

CHAPTER 16

ANALYSIS OF CISG ARTICLE 35 - CONFORMITY OF THE GOODS IN THE CHANGING POWER DYNAMICS OF CORPORATE SOCIAL RESPONSIBILITY

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I INTRODUCTION

The rules on "Conformity of the Goods: Article 35 of the United Nations Convention on International Sale of Goods ("CISG") is often discussed in the international sales law community.¹ The debate is centered on the issue: "Whether a breach of a non-physical or tangible feature of a good can constitute a violation of non-conformity under Article 35 of the CISG."² Traditionally, courts and arbitral tribunals have viewed non-conformity as a consequence of the physical features of goods.³

Consumers are demanding goods that are of good physical quality and also assuage their conscience of any guilt.⁴ Consumers are looking at their products in

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1 Joshua D. Karton and Lorraine de Germiny "Has the CISG Advisory Council Come of Age" (2009) 27 Berkeley J. Intl Law 448 Available at: <<http://scholarship.law.berkeley.edu/bjil/vol27/iss2/4>> (Last accessed August 13, 2015).

2 Ibid.

3 Stefan Kroll "Burden of Proof for the Non-Conformity of Goods under Art. 35 CISG" (2011) LIX (3) Belgrade Law Review 162-180. Available at <www.cisg.law.pace.edu/cisg/biblio/kroll2.html> (Last accessed August 13, 2015).

4 Dura Mansoor "The Global Business Crisis and Consumer Behavior: The Kingdom of Bahrain as a Case Study" (2011) 6(1) International Journal of Business and Management available at <www.ccsenet.org/journal/index.php/ijbm/article/viewFile/7161/6526?origin=publicationDetail> (Last accessed August 13, 2015).

two dimensions. One is the physical quality of the goods; the second is the emotional value of the goods.⁵

This approach taken by consumers has also led businesses to look at their practices to satisfy their consumers. Companies now spend significant portions of their budget on branding and goodwill.⁶ The demand for positive image and affiliation has led to the proliferation of Corporate Social Responsibility (CSR) policies and rules of conduct.⁷

Given this emerging business trend, the law of international sales has had to adopt to accommodate the legal implications of attempting to define nonconformity in the non-traditional sense.⁸

The United Nations Global Compact Initiative ("UNGCI") is at the forefront of corporate citizenship. The UNGCI has accumulated more membership than any other global citizenship initiative in the world today.⁹ The UNGCI is recognised by members of the business community as a useful initiative to develop a corporate social responsibility framework. The UNGCI principles apply to all aspects of business and are becoming much more relevant to the conduct of companies in the manufacturing of goods and standard of goods.¹⁰

The purpose of this article is to review how this trend is providing a new or expanding the definition of non-conformity under Article 35 of the CISG using the UNGCI as an example.

5 Ibid.

6 Business in society: making a positive and responsible contribution. <www.iccwbo.org/products-and-services/trade-facilitation/9-steps-to-responsible-business-conduct/> (Last accessed August 14, 2015).

7 Joshua D. H. Karton & Lorraine de Germiny, above n 1.

8 Ibid.

9 UN Global Compact, Overview of the UN Global Compact. <http://nbis.org/nbisresources/sustainable_development_equity/un_global_compact.pdf> (Last accessed August 14, 2015).

10 United Nations Global Compact. Communication on Progress (2013-2014) <www.unglobalcompact.org/system/attachments/70481/original/PKF_Kenya_COP_2014.pdf?1395411066>. (Last accessed August 14, 2015).

II THE UNITED NATIONS CONVENTION FOR INTERNATIONAL SALE OF GOODS (CISG)

The CISG was concluded by the United Nations Commission on International Trade Law ("UNCITRAL") in 1980.¹¹ The goal of the CISG is to provide a modern, uniform, and fair regime for the settlement of disputes occurring in international sale of goods transactions and introduces certainty in commercial exchanges.¹² The CISG has gained worldwide acceptance and currently boasts a membership of about 83 states including nine out of the ten leading trade nations around the world. The CISG member states come from diverse legal traditions and levels of economies throughout the world.¹³

The CISG's success is attributed to its three core principles:¹⁴

- (1) The departure from domestic legal terms and concepts, and the use of a more independent language;
- (2) The discard of the systems inherent in traditional domestic approach, and the adoption of features of a transparent structure unfettered by any historical path dependencies; and
- (3) The Convention's remedy mechanism.

These core principles have proven over the years that the CISG is indeed a suitable international sales law instrument. The CISG is readily available because of the existence of a database of case law and scholarly articles maintained by UNCITRAL and other collaborative entities.¹⁵

11 William P Johnson "Turkey's Accession to the CISG: The Significance for Turkey and Sales Transactions with U.S Contracting Parties" (2011) 8(1) Ankara Law Review, available at <<http://dergiler.ankara.edu.tr/dergiler/64/1766/18712.pdf>> (Last accessed August 14, 2015)

12 Ibid.

13 Status, United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980) <www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG_status.html> (Last accessed August 14, 2015).

14 Ingeborg Schwenzer & Pascal Hachem "The CISG-Successes and Pitfalls" (2009) 57 AM.J. COMPL.L.457. See also, Ahadi, Mona "The United Nations Convention on Contracts for the International Sale of Goods: Should Developing Nations Such As Iran Adopt the CISG?" (2013) Durham theses, Durham University available at Durham E-Theses Online: <<http://etheses.dur.ac.uk/16/>> (Last accessed August 14, 2015).

15 Luca Castellani "CISG and Harmonization of Asian Contract Law" available at <www.nysba.org/Sections/International/Seasonal_Meetings/Vietnam/Program_4/CISG_Paper.html> (Last accessed August 14, 2015).

The CISG applies to contract for the sale of goods between parties whose places of business are in a different Contracting States.¹⁶ It also applies when the rules of private international law elect the application of the law of the Contracting State.¹⁷ The CISG does not apply to sales involving consumers, services, and certain specified types of goods. The CISG also regulates the obligation of the buyer as well as the allocation of risk.¹⁸

III THE UNITED NATIONS GLOBAL COMPACT INITIATIVE

The United Nations Global Compact Initiative is a "self-policing global policy initiative to encourage businesses to align their practices with the principles outlined under the initiative."¹⁹

The framework of the Global Compact has ten base principles grouped under four main areas namely: human rights, labour, the environment and anti-corruption.²⁰

The Global Compact is now the world's largest corporate citizenship initiative with over 12,000 corporate participants and other stakeholders from over 145 countries.²¹ The Global Compact is an opportunity for businesses, governments, and civil societies to collaborate and partner with the United Nations to create and implement sustainable policies and practices to meet emerging social, political and economic challenges in business.²²

16 Katrina Winsor "The Applicability of the CISG to Govern Sales of Commodity Type Goods" (1/2010) 14 *Vindobona Journal of International Commercial Law and Arbitration* 83-116 available at <www.cisg.law.pace.edu/cisg/biblio/winsor.html> (Last accessed August 14, 2015).

17 Adam Newhouse & Tanaka Tsuneyoshi "CISG – A Tool for Globalization (1): American and Japanese Perspectives" (2012) available at <www.ritsumeit.ac.jp/acd/cg/law/lex/rlr29/Adam_Tanaka.pdf> (Last accessed August 14, 2015).

18 Judith L. Holdsworth "Practical Applications of the United Nations Convention on Contracts for the International Sale of Goods (CISG)" (2001) available at <www.cisg.law.pace.edu/cisg/biblio/holdsworth.html> (Last accessed August 14, 2015).

19 Melissa Ouellet, Jodi L. Short & Michael W. Toffel "Reinforcing Regulatory Regimes: How States, Civil Society, and Codes of Conduct Promote Adherence to Global Labor Standards" (Working Paper # 65, 2013) available at <www.ksg.harvard.edu/m-rcbg/CSRI/publications/workingpaper_65_toffel_short_ouellet.pdf> (Last accessed July 30, 2015).

20 Ten Principles under the United Nations Global Compact available at <www.unglobalcompact.org/abouttheGC/thetenprinciples/index.html> (Last accessed July 30, 2015).

21 Overview of the UN Global Compact available at <www.unglobalcompact.org/AboutTheGC/index.html> (Last accessed July 31, 2015).

22 Operationalizing the UN Global Compact-PRI "Guidance on Responsible Business in Conflict-Affected and High-Risk Areas" A Joint UN Global-PRI Publication available at <www.eni.com/it_IT/attachments/sostenibilita/etica-impresa/B4P_Resource_Package_company.pdf> (Last accessed July 29, 2015).

The two core visions of the Global Compact are²³:

- (1) To mainstream the Global Compact's ten principles in business strategy and operations around the world; and
- (2) Catalyse business action in support of UN goals and issues, with emphasis on collaboration and collective action.

The Global Compact is a conduit promoting ideas sharing and networking opportunities for businesses and other corporate entities.²⁴ An example was demonstrated in 2009, when Latham & Watkins, a global law firm issued a memorandum on the importance of voluntarism as the foundation of the Global Compact initiative.²⁵ The Latham & Watkins memo outlined the importance of the Global Compact's commitment to voluntarism as a complement to regulatory policies.²⁶

The voluntarism focus of the Global Compact has received both praise and criticism.²⁷ Critics cite that the volunteerism focus without any enforcement mechanism creates a loophole for companies to "blue wash" their image as a Global Compact member without actually following through with the obligations and commitments.²⁸ Proponents also praised the voluntarism focus as a complementary self-regulating mechanism in addition to other regulatory policies and rules. Also often criticised is the lack of a definitive timeline for the implementation of the UNGCI principles. This is often viewed and interpreted as leaving room for unaccountability by companies.²⁹

23 Ibid.

24 Sven Wiedemann "Investigation of International Trends and Initiatives for a sustainable real estate Market: Development of a Strategic Approach for the adaptation of the UN Global Compact Principles to the real estate Sector." Karlsruhe Institute of Technology (KIT) (2014) KIT Scientific Papers in Real Estate, Vol. 1 available at <www.oew.kit.edu/english/290.php> (Last accessed August 14, 2015).

25 Latham & Watkins, LLP "The Importance of Voluntarism" (2009) available at <www.unglobalcompact.org/docs/about_the_gc/Voluntarism_Importance.pdf> (Last accessed August 14, 2015).

26 Ibid.

27 Hertie School of Governance-Working Papers, No.38, and CSR Instruments: A Guide for Policymakers. Edited by Anke Hassel (2009) available at <www.hertie-school.org/fileadmin/images/Downloads/working_papers/38.pdf> (Last accessed August 14, 2015).

28 Ibid.

29 Ibid.

IV RULES ON THE CONFORMITY OF THE GOODS UNDER THE CISG

The legal analysis starts with the provisions of Article 35 of the CISG. Article 35 is divided into three sections³⁰:

- (1) The seller must deliver goods that 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 judgment;
 - (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.

Section (1) of Article 35 is primarily the rules often used to determine non-conformity of the goods. Section (1) embodies the fundamentals of contract law, ie freedom of contract. Therefore pursuant to Article 35(1), the buyer is entitled to receive exactly what was bargained.³¹ Article 35(2) which contains four subparts is triggered when the parties have not agreed otherwise on their contractual

30 Annotated text of the CISG, Article 35 available at <<http://cisgw3.law.pace.edu/cisg/text/e-text-35.html>> (Last accessed August 14, 2015).

31 Djakhongir Saidov "Article 35 Of The CISG: Reflecting On The Present And Thinking About The Future" (2013). 58 Villanova Law Review 529 available at <<http://lawweb2009.law.villanova.edu/lawreview/wp-content/uploads/2013/07/VLR405.pdf>> (Last accessed August 14, 2015).

expectations.³² This begins with an inquiry to establish the absence of a valid contractual agreement that is being subrogated. The four subparts also contains some positively expressed assumptions about the contractual requirements of the goods.³³ Article 35(3) provides exceptions to the seller's liability where the buyer knew or could not have been unaware of the lack of conformity.³⁴

V CAN A BREACH OF A GLOBAL COMPACT PRINCIPLE GIVE RISE TO A BREACH OF CONTRACT UNDER ARTICLE 35 OF THE CISG?

As previously stated the CISG governs transactions of which the subject matter is the sale of goods.³⁵ Consequentially, the rules on conformity are written to define the subject matter of the transactions, the goods.³⁶ In consistence with this interpretation, 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.³⁷ This scenario is fairly easy to determine in the event of a dispute.

The interpretation and application of Article 35(2) has raised more of the issues courts, and arbitral tribunals are often called upon to resolve.³⁸ The central concept of Article 35(2) is to use the sub-parts to determine if the seller produced goods that are in conformity with the buyer's expectation or commercially valuable. This is often challenging where the buyer is claiming a breach of an implied purpose. For instance, a buyer who advertises as a global compact company claims that because

32 Harry M. Flechtner "Funky Mussels, A Stolen Car, And Decrepit Used Shoes: Non-Conforming Goods And Notice Thereof Under The United Nations Sales Convention (CISG)" (2008) 26 Boston University International Law Journal, available at <www.Bu.Edu/Law/Central/Jd/Organizations/Journals/International/Volume26n1/Documents/1-28.Pdf> (Last accessed August 14, 2015).

33 Ibid.

34 Ibid.

35 John P. McMahon Guide for Managers and Counsel Applying the CISG Guides for Business Managers and Counsel. (2010) Available at <www.cisg.law.pace.edu/cisg/guides.html> (Last accessed July 30, 2015).

36 Harry M. Flechtner "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" University of Pittsburgh Legal Studies Research Paper No. 2012-19 available at <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=212166> (Last accessed July 30, 2015).

37 Above n 32.

38 Teija Poikela "Conformity of Goods in the 1980 United Nations Convention on Contracts for the International Sale of Goods". (2003/1) Nordic Journal of Commercial Law 1-68 available at <www.cisg.law.pace.edu/cisg/biblio/poikela.html> (Last accessed August 10, 2015).

his business tenets are aligned to the principles of the global compacts he implies that because of his advertisements all of his goods must be fit for purpose and align with the message of his advertisement.

Even though the current rules on conformity appear to be adopting the emerging trend of CSR policies as an integral part of today's commerce; there are some controversies on the way the rules are being applied. The controversy mainly stems from the fact that most of the global compact companies are at varying stages of meeting their obligations and commitments under the initiative. One of the main issues has been the determination or definition of "purpose" when the buyer did not define it during the negotiation stages. Another point of contention has been how should the parties' liabilities be determined where the buyer claiming non-conformity is not in total compliance with the Global Compact principles.

This ultimately leads to the question, should purpose be determined based on the principles completed by the buyer or on future principles that will be completed by the buyer? Under the current framework of Article 35, an imposition of Article 35(2) to analyse these issues can create an ambiguity leading to one-sidedness favouring the buyer who is claiming to be a Global Compact company.

VI CONCLUSION

With the current rules on conformity, the relationship between manufacturing of goods and the promotion of CSR policies has become a sophistication that requires a set of guidelines to help courts, arbitral tribunals and other stakeholders to find consistency and cooperation. The emergence of CSR policies stands out because of the various degrees of economic development, consumer protection laws and labour laws in different jurisdictions. The CISG does not exclude consumer protection laws and other issues that are "domestically" protected. However, the cases of non-conformity for violation of CSR policies are typically consumer or jurisdiction driven. These cases raise issues that were at the time of negotiating the CISG dubbed "too controversial", and thus tabled for future review. Accordingly, the time to revisit those issues may be now.