social responsibility of business is to increase its profits’, (Friedman in New York Times (1970), [1]) or, as some paraphrase, that: ‘the business of business is business’ (Schwenzer and Leisinger in Commercial law challenges in the 21st century: Jan Hellner in Memoriam (2007), [2]). Conversely, global business pours enormous sums into creating and maintaining a brand, including associating it with such values including sustainable development (*e.g.*, Apple). This is because having a brand, albeit costly, wields great returns (Maley in 12 Int Trade Bus Law Rev (2009), [3]); Saidov in The law of damages in international sales: the CISG and other international instruments (2008), [4]). In other words, ethical standards may have value (Schwenzer and Leisinger in Commercial law challenges in the 21st century: Jan Hellner in Memoriam (2007), [2]). This becomes also important in the context of international trade in goods. It is naturally the case that for many international sales contracts, ethical values bear little meaning for the parties (Maley in 12 Int Trade Bus Law Rev (2009), [3]). However, how goods are produced has ramifications for their value (Schwenzer and Leisinger in Commercial law challenges in the 21st century: Jan Hellner in Memoriam (2007), [2]). This therefore gives rise to the question: is, indeed, the business of business, business? This chapter examines the parties’ obligations under transactions governed by the 1980 United Nations Convention of

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Contracts for the International Sale of Goods. This contribution's main argument is that sustainable development may be deemed an internationally-recognised trade standard forming part of many global brands, which is witnessed at the international level in the plethora of signatories to the United Nations Global Compact. Thus, the standards underpinning sustainability may be used to supplement the content of international sales contracts. This may be achieved through supplementing the conformity requirements that the goods must meet as enshrined in CISG Article 35 in three ways: through an implied term, through the goods' particulars, or through their ordinary purpose. All of these conformity requirements are discussed.

Keywords Brands · Corporate social responsibility · Ethical consumption · International sale of goods · Sustainable development

13.1 The Brand and Its Incorporation of Sustainable Development

Goods are more than just the sum of their parts. For many buyers, the goods' physical qualities are just as important as their or their seller's reputation. And it seems more true than ever that consumers nowadays do not only buy a product—a good—but also feelings.¹ This is due to the fact that buyers nowadays do not only sell physical goods but with them the emotional connotations these goods contain. Indeed, Nike's chief executive officer, Phil Knight, implied that Nike does not sell shoes, Nike sells feelings.² These feelings associated with the goods can be brought under the umbrella-term of the *brand*.

The definition of a brand, adopted from a commercial perspective by legal writers, describes 'the impression of a product in the minds of potential users or consumers'.³ Some brands are even referred to as *lifestyle brands*.⁴ In other words, the image that the sold goods convey represents an entire lifestyle. The brand is thus a term that carries an emotional value, which may also impact the goods' economic value.⁵ This was made abundantly clear by Howard Schultz—the chief executive officer of Starbucks—who wrote that 'if people believe they share values with a company, they will stay loyal to a brand'.⁶ Moreover, goods associated with a strong brand have a competitive advantage compared to no-brand goods.⁷ This is why, in addition to a strong brand, reputation and goodwill are important commercial assets for businesses.⁸ What can thus be said for certain is that a brand can have enormous value.

¹Dysted [5, 4].

²See Willigan [6, at 92].

³Maley [3, at 88].

⁴Dysted [5, at 3].

⁵See Maley[3, at 88].

⁶Schultz and Yang [7, 193].

⁷See Ramberg [8, 71, 72].

⁸See Saidov [4, at 60].

Brands that do not have emotional value attached to them are more susceptible to competition, and thus weaker on the market, as emotional qualities cannot be as easily replicated as physical qualities.⁹

To summarise, the brand may, among other things, represent a certain ethic, idea, or lifestyle. It is therefore unsurprising that the necessity arises to protect a brand in international sales transactions, which may include associating a brand with standards of sustainable development. The idea behind sustainable development is ‘the idea that the current generation wants future generations to be able to benefit from ... resources in much the same way that we have. The goal is to develop our natural resources, but to do so in a way that does not permanently destroy them’¹⁰ or ‘to meet the needs and aspirations of the present without compromising the ability to meet those of the future’.¹¹ This chapter refers to these standards as the *sustainability standards*. More than several private efforts have been made to associate various brands with sustainability standards. The private initiative deemed most successful is the United Nations Global Compact (the UN Global Compact).¹² In a nutshell, the UN Global Compact deals with corporate sustainability; in fact, these are the first two words of its preamble.¹³ The underlying idea being that companies must apply a principles-based approach to business and operate ‘in ways that, at a minimum, meet fundamental responsibilities in the areas of human rights, labour, environment and anti-corruption’.¹⁴ The UN Global Compact imposes several broad, yet minimal, ethical standards, which boil down to ten principles dealing with: human rights, labour, the environment, and anti-corruption. By becoming a signatory to the UN Global Compact, a business declares that it will respect the ten principles. At the time of preparing this chapter, the number of signatories to the UN Global Compact exceeded 13,000 participants.¹⁵ Since it is the most successful private initiative on an international scale, the UN Global Compact will serve as a beacon for establishing whether—firstly—sustainability standards have become interwoven into the brands of the signatories of the UN Global Compact; and secondly, whether, due to its great success, an international trade usage under the United Nations Convention of Contracts for the International Sale of Goods exists as to the obligation to respect sustainability standards embodied by the UN Global Compact’s ten principles.

⁹See Ramberg [8, at 72].

¹⁰Ørebech and Bosselman [9, 12].

¹¹World Commission on Environment and Development, *Report of the World Commission on Environment and Development: Our Common Future*, <http://www.un-documents.net/our-common-future.pdf> (last visited 20 Sept. 2018).

¹²See Schwenzer and Leisinger [2, at 257].

¹³United Nations Global Compact, *The Ten Principles of the UN Global Compact*, <https://www.unglobalcompact.org/what-is-gc/mission/principles> (last visited 20 Sept. 2018).

¹⁴*Id.*

¹⁵United Nations Global Compact, *See Who’s Involved*, <https://www.unglobalcompact.org/what-is-gc/participants> (last visited 20 Sept. 2018).

13.2 Non-physical Qualities of Goods

The protection of a brand is a pertinent issue in international trade, including international trade in goods. The most prevalent legal document dealing with international sales in goods is the United Nations Convention of Contracts for the International Sale of Goods (CISG). No reference to brand equity, ethics, or sustainable development was made in the CISG itself or in its legislative history.¹⁶ Nonetheless, the CISG imposes an obligation on the seller to, put briefly, deliver the right goods, to the right place, at the right time and at the agreed price.¹⁷ The first of these obligations is defined in CISG Article 35. Namely, CISG Article 35(1) states:

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.

This provision encompasses the so-called principle of *conformity*, which is a term describing whether ‘the goods concord with the parties’ actual intent and presumed intent’.¹⁸

In relation to the term *goods*, these are, under the CISG, first and foremost tangibles.¹⁹ Kristian Maley poetically wrote that ‘[t]he nucleus of an international sale is the provision of a good with certain defined physical characteristics’.²⁰ The obligation to deliver conforming goods refers undoubtedly to their physical attributes. At first glance the logical conclusion is that the violation of any non-physical standards—be it ethical, brand or sustainability standards—does not negatively impact on the goods.²¹ However, the term *quality* used in CISG Article 35(1) is understood broadly as meaning not only their physical condition but also ‘all the factual and legal circumstances concerning the relationship of the goods to their surroundings’.²² Goods may thus also have an intangible dimension such as reputation, image, or intellectual property rights.²³ Such non-tangible qualities are what Maley deems to surround the nucleus of an international sales transaction.²⁴ Such qualities are considered *incorporated* into the goods as their subsidiary component, and becoming their non-physical characteristic.²⁵ However, it may be argued that allowing for non-physical qualities to be incorporated into the goods may engender problems under CISG Article 3:

- (1) Contracts for the supply of goods to be manufactured or produced are to be considered sales unless the party who orders the goods undertakes to supply a substantial part of the materials necessary for such manufacture or production.

¹⁶Dysted [5, at 14].

¹⁷Henschel [10, 23].

¹⁸Maley [3, at 83].

¹⁹See *id.* at 85; see also Ramberg [8, at 77, 82].

²⁰Maley [3, at 88].

²¹See Schwenzler and Leisinger [2, at 266].

²²*Id.* at 267.

²³See Dysted [5, at 12].

²⁴See Maley [3, at 88].

²⁵*Id.* at 85.

- (2) This 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.

A typical example may be that of a supply chain, whereby the buyer, who is the brand-holder, procures goods which will bear the buyer's brand. The brand itself may be of greater value than the goods. After all, the \$31.4 billion Nike brand²⁶ is worth more than a shipment of hundreds of pairs of shoes. Christina Ramberg takes issue with this point, however, arguing that 'it is probable that courts and arbitrators will apply the CISG to international sales of goods irrespective of whether a substantial proportion of the price relates to emotions rather than the product's physical properties'.²⁷ Indeed, it seems that this may be the case, since the provision is not applicable to cases where the buyer provides industrial property rights, licences, plans or know-how.²⁸ Consequently, although such contributions may form a substantial part of the goods' value, they do not fall within the scope of CISG Article 3(1) *per se*.

Unlike CISG Article 3(1), Article 3(2) 'deals with mixed contracts, in which the obligation to deliver a good or goods is combined with the obligation to provide services'.²⁹ A contract partly for the sale of tangibles, and partly for the provision of non-tangible qualities may be deemed a mixed contract.³⁰ In this context it has been argued that '[t]o provide an emotional feeling is closely related to services'.³¹ Consequently, it may be argued that non-physical qualities should not form the preponderant part of the seller's obligations, because—by operation of CISG Article 3(2)—such a contract would not be a contract for the international sale of goods, and thus the CISG would not apply.³² Yet such an approach is predicated on the misunderstanding that CISG Article 3(2) applies when the services are employed in the manufacture of the goods, that is to say, they are merged with the obligation to deliver the goods.³³ This is not the case. The provision is applicable 'only if there are separate obligations to supply goods and to provide services in one entire contract, which could equally have been agreed upon in two or more contracts ...'.³⁴ In other words, where sustainability standards form part of the goods' quality, there is no need to resort to CISG Article 3(2).

In sum, regardless of whether one shares this view, marketing is not inconsequential to the value of goods; the implications of marketing for the perceived value

²⁶ See Forbes, *The World's Most Valuable Brands*, <https://www.forbes.com/powerful-brands/list/#tab:rank> (last visited 20 Sept. 2018).

²⁷ Ramberg [8, at 77].

²⁸ See Schlechtriem and Schwenzer *Article 3*, in [11, 61, 66]; see also Schlechtriem and Butler [12, 24].

²⁹ Schlechtriem and Butler [12, at 26]; see also Schwenzer and Hachem, *Article 3* in [11, at 67].

³⁰ See Ramberg [8, at 77].

³¹ *Id.*

³² See Maley [3, at 88].

³³ See Schwenzer and Hachem, *Article 3* in [11, at 67].

³⁴ *Id.*

of goods demonstrates the increasing importance of non-physical characteristics, in particular brand equity, to the value of goods.³⁵ Ordinarily, brand equity is protected under intellectual property and notions such as *goodwill*.³⁶ Goodwill however is connected to the business, while brand equity can attach to the goods.³⁷ For this reason brand equity can be protected through various legal means, including through the enforcement of intellectual property rights or under tort law.³⁸ It can, lastly, as will be demonstrated, be protected through rules on conformity of goods.

13.3 Express or Implied Term?

Parties have great autonomy as regards their understanding of *conformity*. The parties' subjective intention is of the greatest importance under CISG Article 35(1), and thus it is first and foremost for the parties to decide what features the goods must contain.³⁹

The starting point is that there are no limits to the contractual requirements which the parties may agree with respect to the goods, for example, that the goods may not be made by child workers, that the goods should be produced in an environmentally-friendly way ... that the goods should satisfy the special safety and environmental requirements of the buyer's country, etc. Only the imaginations of the parties and mandatory public law rules can set limits to what can be validly agreed.⁴⁰

It seems that the case is clear-cut if the parties are sufficiently diligent and explicitly provide in the contract—by means of an express term—the non-physical qualities the goods must possess.⁴¹ Would this also be the case if a contract contained no reference to non-physical attributes? It is conceivable for a contract to contain, in addition to express terms, an implied term in regard to conformity.⁴² This may however be subject to dispute, especially between parties from different jurisdictions.⁴³ The exact characteristics of the goods are namely subject to interpretation, which is the purview of CISG Article 8⁴⁴:

- (1) For the purposes of this Convention statements made by and other conduct of a party are to be interpreted according to his intent where the other party knew or could not have been unaware what that intent was.

³⁵ See Maley [3, at 88].

³⁶ See *id.* at 93.

³⁷ See *id.*

³⁸ See *id.* (N.B., with regard to providing examples of trademark dilution, the tort of passing off and breach of personality rights).

³⁹ See Schlechtriem and Butler [12, at 113]; see also Maley [3, at 122]; see also Kruisinga [13, 29].

⁴⁰ Henschel [10, at 162].

⁴¹ See Dysted [5, at 14].

⁴² See Schwenger and Leisinger [2, at 267].

⁴³ Dysted [5, at 6].

⁴⁴ See Kruisinga [13, at 29].

- (2) If the preceding paragraph is not applicable, statements made by and other conduct of a party are to be interpreted according to the understanding that a reasonable person of the same kind as the other party would have had in the same circumstances.
- (3) In determining the intent of a party or the understanding a reasonable person would have had, due consideration is to be given to all relevant circumstances of the case including the negotiations, any practices which the parties have established between themselves, usages and any subsequent conduct of the parties.

The provision directs the interpreter's efforts towards—firstly—the parties' subjective intention; and secondly—when the first fails—towards the *reasonable person* standard. A breach of an express or implied term concerning the goods' conformity will constitute a *subjective defect*⁴⁵ and as a result a breach of contract under CISG Article 35(1).⁴⁶

Lastly, under CISG Article 8(3), in both cases (subjective intention and the reasonable person standard) due consideration is to be given to all relevant circumstances of the case, including the negotiations, any practices which the parties have established between themselves, usages, and any subsequent conduct of the parties. The inclusion of the term *usages* draws attention to CISG Article 9,⁴⁷ which reads:

- (1) The parties are bound by any usage to which they have agreed and by any practices which they have established between themselves.
- (2) The parties are considered, unless otherwise agreed, to have impliedly made applicable to their contract or its formation a usage of which the parties knew or ought to have known and which in international trade is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade concerned.

CISG Article 9 supplements the terms of the contract⁴⁸ and Article 35(1) as to the implied terms on quality.⁴⁹ Moreover, CISG Article 9(2), unlike Article 9(1), supplements the contract independent of the parties' intent.⁵⁰ It namely supplements the contract similarly to the reasonable person standard of CISG Article 8(2)⁵¹ by imposing the necessity to consider trade usages, which are 'rules of commerce which are regularly observed by those involved in a particular industry or marketplace'.⁵²

⁴⁵See Schlechtriem and Butler [12, at 114] (explaining that a subjective defect of the goods is in essence their non-adherence to the goods' description under the contract).

⁴⁶See Schwenger and Leisinger [2, at 267].

⁴⁷See generally Dysted [5, at 16] (indicating that CISG Article 8 must be read together with CISG Article 9).

⁴⁸Martin Schmidt-Kessel, *Article 9*, in [11, 182].

⁴⁹See Schwenger and Leisinger [2, at 266–267].

⁵⁰Schmidt-Kessel, *Article 9*, in [11, at 183].

⁵¹*Id.* at 188.

⁵²*Id.* at 187.

Through CISG Article 9(2), non-physical features may impliedly become part of the contractual description of the goods.⁵³ Ingeborg Schwenzer and Benjamin Leisinger made the argument that where CISG Article 9(1) is not applicable, ethical standards might still become part of the contract under CISG Article 9(2).⁵⁴ This will however depend on whether such standards constitute an international trade usage under said provision. In order for an international trade usage to apply it must—firstly—be ‘acknowledged and widely observed by parties to contracts of the type involved in the particular trade concerned’.⁵⁵ Secondly, the parties knew or ought to have known of the international trade usage.⁵⁶ This gives rise to the question: can an international trade usage be established with regard to ethical standards, such as the standards underpinning sustainable development? It is arguable whether this is a futile exercise. Schwenzer and Leisinger argue that ‘first and primary consideration should be given to usages and practices that have been established in certain trade branches’.⁵⁷ Codes of conduct common for particular trade branches are of particular relevance here, or general private initiatives.⁵⁸

This brings one back to the UN Global Compact; the values underpinning the UN Global Compact may become, or may be perceived by consumers as, part of a company’s brand, and may thus become part of the goods’ description. This may be achieved in several ways: firstly, through express notice:

when a buyer makes it known to a seller that the quality of the goods must be produced in compliance with Global Compact principles during the negotiation stages, under Article 35(1) the seller is under a contractual obligation to produce the goods in compliance with the quality demanded by the buyer.⁵⁹

Expressly making known that a buyer’s brand includes sustainable development standards can be achieved in more ways than one. The most obvious is explicitly stating such standards in a written contract. A less obvious avenue is making reference to or including as an annex to the contract a code of conduct, corporate social responsibility (CSR) policy, or standard terms.⁶⁰ Secondly, in case no express reference is made, sustainable development standards underpinning a brand may amount to an implied term under CISG Article 35(1) through contractual interpretation. Without explicit reference to sustainable development in a contract, or a CSR policy, the goods’ description may still contain sustainable development standards. This may happen in a scenario when a buyer communicates its ethical standards to the world ‘externally with the direct or indirect purpose of enhancing the surrounding society’s

⁵³ See Schwenzer [14, 103, 107].

⁵⁴ Schwenzer and Leisinger [2, at 265].

⁵⁵ Schlechtriem and Butler [12, at 59] (referencing *BP Int’l Ltd. v. Empresa Estatal Petroleos de Ecuador*, 332 F.3d 333 (5th Cir. 2003)).

⁵⁶ See Schlechtriem and Butler [12, at 59].

⁵⁷ Schwenzer and Leisinger [2, at 265].

⁵⁸ *Id.*

⁵⁹ Williams [15, 299, 305].

⁶⁰ See Ramberg [8, at 78–79].

impression of the company'.⁶¹ One such scenario may include, in the author's opinion, whether the buyer is a party to the UN Global Compact. The UN Global Compact expressly mentions in its contents sustainable development.⁶² Is, however, merely being a party enough? On the one hand, Christina Ramberg (writing admittedly about a buyer's CSR policy) argues that 'I do not think that the purchaser's general CSR-policy could form a basis for a claim of non-conformity against a supplier even when the supplier is aware of the policy'.⁶³ Nonetheless, she goes on further to argue that there must exist certain additional factors for a CSR policy or non-physical attributes to apply to the goods' description, such as: 'the purchaser's interest in its CSR-policy [being] too obvious to need stating' or 'the very essence of the contract is to acquire a feeling more than a physical product'.⁶⁴ It seems reasonable that the requirements of conformity are dependent on context and the buyer's reasonable expectations.⁶⁵ Hence the crucial issue is whether the buyer may reasonably expect that the goods—be it through their production process or the materials they are made from—meet sustainability standards. For Schwenzer and Leisinger the answer seems straightforward; they go one step further to even advance an argument independent of any brand-protection issues. Namely, they argue that 'the observance of, at least, basic ethical standards can be regarded as an international trade usage and, thus, as an implied term in every international sales contract'.⁶⁶ In the author's opinion this seems to be a reasonable argument to make. Since Schwenzer and Leisinger's article was published, the number of signatories to the UN Global Compact has increased by approximately 5000 participants, suggesting increasing recognition of an international trade usage under CISG Article 9(2), or, at least, recognition that a party to the UN Global Compact may reasonably expect to associate its brand with minimum levels of global sustainability standards.

In sum, the principle of conformity in CISG Article 35(1) is wide enough in scope to encompass the goods' non-physical characteristics. These can be incorporated into the contract either through an express or implied term. In order to ascertain the existence of the latter, it is necessary to turn to CISG interpretive tools, among them the incorporation of any applicable international trade practice. An international trade practice to abide by sustainability standards may exist by means of the UN Global Compact. Nonetheless, if the principle of conformity is not sufficient, the subsequent part of CISG Article 35 provides additional ancillary objective rules and standards of conformity.

⁶¹*Id.* at 78.

⁶²United Nations Global Compact, *The Ten Principles of the UN Global Compact*, <https://www.unglobalcompact.org/what-is-gc/mission/principles> (last visited 21 Sept. 2018).

⁶³Ramberg [8, at 81].

⁶⁴*Id.*

⁶⁵*See id.* at 83.

⁶⁶Schwenzer and Leisinger [2, at 267].

13.4 Particular or Ordinary Purpose?

Even if one does not recognise an international trade standard, and if efforts of contractual interpretation fail, meaning when ‘the contract does not contain any, or contains only insufficient, details of the requirements to be satisfied by the goods for the purposes of Article 35(1)’,⁶⁷ CISG Article 35(2) provides ‘ancillary objective rules and standards’⁶⁸ or standards on a ‘subsidiary determination of conformity’.⁶⁹ In other words, having received an unsatisfactory answer as to what the parties agreed to (in accordance with CISG Article 8), only then is CISG Article 35(2) applicable.⁷⁰ The provisions of CISG Article 35(2)—being based on an objective criterion as to the goods’ intended purpose⁷¹—are deemed to be ‘a continuum of the parties’ presumed intention’ based on a reasonableness standard.⁷² CISG Article 35(2) seeks to settle any interpretative doubts by providing two implied obligations⁷³ based on the goods’ fitness for their ordinary (CISG Article 35(2)(a)) or particular (CISG Article 35(2)(b)) purpose. Under such a framework, sustainability standards may have a role to play.

13.4.1 Particular Purpose Under CISG Article 35(2)(b)

On the one hand, sustainability standards may be viewed as the goods’ *particular purpose* under CISG Article 35(2)(b). This provision should be analysed first, as it takes precedence over CISG Article 35(2)(a), viz, the ordinary purpose.⁷⁴ According to CISG Article 35(2)(b):

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

A particular purpose is understood as ‘a purpose which lies outside what is considered the ordinary use of the goods’.⁷⁵ The application of the provision is broader than

⁶⁷Ingeborg Schwenzer, *Article 35*, in [11, 103, 107].

⁶⁸Schlechtriem and Butler [12, at 115].

⁶⁹Schwenzer and Leisinger [2, at 267].

⁷⁰See Schlechtriem and Butler [12, at 115] (stating that ‘Article 35(2) CISG sets out what reasonable parties would have agreed upon had they put their mind to it. This is important since it means that the first inquiry has to be what the parties agreed upon and only if that inquiry is not satisfactory is Article 35(2) CISG applicable’).

⁷¹See Schwenzer, *Article 35*, in [11, at 575].

⁷²Schlechtriem and Butler [12, at 115].

⁷³See Krusinga [13, at 30].

⁷⁴See Schwenzer, *Article 35*, in [11, at 575].

⁷⁵Henschel [10, at 222].

merely specific technical requirements.⁷⁶ Namely, it may obligate a seller to abide by public law regulations of the buyer's state.⁷⁷ It may however be even broader than that, since it may also encompass other factors than public law regulations, including ideological, cultural or traditional.⁷⁸ For instance a buyer may buy goods in order to subsequently sell them in a specific market, where great emphasis is put on sustainability standards.⁷⁹ After all, fitness for resale in a particular market may be more limited than universal fitness for resale.⁸⁰

The additional hurdle imposed by CISG Article 35(2)(b) is for the particular purpose to be expressly or impliedly made known to the seller at the time of the conclusion of the contract. The test whether this is indeed the case is objective: was the seller put in a position to be able to recognise the purpose?⁸¹ Schwenzler and Leisinger propose that a seller is put on notice when 'the buyer's firm, i.e. the company's name, contains information in this regard or where its reputation in context with ethical values is widely known in the trade sector concerned'.⁸² Here again the importance of context is highlighted. In the author's opinion a strong indication of a buyer's reputation—brand—in the context of ethical values—such as sustainable development—may be a buyer's participation in the UN Global Compact. The second hurdle is the buyer's reliance on the seller's skill and judgement. No obligation to provide goods meeting a particular purpose exists in circumstances that indicate that the buyer did not rely, or that it was unreasonable for him to rely, on the seller's skill and judgement. Generally, as a rule, it is presumed that the buyer did rely on the seller's skill and judgement.⁸³ It is questionable whether this principle applies to non-physical qualities of the goods, since—under the so-called *sphere of influence principle*—for such qualities the buyer, and not the seller, are a better judge of such characteristics.⁸⁴ Kristian Maley underlines here: 'where a product does not have existing brand recognition in the seller's country, it is unlikely that the buyer would reasonably rely on the seller to make judgements in respect of the product's brand'.⁸⁵ Nonetheless, he underlines that in the case of global brands, such as Coca-Cola, Kodak or Unilever, 'the brand recognition and reputation of the goods will typically be in the seller's sphere of influence'.⁸⁶ Here too, this author believes, participation on the part of the brand-holder in the UN Global Compact has ramifications, since it

⁷⁶See Maley [3, at 93].

⁷⁷Bundesgerichtshof [BGH] [Federal Court of Justice] Mar. 8, 1995, VIII ZR 159/94 (Ger.), <http://cisgw3.law.pace.edu/cases/050302g1.html>.

⁷⁸See Maley [3, at 117].

⁷⁹See Schwenzler and Leisinger [2, at 267].

⁸⁰See Maley [3, at 117].

⁸¹Henschel [10, at 230].

⁸²Schwenzler and Leisinger [2, at 267].

⁸³See Maley [3, at 119].

⁸⁴See *id.* at 119–120.

⁸⁵*Id.* at 120.

⁸⁶*Id.*

makes a brand's adherence to global sustainable development standards *global* and thus expands the seller's sphere of influence.

13.4.2 Ordinary Purpose Under CISG Article 35(2)(a)

Sustainability standards may, on the other hand, be viewed as the goods' *ordinary purpose*. Under CISG Article 35(2)(a): 'Except where the parties have agreed otherwise, the goods do not conform with the contract unless they are fit for the purposes for which goods of the same description would ordinarily be used'. Whether they indeed are fit for their ordinary purpose is objectively ascertained based on the view of a person in the specific trade.⁸⁷ One of the aspects of the goods' ordinary purpose is that they must be fit for commercial purposes, and among others, resaleable.⁸⁸ In order to objectively ascertain the goods' resaleability, they should be analysed through the scope of market expectations towards them, such as tradition, culture, economic circumstances, or legal requirements.⁸⁹ CISG case law indicates that reputation has implications for goods. Kristian Maley notes that case law under CISG chiefly concerns a party's entitlement to damages rather than whether a breach has occurred.⁹⁰ Nevertheless, the case law is informative. The ramifications that the negative reputation of the goods may have, have been apparent in cases concerning unfortunate advertising campaigns⁹¹ or where the goods are unsafe.⁹² However, with regard to the former, it is not always easy to prove a causal link between loss and reputational damage.⁹³ With regard to the latter, the so-called *Pocket ashtray* case⁹⁴ concerned an agreement between an Italian and a Scottish company whereby the latter was to deliver a number of pocket ashtrays. The first shipment contained defective and dangerous goods due to the excessive sharpness of the blades. The seller replaced the defective goods. Nonetheless, subsequent sales were prejudiced due to the reputational damage to the buyer, and hence the buyer instigated arbitral proceedings claiming damages for loss of earnings before the Chamber of Commerce, Industry and Handicraft of the Swiss Canton of Ticino. The arbitrator ruled that the first shipment was defective, since the ashtrays were unsuitable for ordinary use. The claim for damages was upheld, since the loss was caused due to the bad

⁸⁷ See Schlechtriem and Butler [12, at 115].

⁸⁸ See Henschel [10, at 211]; see also Schwenzer and Leisinger [2, at 267–268].

⁸⁹ Schlechtriem and Butler [12, at 116].

⁹⁰ See Maley [3, at 116].

⁹¹ Oberlandesgericht Frankfurt [OLG] [Appellate Court Frankfurt] Mar. 15, 1996, 25 U 100/95 (Ger.), <http://cisgw3.law.pace.edu/cases/960315g1.html>.

⁹² Bundesgerichtshof [BGer] [Federal Court of Justice] Oct. 10, 2005, 4P.146/2005/biz (Switz.), <http://www.unilex.info/case.cfm?pid=1&do=case&id=1094&step=Abstract>.

⁹³ See Maley [3, at 113].

⁹⁴ Bundesgerichtshof [BGer] [Federal Court of Justice] Oct. 10, 2005, 4P.146/2005/biz (Switz.), <http://www.unilex.info/case.cfm?pid=1&do=case&id=1094&step=Abstract>.

reputation of the goods as being hazardous. This judgment was subsequently upheld by the Swiss Supreme Court. The foregoing indicate in essence that goods may be deemed non-conforming due to their negative reputation, only if the non-conformity is due to a physical defect. Maley criticised this view:

This reasoning ... is problematic, because following the principle articulated, the buyer's right to return the goods owing to negative reputation would arise only if the seller had previously delivered defective goods. This seems to be a somewhat artificial distinction, as the direct cause of the poor sales was the negative reputation of the product rather than the non-conformance of the first shipment.⁹⁵

Such criticism is valid, as negative reputation alone—without any physical defect—can be a source of financial loss. Indeed, this was made clear by the German Bundesgerichtshof in the so-called *Frozen pork case*.⁹⁶ The case concerned sold Belgian meat products which were suspected of being hazardous. Moreover, the risk of the goods' defectiveness had already passed in that case to the buyer. This, however, was irrelevant for the Bundesgerichtshof, which held that:

Whether and to what extent the meat delivered to [Buyer] was actually contaminated with dioxin is irrelevant because the suspicion alone, which excluded the marketability, which became apparent later and which was not invalidated by the Seller, has a bearing on the resaleability and tradeability.⁹⁷

In other words, conformity need not attach to the sheer physical qualities of the goods; it can be independent—just as sheer suspicion is.⁹⁸ For this reason, in the author's opinion, a breach of sustainability standards attached to a brand need not be connected to the physical qualities of the goods per se, since commercial reality suggests that a negative reputation can have vast repercussions, even when the physical state of the goods is entirely satisfactory.

13.4.3 *Obviousness of Non-conformity*

Lastly—regardless of the particular or ordinary purpose—it is important to note, however, that bad faith or lack of due diligence on the part of the buyer, fortunately, is unlikely to be rewarded within the CISG context. Namely, under CISG Article 35(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'. Liability under said provision is excluded only for cases that are obvious.⁹⁹ This

⁹⁵Maley [3, at 114].

⁹⁶Bundesgerichtshof [BGH] [Federal Court of Justice] Mar. 2, 2005, VIII ZR 67/04 (Ger.), <http://cisgw3.law.pace.edu/cases/050302g1.html>.

⁹⁷*Id.*

⁹⁸It must however be underlined that the ruling was limited to cases where the suspicion led public authorities to enact measures precluding the goods' tradeability.

⁹⁹*See* Schwenzer, *Article 35*, in [11, at 586].

means its application is limited to cases of gross negligence.¹⁰⁰ CISG Article 35(3) has relevant implications for the incorporation of sustainability standards into the description of the goods. In this context Schwenzer and Leisinger voice an important caveat, namely:

It might be necessary to note here that, in cases where the buyer is only willing to pay a price that is so low that ethical production standards are impossible to be applied—and consequently cannot be expected—, the buyer cannot rely on an implied term of the contract.¹⁰¹

For this reason interpretative attempts under CISG Article 35(2),¹⁰² or Article 35(1),¹⁰³ must be accompanied by attention to whether the price is too low to require adherence to sustainability standards. If the answer is that it obviously is, then one cannot rely on the goods' lack of conformity.

13.5 Conclusions

It may seem facile to attach emotional value to products of a particular brand. Yet it is this phenomenon that allows principles underpinning sustainability—environmental sustainability or humane labour conditions—to find their way into a contract for the sale of goods without express reference. This almost seems cynical, yet the broad scope of the conformity requirement of CISG Article 35 makes this possible. This may come practically into play when interpreting a contract for the sale of goods. Namely, in the course of contractual interpretation it seems prudent to ask a series of questions to ascertain whether sustainability standards form part of the contract. They do if:

- (a) the interest in the goods being products in accordance with sustainability standards is too obvious to need stating;
- (b) the contract would not be commercially viable without sustainability standards;
or
- (c) the very essence of the contract is to acquire a feeling of sustainability more than a physical product.

Regardless of these questions, one cannot neglect the caveat made clear by Schwenzer and Leisinger and must ask the additional question whether the price is so low that it is impossible to anticipate the use of ethical production methods. Indeed, in the final analysis, it is common sense that should dictate the contents of the contract—and common sense seems always to whisper that if the price is too good to be true, then

¹⁰⁰See Schlechtriem and Butler [12, at 120].

¹⁰¹Schwenzer and Leisinger [2, at 265].

¹⁰²N.B., CISG Article 35(3) does not apply to cases of Article 35(1); see Schlechtriem and Butler [12, at 120–121].

¹⁰³Schwenzer and Leisinger's comment pertained to an *implied term*, suggesting that the comment's scope was beyond the scope of application of CISG Article 35(3).

it probably is not true; someone else, somewhere else in the process has had to pay for it in some way.

References

1. Friedman, M. (1970, September 13). The social responsibility of business is to increase its profits. *New York Times*.
2. Schwenzer, I., & Leisinger, B. (2007). Ethical values and international sales contracts. In R. Cranston (Ed.), *Commercial law challenges in the 21st century: Jan Hellner in Memoriam*. <http://cisgw3.law.pace.edu/cisg/biblio/schwenzer-leisinger.html>.
3. Maley, K. (2009). The limits to the conformity of goods in the United Nations convention on contracts for the international sale of goods. *12 International Trade & Business Law Review*. <http://cisgw3.law.pace.edu/cisg/biblio/maley.html>.
4. Saidov, D. (2008). *The law of damages in international sales: The CISG and other international instruments*.
5. Dysted, C. (2015). Ethical defects in contracts under United Nations convention on contracts for the international sale of goods. Unpublished master's thesis, University of Copenhagen Faculty of Law, on file with Albert H. Kritzer CISG Database. <http://cisgw3.law.pace.edu/cisg/biblio/dysted.pdf>.
6. Willigan, G. (1992). High-performance marketing: An interview with Nike's Phil Knight. *Harvard Business Review* (July–August). <https://hbr.org/1992/07/high-performance-marketing-an-interview-with-nikes-phil-knight>.
7. Schultz, H., & Yang, D. J. (1997). *Pour your heart into it: How Starbucks built a company one cup at a time*.
8. Ramberg, C. (2015). Emotional Non-conformity in the international sale of goods, particularly in relation to CSR-policies and codes of conduct. In I. H. Schwenzer & L. Spagnolo (Eds.), *Boundaries and Intersections: 5th Annual MAA Schlechtriem CISG Conference*, March 21, 2013. Vienna: Conference in Honour of Peter Schlechtriem.
9. Ørebeck, P., & Bosselman, F. (2005). The linkage between sustainable development and customary law. In *The role of customary law in sustainable development*. Cambridge University Press.
10. Henschel, R. F. (2005). *Conformity of goods in international sales*.
11. Schlechtriem, P., & Schwenzer, I. (2010). *Commentary on the UN convention on the international sale of goods* (I. Schwenzer (Ed.), 3rd ed.).
12. Schlechtriem, P., & Butler, P. (2009). *UN law on international sales*.
13. Kruisinga, S. (2004). *(Non-)conformity in the 1980 UN convention on contracts for the international sale of goods: A uniform concept?*
14. Schwenzer, I. (2015). Conformity of the goods—Physical features on the Wane. In I. H. Schwenzer & L. Spagnolo (Eds.), *Boundaries and Intersections: 5th Annual MAA Schlechtriem CISG Conference*, March 21, 2013. Vienna: Conference in Honour of Peter Schlechtriem.
15. Williams, J. (2015). Analysis of CISG Article 35—Conformity of the goods in the changing power dynamics of corporate social responsibility. In *19 Hors Serie Trade Development through Harmonization of Commercial Law*. University of Victoria Wellington Faculty of Law. <https://www.victoria.ac.nz/law/research/publications/about-nzacl/publications/special-issues/hors-serie-volume-xvi,-2013/Williams.pdf>.