CONFORMITY OF GOODS IN THE 1980 UNITED NATIONS CONVENTION OF CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS

By Teija Poikela[1]

Nordic Journal of Commercial Law
issue 2003 #1

[1] Teija Poikela is attorney at Studio Legale Sutti, Milan, Italy and is currently on research leave.

1 INTRODUCTION

The Art 35 of the 1980 United Nations Convention of Contracts for the International Sale of Goods states that

> «(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 not conform to the contract unless they:
>
> (a) are fit for the purposes for which the 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 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 the goods which the seller has held out to the buyer as a sample or as a 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 sub-paragraph (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.»

This study will focus on the meaning of the term «non-conformity» as understood by Article 35 of the Convention, (the CISG), and on providing an overlook of case law in its application. Also the solutions adapted by certain domestic legal systems are studied.[2]

In the social sciences it is coming to be recognized that one of the greatest difficulties is that of statement, and that many disputes are due to the imperfections of the language. Also jurisprudence is in need of semantic analysis. The difficulty of using words does not press upon the ordinary man because it usually does not matter to him whether, for instance, he calls a number of stones a «heap» or not. All that matters is that he should make his meaning clear enough for the purpose at hand.[3] In law, however, it is different, for therein we draw sharp conclusions based upon these words of gradation. The question, whether a man is left in freedom or detained in a mental institution, depends on whether he is classified as sane or insane in the legal sense, as also does the question whether his dispositions of property are upheld or not. [4] In fact, the language of law has long been a source of concern to the society. It has been the subject of continuous literary criticism and satire. Critics have highlighted its technical terms, its convolutions and its prolixity. Calls have regularly been made for the use of a simpler style. Some improvements have been made in response to those calls, but legal language remains largely unintelligible to most non-lawyer members of the society. In some cases, the obscurity may arise from the complexity of the law and of its subject matter. In other

[2]The current situation in the United Kingdom was chosen to be studied more accurately because it is *not* a contracting state of the CISG. As regards the position of the Scotland, from the comparative studies' point of view it is rather interesting since it has adopted elements from both English and European legal traditions, making it an example of so called mixed legal system. This derives from historical reasons. By the Act of Settlement of 1707 Scotland kept its legal system and courts. The Scottish legislator, judges and practitioners follow developments of English case and statutory law with particular interest. *Mikkola*, p. 52

[3] *Glanville Williams*, in Lloyd's Introduction to Jurisprudence, p. 1181

[4] *Glanville Williams*, p. 1183

cases, however, it is due to the complexity of the language in which the law is expressed. While this is particularly painful truth in many domestic realms, international conventions tend to make an exception from this rule; since a lot of time and effort is given in the drafting of the conventions and as it is kept in mind that the interpreters - the users - of the conventions will have different legal backgrounds, it is necessary to strive for clear wording.

The linguistic definition of the term «conformity» is one based on agreement and congruity, and thus largely a subjective term. However, for the purpose of a legal context, a larger degree of certainty is required from a term.[5] To find out the real meaning of the term, we have to study the prevailing interpretation of it.[6]

Throughout the work on uniform laws realists have been saying: «Even if you get uniform laws you will not get uniform results.» In fact, laws often use concepts that are local mental inventions that lack equivalent concepts in other legal systems. [7] International unification *is*, in fact, impossible. We should, however, consider the alternatives: conflicts of rules that are unclear and vary from *forum to forum*; national systems of substantive law expressed in doctrines and languages that, for many of us, are impenetrable. What *is* possible is to make law for international trade a bit more accessible and predictable. [8]

2 VIENNA CONVENTION

2.1 Historical background - the need for a convention

The legal structures, as well as any other structures in the society, must change as does change the society itself. *Karl Popper* compares the situation of legal knowledge and its development to a situation of development of a town. To enable the development to take place it is not enough to repair and fix the existing entities. Once in a while one has to try to see the whole from a distance and have courage to remove what is old or not working, in order to construct something new, something that is based on current circumstances prevailing in the society. This is the case in international trade. In the era of globalization, when the national borders are losing their original significance, updating national laws doesn't suffice; there is a need for international, uniform regulation.

[5] *Baasch Andersen*, chapter I.1. See also *Sacco*, Langue et droit, in Italian National Reports, p. 1 and *Castronovo , Carlo* who comments Principles of European Contract law in Vita notarile 2000, I, p. 1193: »àla lingua prescelta tende a costringere i concetti e le categorie negli stampi ad essa propri, sicchè il rischio è quello di adottare gli istituti giuridici che costituiscono il prodotto di quella lingua sul piano del diritto. Dall'altro, se per evitare tale inconveniente si adotta un linguaggio giuridicamente inusitato, si rischia di costruire figure incomprensibili per gli stessi giuristi che quella lingua hanno sempre avuto quale lingua giuridica madre. Si tratta allora di non diventare prigionieri della lingua nella quale si formula il disposto normativo limitandosi a riprodurne gli istituti giuridici che le sono propri originariamente, senza dare vita però a qualcosa che, in quanto magari diverso, se diverso deve essere, dall'istituto che in quella lingua ha trovato finora espressione, sia un prodotto di sintesi come i prodotti chimici che non hanno uguale nella realtà naturale, cioè una figura che finisce con il non avere molto senso giuridico.»

[6] *Popper* compared two types of researchers: critic is the one who studies new discoveries to be able to see prevailing theories in a new light, while neurotic is the one who studies new findings only to strengthen one's own outlook.

[7] Use of untranslatable civil law concepts was one of the reasons why the predecessor of the CISG was rejected by common law world.

[8] *Honnold*, Journal of Law and Commerce, p. 207

Considering that unification of the law of international trade promotes certainty of law and hence the circulation of goods and wealth, it's not surprising that through the ages there have been numerous attempts to uniform the laws regulating international trade, based on the idea of creating a transnational body of norms capable of beating the worst enemy of the merchants: the barriers constituted by national legislations.[9]

Since the creation of an internationally accepted convention in the field of international trade required world-wide participation, the United Nations Commission for International Trade Law (hereinafter the UNCITRAL) was established 1966 to revise the material concerning international trade. This body had its first session in 1968; in its first decade UNCITRAL made notable progress in preparing uniform international rules for arbitration, carriage of goods by sea, negotiable instruments and the sales of goods. This progress was analyzed in a symposium issue of the American Journal of Comparative law. [10]

One of the formidable efforts of UNCITRAL to unify international commerce was The Diplomatic Conference of Vienna, held from 10th of March to 11th of April 1980. Sixty-two states and eight international organizations participated in the conference. At the end of the conference the draft of Convention on Contracts for the International Sale of Goods (the CISG), was approved unanimously.[11] However, the Convention did not enter into force, even in the first Contracting States, until 1.1.1988, when the requirements of becoming effective were met.

However, it should be noted, that in spite of the widespread adoption[12] of the CISG, the application of its predecessors, ULIS[13] or ULF[14], is not completely excluded: they can still be applied even between the Contracting States if the CISG does not apply.

When Ernst Rabel, a noted German jurist, in the course of preparing the first drafts for a uniform sales law, compiled and analyzed the legal rules regulating the seller's obligation with respect to the quality of the goods sold, he came to the conclusion that, while these are practical questions of everyday commerce, to the lawyer they are full on unresolved difficulties. The irregularities and lack of clarity were essentially caused by the irrational survival of a doctrine rooted in antiquity. Subsequently, Rabel uncovered the roots that are the Roman, Anglo-America and German laws. He also exposed the common core of all legal systems: that the seller shall assume the responsibility that the goods sold conform to the contractual agreement. The seller's obligation and liability, therefore, are not derived from any special warranty nor is he always liable for certain objective characteristics of the goods sold. With this opinion Rabel subsequently shaped the further development of German law, even though it is under attack

[9] *Ferrari*, p. 5
[10] *Honnold*, p. 51
[11] *Ferrari* 1998, p. 6
[12] The CISG has been ratified by 62 states and this makes it one of the most successful uniform international conventions to date. The Contracting States are: Argentina, Australia, Austria, Belarus, Belgium, Bosnia-Herzegovina, Bulgaria, Burundi, Canada, Chile, China (PRC), Colombia, Croatia, Cuba, Czech Republic, Denmark, Ecuador, Egypt, Estonia, Finland, France, Georgia, Germany, Ghana, Greece, Guinea, Hungary, Iceland, Iraq, Italy, Kyrgyzstan, Latvia, Lesotho, Lithuania, Luxembourg, Mauritania, Mexico, Mongolia, Netherlands, New Zealand, Norway, Peru, Poland, Republic of Moldova, Romania, Russian Federation, Saint Vincent and the Grenadines, Singapore, Slovakia, Slovenia, Spain, Sweden, Switzerland, Syrian Arab Republic, Uganda, Ukraine, United States of America, Uruguay, Uzbekistan, Venezuela, Serbia-Montenegro (formerly Yugoslavia) and Zambia.
[13] Uniform Law on International Sales, The Hague 1964
[14] Uniform Law on the Formation of Contracts for the International Sale of Goods, The Hague 1964

again. It laid also the basis of the first drafts of the later ULIS. Nothing describes this basic principle better than the statement by Lord Justice Brett 1877: « The governing principle is that the thing offered or delivered under a contract of purchase and sale must answer the description of it which is contained in words in the contract, or which would be so contained if the contract were accurately drawn out.» [15]

2.1.1 The position of the CISG in respect to national laws

In general, the CISG takes precedence over the law of the Contracting States but there are cases where it recedes in favor of individual regulations of certain States, either by virtue of the CISG directly, or by virtue of a reservation made by a contracting State. In the latter case, the consequences of a declaration of reservation are only, according to a widely held opinion, in the non-application of the Convention to the affected contracts. It is in the first case that the rules of a particular State are positively called to apply in lieu of the stipulations of the Convention, *i.e.* the prescriptions of the *lex fori*. Above all, the CISG may be superseded, pursuant to its Articles 90 and 94, by national laws.[16]

A good illustration of the linkage between the Vienna Convention and national law is provided by the law of the United States of America. The Convention is part of the federal law of the U.S.A. and, as such overrides Uniform Commercial Code, which is state law in the States which have given effect to it, [17] except if the parties have excluded the application of the Convention in whole or part[18] or in so far as a particular topic is not regulated by the Convention. These topics include important parts of Article 2 of the UCC - this is the Article dealing with Sales - such as the special trade terms and the provisions on passing of title, reservation for security and good faith. The same relationship exists between the CISG and other national systems of law. It will therefore be necessary in many cases to ascertain the national law governing the international sales contract.[19] However, the crucial difference between the two must be borne in mind: the Convention is a code applicable to sale of goods. The UCC is a collection of codes and one of these is a sales code. The UCC also contains rules on letters of credit, methods of perfecting security interests in goods and other commercial subjects; some of which can also be relevant to sales of goods.[20]

While the ULIS is intended to be a self-contained code with regard to the topics regulated by it, and expressly excludes the rules of private international law, the draftsmen of the Vienna Convention were aware that measures of conflict avoidance can reduce the dangers of a conflict of laws but cannot completely exclude them. For this reason they have linked the CISG with national systems of private international law.

[15] *Galston - Smit*, 6-20
[16] *Enderlein - Maskow*, p. 11
[17] These are all USA States and jurisdictions, except Louisiana. The effect is that the Vienna Convention is law in Louisiana, but Article 2 of the UCC is not.
[18] By virtue of Art. 6 of the Convention. If the parties adopt in their contract the law of a Contracting State, their adoption would include the adoption of the State's private international law and they would then again adopt the Convention; if they wish to exclude the Convention, they have to adopt the domestic law of the Contracting State. Thus, a choice of law clause in favour of the law of New York makes the Convention applicable, but a choice of law clause in favour of New York law excluding the CISG does not have this effect.
[19] *Schmitthoff's Export Trade*, p. 688
[20] *Kritzer*, p. 6

2.2 Comparing the ULIS and the CISG

This linkage between the CISG and national laws occurs in two respects. First, CISG, like the Uniform Sales Law, does not regulate all incidents of the international sales transaction. It does not regulate:

a) the special trade terms for the delivery of goods and the fixing of the price, and
b) passing of the title of goods.[21]

The reason for exclusion (b) is that the regulation of the passing of title in the various legal systems is so different that a uniform rule could not be established. In addition, the Convention does not regulate the law governing the alleged invalidity of a contract on general grounds, such as fraud, misrepresentation, incapacity and so on. Product liability is likewise not regulated by the Convention.

Secondly, the CISG contains an express reference to national systems of private international law for the filling of gaps in the Convention. Art. 7(2) provides:

> «Questions concerning matters governed by this Convention not expressly settled in it are to be settled in conformity with the general principles on which it is based or, in the absence of such principles, in conformity with the law applicable by the virtue of the rules of private international law. «

Every convention which does not constitute an exhaustive source of its subject, but regulates only certain issues of it excluding others, can easily give rise to problems concerning the precise meaning of its provisions and to problems concerning necessity of filling the gaps that inevitably appear as a result of an incomplete regulatory structure. These issues may arise in relation to any international convention, but they are most accentuated in the uniform sales law as resulting from the Vienna convention, since such issues generally arise in proportion to the number of legal systems represented by the various Contracting states.[22]

Whereas ULIS has been adopted in the form of uniform law which contracting states, adhering to the special conventions of introducing the law to their national legal system, are bound to incorporate into their national law, the CISG has been shaped in the form of convention. In one document, it contains rules governing the relations between parties to contracts of sale as well as the international law instruments to put them into force. The CISG thus follows a new trend in the formal arrangement of a universal standardization of law that was already employed in the conventions on prescription, agency, factoring and leasing. Prevailing opinions also expect meritorious rules of a contractual convention to be incorporated into the domestic law of the Contracting States, so that they become binding on their legal subjects. Yet there is a difference with uniform laws insofar as this incorporation elucidates the international character of the respective rule, underlines its special position in domestic law, and furthers an interpretation and application, which is aimed at standardization of law. Consequently, it aims at an international harmony of decisions and represses a legal practice coined with national concepts, to which different jurisdictions tend to lean towards in the case of uniform laws. [23]

An apparent expression thereof is that the use of the convention form provides, in cases of discrepancies, for an interpretation pursuant to the authentic text and not according to a translation into another language. Incorporation into domestic law is effected by promulgating

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22 *Ferrari*, Uniform Interpretation of The 1980 Sales Law, p. 4
23 *Enderlein - Maskow*, p. 8

the adopted convention and not by enacting a special law. The strengthening of the international character of contractual norms may even be more effectively achieved, if one dispenses with the auxiliary construction of integration into domestic law, and rather proceeds from the assumption that domestic law renounces its own regulations and their use for the benefit of the convention and the extent of its scope. When a state becomes party to a convention containing authoritative rules for its legal subjects, we would prefer to interpret that the rules become directly binding on its legal subjects as international rules. Such a construction is even favored whenever domestic law refers to international norms. This reference may clear up matters, however it does not seem to us a *condictio sine qua non*, for it implies making the direct application of international norms dependent on national law, a practice that still is widespread. However, this is not to be desired, for the very reason that it would lead to a situation where some countries apply international treaty norms as integral part of their domestic law system whereas other countries directly apply them as international law.[24]

2.3 Interpretation of the CISG

Since there is no supranational instance or Supreme Court before which international sales cases can be brought, the problems of uniformity must be solved in the domestic realm.[25] The drafters of the CISG were aware of this problem, as evidenced by the fact that they inserted into the Convention provision designed to reduce the danger of diverging interpretations.[26] According to many of the legal writers who have dealt with the issue of interpretation of the CISG[27], interpreting it one should always take into consideration that it is a result of international unification efforts that, unlike domestic statutes, was not elaborated with any particular legal system or language in mind. Thus, it has been suggested that it is necessary to read the CISG not through the lenses of domestic law but rather in an autonomous manner, which is why in interpreting the CISG one should not resort to the meaning generally attached to certain expressions within the ambit of a particular legal system.[28]

Many commentators have argued, that even where the expressions employed by the CISG are textually the same as expressions that have a specific meaning within a particular legal system, they must be interpreted autonomously. However, still there are some expressions that an interpreter must interpret «domestically,» despite the negative effect that may have on the uniformity the drafters of the CISG wanted to achieve. One such expression is «private international law.» [29] *Ferrari* concludes that where the CISG makes reference to private international law, it refers to a domestic concept of private international law. More particularly, the CISG refers to the private international law of the forum. One important conclusion can be drawn from this: the obligation to interpret the CISG in an autonomous manner is not

[24] *Enderlein - Maskow*, p. 9

[25] Although a tribunal monitoring its application would be preferable, the uniformity of the CISG would seem well protected to a certain degree. See *Baasch Andersen*, 2.1.2

[26] It has often been stated that it is only possible to reduce the danger of diverging interpretations; it is not possible to eliminate them altogether. See also *Lookofsky* in «Consequential Damages in Comparative Context» 1980, p. 294

[27] Several papers have been written on the interpretation of the CISG. See among others *M.J.Bonell*, «L'interpretazione del diritto uniforme alla luce dell'art. 7 della convenzione di Vienna sulla vendita internazionale», Rivista di diritto civile (1986/II), 221 and *S.Cook*, «Note, The Need for Uniform Interpretation of 1980 United Nations Convention on Contracts for the International Sale of Goods», p.50

[28] *Ferrari*, Uniform Law Review 2001-1, p. 204. See also *Ferrari* in Diritto e procedura civile, p. 282

[29] Even though the expression »private international law» is employed only twice by the CISG its importance should not be underestimated. This importance is due to the fact that the references to the *de quo* relate to the CISG's sphere of application, as well as to its gap-filling, two of the most relevant issues under the CISG. See *Ferrari,* Journal of Law and Commerce, 17, p. 250.

absolute. This conclusion causes a new problem, that is, how does one identify the concepts that are not to be interpreted autonomously? Unfortunately, the CISG does not offer any guidance, as it does not offer any guidance on the different, albeit related issue of how to determine which interpretation should be preferred when the Convention itself gives rise to different autonomous interpretations. One must therefore conclude that the CISG's autonomous interpretation cannot, by itself, guarantee uniformity.[30]

The requirement of autonomous interpretation was expressly held by an arbitral award of the International Chamber of Commerce, which did not overtake the distinction made in French domestic law between non-conforming delivery and *garantie de vîces caches.*[31] It may be noted, however, that the apparent or hidden nature of the defects, though not leading to the same results as in French domestic law, seems to play an important role in case law regarding examination and notice requirements.

The independence of the CISG concept of lack of conformity has been affirmed also by the German Supreme Court: A German dealer in chemical products concluded four contracts for the purchase from a Dutch company of cobalt sulphate with specific technical characteristics. The buyer refused to pay the price alleging, *inter alia*, that he was entitled to avoid the contracts because the goods were of a kind different from that agreed upon and therefore the delivery amounted in fact to a non delivery. The Court did not follow the buyer's reasoning, which was clearly aimed at taking advantage of the subtle distinction drawn by German courts between a defect and an *aliud pro alio.* It stated that the CISG, contrary to German domestic law, does not make any difference between delivery of goods of a different kind and delivery of non-conforming goods.[32] The court's refusal to apply a distinction, which «plagues» not only German law, but also that of other countries, is to be appreciated. This is all the more so as a previous decision of a German *Oberlandesgericht* had cast doubts on the correct use by courts of the concept of non-conformity.[33] The *Bundesgericht* decision does not rule as on whether a delivery of goods, which are totally different from the ones indicated on the contract, should still be subject to the conventional rules on lack of conformity. It may be that in such extreme situations the courts would resort to other remedies such as the ones provided in case of mistake.

2.3.1 Linguistic problems

As already anticipated in the beginning of this study, the interpretation and application of a legal text is strictly dependent on its linguistic expressions. Legal translation should therefore be considered as a relevant prerequisite for the introduction and application of uniform law texts in those countries whose language does not happen to be the official language of the international instrument to be applied. Comparative law scholars have often stressed the difficulties and risks inherent in legal translation, that go far beyond the linguistic field, to

[30] *Ferrari*, CISG Case Law: A New Challenge for Interpreters, p. 253

[31] ICC Court of Arbitration, n. 6653/1993, Journal de Droit International, 1993, p. 140. The decision has been revised on other grounds by Cour d'Appel de Paris, 6.4.1995

[32] BGH 3.4.1996, ZIP, 1996, 1041. The buyer's contention in this case was clearly unfounded, because the seller had delivered the agreed upon chemical substance, though not conforming to the contractual specifications. This fact, however, does not diminish the importance of the decision. No undue burden is put on the buyer by requiring notice in all cases when the goods do not correspond to the contract. See *Veneziano*.

[33] OLG Düsseldorf 10.2.1994, 6 U 119/93. In this case a part of the delivered textiles (1/4) were of a different pattern and color than the one agreed upon. The court ruled that the delivery of a false color was to be treated as a non delivery, and that the seller could not declare the contract avoided since he did not fix an additional time for performance. *Veneziano*, p. 42

range toward legal comparison, by reason of the relativity of the legal terminology employed in the various legal systems. [34] Notwithstanding these difficulties it is of vital importance that an exact translation be achieved, as an improper one may certainly affect the operation of uniform law and impair the uniformity itself of the rules adopted. For example, the first unofficial Italian version appears in respect of various points to be inappropriate and misleading, probably as a result of an unnecessarily technical approach to the translation process. A new and more correct Italian version is now available.

2.4 The problems arising out of interpretation

From the obligations to «have regard to the Convention's international character,» [35] and to have regard «to the need to promote uniformity in its application» legal scholars have deduced that whoever has to apply the Convention, must make efforts to adopt solutions which are tenable on an international level, solutions which can be taken into consideration in other Contracting States as well. The more various concepts are interpreted autonomously, the more likely it is to achieve the desired result. On the other hand, some legal writers have interpreted the aforementioned obligation to mean that in applying the CISG, courts must take into account relevant decisions of other States. However, requiring interpreters to consider foreign decisions can create practical difficulties: foreign case law cannot easily be retrieved and is often written in a language unknown to the interpreter. [36]

2.5 Steps taken to overcome obstacles

In order to overcome the obstacles that tend to hamper the uniform application of the CISG, various steps have been undertaken. There has been a great progress in the accessibility to international case law with the arrival of databases on the Internet and collections of case law such as CLOUT[37] and UNILEX although this progress is primarily made for the legal systems of Central Europe and United States. Nevertheless, the need of updated database of case law has been recognized elsewhere, too.[38] However, the knowledge of foreign case law does not *per se* suffice to guarantee uniformity, just as knowledge of domestic case law does not avoid all interpretative problems within a particular jurisdiction, also because in the majority view foreign case law has a persuasive value only.[39] The solution of another kind, proposed by *Bonell*, is that UNCITRAL should promote a creation of a sort of «Permanent Editorial Board». The Board should be composed only of representatives of States that have actually ratified the Convention, it being understood that the smaller States, particularly those belonging to the

[34] See also opinion of *Lord McEvan*, in the cause David Frape against Emreco International Ltd.
[35] Some courts have indeed referred to this obligation. For instance, a Swiss court decision stating, «in interpreting CISG, one has to have a particular regard to its international character. The starting point of any interpretation must me the Convention itself, not domestic law» as well as an Italian Tribunal (12.7.2000 Tribunale di Vigevano). Reference to the need to avoid interpreting the Convention in the light of domestic law may be found in some US cases as well: «although the CISG is similar to the UCC with respect to some provisions, it would be inappropriate to apply the UCC case law in construing contracts under the CISG», in Claudia v. Olivieri Footwear Ltd., 1998 Westlaw 164824.
[36] *Ferrari*, Uniform Law Review 2001-1, p. 205. See also *Honnold's* view later in this study.
[37] CLOUT- Case Law Of UNCITRAL Texts
UNILEX- database edited by Prof. Bonell, from the Italian National Research Council (CNR)
[38] As *Boggiano*, a professor of law, University of Buenos Aires, states, » In the interpretation of uniform rules the main purpose of promoting international uniformity should be given serious consideration. In case law and practice this aim is nevertheless disregarded or at least not given adequate weight. Full treatment of the whole case law and practice on uniform law in Latin American countries would require an enormous apparatus that would exhaust the resources and powers of a single scholar, but such an exhaustive piece of work should be carried out if a vivid and realistic picture and not merely a summary of general rules is desired. Such an enquiry is becoming ever more necessary and it is far from being futile.»
[39] *Ferrari*, Uniform Law Review 2001-1, p. 206

same geographical region, may well appoint a common representative. Such a composition of the Board would ensure on the one hand that only those States which have actually ratified the Convention play an active role in its implementation and, on the other, that equal attention be given to each national experience without privileging any country or region for political, economic or even purely linguistic reasons. Each member of the Board should be responsible for gathering judicial decisions and bibliographic material relating to the Convention from his own country or region. The Board as a whole should be concerned with the delicate task of reporting material thus collected. It should then proceed to a comparative analysis of the material collected.[40]

It has been even suggested that a supranational jurisdiction under the auspices of UNCITRAL would be established that would act as a supervisor of the proper interpretation of the Convention and settle international disputes in a neutral setting with objective and experienced judges. This idea has played a key role in the debate for a long time but is now perhaps more a possible option considering the present political climate. Another less ambitious possibility would be to confer on UNCITRAL the power to render advisory opinions in matters regarding the application and interpretation of the conventions elaborated under its auspices.[41]

2.6 CISG-Contract

Interpretation of a contract means in the present context an activity that aims at confirming what the contracting parties actually did agree upon. If an agreement has parts that are unclear, those parts are given a meaning through the interpretative process. Interpretation is needed when the parties' views regarding respective obligations differ and thus have to be confirmed by a third party. Interpretation has to be differentiated from the gap-filling that, in its turn, aims at finding a reasonable solution for the situations that are not contractually agreed upon. In practice the task of the interpreter is somehow more difficult than it may seem; it is up to him to define the borderline between the two. The contract has to be interpreted before we can take a position as regards the presence of the gaps. Moreover, the two activities may appear to be so similar with each other that, as a result, it is difficult to determine which one is needed. On the one hand the background material for gap-filling may be scarce to the extent to require interpretation but on the other hand it may appear that the interpreter is forced to rely on the complementary norms applicable to the contractual relationship.[42]

The interpretation should not be separated from the other phenomena of contract law, since interpretation usually takes place in the context of a broader decision-making. Thus, the interpretation should not be limited to the material issues of the contract but include also other considerations, such as whether the contract was ever concluded, *i.e.* does a valid contract exist that may be interpreted.

2.6.1 Approaches to interpretation

Alternative approaches to interpretation are the objective and the subjective approaches. The former looks for a natural interpretation taking as a starting point the expressions of common use, the term «common use» including also the specific language used on a particular

[40] *Bonell*, p. 242
[41] *Kaczorowska*, p. 129
[42] Oikeustoimilaikitoimikunnan mietintö 1990:20

professional sector. The latter, instead, starts from the parties' intention: the expressions are seen as reflecting parties' common intention and the purpose of the agreement. Many prefer this latter approach since it conforms better with the principles of freedom of the contracting and the autonomy of the parties' will. Considering that the parties are free to decide with whom to contract and on which conditions, it is natural to think that they are also free to decide which expressions to employ. Those who object the use of subjective method claim that the interpretation is most needed exactly *when the common intention is unclear* and thus the subjective approach does not offer a real answer to the questions. Those who defend the objective method allege that by employing the ordinary meaning of the words, a greater certainty of contractual relationships is achieved, also because the contracts often have an effect to undetermined group of third parties as well. This approach also excludes the uncertainty derived from speculations on what the contracting party actually meant by employing a certain expression. Third parties' position counts also because some rights are transferable and the transferee needs to know the rights and obligations deriving from his new position.[43]

2.6.2 Interpretation of a contract of sale

It has been suggested, that when interpreter applies the Finnish Sale of Goods Act, the interpretation of a sales contract should be done respecting the same principles that are respected when interpreting any other type of contract. In any event, it may be prudent to take into account the principles applicable to the CISG, *whether or not the Convention applies*. The Nordic countries decided that the Part II of the Convention would not be applicable; the most likely reason for this having been the need to keep the rules governing the formation of the contract similar to every type of the contract i.e. not creating a different regime for the contracts of sale of goods. Anyhow, the CISG contains some important principles concerning the interpretation and application of the contract. CISG Art. 8 states that the contractual expressions have to be interpreted in conformity with the intention of the party, unless the counterparty did not know it or could not have been aware of it, the purpose of the intention being the discovery of the parties' common purpose. The awareness of the counterparty's intention - in this context - should be understood as a common purpose. It follows that the party who does not accept the purpose of the counterparty must expressly draw other's attention to this fact. This is an expression of an underlying obligation of loyalty towards the other party.[44]

The situation in the U.K. is that, one cannot necessarily draw a conclusion that all their words have become part of the contract based on what the parties said. Their statements may be classified either as terms of the contract or as «mere representation.» The distinction was long of great practical importance, but new developments have reduced its effect without lessening its conceptual significance. If a statement is a term of the contract, it creates a legal obligation for whose breach an appropriate action lies at common law. If it is a «mere presentation,» the position is much more complicated. It is clear that, if a party has been induced to make a contract by a fraudulent misrepresentation, he may sue in tort for deceit and may also treat the contract as voidable. But until recently it was believed to be principle of the common law that there should be «no damages for innocent misrepresentation,» and that, in this context, «innocent» meant any misrepresentation which was not fraudulent. In the nineteenth century,

[43] In the judiciary interpretation certain principles are recalled, in order to favour a proper position. In the doctrine various principles have been broadly analized: the principles may be roughly divided into two categories, namely linguistic and judicial principles.
[44] *Routamo - Ramberg*, s. 30

equity indeed allowed the right of avoidance to a party who had been induced to make a contract by such an «innocent» misrepresentation, but this remedy was limited in a number of ways. By the Misrepresentation Act 1967, representees acquired a remedy that in most cases will be preferable to an action of negligence. Section 2(1) of this Act in effect gives a right to damages to anyone induced to enter a contract by a negligent misrepresentation, and casts upon the representor the burden of disproving the negligence. But where a statement is made neither fraudulently nor negligently, the injured party can still obtain damages only by showing that if forms part of this contract. Contractual cartography remains important.[45]

3 THE GOODS

3.1 The object of the sales contract: definitions of »goods» in the CISG

The Convention does not define «goods» but some of the exclusions specified in the Art. 2[46] and other provisions of the Convention provide guidance for construing this basic concept. It is clear that the «goods» governed by the Convention must be tangible, corporeal things, and not intangible rights like those excluded by Art. 2(d): stocks shares, investment securities and instruments evidencing debts, obligations or right to payment. The point is that these documents represent intangible rights - a claim for payment or for receiving dividends or other payments from an enterprise.[47] Possible dispute over whether electricity is tangible (a quantum) or intangible (a wave) was avoided by the exclusion of electricity. On the other hand, a sale of gas is within the Convention; a motion to exclude gas was defeated.[48] The classification of computer software has led to controversy; some software seems difficult to distinguish from an exceedingly compact book or photograph record. Here, as in other borderline areas, it seems prudent to state in the contract whether the Convention applies. The conclusion that «goods» refer to tangible, corporeal things means that sales of patent rights, copyrights, trademarks and «know-how» are not governed by the Convention.[49] The Convention does not address certain questions that arise frequently in the area of sales law; it does not contain provisions on letters of credit, methods of perfecting security interests in goods and other commercial subjects, many of which can be relevant to sales of goods.[50]

3.2 The meaning of «goods» in the U.K.

Until the advent of the Sale of Goods Act of 1893, English sales of goods was, for the most part, contained in a vast body of case law. The provisions of the 1893 Act remain the basis of English sales of goods law, although that Act has now been re-enacted in the Sale of Goods Act 1979 and been consolidated with more recent law relating to the sale of goods, particularly, some parts of the Misrepresentation Act of 1967, the Unfair Contract Terms Act of 1977 and Sale and Supply of Goods Act 1994 and Sale of Goods Act (Amendment) 1994. There is a

[45] *Furmston, M.P.,* p. 127

[46] Art. 2: »This Convention does not apply to sales: (a) of goods bought for personal, family or household use, unless the seller, at any time before or at the conclusion of the contract, neither knew nor ought to have known that the goods were bought for any such use; (b) by auction; (c) on execution or otherwise by authority of law; (d) of stocks, shares, investment securities, negotiable instruments or money; (e) of ships, vessels, hovercraft or aircraft; (f) of electricity.

[47] Art. 3(2) takes a similar approach in excluding the contracts in which the preponderant part of a party's obligations consists in the supply of labor or other services. See *Honnold*, p. 101

[48] Delegates were clear that »gas» constituted »goods.» Also sale of oil is covered.

[49] *Honnold*, p. 101

[50] *Kritzer*, p. 5

considerable mass of case law interpreting the Act of 1893, much of which remains relevant to the interpretation of the Act of 1979. [51]

The enactment of The Uniform Laws on International Sales Act introduced the two Uniform laws adopted by the Hague Conference of 1964 into the law of United Kingdom. The Act of 1967 was activated and the two Uniform Laws came into force in the United Kingdom on August 18, 1972. [52]

The sphere of application of the CISG is different from that of the Uniform Laws. While the latter are intended in principle to all international sales but enable an acceding State to restrict their application to sales contracts between parties who have their place of business or habitual residence in Contracting States, the Vienna Convention - realistically - restricts its application to contracts between parties who have their place of business in different Contracting States, or to cases in which the proper law of the contract is that of the Contracting State. [53]

The term «goods» is defined as including «all personal chattels other than things in action and money.» The term includes «emblements, industrial crowing crops, and things attached to or forming part of the land which are agreed to be severed before sale or under contract of sale.» The definition is fairly extensive but there are nevertheless some things that do not, or may not fall within this definition, for instance items of intellectual property and company shares. The question as to whether or not the sale of computer software should be treated as a sale of goods does not admit a simple answer. Much of software is sold over the counter in stores in the same way as books and records. If there is a defect in the medium carrying the program, there is no difficulty in holding that there is a breach of the quality warranties of the Sale of Goods Act. It does not seem to push this analysis much further to say that if a malicious person has infected the software with a virus which damages the data and other matter stored in the purchaser's computer, the seller should be liable under the Sale of Goods Act. In the first place, that is a way of transferring liability to the person ultimately responsible, namely the software house, whom the shop supplying the software will no doubt sue in turn. Secondly, the situation is analogous to that where, for example, an infected animal spreads disease through the purchaser's herd. But other software is either specially written for the customer, or requires extensive work to be done to adapt it to the customer's needs. There is no continuing relationship between the parties, which may eventually require the customer to have access to the source codes if the supplier goes into liquidation or is otherwise unable to continue to develop the program for the customer's needs. The sale of goods analogy, which presupposes a particular point in time when the parties can be said to have »sold the goods», seems inappropriate. Clearly, if there are defects in the underlying product, the medium of an «off-the-peg» program which is to be adapted, then these can be dealt with under the Sale of Goods Act.

[51] *Atiyah - Adams*, p. 1 See also the comments of Tudway, in Developments in English Law affecting contracts for the international sales of goods, p.66

[52] The Order in Council which gives effect to the two Uniform Laws provides that the Uniform Law on Sales shall only apply if it has been chosen by the parties to the contract. (This regulation was admitted by the 1967 Act. The United Kingdom was entitled to restrict the scope of application of the Uniform Law on Sales in this manner by virtue of Art. 5 of the First Convention). The Uniform Law on Formation has only ancillary character and applies only to contracts to which the Uniform Law on Sales is applied. While such a restriction considerably reduces the usefulness of the Uniform Laws, it might lead to a difficulty if one party to the contract is resident in the United Kingdom and and the other in a country in which the Uniform Laws apply automatically. This raises a problem of private international law, namely that it has to be determined whether the applicable law of the contract is English or foreign law. In the latter case, the Uniform Laws apply to an English party who has not adopted them in contract, but in the former, they apply only if adopted by the parties.

[53] *Schmitthoff's Export Trade*, p. 687

But the contract to supply software adapted to customer's requirements will usually entail more than a mere undertaking on the part of the supplier to use reasonable care and skill. [54] The seller's assertions about the performance of the software will often be crucial. These representations may themselves, of course, give rise to a claim for damages for material misrepresentation.

It is not wholly clear whether the term «goods» could cover human blood for transfusion or other similar items not ordinarily thought to be the subject of commerce. Another point that requires comment is the latter part of the statutory definition. Since the products of soil must always be sold with a view to their ultimate severance «under the contract of sale,» it appears that, whether or not they are also land within the meaning of the Law of Property Act 1989, they are now always goods within the meaning of the Sale of Goods Act. It is, however, still necessary to distinguish the products of the soil or «things attached to or forming part of the land» on the other hand, from the actual land itself, or interests therein, on the other. The sale of sand from a quarry, for example, is not a sale of things attached to or forming part of the land, but a sale of an interest in the land itself.[55]

3.2.1 Different types of goods in the U.K.

The subject matter of the contract of sale may be either **existing goods** owned or possessed by the seller, or **future goods**, or a ***spes***, or chance. Existing goods may be either specific or unascertained. Future goods include goods not yet in existence, and goods in existence but not yet acquired by the seller. It is probably safe to say that future goods can never be specific goods within the meaning of the Act. This certainly seems to be true of those parts of the Act dealing with the passing of title. However, if sufficiently identified, future goods may be specific goods in some cases. A sale of 200 tons of potatoes to be grown on a particular piece of land was held to be a sale of specific goods, despite the fact that they were not existing goods, for the purposes of the common law rules of frustration.[56]

The sale of a *spes* - chance - must be distinguished from the contingent sale of future goods, though the distinction is not so much as to the subject matter of the contract but as to its construction. Thus it is possible for a person to agree to buy future goods from a particular source and to take a chance) or, in the language appropriate to the sale of goods, the risk) of the goods never coming into existence. For example, a person may agree to buy whatever crop is

[54] *Atiyah - Adams*, p. 47 In the *Saphena Computing Ltd v. Allied Collection Agencies Ltd* the purchasers sought damages for failure to supply software which was reasonably fit for the purpose for which it was required. It was held at first instance that there was implied term as to the fitness of the software for the purpose for which it was required, and that this obligation had not been fulfilled by the time the parties terminated their relationship, but the effect on the termination agreement was, *inter alia*, that the plaintiffs were not required to carry out further work on the software, and had to make available to the defendants the source codes in order that the defendants might make it reasonably fit for the purposes specified. The Court of Appeal upheld this decision. In New South Wales it has been held that a supply of a package of conputer hardware and software together is a sale of goods within the Act for the purposes of the implied terms as to quality and fitness, so these terms apply not merely to physical objects, but to the software programs contained in them.

[55] *Atiyah - Adams*, p. 49. In *Morgan* v. *Russel* (1909 1 KB 357) it was held that the sale of cinders and slag, which were not definite or detached heaps resting on the ground, was not a sale of goods but a sale of an interest in land and, therefore, the Sale of Goods Act did not apply. Similarly, in the Australian case of *Mills v. Stockman* (1966-67 116 CLR 61) a quantity of slate which had been quarried and then left on some land as waste material for many years was held to be part of the land, and not goods. The slate was »unwanted dross cast on one side with the intention that it should remain on the land indefinitely, and, by implication, that it should form part of the land.

[56] Failure of the crop was thus held to form the basis for avoidance of the contract.

produced from a particular field at a fixed price. [57] There are at least three possible constructions:

1. It may be a contingent sale of goods within the section 5(2)[58] in which case if the crop does not come into existence the contract will not become operative at all and neither party is bound.
2. Alternatively, it may be an unconditional sale that is the seller may absolutely undertake to deliver the goods, so that in effect he warrants that there will be a crop in which case, if there is no crop, he will be liable for non-delivery.
3. Thirdly, it may be a sale of a mere chance, that is the buyer may take the risk of the crop failing completely, in which case the price is still payable. [59]

3.3 «Goods» in Finnish legislation

The current law regulating commercial relationships in Finland is Sale of Goods Act (hereinafter FSGA), enacted 1987. Before it came into force, the only general provisions available dated as far as 1734. Provisions relating to sales of specific goods were of course enacted throughout the years but many important issues were not regulated at all. At this point it has to be noted, however, that even in cases of the lack of a proper, up-to-date statute law, we can hardly speak of a total gap. Since the very beginning of the existence of the Finnish doctrine of the jurisprudence, a strong reference has been made to other Nordic countries, due to the cultural and social similarities in these states. As regards the references to past writers in general, it has to be borne in mind that even though new rules of law are enacted and the old ones become non-effective, the ideas lying underneath do change slowly. The core of the law, the basic principles of just and unjust, defective and effective remain long unchanged.

Earlier, the rules regarding lack of conformity were scarce; the old Sale of Goods Act (OSGA) 1:4 stated that:

> «If the goods sold are later noted to be defective, and if it's lawfully proved that the seller was aware of it but still did not disclose it, shall the seller take the goods back and return the performance of the counterparty; and shall he also settle his damages. If the goods bear a defect not visible, which of neither seller nor the buyer was aware of, shall the contract of sale be void, and shall the parties withdraw the respective performances. If it was agreed that the buyer shall keep the goods whether or not they turn out to be better or worse than what was agreed upon, shall the contract remain valid anyhow.» [60]

This rule of law turned out to be rather problematic in practice; a situation where the rules concerning sale of movables were almost absent, raised a question whether those few existing rules were exhausting when it comes to determining the remedies in the case of defective goods. What followed was that it was alleged that the buyer could not claim for reduction of the price since the norms did not recognize it. Furthermore, the scope of the application of the said rule has been under some discussions; some have claimed that the said rule is applicable only to the

[57] Such a transaction comes perilously close to a gamble but, as the seller stands to gain the same amount in any event, it appears that the sale cannot be a wager within the Gaming Act 1845.
[58] Section 5(2): »There may be a contract for a sale of goods the acquisition of which by the seller depends on a contingency which may or may not happen.»
[59] *Atiyah - Adams*, p. 52
[60] There was also a specific rule concerning a sale of a horse: a trial of three days.

sale of specific goods while the others alleged that it's applicable also to the sale of generic goods. [61]

The OSGA 1:4 took a negative approach; it described the situation where the goods could be considered defective. Given the scarcity of the rules of law, in order to obtain a more comprehensive idea of the concept, I find it appropriate to study the differing views in the doctrine of that time. According to *Chydenius*, the defect has to be of a kind that reduces the value of the goods or renders them less suitable for their ordinary purpose, in a manner that a reasonable man would not have committed himself to the contract. *Hakulinen*, instead, sees the goods defective whenever their value is reduced or their suitability to ordinary or contractually agreed purpose is reduced or extinguished. *Kivimäki*, on his part, sets the criteria otherwise: «The defect is understood as a factor that renders the goods non-functional, whether it is a material, structural or other kind of factor. However, also the lack of a feature may be considered as such, if the seller knew that the buyer expected the goods to bear that certain character and the lack of it actually renders the goods different from what was agreed upon.[62]

This situation where Finland did not have an up-to-date Sale of Goods Act created a different set of problems. Without a proper written law, a Finnish party was in a weaker position from the beginning. The Finnish party was often forced to accept the other party's choice of law without a chance for negotiations. The Sale of Goods Act 1987 lifted the Finnish parties from their disadvantageous starting point and gave them equal bargaining powers compared to those of their foreign business partners.[63]

Given that Finland has made a declaration to Article 92 that it is not bound by Part II of the Convention (Formation of the Contract), the parties have to pay attention to drafting the choice of law clause. It should be noted that the Part II of the Convention might still be applicable to the contract of sale in Finland if the rules of private international law lead to the application of the law of the country, which has ratified the CISG without an Article 92 declaration.[64]

The FSGA calls the object of the sale goods (*tavara*). The linguistic meaning of this word is a property which can be an object of an exchange on the market, and which can be assigned (tangibles). The term suits less to intangibles, such as rights. Some difficulties appear when the borderline between a contract of service and a contract of sale needs to be drawn. Supply of electricity is undisputedly considered a service. However, the rights based on such a contract may be object of the sales contract. Gas and water, instead are regarded as goods in the meaning of FSGA, according to their nature. More problematic are audiovisual electric transmissions.

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[61] *Godenhielm*, p. 88. But see KKO 1948:II:187 where the court held otherwise.

[62] *Aaltonen*, p. 99 Considering different aspects of the seller's liability as regards the reduction of the value of the goods, it has to be borne in mind that the seller is not responsible of the effective commercial proficiency of the goods.

[63] When the different possibilities to ratify the CISG were explored, it was discovered, that even though it was important to develop domestic sales law in accordance with international trends, the CISG was not suitable to form a new Sales Law as such. The CISG was a compromise between the different legal traditions and it was essentially developed for the needs of international trade. While some provisions were seen as self-evident, others were seen to be too imprecise for the purposes of a domestic sales law. On the other hand, if a sales law would have provisions concerning both international sale of goods and domestic sale of goods, the differences between the two would be easily detected and understood. However, it was discovered that several provisions would have to be modified for the purposes of domestic sales, which would eventually lead to a complex law. It was also feared that the solution would arouse suspicion among the foreign traders that the domestic traditions influence the interpretation of the CISG. *Kuoppala,* Chapter 1.2.2.3.

[64] *Kuoppala*, Chapter 1.2.1

On the other hand, the FSGA may be applicable even on the fields not covered by it, throughout the analogy. As regards computer products, the situation is more problematic, as we have seen above. There is no doubt that a computer falls to the category of «goods.» However, a computer does not work without its software. Usually the software is not actually sold, but a license to use it may be granted. Hence, the applicability of the FSGA is problematic since the applicability requires that the goods be handed over to the buyer. [65]

Usually the object of the sale exists at the moment of the conclusion of the contract. This is, however, not a necessary requirement. Also the goods that *will* come to an existence or can be determined only afterwards may be traded. It may well be that the buyer will in the end have nothing as a counterperformance; let us just think of a lottery ticket.[66]

4 LACK OF CONFORMITY

4.1 The CISG rules regarding lack of conformity

The CISG Article 35 determines when goods are deemed to conform to the contract, although it doesn't cover third party claims or claims based on industrial or other intellectual property; the latter are governed by CISG Articles 41 and 42. CISG Article 35 largely corresponds to Article 33 ULIS. However, the wording of CISG Art.35 is substantially simpler and more precise than that of its predecessor. Article 35 of the CISG begins by stating the basic rule that the goods must conform to the requirements of the contract, whereas Art. 33 of ULIS includes the basic rule as a subsidiary, catch-all provision. Art. 35 of the CISG and Art. 33 of the ULIS differ as regards the classification of non-conformity in dogmatic terms. While under the ULIS, non-conformity of the goods automatically constituted a failure to fulfil the delivery obligation, under the CISG non-conformity of the goods has no effect on delivery, but gives rise to the buyer's remedies under CISG Art. 45.[67] A further difference is to be found in Article 33 (2) of the ULIS, which declared immaterial discrepancies to be irrelevant. It was thought that such a rule is unjustified, if avoidance of the contract is possible only in the event of a fundamental breach of contract. [68] Article 35(3) of the CISG is based on Article 36 of the ULIS. However, the latter provision did not include a sale by sample or model within its terms. [69]

Under the ULIS the seller had not fulfilled his obligation to deliver the goods where he handed over goods which failed to conform to the requirements of the contract in respect of quality and description. However, under the CISG, if the seller has handed over or placed at the buyer's disposal goods which meet the general description of the contract, he has «delivered the goods» even though those goods do not conform to the contract in respect of quality and

[65] *Routamo - Ramberg*, p. 14
[66] *Routamo - Ramberg*, p. 11
[67] Even Art 35 CISG noes not expressly treat delivery of different goods, it must be considered lack of conformity no matter how extreme is the deviation. See *Schlechtriem 2*, p. 67. Otherwise *Bianca* in Conformità dei beni e diritti dei terzi, p. 147, where he makes difference between the goods that do not conform to the description of the contract and the goods that are totally different than what was agreed upon.
[68] An Australian proposal that a provision corresponding to Article 33(2) ULIS should be included was rejected at the Diplomatic Conference. The Canadian delegation withdrew a proposal that the requirement for the goods to be fit for ordinary and particular purposes should be applicable only to sales made by professional sellers and that the criteria governing fitness for ordinary use should be clarified. See *Schlechtriem*, p. 275
[69] *Schlechtriem*, p. 275

quantity. It should be noted, however, that, even though the goods have been «delivered», the buyer retains his remedies for the non-conformity of the goods. [70]

4.1.1 Practical importance of Art. 35

The case law interpreting CISG Article 35 is scarcer than one would think; many decisions leave open the question of a defect and are solved on the basis of lack of examination or the notice of the non-conformity by the buyer or lack of evidence regarding those requirements. The limited number of cases is explained also by the fact that quite a few decisions concern requirements for avoidance of the contract.[71]

In order to rely on a lack of conformity, the buyer must comply with articles 38 and 39 which concern the burden of examining the goods and of giving notice of the non conformity. The failure to comply means loss of right to invoke a lack of conformity, except if the seller knew or ought to have known of it and did not disclose it to the buyer (CISG Art. 40), or if the buyer was justified in not complying with the examination and notice requirements (CISG Art. 44). Furthermore, there is a cut-off period: after two years, the buyer cannot give notice even if a hidden defect is then discovered.[72] When the buyer is entitled to rely on the lack of conformity, the whole set of remedies in the Convention may be invoked, provided that the conditions set forth for each of them are present: avoidance (CISG Art. 49), repair of substitution of goods (CISG Art. 49), reduction of price (CISG Art. 50), and in any case, damages (CISG Arts. 74-77).

CISG Article 35 is based on a uniform concept of »lack of conformity». That concept includes not only differences in quality, but also differences in quantity, delivery of an *aliud* [73] and defects in packaging. In so doing, the CISG differs materially from the most domestic laws on liability for defective goods, which often make a subtle distinction. In general, no significance is attached to the distinction, familiar in Germanic legal systems, between ordinary characteristics of goods and a specific warranty that particular characteristics exist, or between *peius* and *aliud*, or between an *aliud* capable of being authorized by the buyer and which is not. Nor has the French distinction between *vice cachè* and *vice apparent* been included in the CISG.[74] Finally, CISG Art. 35 does not differentiate between conditions and warranties. This must be borne in mind when interpreting the concept of «conformity», because there is otherwise a risk that each

[70] Secretariat Commentary, comma 2

[71] See decisions Tribunal Cantonal du Valais, 29.6.1998; Bezirksgericht Unterrheintal St. Gallen 16.9.1998; Oberster Gerichtshof 30.6.1998; Pretura di Torino 30.1.1997; Tribunale d'Appello di Cantone di Ticino 15.1.1998

[72] As a consequence of his negligence the buyer loses the right to claim a remedy from the seller on the basis of the lack of conformity. Since a delivery that falls short is regarded as one type of a lack of conformity the negligent buyer may end up paying for goods that were never actually delivered. Even though the consequence is very strict from the buyers' point of view, the sellers' need to know if the buyer intends to issue claims is far more important than the buyers' right to rely on the lack of conformity. It's important to protect the seller against claims, which arise long after the goods have been delivered. Claims issued in that way are often of doubtful validity and when the seller receives his first notice of such a contention at a late date, it would be difficult for him to obtain evidence like the condition of the goods at the time of delivery, or to invoke the liability of a supplier from whom the seller may have obtained the goods or the materials for their manufacture. See *Kuoppala*, chapter 1.1.2.

[73] About difficulties in interpretation of said article, see also *Bianca* in Convenzione di Vienna sui contratti di vendita internazionale di beni mobili, p. 147.

[74] However, the nature of the defects does count: it has to be taken into consideration when valuating the length of the reasonable time of notice of lack of conformity.

court will interpret CISG Art. 35 in accordance with its own domestic legal classifications and that such differences in interpretation will hinder unification of the law.[75]

4.1.2 Agreement between the parties

CISG Art. 35 provides that regard must be had first to the requirements of the contract. The primary test is, therefore, what characteristics of the goods are laid down in the contract by means of quantitative and qualitative descriptions. Article adopts the premise that a defect must be defined by reference to what the contracting parties intended, a premise which is accepted by the prevailing opinion in various legal systems. The requirements may be expressly or impliedly determined in the contract. It is likely that in particular in an implied agreement reference is made to specific industry standards. The contractual requirements may be individually negotiated, but they may also follow from the standard business terms of the seller or the buyer. Advertisements by the seller, in which, for example, he refers to particular qualities of the goods, may be taken into consideration in order to determine the conformity with the contract under CISG Art. 35.[76]

The general rule of CISG Article 35 is that the goods must conform to what the parties have agreed upon in the contract, the brevity of which does not immediately reveal its importance. The objective tests contained in the Article are meant to play a subsidiary role in this respect. It must be borne in mind, that the agreement of the parties concerning quality, quantity and description does not need to be express. It may be implied by way of interpretation of their statements and conduct (CISG Art. 8).[77] Specific requirements may be deduced, however, from the purpose and the circumstances of the contract, and from usage even if there is no direct agreement. [78]

4.1.2.1 Gap filling, parol evidence-rule

Where the parties' express agreement seems incomplete, *e.g.* as regards the quality of goods, we would normally turn to the CISG implied obligations to fill in the gaps. Sometimes, however, the document that seems to represent the complete agreement between the parties does not, a party may claim, include all express oral statements made during the contract negotiations. Is that party entitled to introduce evidence to prove that the oral statement is part of the written contract; perhaps even that the written contract does not mean what the words seem to say? The so-called parol evidence rule[79] would deny any effect to the parties' alleged oral understanding, simply because that understanding would vary the written contract of sale. Some jurisdictions might not be even allow presentation of any evidence for the purpose of proving that the oral statement was made. However, under the CISG (Art. 11) a «contract of sale» may be proved by any means. Since this language refers to all the contract terms allegedly agreed upon, a court should admit evidence of additional or different terms. This interpretation is supported by the CISG Art. 8(3) requiring that in order to determine the intent of a party, «due consideration be given to all relevant circumstances of the case including the negotiations» etc. For these reasons the parol evidence rule is inapplicable to a CISG

[75] *Schlechtriem*, p. 275
[76] *Schlechtriem*, p. 277
[77] Veneziano, p. 44
[78] Enderlein - Maskow, p. 141 The question whether insignificant differences in quality have to be considered, remains open. A relevant Australian proposal was not successful.
[79] The parol evidence rule - which is really a rule of substantial law - applies only in the case of a fully »integrated» written instrument, but under some laws (e.g. Texas State Law) written agreements are presumed to be fully integrated.

contract. So, if a prior statement has been made, we should give «due consideration» to that fact. A contrary statement in an American CISG case, which has been contradicted by another American court, is clearly out of tune with the international view.[80]

Extrinsic evidence of a custom in the trade is permitted provided it is not contrary to an express provision in the written contract, or to establish that there is a collateral contract. The court may rectify a written agreement that by mistake does not accurately record the agreement of the parties although it may simply consider the amended contract without formally ordering its rectification. Where one party has given another a verbal promise not to rely on a term in the general conditions and that promise has been accepted by another party, he cannot rely on that term if it would make the verbal contractual wholly illusory. [81]

As previously stated in connection with the interpretation of a sales contract in the U.K., the fact that the CISG has removed the parol evidence hurdle does not mean that every pre-contractual statement will be given contractual effect. Courts and arbitrators may still entertain a *presumption* of the completeness and correctness of writing and after hearing the witnesses the fact-finder may conclude that this presumption has not been overcome. Even in cases where there is a clear proof that a given oral statement concerning a matter relevant to the sale that was made, CISG Articles 8 and 11 do not automatically determine whether the statement should be treated as part of the contract, *i.e.,* whether the statement-maker intended his pre-contractual statement to bind. What these CISG provisions do is to mandate courts and arbitral tribunals in an international sales case to allow proof of and to consider the effect of statements allegedly made.[82]

4.2 Finland's rules of law on the conformity of goods

The Finnish Sale of Goods Act differentiates the lack of conformity as regards the quality and third-party claims. This distinction makes difference when assessing the seller's responsibility; he is responsible of all the losses, direct and indirect, deriving from third-party claims if the lack of conformity existed at the moment of the conclusion of the contract. The responsibility is, however, excluded if the buyer was aware of the non-conformity at the determining moment. The FSGA is directed to regulate the defects connected to the use and the properties of the goods. These so called factual defects include for example defects deriving from raw material, inaccurate manufacturing or structural erroneousness. The rules concerning the seller's obligation to remedy the defects are meant to cover specifically these cases, since defects of other kind would be extremely difficult or even impossible to remedy. [83] Case law of Finnish courts outlines the application of the rules concerning lack of conformity.

4.2.1 Conformity with contract, section 17

The Finnish Sale of Goods Act, section 17 states:
«The goods must conform to the contract in regard to description, quantity, quality and other properties and be contained or packaged in the manner required by the contract.

[80] See case Beijing Metals v. American Business Center, 993 F.2d 1178 (5th Cir 1993). The contract of sale of bacon was governed not by Texas domestic law, but CISG. Under Art. 11 a contract of sale may be proved by any means, including witnesses. Since this language refers to all the contract terms allegedly agreed upon, even a Texas court should admit evidence of additional or different terms. Bernstein - Lookofsky, p. 55
[81] Schmitthoff's Export Trade, p. 62
[82] *Bernstein - Lookofsky*, p. 57
[83] *Routamo - Ramberg*, p. 131

Except where the parties have agreed otherwise, the goods must:

(1) be fit for the purpose for which similar goods are ordinarily used;
(2) be fit for any particular purpose for which the goods were intended if the seller knew or must have known of this purpose at the time of the conclusion of the contract and it was reasonable for the buyer to rely on the seller's skill and judgment;
(3) possess the qualities of goods which the seller has held out as a sample or model; and
(4) be contained or packaged in a manner that is usual or otherwise appropriate for similar goods, if packaging is necessary to preserve or protect the goods.

If the goods do not conform to the provisions of paragraph 1 or 2, they are defective.»

The CISG 35 has served as a model for the rules concerning lack of conformity in Finnish Sale of Goods Act in the section 17. The starting point for both of these regulations is the contract itself: the valuation is based on the requirements stated in the contract. When no such requirements are present in the contract, the gaps need to be filled with other norms. In this respect a distinction must be made between the interpretation of the contract and gap filling. As the wording of the CISG 35 leaves little, or no room at all whatsoever for extensive interpretation, FSGA 17 has to be interpreted this way. Those cases that are listed in the CISG 35(2) and which have served as a model for FSGA 17 do not constitute an exhaustive list. When neither the contract itself nor the cases of FSGA 17 do not offer guidance, it has to be decided how the «conformity with the contract» will be defined. [84]

As regards to the quality of the goods, the seller's responsibility, when relying to the FSGA 17, derives from his declaration of intention, irrespective of the fact whether or not the responsibility is based on the cases listed in 17. Therefore, it's not necessary to examine whether or not the seller was aware of the lack of conformity; his responsibility ensues from it in any case. Attention has to be paid to the fact that the requirement laid down by 17.2 «fit for the purpose for which similar goods are ordinarily used» has to be interpreted strictly. It doesn't regard bad quality. For example, a car that consumes remarkably lot of gasoline, or a piece of furniture manufactured of poor materials, is not defective in a sense of 17.2. [85]

KKO 1998:150[86]: The seller had the right to avoid the sale contract because the painting bought wasn't authentic even if the seller had expressly held out its authenticity. The seller relied on his original title; the painting had been bought from a noted auction room as authentic. The seller claimed that the notice of non-conformity was made too late: the contract had been concluded in the autumn 1991, the buyer had had the painting examined by professionals on 13.1.1995 and the notice of non-conformity was made 28.1.1995. The buyer avoided the contract 13.6.1995. The judges disagreed on the decision: the majority consented to the buyer's right to reduction of the total price (the aforementioned painting was a part of collection of several paintings that were bought at the same occasion) but a minority disagreed. The minority stated that the notice of non-conformity wasn't made timely and the buyer had lost his right to rely on the defects of the goods.

4.2.2 Information relating to the goods, section 18

However, the definition of defective goods as stated by section 17 is not exhaustive: section 18 lays down additional rules concerning information relating to the goods:

[84] *Routamo - Ramberg*, p. 129
[85] *Routamo - Ramberg*, p. 130
[86] Korkein Oikeus, KKO, Finnish Supreme Court

«The goods are also defective if

(I) they do not conform to information relating to their properties or use which was given by a person other than the seller when marketing the goods or otherwise before the conclusion of the contract and

(II) the information can be presumed to have had an effect on the contract[87]

The goods are also defective if

(I) they do not conform to information relating to their properties or use which was given by a person other than the seller, either at a previous level of the chain of supply or on behalf of the seller, when marketing the goods or otherwise before the conclusion of the contract, and

(II) the information can be presumed to have had an effect on the contract. However, the goods shall not be considered defective if the seller neither knew nor ought to have known of the information that was given.

The provisions of paragraphs 1 and 2 shall not be applied if the information has been corrected clearly and in time.

In its decision 1991:153 The Supreme Court of Finland has paid attention to the moment of the delivery of the goods instead of the moment of the conclusion of the contract, as the wording of the law presumes. The buyer had ordered gravel for a construction project. The seller, at the moment of delivery of the goods to the construction site, became aware of the purpose for which the gravel was intended, and realized its inappropriateness for the purpose. Since the seller didn't inform the buyer of the inappropriateness, as he, being a professional on his field, should have done, the Court ruled that the goods did not conform with the information provided by the seller.[88]

KKO 2001 77: The seller had given an express warranty that the goods would be fit for the particular purpose disclosed by the buyer. The goods were yet to be manufactured at the moment of the conclusion of the contract. The seller had, however, expressly guaranteed the suitability of the goods for the particular purpose without having checked it. The seller's responsibility ensued from his negligence to assure himself of the suitability for the particular purpose. The conclusion was that the goods must conform to the information given to the buyer before concluding the contract. Otherwise the goods are defective in the sense of 18. If the information to the buyer has been given at the time of conclusion of the contract, they are considered to «have had an effect on the contract.»[89]

In its decision 1998:51 the Supreme Court of Finland stated that the second-hand car that had been driven for 73 000 kilometres instead of the 49 000 told to the buyer, didn't conform with the information given to the buyer. The Court made a reference to the sections 17 and 18. [90]

The seller's responsibility is not limited only to cases where the seller has given the information to a specific customer. It also includes the information given through a marketing campaign directed to the public. However, all the information given cannot be considered relevant. The seller's liability will ensue only if the information given has had an effect on the contract; the

[87] The tokens (I) and (II) are here and later in the text, as well as in the unofficial translation of Ministery of Justice, used only to facilitate the reading and understanding of the translation. They do not appear in the original Finnish or Swedish texts and should therefore not be used to identify any references to the Act.

[88] KKO 1991:153

[89] *Wilhelmsson - Sevón - Koskelo*, p. 102

[90] KKO 1998:51

information must have been of reasonable importance to the buyer and the buyer must have been aware of the information before the conclusion of the contract. If the seller wants to free himself from claims deriving from wrongful information, he should correct the buyer's false belief before the conclusion of the contract. The seller's responsibility is not limited to a campaign launched by the seller himself, but it includes also the information given by an earlier link of the distribution chain or another person working for the seller. Only if the seller wasn't and couldn't have been aware of this information, may the seller avoid the responsibility. However, the seller's knowledge of the wrongfulness of the information is insignificant. If a specific reservation concerning the truthfulness of the information is not made, the seller should be prepared to take responsibility of the wrongfulness, also in situations when he has acted in good faith.[91]

The seller is not responsible only for the information given, but also for failing to give information. The responsibility will ensue from the failure, if he knew or ought to haven known and the buyer could reasonably presume to be informed of. An additional condition is that the failure has had an effect on the contract. It may be concluded that 19.2 has to be seen as a minimum requirement of the seller's obligation to inform the buyer that cannot be displaced by a general remark limiting the responsibility. When the sale contract is concluded without «as is» clause, this seller's obligation is remarkably wider. When assessing the elements of a single case, this seller's obligation has to bee seen together with the buyer's awareness and his opportunity to examine the goods beforehand. [92]

In case S 96/1215 Helsinki Court of Appeal[93] applied the CISG. The Court saw no reason to change the judgment of the Court of the First Instance which stated that it was undisputed that the buyer had required that the sample goods should possess certain characters indicated in its orders, and had expressly drawn the seller's attention to this. Considering the information and assurance from the seller's side it wasn't the buyer's duty to find out how the seller will carry out the manufacturing. The court held that the buyer did count on the seller's expertise and could rely on the results from the tests taken before the delivery.

Aaltonen has prepared a three-phase structure for classifying the promises of the seller. The starting point is the warranty (*takuu*) from the seller's side that the goods do or do not have a certain property. This kind of seller's commitment reflects a fundamental character of the goods. In case that character is lacking, the buyer may declare the contract avoided.[94] Even if the seller encouraged the buyer to examine the goods at the moment of the above promise, the invitation itself does not free the seller from the warranty. This form of warranty requires seller's particular commitment, and without it, the promise cannot be considered as a warranty. The next category is a seller who promises the buyer the goods to have a certain character, without a particular commitment to the promise. *In Ekström's* view the seller's awareness of the defect is not a relevant factor; he is liable of it in any case.[95] *Hakulinen*, instead, claims the seller's responsibility of only for what has been stated of the goods. According to *Vihma, on the other hand,* the contract cannot be avoided relying on the unawareness. *Vihma* also strongly opposes to what has been said by *Chydenius*, who, on his turn, claims that the unaware seller's

[91] *Wilhelmsson - Sevón - Koskelo*, p. 103
[92] *Wilhelmsson - Sevón - Koskelo*, p. 104
[93] Helsingin Hovioikeus 30.6.1998
[94] In terms of the CISG.
[95] *Aaltonen*, p. 131. *Vihma* and *Kivimäki* interpret the situation otherwise, see *Aaltonen*, p. 132 -134.

activity could be interpreted as fraudelent if he gets, by means of misleading information, the buyer to conclude the contract. The third category covers those promises that could be seen as sales promotion that cannot be considered as serious promises by a reasonable person. In practice it's not easy to make a difference between the last two. To try to transform the seller's promise to a term of the contract could be a solution. If it is not reasonably feasible, the promise would likely be regarded as sales promotion.

4.2.3 «As is» clause, section 19

In addition, there are rules concerning «as is» clause. Section 19 states:
«If the goods have been sold subject to an «as is» clause or a similar general reservation concerning their quality the goods shall, nevertheless, be considered defective if:

1. the goods do not conform to information relating to their properties or use which was given by the seller before conclusion of the contract and the information can be presumed to have had an effect on the contract;
2. the seller has, before the conclusion of the contract, failed to disclose to the buyer facts relating to the properties or the use of the goods which the seller could not have been unaware of and which the buyer reasonably could expect to be informed about and the failure to disclose the facts can be presumed to have had an effect on the contract; or
3. the goods are in essentially poorer condition that the buyer reasonably could expect taking into account the price[96] and other circumstances.

When second-hand goods are sold at an auction, they shall be considered sold «as is.» When applying the provisions of paragraph (1)(3), regard shall be had to the asking price of the auction.»

Often the seller, wanting to limit his liability, sells the good using «as they are» or similar general expression as a reservation as regards to the quality of the goods. This, however, doesn't free him from the responsibility ensuing from information that he or his representative has given. To achieve the said goal the contractual clause should be more specific. [97]

The section 20 states that the buyer cannot rely on a defect that he could not have been unaware of at the time of the conclusion of the contract. This corresponds to the CISG 35(3). However, the Convention and FSGA differ here: the statement of the CISG 35(3) concerns only the cases listed in the subparagraph 2, and which correspond with the cases 1 - 4 of the section 17, while the 20 covers the buyer's awareness of defects in general. The buyer's

[96] In the English doctrine the price is generally considered as a relevant factor in deciding what quality the buyer is entitled to expect. Goods which are commonly sold for a variety of purposes are also commonly sold for a variety of prices. And this is not only because market prices may vary, but also because some uses may require goods of better quality, and goods fit for those purposes may therefore command a premium. So, in the example of the wrecked car sold as a source of spare parts, one would obviously expect the price to be very much lower than if the car was sold as a roadworthy vehicle for ordinary road use. Hence, if the price was a normal sort of price, the buyer is entitled to expect the car to be roadworthy, if it was not a case of a car with an antiquarian value. In this case the transaction would be characterized as being about a sale of a »collector's car,» and the fact that it was not roadworthy, might not render it unsatisfactory**.** In short, the borderline cases of this sort, the court characterizes the deal will be crucial. *Atiyah - Adams*, p. 156

[97] *Wilhelmsson - Sevòn - Koskelo*, p. 103. See also *Aaltonen*, p. 169. A clause similar to this a so called «tel quell»-clause, which is widely used above all in the overseas sales. According to this clause, the buyer takes the chance that the goods are not as he expected. On the other hand, the tel quell-seller has no right to pick certain items - those less valuable - from a lot, and comply with his delivery obligation in this way. The clause is always somehow aleatory; using it the buyer assumes risks that, if realized, may endanger the purpose and the sense of the contract. The *mala fede* seller cannot be discharged from the liability.

awareness is of a decisive nature when assessing his right to rely on a defect; one cannot suppose that the goods are «defective» if the buyer was aware of the discrepancies in the quality and still bought the goods. [98]

KKO 1992 158: After the contract of sale of an apartment had been concluded, it appeared that the apartment suffered of a structural defect. The seller was responsible of the apartment's conformity with the contract. The Court took into consideration the inconvenience caused to the buyer, the responsibility of the housing corporation and the final cost that remained to be borne by the buyer.

4.3 Relevant rules of law in the UK

4.3.1 Parol evidence in the UK; what did the parties say or write?

As a general rule, no contractual formality is required under English law. Only exceptional circumstances demand a degree of formality either as a substantive or as a procedural requirement of contract. A contract may be made wholly by word of mouth, or wholly in writing, or partly by word of mouth and partly in writing. If the contract is wholly by word of mouth, its contents are a matter of evidence normally submitted to a judge sitting as a jury. What the parties said exactly must be found as a fact. For example in *Smith v. Hughes*[99] where the question was whether the subject matter of a contract of sale was described by the vendor as «good oats» or as «good old oats.» With reference to international conventions one must point out that the rigidity of the literal rule has recently been eased, also in other common law countries.[100]

The exclusion of oral evidence to «add to, vary or contradict» a written document has often been pronounced in peremptory language but in practice its operation is subject to a number of exceptions. In the first place, the evidence may be admitted to prove a custom or trade usage and thus to «add» terms which do not appear on the face of the document and which alone give it the meaning which the parties wished it to possess. In the second place, there is no reason why oral evidence should not be offered to show that, while on its face the document purports to record a valid and immediately enforceable contract, it had been previously agreed to suspend its operation until the occurrence of some event, such as the approval of a third party, and that event had not yet taken place. The effect of such evidence is not to «add to, vary or contradict» the terms of a written contract, but to make it clear that no contract has yet become effective. Thirdly, there is a limited equitable jurisdiction to rectify a written document where it can be shown that both parties under a common mistake executed it. Finally, the exclusion of oral evidence is clearly inappropriate where the document is designed to contain only part of the terms - where, in other words, the parties have made their contract partly in writing and partly by word of mouth. This situation is so comparatively frequent as in effect to deprive the ban on oral evidence of the strict character of a «rule of law» which has been attributed to it. It will be presumed, «that a document which looks like a contract is to be treated as the whole contract.» But this presumption, though strong, is not irrefutable. In each case the court must decide whether the parties have or have not reduced their agreement to the precise terms of an all-embracing written formula. The question is basically one of intention and, like all such

[98] *Routamo - Ramberg*, p. 129
[99] (1871) LR 6 QB 597
[100] *Ferrari*, in Uniform Interpretation of The 1980 Sales Law, p. 6

questions, elusive and conjectural. It would seem, however, that the more recent tendency is to infer, if the inference is at all possible, that the parties did not intend the writing to be exclusive but wished it to be read in conjunction with their oral statements.[101]

4.3.2 Conditions and warranties

The Sale of Goods Act states as follows:
Section 11: «When condition to be treated as warranty - (1) Where a contract of sale is subject to a condition to be fulfilled by the seller, the buyer may waive the condition, or may elect to treat the breach of condition as a breach of warranty and not as a ground for treating the contract as repudiated.»

(2) Whether a stipulation in a contract of a sale is a condition, the breach of which may give rise to a right to treat the contract as repudiated, or a warranty, the breach of which may give rise to a claim for damages but not a right to reject the goods and treat the contract as repudiated, depends in each case on the construction of the contract; and a stipulation may be a condition, though called a warranty in the contract.

(3) Subject to section 35A if a contract of sale is not severable and the buyer has accepted the goods or a part of them, the breach of a condition by the seller can only be treated as a breach of warranty - and not as a ground for rejecting the goods and treating the contract as repudiated - unless there is an express or implied term of the contract to that effect.

(4) Nothing in this section affects a condition or warranty whose fulfilment is excused by law because of impossibility or otherwise.

(5) Paragraph 2 of this section applies in relation to a contract made before 22nd of April 1967.»

At the time when the old Sale of Goods Act was passed, contractual obligations were generally thought of as falling into two principal classes, namely conditions and warranties. In addition, there existed a body of equitable rules governing mere misrepresentations. In the 1950s and 1960s, it was suggested in a number of decisions that the distinction between a condition and a warranty was not exhaustive.[102] This development assumed two forms. On the one hand, it was said that there were terms even more important than conditions - fundamental terms. On the other hand, it also came to be said that there was a category of terms mid-way between the condition and the warranty, namely innominate (intermediate) terms. Both of these are considered further below.[103]

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[101] *Furmston, M.P.*, p. 126
[102] There has been an assumption that all contractual terms had to fall within one class or another and that this distinction could, in principle, be drawn at the time when the contract was made. Any term whose breach could possibly take a serious form naturally tended to be treated as a condition as a result of this approach. Since the distinction related to the terms of the contract and not to the consequences of the breach and, indeed, had to be applied in theory as at the date when the contract was made, there was a tendency for many terms to be treated as conditions even though their breach only caused minor inconvenience or loss, or even none at all. The consequence of this was that in the law of sale of goods, the duties of the seller were traditionally treated very strictly. Any deviation from the terms implied by the Act justified the buyer in rejecting the goods. But it was also widely assumed by lawyers that there was nothing peculiar in the law of sale or even in the Sale of Goods Act with respect to these questions. It was generally thought that the position was the same with respect to all the seller's duties. *Atiyah - Adams*, p. 57
[103] *Atiyah - Adams*, p. 53

The buyer is entitled to reject the goods if a condition relating to them is broken. *A condition is a term to which the parties, when making the contract, attribute such importance that it can truly be described as being of the essence of the contract.*[104] A condition has to be distinguished from the warranty, which is a contract term of less significance and which relates to matters collateral to the main purpose of the contract. In the case of breach of a warranty the buyer is not entitled to reject the goods. He has to retain them but may claim damages, which, if the goods have an available market, are prima facie, the difference between the value of the goods as delivered and the value that they would have if they had complied with warranty. [105] As a condition is treated as being of higher legal quality than warranty, every condition includes warranty - a statement that cannot be reversed. The buyer is, therefore, at liberty to treat a broken condition as a broken warranty and, instead of rejecting goods, he may elect to keep them and claim the difference as damages. If the buyer is deemed by law to have accepted the goods and if, consequently, he has lost his right to reject them, he is bound henceforth to treat what originally was a condition, as a warranty and his only claim is for damages for breach of warranty.[106]

The distinction between conditions and warranties was originally based on two factors. One factor was the intention of the parties as expressed in the contract and, thus, the question into which category a stipulation fell was treated as one of construction. But often the intention of the parties in this respect was indeterminable from the words used; and so the courts relied secondly on the general requirement of significant failure in performing the contractual obligation. This is no longer the sole basis of the distinction but the courts still take it into account when deciding, in cases of first impression, whether particular terms are to be classified as conditions.[107]

The Sale of Goods Act 1979 implies into a contract of sale certain terms that, in England and Wales, are to be regarded as conditions. If the goods are described then the goods supplied must correspond with their description in the contract. They must be of satisfactory (previously «merchantable») quality.[108] They must be fit for the particular purpose for which, with the knowledge of the seller, they are bought[109] or, if the purpose of the goods in question is not made known to the seller, they must be fit for all the purposes for which such goods are commonly supplied. Further, they must correspond the sample, if they have been ordered on the basis of a sample provided, or with sample and description. These terms are implied by law into contracts of sale but subject to the Unfair Contract Terms Act 1977, may be contracted out or varied.[110]

In addition to the statutorily implied conditions certain terms in international sales contracts are taken to be conditions. Generally, terms as to time are held to be a condition of the

[104] If a term is strictly a condition this means that its full performance is a condition of the other party's obligations; his duties are conditional on the performance of the counterparty. *Atiyah - Adams*, p. 56

[105] Appropriate measure is the difference between value of goods on delivery and the value if warranty had been fulfilled. If he has not yet paid the full price, he may set off his claim for damages against the price in diminution or extinction of the latter. See case *Bence Graphics International Ltd. V. Fasson U.K. Ltd. (1998) Q.B.87*

[106] *Schmitthoff's Export Trade*, p. 85

[107] *Treitel*, p. 602

[108] As to the difference between words of identity and words of quality see the case *Trasimex Holding SA of Panama v. Addax BV of Geneva (1997) EWCA Civ 2096*

[109] See case *R.Bartram and others v. Try Homes Ltd. Instalfoam and Fibre Ltd. Owens Corning SA (1998(EWCA Civ 1177*

[110] Sale of Goods Act 1979, see also Unfair Contract Terms Act 1977. *Schmitthoff's Export Trade*, p. 86

contract. [111] The port of loading in an f.o.b. contract is a condition, as is the name of a vessel and the type of vessel to be used for the carriage of the goods if they have, unusually, been agreed between the parties. In the absence of any such agreement it is a condition of the contract that the goods be carried on a vessel that is usual in the trade for the carriage of such goods. [112]

It may therefore be seen, that a breach of a condition operates as a repudiation of the contract by the party in breach. Consequently, a buyer who is entitled to reject the goods is in the same position as a buyer to whom the goods were not tendered at all,[113] unless the breached term has to be treated as an innominate term, or if *de minimis* rule[114] or special considerations, such as a trade custom or an agreement of the parties to the contrary, [115] apply. In a normal situation the buyer is entitled to claim damages from the seller for the non-delivery of the goods. [116] If he has paid the purchase price in advance he can recover it by way of damages, and if he has suffered other reasonably foreseeable loss, he can recover damages as well. The motivation for the buyer's desire to reject the goods is usually that the non-conforming goods that the seller has tendered are useless to him and that the claim for damages is his only remedy. The practical point in the distinction between the buyer's right to reject the goods on grounds that a condition of the contract is broken and his right to claim damages for breach of warranty is that in the former instance the buyer can often claim damages on a considerably higher scale than in the latter. Where a party is entitled to damages, he is bound to take reasonable steps to mitigate his loss but he is not bound «to go hunting the globe» to find a market in a distant country, nor can it be held against him, if he has acted reasonably, that a method of mitigation more favorable to the defaulting buyer existed.[117]

Since the term warranty is defined by section 61 as an « agreement with reference to goods which are the subject of the contract of sale, but collateral to the main purpose of such contract, the breach of which gives rise to a claim for damages but not a right to reject the goods and treat the contract as repudiated.» Both the meaning and the legal effects are explained. However, the term «collateral» - hallowed by usage - is not very wisely chosen, for it may give the impression that a warranty is a term which is somehow outside the contract, whereas it is fact a term of the contract.[118]

4.3.3 Implied condition as to title

One of the most important conditions in a contract for the sale of goods is that the seller will pass to the buyer a good title at the time of the sale. The relevant section[119] reads:

[111] See case *B.S. and N.Limited (BVI) v. Micado Shipping Ltd. (2000) Civ 296*
[112] *Schmitthoff's Export Trade*, p. 86
[113] The seller may, however make a second tender of new goods if the time for delivery has not expired. Compare with the CISG Art. 48(1).
[114] De minimis non curat lex.
[115] The conditions of trade associations which e.g. in the commodity trade, are widely accepted, sometimes exclude the rejection of goods.
[116] The measure of damages is the difference between the contract price and the market price, if there is an available market for the goods. The relevant market price that is prevalent at the date of delivery or, failing delivery, at the date of refusal to deliver. See case *BMBF (No 12) Ltd. v Hartland and Wolff Shipbuilding and Heavy Industries Ltd. (2000) EWCA Civ 862*
[117] See case *Skandia Property (UK) Ltd. Vala Properties BV v. Thames Water Utilities Ltd. (1999) EWCA Civ 1985*
[118] *Atiyah -Adams*, p. 63
[119] Act 1893 12(1) 1979 12(1)

« (1) In a contract of sale there is an implied condition on the part of the seller that in the case of an agreement to sell he will have such a right at the time when the property is to pass.
(2) In a contract of sale, other than one to which subsection (3) applies, there is also an implied warranty that
a) the goods are free, and will remain free until the time when the property is to pass, from any charge of encumbrance not disclosed or known to the buyer before the contract of sale is made; and
b) the buyer will enjoy quiet possession of the goods except so far as it may be disturbed by the owner or other person entitled to the benefit of any charge or encumbrance so disclosed or known
(3) This subsection applies to a contract of sale in the case of which there appears from the contract or it is to be inferred from the circumstances an intention that the seller should transfer only such title as he or a third person may have.
(4) In a contract to which subsection (3) applies, there is an implied warranty that all charges or encumbrances known to the seller and not known to the buyer have been disclosed to the buyer before the contract is made.
(5) In a contract to which subsection (3) applies, there is also an implied warranty that none of the following will disturb the buyer's quiet possession of the goods, namely
a) the seller;
b) in a case where the parties to the contract intend that the seller should transfer only such title as a third person may have, that person;
c) anyone claiming through or under the seller or that third person otherwise than under a charge or encumbrance disclosed or known to the buyer before the contract is made.
(6) Paragraph 3 of the Schedule applies in relation to a contract made before 18th May 1973.

It must be noticed that the seller undertakes to ensure that the buyer would thereafter have the power to transfer that title to subsequent purchaser. Normally, the transfer of the title should give the buyer an ability to make such a transfer of a title. But in some instances, the one may not necessarily follow the other.[120]

[120] In *Niblett v. Confectioners' Materials Co*, (1921) 3 KB 387, All ER Rep 459, English buyers bought from New York sellers a consignment of condensed milk. Payment was agreed to be made in cash upon reception of the shipping documents. When the goods arrived, Her Majesty's customs detained the goods on the ground that they infringed a registered United Kingdom trademark. The buyers were therefore compelled to remove the labels which carried the offending trademark from the cans before they were sold. The sale of the cans devoid of labels resulted in a loss. The buyers sued the sellers, claiming the breach of two implied undertakings. Firstly, it was argued that the buyer did not enjoy the warranty of quiet possession of the goods. The court held that the warranty of the quiet possession was breached because the buyers »were never allowed to have quiet possession.» The second ground upon which the buyers rested their claim was the breach of the implied condition that the sellers were the owners of the goods and were able to pass a good title to the buyers. But that itself did not provide the buyers with a right of resale. The ability to transfer a good title to the buyers in this case did not confer upon that buyer an ability to resell and transfer a good title to a subsequent purchaser. Therefore the court held that implied condition was also breached. Scrutton LJ wrote: »The respondents impliedly warranted that they had then a right to sell the goods. In fact they could have been restrained by injunction from selling the, because they were infringing the rights of third persons. If a vendor can be stopped by process of law from selling, he has not the right to sell.» *Marasinghe*, p. 150

4.3.4 Innominate term

The innominate term is a contractual term that is neither a condition nor a warranty. Its characteristic is that, if the contract is breached, the effect of the breach depends on the nature and gravity of the breach.[121] If the breach is grave, the innocent party can treat the contract as repudiated, but if the breach is not serious the contract remains and the innocent party can only claim damages for any loss that he may have suffered. The concept of innominate term was developed in shipping contracts with respect to the stipulation that the ship should be seaworthy. Unseaworthiness could be of serious or insignificant character and its effect on the contract varies according to the facts that made the ship unseaworthy. The concept on the innominate term was extended to other types of contract, notably to the contract of sale.[122]

An illustration of the application of the innominate term to the law of international sales is provided by the case *Cehave NV v. Bremer Handelsgeschellschaft mbH; the Hansa Nord.* Bremer Handelsgeschellschaft, a German company, sold a quantity us U.S. orange pellets c.i.f. Rotterdam to Cehave, a Dutch company. The pellets were to be used in the manufacture of cattle food. The contract was made on a form of the Cattle Food Trade Association that contained a term «Shipment to be made in good condition.» The consignment in issue was about 3.400 metric tonnes and was carried in The Hansa Nord. The price at the time of arrival of the ship had fallen considerably. On discharge from The Hansa Nord the cargo ex hold vo.1 (1.260 tonnes) was found to be damaged but the cargo ex hold no. 2 (2.053 tonnes) was in good condition. The buyers rejected the whole consignment. The Rotterdam court ordered its sale. It was purchased by a middleman for a sum that, after deduction of the expenses, amounted to an equivalent of one third of the original contracted price. The middleman sold the pellets the same day for the same price to the original buyers who took them to their factory and used them for the manufacture of cattle food although they received a somewhat smaller quantity of pellets than they would have done if part of the consignment had not been damaged. The total result of the transaction was that the Dutch buyers received goods that they had agreed to buy for £ 100.000 at the reduced price of about £ 30.000. The case went to arbitration and then to the courts. The court of appeal held that the contractual term «shipment to be made in good condition» was not a condition within the meaning of the Sale of Goods Act but was an innominate term.[123] The court held that the buyers were not entitled to reject the whole consignment but were entitled too damages for the difference in the value between the damaged and conforming goods on arrival in Rotterdam. The case was remitted to the arbitrators for the determination of these damages. [124]

Section 15A, inserted by the Sale and Supply of Goods Act 1994, provides that where the buyer would have a right to reject the goods on the grounds of a breach of sections 13, 14 or 15 and is not in the capacity of a consumer, he may not treat the breach as a breach of condition where it is so slight that it would be unreasonable to do so. The buyer in such a circumstances may only treat the breach as a breach of warranty, although the parties may provide otherwise expressly or

[121] See cases *Alfred McAlpine Plc. v. Bai (run-off) Ltd. (2000) EWCA Civ. 40* and *Manifest Shipping Company Ltd. v. Uni-Polaris Shipping Company Ltd and others (2001) UKHL 1*

[122] Lord Wilberforce referred to it as »the modern doctrine» when he said:»The general law of contract has developed along much more rational lines in attending to the nature and gravity of a breach or departure rather than in accepting rigid categories which do or do not automatically give right to rescind, and if the choice were between extending cases under Sale of Goods Act 1893 into other fields, or allowing more modern doctrine to infect those cases, my preference would be clear.»

[123] Lord Denning M.R. said: »If a small proportion of the goods sold was a little below that standard, it would be met by commercial men by the divergence was serious and substantial.»

[124] *Schmitthoff's Export Trade*, p. 88

implicitly. It is suggested, that entry into a contract on f.o.b. and c.i.f. terms implies that the parties do not intend section 15(A) to apply. However, the concept of the innominate term should not be overused. Many terms are regarded by the parties as so essential that they qualify as conditions in the legal sense. This applies, in particular to most time clauses in commercial contracts e.g. in a f.o.b. contract a clause that «buyer shall give at least x consecutive days' notice of probable readiness of vessel(s).» Similarly, in a c. and f. contract a clause that the ship shall sail directly from the port of loading to the port of discharge (direct shipment clause) was held to be a condition and not an innominate term.[125]

4.3.4.1 Scope of the category of intermediate terms

Granted that the threefold classification of terms does exist, the question about into which category particular terms should be placed arises. In discussing this question we shall assume that the parties have not provided an express classification of the term in the contract itself; and that the court will generally apply a previous judicial classification of the term. Our main concern will therefore be with previously unclassified terms. Since judicial classification of a term as a warranty is rare, the important issue is whether a previously unclassified term is to be classified as a condition or as an intermediate term. The issue is difficult because it gives rise to a conflict between two policies.

The first of these policies is to restrict the right to rescind to cases in which the breach causes serious prejudice to injured party, and so to prevent a party from rescinding for ulterior motives or on grounds that have been criticized as «excessively technical.» This policy favors the classification of terms as intermediate.[126] This policy can, however, be excluded by evidence of contrary intention.[127] Based on case law the following conclusions can be drawn. Firstly, the law has to have regard to the nature and gravity of the breach before it becomes possible to say whether the innocent party is entitled to repudiate a contract for breach of a term of a contract. Secondly, it has been held, that the Sale of Goods Act does not exhaustively divide all terms into conditions and warranties and that innominate terms can exist in contracts of sale of goods and that the express term that the goods have to be in good condition may be a term of that character. [128].

4.3.5 Fundamental terms

The third category of terms, the fundamental terms, emerged as a powerful weapon to strike down the effect of widely drafted exclusion clauses, which limited the range of remedies available to the buyer. It has been held by courts that where the seller commits a breach of a fundamental term, the contract would be considered to have suffered a fundamental breach, and as such could render the exclusion of liability clauses found in the protecting the seller inoperative. This gave the buyer a right to sue the seller for the breach despite the exclusion

[125] *Schmitthoff's Export Trade*, p. 89

[126] It is illustrated by number of decisions. In Tradax International S.A. v. Goldschmidt S.A. a contract for the sale of barley contained the words »four per cent. foreign matters»; and they were held to amountonly to an intermediate term, so that the buyer was not allowed to reject merely because the goods delivered contained 4.1 per cent foreign matters.

[127] Tradax Export S.A. v. European Grain & Shipping Co. a contract for the sale of solvent extracted toasted soya bean meal contained the words »maximum 7.5 per cent. fibre.» These words were held to be a condition so that the buyer was entitled to reject when the goods were found to have a fibre content of 9.28 per cent. There was evidence that, in sales of the commodity in question, fibre content was normally a matter for price adjustment. It followed that, by taking the unusual step of specifying a maximum fibre content, the parties had provided evidence of their intention to depart from that normal practice and of giving the buyer the right to reject, should the specified percentage be exceeded. *Treitel II*, p. 609

[128] *Atiyah - Adams*, p. 59

clauses. The law regarding fundamental breach, however, was outside the Sale of Goods Act, though applicable to a contract of sale. The Sale of Goods act preserved the application of the rules of the common law, therefore enabling, *inter alia*, the doctrine of fundamental breach to apply to a contract of sale. The Sale of Goods act does not refer to fundamental terms. Instead, the effect on fundamental term may be found in the way the Act deals with the breach of a condition. The Act specifies that a breach of a condition may give rise to a right to treat the contract as repudiated or a warranty the breach of which may give rise to a claim for damages but not to a right to reject the goods and treat the contract as repudiated. [129] Sometimes a breach may, by the operation of law, be reduced to the status of a breach of warranty. This occurs when the buyer has either accepted the goods or where the property in the goods has passed to the buyer in a contract of sale that is not severable. Besides this, the buyer may, at his option, choose at any time to consider a breach of a condition as a breach of a warranty, in which case he may sue only for damages and not for a rescission of the contract. The Act considers the implied condition as to title and implied condition as to merchantability of the goods as conditions for the breach of which the buyer is given a right to both repudiate the contract and sue for damages. [130]

4.3.6 Representations

Whether a statement is or is not a part of the contract is said to depend upon the intention of the parties, but this most elusive criterion is often of little use in this connection. This situation has come about especially since the courts have been prepared to hold that an oral statement may override the written terms of a contract. It is probably true to say that the courts are now much more ready to interpret a statement as a term of a contract than they were a hundred years ago. The tendency these days frequently appears to be for the courts to hold a statement to be a term of a contract when they think of it as reasonable to impose liability in damages on the person making the statement, and vice versa. Thus to attempt to decide whether a statement is a term of a contract or a mere representation without reference to the result is, in many cases, like putting the cart before the horse. On the one hand, a statement as to the quality or state of the goods by a seller will almost invariably be held to be a term of the contract if the seller is a dealer in the goods. In the absence of a clear intention one way or the other, a statement is a term of the contract where the person making it had, or could reasonably have obtained, the information necessary to show whether the statement was true.

To conclude, it seems to be unnecessary to make more than a brief reference to the possibility of an action for negligent misrepresentation at the suit of a buyer, whether or not he is able to establish that the representation amounts to a term of the contract. Although it is now clear that an action for negligent misrepresentation will lie in some cases even at common law, it will not often be possible for a buyer to call to arms this cause of action in a case where the representation is not a term of the contract. But this is now of little importance for, under the Misrepresentation Act 1967, a contracting party is given a statutory cause of action for misrepresentation against the other contracting party. Since the onus is placed on the representor to show that he had reasonable grounds to believe, and did believe up to the time the contract was made, that the facts represented were true, it seems probable that claims based on misrepresentation will in future frequently be joined with claims for damages for breach of condition or warranty. But damages the Misrepresentation Act may not be assessed in the same

[129] Sale of Goods Act 1893 and 1979, 61(2) and 62(2) respectively.
[130] *Marasinghe*, p. 148

way as damages for breach of a term of the contract, so the distinction may still be important in some cases.[131]

4.3.7 Scots law

Much of what has been said in this chapter is, at best, interesting background information for the Scots lawyer. The distinction of contractual terms into conditions and warranties is unknown in Scots law, although its deployment to categorize the terms implied under the Sale of Goods Act did cause some confusion until the passage of the Sale and Supply of Goods Act 1994. But as the implied terms are now defined in Scotland without use of the words «condition» or «warranty,» this difficulty has ceased to cause trouble. The Scottish approach to the customer's right to terminate a contract for the supply of goods following breach of an implied term by the supplier is now the same as it would be for any other contract, namely, to ask whether the breach is sufficiently «material» to justify the remedy. Scots lawyers do, however, refer to contractual terms as warranties, usually when the term is an undertaking as to a state of fact, such as a condition of goods; but it does not follow from this that the only remedy from breach is damages. Termination will be possible if the breach is material. The distinction between a contract term and a representation is well established in Scots law, and the tests used in this regard in England are also applied in Scotland. Negligent and fraudulent misrepresentations are delicts, giving rise to claims for damages. There may be recovery for pre-contractual negligent misrepresentation under section 10 of the Law Reform (Miscellaneous Provisions)(Scotland) Act 1985.[132]

5 DETAILED ANALYSIS

5.1 Quantity of goods

5.1.1 The CISG

According to Art 35(1) a difference in the quantity of the goods is considered to be non-conformity. The fact that the lack of quantity amounts to non-conformity is clearly stated by some decisions. Courts refer to the same rules applicable for defective goods; in particular, the buyer must give notice to the seller within a reasonable time of discovery of the lack of quantity. [133]

However, a difference has to be made as to whether or not the documents allow for a minimum quantity or they rigorously require one single delivery. Notice has to be given only when the seller really delivers less than indicated in the documents. The seller may not invoke that notice has not been given if he was aware of the lack of conformity, e.g. if he himself made out the documents in accordance with the actually delivered quantity. [134]

But what happens when the quantity of goods delivered by the seller is greater than the one agreed upon the contract? This fact pattern emerged in a case decided by the French Supreme Court: electronic components were ordered by a French company from a German one. One of

[131] *Atiyah - Adams*, p. 66
[132] *Atiyah -Adams - MacQueen*, p. 89
[133] OLG Düsseldorf 8.1.1993 RIW 1993. Tinned cucumbers were sold by a Turkish company to a German one. A lesser quantity of cucumbers than the one agreed upon had been delivered.
[134] *Enderlein - Maskow*, p. 142

the buyer's contentions regarded the quantity of the delivered goods. The buyer alleged that the seller had delivered goods in excess and asked him to take them back. The lower instance court ruled that the buyer was obliged to pay the entire price because he should have immediately returned the excessive goods back instead of asking the seller to take them back. Upon the buyer's claim - that he was entitled to retain the goods until reimbursement by the seller of the reasonable expenses incurred in preserving the goods (Art. 86(1)) - the Cour de Cassation held that no evidence of such expenses had been provided by the buyer.[135] Commentators have criticized this decision, as far as treatment of excessive quantity is concerned. Article 35(1) does not vouch for a distinction between delivery of a quantity lesser or greater than the one agreed upon in the contract: excessive quantity should be treated as a non conformity and the buyer should promptly examine the goods and give notice within a reasonable time, if he wants to rely on the remedies provided in the Convention, but he is under no obligation to return the goods to the seller. Should he decide to accept the excessive quantity, he is obliged to pay its entire price (Art. 52 CISG).[136]

After all the considerations about what was agreed between the parties and how the parties are supposed to react, it should be taken into account the consequences to the parties; if it was essential to the buyer to have a full delivery immediately, or if it was of little difference to receive a part of the goods delayed, or not to receive this part at all, and the counterparty's knowledge of this fact. For example, if, based on a supply contract, the buyer delivers 90 % as agreed and the missing 10 % together with the next agreed delivery within a short period of time, attention must be paid to how much inconvenience was caused to each party and if it would have been reasonable to expect the vendor, by all means, to try to comply with her contractual duties at once. In any event, reasonability of the parties' claims is decided on a case by case- basis.

5.1.2 Finland

As regards a non-conforming delivery, the situation can be seen from two different points of view. The first one considers the lack of goods as a partial delay, while the second defines it as a specific defect: defect in quantity. Similarly as with defects in quality, here it is also difficult to figure out a rule to identify the presence of defects. Some general principles applicable to the non-conformity as regards quality are applicable also to the non-conformity as regarding quantity. Which criteria we should utilize to find out whether a certain case is a delay or erroneous quantity? The first point to capture one's attention is the difference between the amount contracted and the one delivered. If the difference is remarkable, it is tempting to think that the seller never had intention to deliver the contractual amount. This turns the situation to the «seller's delay.» In the event of a minor difference, the situation is closer to the «defect in quantity.» Both interpretations call for attention to the circumstances.[137] The smaller the missing amount is, the more it is likely that the seller intended to perform a complete delivery and thus we can speak about quantitative defect. In order to draw the line between the two kinds of non-conformities, emphasis should be put on the seller's intention: if seller alleges to have performed a complete delivery, despite the lacking amount, we can consider this defect on quantity.

[135] Cour de Cassation 4.1.1995. The Supreme Court confirms a decision of the Cour d'Appel de Paris 22.4.1992.
[136] *Veneziano*, p. 43
[137] *Aaltonen*, p. 179

In a case of excessive delivery, the buyer is under a duty to separate the amount of goods contracted. If it is feasible without causing damage to them, it is not reasonable to deem the buyer entitled to reject the delivery. The contrary would cause remarkable damage to seller; returning of the goods and difficulties in finding another buyer for the whole delivery could result in unreasonable consequences. The buyer is anyhow entitled to claim from the seller the cost resulting from the separation. If the seller delivers the amount greater that what was contracted, in order to get rid of his stock, or to extend the business relation with the buyer, the buyer is entitled to discharge the contract. It would not be fair that the seller could, through the contract of sale, make the buyer accept the goods he did not order.

The discrepancy between the amount ordered and the one actually delivered should be considered simply as another offer from the seller's side. Scandinavian sale of goods acts do not expressly recognize the limits between which the amount delivered could freely fluctuate in cases of contracted maximum and minimum. *Almen* concludes that when the minimum and the maximum are agreed, the fluctuation may be even greater that ten per cent. According to him, the party entitled to choose could not claim less than half of the maximum or more than twice the minimum. *Aaltonen* rejects this approach, deeming it too vague and aleatory to be taken as a principle to follow. Also *Raninen*[138] is in this view. He claims that «despite that we need not to be limited to the variance of ten per cent, we can certainly not go as far as *Almen goes*.» *Aaltonen* doubts whether the view regarding the «last ship rule» adopted by *Raninen* could be really acceptable. According to last ship rule, the tolerance of fluctuation between the single deliveries concerns only the last ship. *Aaltonen* presents an issue of recognizing the last ship loaded in case of a plurality of them. The point of the last ship rule, however, is elsewhere: it is not a question of which ship departed or arrived as first, but, that the rule can be applied only once and only after all the deliveries have been done. This usually coincides with the unloading of the last ship after which it is possible to confirm the total amount.[139]
The problem gets a bit more complex when the contracted amount is defined through the seller's capacity to produce and when his capacity is reduced for reasons beyond his influence. In such circumstances he cannot be considered liable for a non-conforming delivery. Another difficult issue is an event when the seller has more than one commitment to his production and the remaining capacity has to be divided between the parties involved. [140]
In practice it is rather difficult to recognize when the defect is of quality or quantity, since both of them can appear simultaneously. The quality of the goods may be expressed in terms of quantity: the width of the fabric or the volume of the container.

5.1.3 The UK

Where the delivery is of a quantity less than what was contracted, the buyer may in such a situation reject the whole or accept the lesser quantity. If the buyer does the latter then the goods must be paid for at the contract rate. Where the seller delivers a quantity of goods greater than the contracted quantity the buyer has three options. The buyer may reject the whole or may accept only the quantity contracted and reject the rest. The third option is to accept the whole delivery. In any event the buyer must pay at the contract rate for the quantity accepted. When goods are rejected, whether relying on to the delivery of the wrong quantity or to some other lawful reason, such as the goods' defects, the buyer is not required to return such goods to

[138] *Raninen*, Kauppatapalausuntoja, *Aaltonen*, p. 184
[139] *Aaltonen*, p. 185
[140] *Aaltonen*, p. 188

the seller. It could suffice that the buyer were to inform the seller of the refusal to accept them. It is then left to the seller to arrange for their return.[141]

Accordingly, the section 30(1) states. «Where the seller delivers to the buyer a quantity of goods less than he contracted to sell, the buyer may reject them, but if the buyer accepts the goods so delivered he must pay for them at the contract rate.» The seller cannot excuse a short delivery on the ground that he will deliver the remainder in due course. Section 31(1) states that: «Unless otherwise agreed, the buyer of goods is not bound to accept delivery thereof by instalments.» There are doubtlessly circumstances where it can be inferred from the contract quantity and the time allowed for shipment that the sellers are entitled to ship more than one load, and therefore entitled to deliver in separate loads. But the general rule is that the seller must deliver in one load. Where delivery in separate instalments is permissible under the contract, the question whether a shortfall in the quantity required permits the buyer to treat the whole contract as discharged is dealt by 31(2) of the Act. [142]

At first sight there seems no obvious reason why the buyer should not be required to accept that part which should have been delivered, whether or not he accepts the rest. But this is not the law, for 30(2) says: «Where the seller delivers to the buyer a quantity of goods larger than he contracted to sell, the buyer may accept the goods included in the contract and reject the rest, or he may reject the whole.» The former law was very strict in its insistence on the correct quantity. Any shortfall or any excess, no matter how small, was a breach of the section and justified rejection of all the goods. There was, and presumably still is, a principle of very limited application, *de minimis non curat lex*[143] which could occasionally be invoked to excuse what would otherwise be a technical breach. [144] This is a legal principle of general application, but its applicability to any particular case seems to be a question of fact that depends, *inter alia*, on how far precise accuracy can be obtained, or whether there are limits of accuracy that are commercially reasonable. The principle ought seldom be applied, for there is no breach of warranty at all. There may perhaps be occasions when it might be applied in consumer sales.[145]

The fact that the buyer may be entitled to reject the whole of the goods delivered in the circumstances dealt with in section 30, means that the seller in such cases is treated as though

[141] *Marasinghe*, p.164

[142] The subsection is not as strict in its requirements as section 30(1); a shortfall in quantity in one installment does not justify the buyer in treating the whole contract as discharged unless it is sufficiently serious to go to the root of the contract as a whole. The result may seem curious at first sight. Leaving aside the effect of section 30, in a situation where a seller contracts to sell and deliver 62 suits to the buyer, but he only delivers 61, the buyer could reject the whole lot if the suits were delivered in one load. But if the suits are to be delivered in separate installments, the buyer's rights are regulated by section 31(2) and on these facts it has been held that the shortfall of one suit was not sufficiently serious to justify the buyer in treating the contract as completely avoidable. But the result is not as odd as it seems. Where the parties do expressly contemplate installment deliveries, serious problems would arise if a shortfall in one installment gave a right to reject previous installments already accepted. So it is natural that such a right should be severely limited , and each installment treated as a separate delivery. *Atiyah - Adams*, p. 105

[143] The law pays no attention to trifles.

[144] To illustrate the application of this principle in the present context, two cases, one on either side of the line, may be contrasted. In *Wilensko Slaski TowarzystwoDrewno v. Fenwick &Co Ltd* (1938 3 All ER 429) the sellers sold timber of specified measurements to the buyers. There were certain permitted, but strictly defined, variations from these specifications. Slightly less than 1 per cent of the timber failed to comply with the contract requirements. The buyers were held entitled to reject the goods. On the other hand, in *Shipton Anderson & Co Ltd v. Weil Bros &Co Ltd* (1912 1 KB 574) the sellers contracted to sell to the buyers 4500 tons of wheat or 10 per cent more or less. The seller delivered 4950 tons and 55 lb, but they did not claim payment for the 55 lb. It was held that the buyers were not entitled to reject the goods. The excess over the stipulated amount being a little over 1 lb in 100 tons, the case clearly called for the application of the maxim *de minimis*. If it had not been applied in this case the rule would have lost all commercial importance.

[145] *Atiyah - Adams*, p. 107

he commits a breach of condition by delivering the wrong quantity. In this respect the duties of the seller are parallel to those laid down as regards sales by description. Indeed, the whole of section 30 is merely an application of the duty to deliver goods conforming to the description imposed by section 13, and it is one of the peculiarities of the drafting of the Act that section 13 is dealt with under the heading »Conditions and warranties» while section 30 is dealt with under »Performance of the contract.»[146]

The buyer's prima facie right of rejection means that he can always convert a breach of the quality into a breach of the rules as to quantity.[147] The same close relationship between the duty to deliver the right quantity and the duty to deliver the right quality will be observed when we consider instalment contracts. Here too, the buyer's right to reject is the same whether the breach consists of a short delivery or a delivery of wrong quality. For these reasons, it is undesirable for the law to distinguish between breaches of sections 13-15 and breaches of section 30, and in general the law does not do so. So it seems clear that the limitation on the right to reject in non-consumer sales introduced by the 1994 Act should apply equally to breaches of the implied terms as to quality and to breaches of section 30. [148]

5.2 Quality of the goods

5.2.1 The CISG

The first subsidiary rule (Art 35(2)(a)) is that the goods must be «fit for the purposes for which the goods of the same description would ordinarily be used.» [149] The delivered goods are fit for the ordinary use when they possess normal qualities: *i.e.*, the characteristics normally required from goods as described by the contract, and free from defects normally not expected in such goods. The CISG imposes these obligations because in the usual sale, and in the absence of contrary intent, today's international buyer is entitled to expect the goods to possess certain basic qualities even if the contract does not expressly so state. Among the implied obligations as to quality, this subparagraph is of great practical importance: it is an international version of an implied warranty of fitness for ordinary use, familiar in many European domestic laws.[150] The implied obligations apply irrespectively of the seller's good or bad faith.

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[146] *Atiyah - Adams*, p. 109

[147] If the seller contracts to deliver 100 tons of wheat of a certain quality and 10 tons are not of the desired quality and buyer rejects them, the seller will only have effectively delivered 90 tonnes, and the question will now be whether the shortfall is so slight that it would be unreasonable for the buyer to reject. More generally, though, the rules as to quality and the rules as to quantity were very similar in their effect, even if different in form. In particular, the close resemblance between the duties created by sections 13 and 30 is brought out all the more when they are examined in detail. In both cases, until the right of rejection was modified by the 1994 Act, the slightest deviation from the terms of the contract was in effect a breach of condition, entitling the buyer to reject the goods. If the seller delivered goods that failed by the slightest margin to conform to the contract description, or if he delivered a fraction too much or too little, the buyer might reject the whole. The only quantification on this was that if the deviations were »microscopic», the seller might be able to plead *de minimis*. But this principle was, and presumably will continue to be, applied as rarely in cases of quantity. In fact, as suggested above, given the restrictions the right of rejection in non-consumer sales, it ought not to be, for the effect of applying it is that there is no breach of warranty at all. *Atiyah -Adams*, p. 110

[148] *Atiyah - Adams*, p. 110

[149] The ULIS mentioned the qualities necessary for the ordinary or commercial use of the goods the CISG has suppressed as superfluous this reference to commercial use, which is covered by the reference to ordinary use.

[150] Unlike many domestic laws, the CISG does not compel the decision-maker to distinguish between a breach of warranties and breach of obligations. This may well facilitate decision-making, especially in the light of the fact that the Convention authorizes an award of monetary compensation for any breach along the lines of a non-fault regime. See *Lookofsky*, p. 54

Goods are often ordered by general description, without any indication as to intended use. Still, goods are always purchased with some purpose in mind, and buyers are entitled to expect reasonable value for their money: bowling balls must be suitable for bowling, canned tomatoes must be suitable for consumption, etc. Within the context of international trade, resale should be considered an ordinary use, so as a CISG buyer who purchases for resale in entitled to expect goods to be merchantable in the ordinary course of business. What is merchantable will then depend upon the reasonable expectations of the ultimate purchasers. The standard of «ordinary use» will rarely be internationally uniform; thus a question arises as to which market or geography we should consider as being determining.[151]

5.2.1.1 Goods unfit for ordinary use

Goods are *unfit* for the ordinary use when a defect or a lack of proper characteristics impedes their material use or yield abnormally deficient results or take unusual costs. The goods are also unfit for normal use when the lack of proper characteristics or the defects, though not affecting the material use of the goods, lessen conspicuously their value affecting their trade use. The goods can be more or less fit for their purposes, but the seller must on the whole deliver goods of average fitness.[152] The fitness of goods for ordinary use must be ascertained according to the standards of the seller's place of business. Indeed, the seller is not supposed to know about specific requirements or limitations in force in other countries. Only in some specific cases it is reasonable to expect seller's knowledge of buyer's local standards. [153] Another position, however, holds that «ordinary use» should be defined by the standards of the country or region in which the buyer intends to use the goods (see the chapter Conformity to Requirements of the National Law in Buyer's Country).[154]

Hence, the quality may be more or less good, but at least it must not be significantly below the standard that can reasonably be expected according to the price and other circumstances. Since the requirement of ordinary use of the goods can be met in quite varying quality, one may safely assume that the buyer can only insist on a certain minimum. The CISG doesn't describe any quality standards; e.g. the cars can be traded for resale but also for scrap metal. A specific problem relates to the period of durability or fitness, which plays a role in the foodstuffs and the pharmaceutical industries. Since no general standards have emerged yet in this respect, a relevant agreement in the contract should be recommended.[155]

Some domestic laws have solved the problem stating expressly that the seller of unascertained goods has to provide for goods of fair quality. The Civil Code of Germany[156], for instance, prescribes that in general the obligations to deliver unascertained goods are to be performed through goods of average kind and quality. Similarly the United States Uniform Commercial

[151] For example, the windows that are perfectly adequate for houses in warm countries, rarely meet the criteria of northern countries.
[152] Even though Art. 35 does not contain express provision imposing on the seller a duty to deliver goods of average quality. See *Bianca*, p. 280
[153] In some legal systems the seller has the right to deliver goods whose quality is below average. Under common law the goods must be merchantable. However, the goods are merchantable whether they are of high or low quality. *Enderlein - Maskow*, p. 144
[154] For example, in Europe gasoline for the operation of cars is still understood as leaded gasoline, whereas the expectations of an American buyer who purchases gas on the Rotterdam spot market might be directed toward unleaded gasoline. This example, though, seems to confirm the opposite solution. If in the seller's country the gasoline is understood as leaded gasoline, the buyer's request will also be understood as a request for leaded gasoline. Naming the place where the buyer intends to use the gasoline is not sufficient *per se* to show that he needs a different type of fuel. *Bianca - Bonell,* p. 274
[155] *Enderlein - Maskow*, p. 145
[156] BGB 243

Code requires the goods to be merchantable. However, in other domestic legislations, unless otherwise agreed, the seller may deliver goods of lower than average quality. It's significant, in this regard, that according to common law judges the seller has to deliver merchantable goods, but merchantable goods does not mean of good, or fair, or average quality.[157] This position is further explained in the decision assuming that merchantable means that the goods are of such quality as to be saleable in the market under the description made in the contract. [158]

5.2.2 Finland

The starting point here is the contract; only in the lack of the agreement as to quality do the circumstances and trade customs step in. Every now and then a contract refers to the goods delivered in the past, which establishes case-by-case measure. Moreover, the sellers may contract in conformity with the rules and classifications of Chambers of Commerce or other similar trade organizations. Often such rules result from years of usage. The contract may speak of «first class,» «average,» or simply use adjectives such as «dry,» «humid,» «bleached» and so on. In this event, the terms used may be divided in two groups; terms that are generally used and those terms that appear only in the context of a single contractual relationship. The expression «good quality» has proved to be particularly confusing.

5.2.2.1 Absence of an agreement

In the Finnish doctrine the view prevails according to which in the absence of any reference to quality of the goods, the seller has to deliver goods of basic quality. This does not actually solve the problem but only alters it: what is «standard quality» expected to be? A general reference can be made to the requirements of a particular sector of commerce. Some allege that the buyer, who neglected to specify the required quality in the contract, cannot claim any better than the lowest acceptable quality. In other words, if the contract does not provide information, it is up to the seller to decide. Some, on the other hand, prefer the interpretation according to which the buyer may claim better quality only if the goods were bought for resale. In this case the buyer may claim quality good enough to render the goods merchantable. In the context of a continuous business relationship it is natural to expect the quality similar to previous deliveries. The fourth view takes into account the price paid; the counterperformance has a decisive role when assessing what the counterparty may expect.

It is somewhat complicated to try to construct a general rule regarding the required quality of goods when the contract itself doesn't inform us of it; to state that the circumstances are to be taken into consideration is hardly of great help in practice. Anyhow, even trickier than that, is to determine what exactly does «the lowest acceptable» quality mean. When it comes to reference to previous deliveries, often there are none to refer to. Hence the solution needs to be found elsewhere: the contract as a whole and other components of the contractual relationship may help in the interpretation. Advanced trading and competition have resulted to a certain pricing policy that is more or less known by those who are active on a particular business. This could justify the expectations of a buyer of costly goods but it has to be pointed out, that the price cannot be the only decisive factor. A kind of a compromise could be found in the concept of «average quality.» Since the contractual relation should be seen also as a relationship of

[157] Taylor v. Combined Buyers Ltd, New Zealand University Law Review (1924) 627, where it is clearly stated that »goods may be of inferior or even bad quality but yet fulfill the legal requirement of merchantable quality. For goods may be in the market in any grade, good, bad, or indifferent, and yet all equally merchantable. On a sale of goods there is no implied condition that they are of any particular grade or standard.» See *Bianca - Bonell,* p. 281

[158] *Bianca - Bonell,* p. 281

cooperation, where both of the parties equally have rights and obligations, and if there are no particular reasons to favor one of the contracting parties- *i.e.* none of them was in a particularly weak position at the moment of the conclusion of the contract, none of them is a consumer, etc. - «average quality» is seen as a half-way solution when seeking the balance between respective performances.[159] According to *Aaltonen*, for example the contracted place of the production of the goods is binding the seller and the goods produced elsewhere are not those contracted upon. [160]

5.2.2.2 Aliud pro alio

When the seller delivers the goods different from what was contracted upon, the question arises as to what the seller actually did. Did he perform a defective delivery, as the goods do not correspond with the description, or did he deliver at all? If the seller delivers goods slightly different, »Golden» apples instead of »Granny Smith,» for instance, is the buyer entitled to reject the delivery. An apple is always an apple, but what if it was crucial for the buyer to have Granny Smiths, for the purpose he had in mind when ordering the goods. Thus, again we come back to the buyer's intention and the seller's awareness of it. So if we consider *aliud pro alio* - delivery as the seller's delay, the buyer could accept the goods, despite that the contractual performance did not take place. It follows that the buyer renounces his right to claim the goods contracted upon and, hence also the remedies he could have availed of relying on the delay. However, the rules governing a delay do not suit very well to the situation at hands. This is particularly true as regards the buyer's duty to examine the goods and give notice of the non-conformity.

The rules of law and the principles governing deficiency of the goods allow much more flexible solutions than those governing a delay. One factor justifying this view is that if the buyer would not be obliged to react to *aliud pro alio* -delivery, it could cause excessive damage to the seller in good faith. This approach is definitely seller friendly, and its application requires that the seller was not acting in bad faith. So the decisive point appears to be, whether the seller had intention to comply his contractual obligation. Once again we find ourselves studying the circumstances as a whole: the greater is the difference between the contracted and the delivered goods, the more it is difficult to the seller to prove that his intention was to comply.[161]

5.2.3 The UK

The implied terms as to quality and fitness in sections 13-15 of the 1893 Act represented an important step in the abandonment of the original common law rule of *caveat emptor*. The three primary terms laid down in the Act now appear in these sections, and their combined effect is to give buyers a substantial degree of protection against the risk of the goods proving to have defects of quality or fitness for purpose. Indeed, it is now unrealistic to treat the basic principle of the law as *caveat emptor* rather than *caveat venditor*.

Caveat emptor
As early as 1617 we find it being argued that »the value of a jewel consists in the estimation of him who will buy it», but in the same case the Court made it clear that a jewel was one thing,

[159] *Aaltonen*, p. 157
[160] *Aaltonen,* p. 162 Note the differing view in the U.K. doctrine.
[161] *Aaltonen*, p. 194

silver[162] something else. In all probability this also explains the famous case of *Chandelor v. Lopus*[163]. The defendant was a goldsmith who sold a »stone» to the plaintiff for £ 100, a considerable sum of money for the time, and affirmed it to be a »bezar stone.» The plaintiff complained that the stone was not a bezar stone, and sued for breach of warranty. However, he lost his case, the Court declaring that the defendant had only affirmed, and not warranted, the stone to be a bezar stone. This decision, which in the twentieth century was resuscitated as a leading authority on sales warranty law, is often taken to be the origin of the doctrine of *caveat emptor*. And that doctrine is, in turn, taken to be evidence that the Courts were uninterested in the fairness of an exchange, which they regarded as a matter for the parties alone. If a buyer failed to obtain a warranty, and in consequence made a bad bargain, that was regarded as his affair.

But again, both the premise and the conclusion are highly suspect. The first thing to be noted is the peculiar nature of the stone in our case; a bezar stone apparently is a stone found in the stomach or intestines of certain animals, and was at one time believed to have magical antidotal or medicinal powers. Even at the time when the Courts still had some belief in just prices one can understand the reluctance of the Court to attempt the value such a strange object, and perhaps even greater reluctance to attempt to discover whether it was indeed what the goldsmith said it was. In all probability the plaintiff was complaining not that it was not a bezar stone but that it did not have the magical qualities he had expected. It seems extraordinary that this case should have been regarded as laying the foundation of the later law of *caveat emptor*. Nevertheless, with or without the help of the case, the doctrine seems to have gained a foothold in the law with the growing commercial freedom of enterprise in the seventeenth century. »No man can be cheated except it be with his own consent, and we commonly say *caveat emptor*.»[164]

In one sense, the three main implied terms lay down a series of duties upon the seller. In the first place, there is the implied term that if the goods are sold by description the goods must correspond with their description. This applies in far wider circumstances that those in which the two other terms apply but it does not afford lot of protection to the buyer, especially where the description of the goods is not detailed. The next implied term is that the goods must be of satisfactory quality. This does not apply in all the circumstances in which the first applies but, on the other hand, it affords the buyer a greater degree of protection, because goods that correspond with their description may not be of satisfactory quality. Even this, however, may not suffice to protect the buyer, since the goods may correspond with their description and yet they may still be unsuitable for the buyer's purpose. Hence, in still more limited circumstances, the buyer may be able to rely on the third implied term, namely that the goods must be fit for the purpose for which they were sold. The difficulties of exposition of this part of the law have unfortunately not been greatly reduced by the legislation of 1973-94, though there has been some gain in simplification.[165]

[162] Silver was sold by weight and had a measurable value.
[163] (1603) Cro. Jac. 4, 79 E.R. 3
[164] Sir Josiah Child, in A New Discourse on Trade 1693. *Atiyah* , p.179
[165] *Atiyah -Adams*, p. 113

5.3 The purpose

5.3.1 The CISG

According to the second standard (CISG Art. 35(2)(b)), the seller must deliver goods which are also fit for any particular purpose of the buyer, provided that such purpose has expressly or impliedly been made known to the seller at the time of the conclusion of the contract. This criterion, which had its antecedent in the ULIS [166], solves the problem of whether an express promise of the seller is necessary about the fitness of the goods for a special purpose when the buyer shows his intention to buy the goods for such a purpose. The solution is in accordance with a principle of fairness.[167]

The seller is not obligated to deliver goods which are fit for some special purpose which is not a purpose «for which goods of the same description would ordinarily be used» unless the buyer has «expressly or impliedly made known to the seller at the time of the conclusion of the contract» such intended use**.** The problem may arise if the seller would have no reason to expect to supply goods appropriate for such a purpose.[168] In a German case[169] the plaintiff, the buyer, alleged that the goods did not conform to the contract, as the fabric that the goods were made of couldn't be cut in an economical manner. The court held that the buyer had no right to refuse to pay the purchase price, as the fabric was in conformity with the contract. Taking into account the quantity, quality and the description of the fabric, the court concluded that the fabric was fit for the production of skirts and dresses. The buyer had not provided the seller with information regarding the manner in which the fabrics had to be cut in order to be economical.

Buyers often know that they need goods of a general description to meet some particular purpose but they may not know enough about such goods to give exact specifications. In such a case the buyer may describe the goods desired by describing the particular use to which the goods are to be put. If the buyer expressly or impliedly makes known to the seller such purposes, the seller must deliver goods fit for that purpose. The purpose must be made known to the seller by the time of the conclusion of the contract so that the seller can refuse to enter the contract if he is unable to furnish goods adequate for that purpose.[170]

More problematic is the situation where the buyer, while negotiating the contract makes known to the seller the purpose, to which the goods are not suitable. Various legal systems have adapted various approaches to said problem. An opinion prevails in Italian doctrine, according to which the situation is comparable to that of an error. In these cases the emphasis is laid on the seller's knowledge of the intended final use of the goods. If this criterion is met, the buyer may rely on the invalidity of the contract and thus the dispute remains out of the scope of the application of the Convention.[171]

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[166] ULIS Art. 3(e)

[167] The provision does not deal with the case where the seller himself illustrates the special purpose the goods are fit for or where the buyer orders goods to be fit for a special purpose. In such cases it is clearly a question of contractual description. The Convention's second criterion is intended for the case where the buyer merely displays the intention to use the goods for a particular aim. The solution favourable to the buyer could be reached by way of contract construction, but the uncertainties regarding this problem in the national laws justified an explicit statement. See *Bianca - Bonell,* p. 275

[168] See Secretariat Commentary, 6th comma.

[169] Landsgericht Regensburg 24.9.1998

[170] It is insufficient for the buyer to make the purpose of the goods known to the seller at a later date. See *Enderlein - Maskow*, p. 145

[171] *Bianca*, in Convenzione di Vienna sui Contratti di Vendita Internazionale di Beni Mobili, p. 148

The seller is not liable for failing to deliver goods for a particular purpose even if the particular purpose for which the goods have been purchased has in fact been expressly or impliedly made known to him if «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.» The circumstances may show, for example, that the buyer selected the goods by brand name or that he described the goods desired in terms of highly technical specifications. In such a situation it may be held that the buyer had not relied on the seller's skill and judgment in making the purchase. If the seller knew that the goods ordered by the buyer would not be satisfactory for the particular purpose for which they have been ordered it would seem that he would have to disclose this fact to the buyer. If the buyer went ahead and purchased the goods it would then be clear that he did not rely on the seller's skill and judgment. [172]It would be also unreasonable for the buyer to rely on the seller's skill and judgment if the seller did not purport to have any special knowledge in respect of the goods in question. [173] If the buyer participates in choosing the goods, inspects the goods before he buys them, selects the manufacturing process, hands over the specifications or insists on a particular brand, he does not rely on the skill of the seller.[174] However, the circumstances in which the buyer may not rely on the seller's skill and judgment cannot be specified in advance but must be ascertained case by case.[175]

5.3.2 Finland

If the seller could have reasonably expected that the buyer had the intention to resell the goods, they have to be of merchantable quality. A defect that reduces goods' attractiveness in the eyes of consumers is considered fundamental even though the goods would be, despite the defect, suitable to their purpose. Here the Finnish view differs from the German «mussels» CISG-case[176]. When assessing if the seller's awareness of the buyer's purpose could be deemed decisive, it cannot be considered sufficient that the seller knew the purpose.[177] The buyer alleging seller's awareness of a particular purpose for which the goods were bought bears the burden of proof of such awareness. In particular cases the buyer may be exempted from this if the seller, for his experience or for other reasons, could not have been unaware of the particular purpose. [178]

When a place of origin is named in the description of the goods, it is clear that the buyer may expect the goods to be of that origin.[179] Antique is supposed to be from a certain period of time although also other characteristics are often required. Second hand goods are presumably

[172] If the buyer did not rely on the seller's skill and judgment, then it is irrelevant whether the seller actually did give judgment or not. It could well be that the buyer informed the seller about a particular purpose and at the same time ordered goods with clear and detailed specifications. The seller will be obliged to counsel the buyer, but the seller will not be responsible if the buyer insists on his order and shows that he does not rely on the seller's judgment. *Enderlein*, p. 157, *Dubrovnik lectures.*
[173] Secretariat Comentary, commas 7 - 10. See also *Bianca - Bonell*, p. 275
[174] *Enderlein - Maskow*, p. 146
[175] See also *Bianca - Bonell*, p. 275
[176]BGH 8.3.1995. The case concerned New Zealand mussels sold to a German buyer. The mussels contained a quantity of a harmful substance significantly greater than the advised levels published in directives of the German Federal Health Department. The Supreme Court confirmed the finding of the lower court which in order to deny that the mussels were unfit for consumption, took into account that they are usually eaten in special occasions and only in small quantities.
[177] For instance, in a case where a buyer intends to retail sell coffee and acquires the coffee from a wholesaler at a low price, we can suppose him as being aware of the possible defect of the goods. In the case of actual defects he has to resell the goods at a price lower than usually, but if the goods are defective to the extent of not being merchantable, *then* the buyer may rely on the defectiveness. The wholesale seller is presumably aware that the goods he is selling are bought for resale.
[178] *Aaltonen*, p. 166
[179] However, some goods have acquired a generic name that originally was associated with a particular geographic location, even though they no longer have nothing to do with that location, such as French fries.

defective to some extent; the level of quality is significantly lower compared with a new item. The typical problem arising from second hand sale is a fraudulent seller, whose promises do not correspond with the actual state of goods.

5.3.3 The UK

The rules governing implied terms about quality or suitability are found in section 14:

(1) Except as provided by this section and section 15 and subject to any other statute, there is no implied condition or warranty about the quality or suitability for any particular purpose of goods supplied under a contract of sale.

(2) Where the seller sells goods in the course of business, there is an implied condition that the goods supplied under the contract are of satisfactory quality.

(2A) For the purposes of this Act, goods are of satisfactory quality if they meet the standard that a reasonable person would regard as satisfactory, taking into account the description of the goods, the price (if relevant) and all other relevant circumstances.

(2B) For the purposes of this Act the quality of goods includes their state and condition and the following qualities in appropriate cases:

a) fitness for all the purposes for which the goods of the kind in question are commonly sold;
b) appearance and finish;
c) freedom from minor defects;
d) safety; and
e) durability.

(2C) The conditions implied by subsection (2) do not extend to any instance making the quality of goods unsatisfactory -

a) which is specifically brought to the buyer's attention before the contract is made;
b) where the buyer examines the goods before the contract is made, what that examination ought to have revealed; or
c) in the case of a contract for sale by sample, which would have been apparent based on a reasonable examination of the sample.

(1) Where the seller sells goods in the course of business and the buyer, expressly or by implication, makes known -

a) to the seller; or
b) *to the credit-broker* (where the purchase price or part of it is payable in instalments and the goods were previously sold by that *credit-broker to the seller)*

1 any particular purpose for which the goods are being bought, there is an implied condition that the goods supplied under the contract are reasonably fit for that purpose, whether or not that is a purpose for which such goods are commonly supplied, except where the circumstances show that the buyer does not rely, or that it is unreasonable for him to rely, on the skill and judgment of the seller or credit-broker.

(2) An implied condition or warranty about quality or fitness for a particular purpose may be incorporated to a contract of sale by usage.

(3) The preceding provisions of this section apply to a sale by a person who in the course of business is acting as agent for another as they apply to a sale by a principal in the course of a business, except where that other is not selling in the course of business and either the buyer knows that fact or reasonable steps are taken to bring it to the notice of the buyer before the contract is made.

Section 14(6) which provided the statutory definition of merchantable quality had as its main element the requirement that the goods should be reasonably fit for the purpose or the purposes for which goods of that kind were commonly bought. The new provisions provide that the quality of goods includes their state and condition. In this regard one must consider aspects of the quality of goods in their fitness for all the purposes for which goods of the kind are commonly sold. Clearly, fitness for purpose was important - indeed, an essential - element of the concept of merchantable quality, and remains important under the new provisions. In this instance it must be noted that section 14(3) is also, and more specifically, concerned with fitness for purpose, but that subsection is aimed at situations where the goods are required for some particular purpose which has been made known to the seller. Section 14(2) on the other and, concerns fitness for ordinary purposes, which do not have to be specifically made known to the seller.[180]

The question arises whether the new statutory definition clears up one major ambiguity that had previously been explored in the cases. Many goods are used for a variety of purposes, and the goods supplied under the contract may be fit for some of these purposes while being unfit for the others. If the buyer has not made known to the seller the particular purpose he wanted the goods for - in which case he could sue under section 14(3) - are the goods to be treated as satisfactory/merchantable or not? In *Aswan Engineering Establishment Co. v Lupdine Ltd*[181] the plaintiffs bought waterproofing compound in plastic pails for export to Kuwait from the defendants: L had bought the pails from the second defendants, B. When the pails were unloaded on the quayside at Kuwait, they were stacked in intense heat for some days. As a result the pails collapsed under their own weight and the waterproofing compound was lost. The plaintiffs sued L and succeeded on the grounds not stated in the reports. L then in turn claimed damages from B for breach of section 14(2) and (3), as well as in tort. Only the former claim is considered here. So far as liability under section 14(2) was concerned, the problem obviously was that the pails were perfectly fit for most purposes for which such pails would be used; they were simply unfit to be stacked high in such intense heat. The Court of Appeal held that the goods satisfied the requirement that they should be of merchantable quality. It must be said, however, that the Court reached this conclusion by looking at earlier case law first. Section 14(6) required goods to be «as fit for the purpose or purposes for which goods of that kind are commonly bought» as it was reasonable to expect. The new provision requires «fitness for all the purposes for which goods of the kind in question are commonly supplied,» so that if the seller knows that goods are not fit for one of the purposes for which goods of the kind are commonly supplied, he must make this known to the buyer.[182]

[180] In fact, the distinction between the two subsections has been muddied because such a wide interpretation has been given to section 14(3) that in practice it often covers ordinary purposes as well as special purposes; so the two subsections in practice overlap significantly.

[181] (1987) 1 WLR 1

[182] It is unlikely, however, that if the facts of the *Aswan* case were to recur, and the case fell to be decided under the new provisions, the outcome would be any different. It therefore seems impossible at this point to avoid looking at some of the earlier case law. The particular point under consideration here was exhaustively discussed by the House of Lords in case in Henry Kendall & Sons v William Lillico & Sons Ltd, (which is also examined in this study under »merchantability)» in which the plaintiffs bought for their pheasants animal feedstuff which turned out to be contaminated with a substance contained in Brazilian ground nut extraction which was one of the ingredients of the feedstuff. The extraction was perfectly suitable to be used in making up animal feedstuffs for use for cattle and other animals; it was only unsatisfactory for use in making the feedstuff for pheasant and partridge chicks. The buyer claimed damages from the seller, and consequently the seller in his turn claimed damages from his seller who, instead, was not held liable since the goods were perfectly usable for one of the main purposes for which goods were commonly bought.

The commodities sold under a general description may be bought by different buyers for a wide variety of uses. It would be unreasonable to say that because the goods are unsuitable for only one of these possible uses the goods were to be treated as non-merchantable. A buyer who complains that the goods were unsuitable just for the use he had in mind must try to bring his case under section 14(3) if he could so[183] and could not expect to persuade the court that the goods were altogether non-merchantable. If the purposes for which the buyer requires the goods is not a common one, this will still be the case under the new provisions, but the outcome on the facts might be different.[184]

5.4 Sample or model

5.4.1 The CISG

Subparagraphs (c) and (d) complete the CISG Article 35 list of implied obligations. If the seller presents goods as a sample or model, the goods delivered must match the sample. In such a case, and unless otherwise agreed, the sample serves the same function as a »description required by the contract.» Of course, if the seller indicates that the sample or model is different from the goods to be delivered in certain respects, he will not be held to those qualities of the sample or model but will be held only to those qualities that he has indicated are possessed by the goods to be delivered. [185] If the description of the goods in the contract and the model do not conform to each other, it may not be deduced, from the fact that without a description in the contract the model replaces an agreement; that the model shall have priority over contractual agreements. [186]

5.4.2 Finland

The sale by sample differs from other types of sale for two different reasons. On the one hand, by presenting a sample the seller commits himself to deliver goods that are similar to the sample. On the other hand, the buyer cannot rely on the facts he should have noticed when examining the sample. Samples may be divided into three categories; seller's sample is the one used to demonstrate what the goods will be like. Minor differences between the sample and the goods are tolerated. Buyer's sample is presented in order to illustrate to the seller how the goods should be: the buyer's sample is to be respected rigorously. The third category is so called sample of type. They merely describe the goods and demonstrate the type: if the goods delivered are of the same type with the sample shown, minor differences have to be tolerated. On the other hand, even though the sample had some defects the buyer ought to have noticed, he does not necessarily lose the right to rely on the said defect. Sometimes the sample is used to demonstrate only one character of the goods; color, material or model. If the contractual

[183] This would normally mean that he would have to show that he told the seller the particular purpose he had in mind.
[184] *Atiyah - Adams*, p. 143
[185] Secretariat Commentary, comma 11
[186] *Enderlein - Maskow*, p. 147. See also *van Houtte*, ICC International Court of Arbitration Bulletin, Vol. 11/No. 2 (Fall 2000) 27 n.10 (choice of law), 26 n.40 : CISG and complementary national law, 29 n. 55. Tribunal ruled that "buyer could not argue that infected buckwheat delivered from China did not conform to the sample, as in the cereal business samples had a limited aim, being intended to define such type-specific characteristics as the kind of buckwheat and the colour and size of the kernel; they were irrelevant to phytosanitary purposes." 29-30 n.61: In a dispute over the quality of hulled buckwheat, sold CIF from China to Poland, the parties had agreed in the contract that the Chinese phytosanitary authorities should inspect the conformity of buckwheat on shipment. Although the quality was bad on arrival in Poland, the product complied with contractual specifications according to the Chinese inspection certificate. As the buyer had agreed to the determination of conformity through the Chinese inspection, it was not entitled to compensation." See also the comments of *Enderlein* in *Dubrovnik lectures*, p. 157.

description of the goods does not coincide with the sample, the sample prevails. However, if the seller, as a response to the seller's claim of non-conformity, alleges to have shown as a sample exactly the same goods as he later delivered, and that the buyer has had the possibility to notice the quality of the sample, a question rises as to what the point of the sample was. In any event, the goods have to correspond with the description. When evaluating the limits of tolerance, attention has to be paid to the nature of the sample; whether is was seller's, buyer's sample or sample of type.[187]

5.4.3 The UK

Both Sale of Goods Acts of 1893 and of 1979 provide that a sale by sample must be express or should be implied from the terms of the contract.

> «In the case of a contract for sale by sample there is an implied condition -
> (a) that the bulk will correspond with the sample in quality;
> (b) that the buyer will have a reasonable opportunity of comparing the bulk with the sample;
> (c) that the goods will be free from any defect, rendering them non-merchantable, which would not be apparent on reasonable examination of the sample.»

Apart from c.i.f.[188] contracts, the buyer would always have an opportunity to compare the bulk with the sample at the time the title and possession are passed. In a c.i.f. contract, title passes against the transfer of documents. The passage of property, however, is conditional upon the goods conforming to the contract. The buyer could repudiate the contract and reject the goods if they, upon arrival, were found not to conform to the samples against which the contract of sale was made. [189]

When studying the relationship between section 13 and the common law distinction between representations and contractual terms, the first question to be examined is the effect of section 13 on the traditional common law distinction between mere representations on the one hand and terms of contract on the other. At first glance it may seem that section 13 does away with this distinction in case of sale by description since the section states, «there is an implied term that the goods shall correspond with the description.» If the section applied only to those parts of the description that amounted to contractual terms in any event, it would seem to be performing the somewhat odd - and redundant - function of declaring that it is an implied term that the seller must comply with an express term of the contract. However, despite this oddity, the section does not seem to obliterate the distinction between mere representations and contractual terms.[190] It has been held that the section does not affect the traditional distinction

[187] *Aaltonen*, p. 202

[188] Incoterms 2000, CIF means cost, insurance, freight. The cif contract places upon the seller the obligation to arrange for the shipping of the goods. The cost of freight is either included in the price quoted - which is usual arrangement in these contracts - or the buyer undertakes to pay upon their arrival. Where the seller and the buyer are separated by large distances, it is sometimes to the buyer's advantage and to his convenience that the burdensome task of arranging the exportation of the goods is left to the seller, who often has knowledge of the local export requirements. The seller, therefore, must arrange for export licenses where these are needed and satisfy all local prerequisites prior to shipping.

[189] *Marasinghe*, p. 154

[190] For instance, in *T & J Harrison v. Knowles and Foster* (1918 1 KB 608) the sellers sold two ships to the buyers, each of which had been stated in particulars supplied to the buyers to have a deadweight capacity of 460 tons, but no reference was made to this in the actual memorandum of sale. In fact, the capacity of each ship was only 350 tons. In one sense these ships had been sold by description and the description certainly referred to their capacity. But the Court of Appeal held that the statements

between mere representations and terms of the contract. For the sale to be by description, the description is influential in the sale so as to become an essential term of the contract. Although this question remains tantalizingly uncommented on in the cases, it seems reasonably clear from some decisions of House of Lords that section 13 of the Act does not automatically convert any or all descriptive words into conditions, or even terms.

It seems to have accepted that the only descriptive words that are to be treated as the subject of section 13 are words that identify the subject matter of the contract. Words, which merely identify the goods in the sense of pointing out where they can be found, are not words of identity in this specific sense. However, a different view might be taken of contracts for the sale of unascertained future goods where each detail of the description must be assumed to be vital. We could summarize as follows:

1. Descriptive words must first be analyzed to see whether they are contractual, or merely amount to representations. If they are misrepresentations only, the normal common law and equitable rules apply, as modified by the Misrepresentation Act 1967.
2. If the words are held to be contractual, it must next be seen whether there is an express term requiring compliance with the words of description. Such a term may be a condition or a warranty, but is most likely to be an innominate term. The buyer's remedies of breach of such a term depend on the nature and consequences of the breach.
3. If there is nothing amounting to an express term, then the next stage is to see whether the description relates to unascertained future goods like commodities. In this event the term is a condition, and strict compliance is required, though a non-consumer buyer's right to reject is now modified by section 15 inserted by the 1994 Act.
4. If the contract is of a different character, it must be inquired whether any item in the description of the goods amounts to a substantial ingredient in the identity of the things sold. If it does, compliance with the item will again be a condition.
5. In any other case, the requirement of compliance with descriptive words is not a condition, but a bare warranty or an intermediate or innominate term.

This may seem complicated, but it does at least avoid putting the court into a straitjacket to enable the court to arrive whatever decision seems appropriate in the circumstances. Section itself seems to have been largely forgotten in this discussion. It is almost impossible to reconcile some cases with the precise words of the Act. Indeed, it is not clear that section 13 actually does anything at all, since all it seems to say as now interpreted, is that where the seller uses words of description which would otherwise amount to condition, then it is an implied condition that the goods should comply with that description. This hardly seems worth saying, although, in bills propositions may be stated which are not designed in any sense to alter the law. It is perhaps unfortunate that section 13 appears to have been outside the terms of reference of the Law Commission's inquiry that led to the 1994 Act. [191]

5.4.3.1 Sale by description

«The sale by description» must apply to all cases where the purchaser has not seen the goods but is relying on the description alone. Hence it follows that a sale must be by description if it is of future or unascertained goods. In addition, the term applies even where the buyer has seen the

about the capacity were merely representations. However, in *Howard Marine & Dredging v. Ogden Ltd* (1978 QB 574) in similar fact-pattern damages were awarded under the Mispresentation Act 1967.

[191] *Atiyah - Adams*, p. 120

goods. It has been made clear by section 13 that the term «sale by description» is wide enough to cover a sale even where the goods have been exposed for sale and selected by the buyer, as in the modern supermarket or department store. But a sale is not by description where the buyer makes it clear that he is buying a particular thing because of its unique qualities, and that no other will do, or where there is absolutely no reliance by the buyer on the description.

Actually, the only case of a sale not being by description occurs where the buyer makes it clear that he is buying a particular thing because of its unique qualities, and that no other will do. For this reason the sale of a manufactured item will nearly always be a sale by description - except where it is second-hand - because articles made to an identical design are not generally bought as unique goods but as goods corresponding to that design. [192] The real question at issue in deciding whether the sale should be classified as a sale by description is whether, on the true construction of the contract, the buyer has agreed to buy a specific chattel exactly as it stands to the exclusion of all liability on the part of the seller. For example, the buyer may examine a second-hand car and the seller may offer it for sale in terms which amount to saying: «There is the car, there is my offer; I guarantee nothing, take it or leave it.» In this event it is thought that the sale would be held to be a sale of a specific thing and not a sale by description. It is to be noted that section 13 applies even though the goods are not sold by a person who sells «in the course of a business.»[193]

Moreover, the seller may deliver the contracted goods mixed with goods of a different description. Here the buyer has two options in this situation. He may reject the whole or may accept the portion of the goods that conforms to the contract. In the latter case, the buyer must pay at the contract rate for the portion accepted.

5.4.3.2 The relationship between the description and the quality or fitness

As section 14 deals with implied conditions as to the quality and fitness of the goods for a particular purpose, section 13 does not on the face of it deal with quality of fitness for purpose. It is quite possible for goods to be of satisfactory quality and fit for their purpose and yet not correspond with their description. Conversely, if the goods do correspond with their description the fact that they are unsatisfactory or not fit for the purpose they are sold will not enable the buyer to plead a breach of section 13. In this event he will often be able to rely on section 14(2) or (3), but there are some circumstances in which a buyer may wish to use section 12 rather than section 14, even though his complaint may in a broad sense be said to be one of quality. First, as seen above, section 13 applies to a sale by a private seller while section 14 only applies to a seller who sells in the course of a business. So a person who buys from a non-business seller can only complain about quality if he can bring his case under section 13. This explains a case where the buyer of the car had obtained damages for breach of the condition implied by section 13 - the car was wrongly described as being of a certain year model. If the

[192] A court in Australia held that the sale of an ordinary pair of walking shoes was a sale by description, although the buyer had tried on and examined the shoes and might well have thought to be buying the particular pair as specific goods. Even the purchase of a second-hand car which was fully examined by the buyer was held to be a sale by description because the buyer had relied in part on a newspaper advertisement issued by the seller. *Atiyah - Adams*, p. 122

[193] Thus in *Varley v. Whipp* (1900 1 QB 513) the defendant agreed to buy from the plaintiff a second-hand machine, which was stated to have been new from previous year and hardly used at all. This was a gross misrepresentation, and the defendant could not rely on section 14, which imposes requirements as to merchantability and fitness for purpose, because the plaintiff was not a dealer in agricultural machinery. As the goods did not correspond with the description, it was held that there was a breach of section 13. Changes made by later legislation are immaterial to this point. *Atiyah - Adams*, p. 123

buyer had been buying from a business seller, he would probably have had a clearer case for damages under section 14 on the ground that the vehicle was not of merchantable quality. [194]

But secondly, the buyer may wish to rely on section 13 because the goods are in fact of satisfactory quality in a general sense, but still do not amount to the goods he thought he was buying. In a hypothetical example, a person who buys a suit described as pure wool may very well want to return if he discovers it is not pure wool, even though it may be perfectly satisfactory, and of good quality. But he can only do that under section 13 because there would be no breach of section 14 on these areas. A third type of case in which a buyer might wish to rely upon section 13, even though his complaint is in a broad sense about quality, occurs where the contract contains a clause excluding liability for matters of quality, but not for matters of description - something which could still happen despite the Unfair Contract Terms Act.

Particular problems often arise where goods are described in general terms, but some extraneous substance is included in the goods, which does not alter the general nature of the goods but significantly affects their utility. The point is illustrated by the decision of the House of Lords in *Ashington Piggeries Ltd v. Christopher Hill Ltd*[195]where herring meal, which was contaminated with a substance that made it unsuitable for feeding to minks, was sold to the buyers because the goods were still properly described as «herring meal,» and it was pointed out that not every statement about the quality or fitness of the goods can be treated as a part of the description.[196]

There is still another type of case that may involve the relation between section 13 and the quality or fitness of the goods. If the contract calls for goods of a certain quality, this quality may itself become part of contract description, but it seems that statements as to quality will not usually be treated as part of the contract description. On the other hand, there are some cases in which quality and description significantly overlap. To take an example once given by Lord Denning, if the goods being sold are said to be «new-laid-eggs» this goes both to quality and description. However for most purposes such cases give rise to no special problems. Breach by the seller will normally involve liability under sections 13 and 14, and the overlap is of no particular importance. It would only be of importance where the implied condition under section 14 is not applicable for some reason and the buyer has to rely exclusively on section 13. He may wish to argue that the term new-laid eggs implies not merely that the eggs are literally new laid, but that they are of good quality, because that is the natural implication of the term. Conversely, if the buyer cannot complain about the quality he is not entitled to raise the same complaint under the guise of a failure to conform to description. [197]

5.5 Packaging

5.5.1 The CISG

The buyer can also expect the goods to be packaged in the usual manner if there is one, or in a manner adequate to protect the goods. Subparagraph (1)(d) makes it one of the seller's obligations in respect of the conformity of the goods that they «are contained or packaged in

[194] *Atiyah - Adams*, p. 124

[195] See the citation of the same case earlier in this study.
[196] *Atiyah - Adams*, p. 125
[197] *Atiyah - Adams*, p. 126

the manner usual for such goods, or, when there is no such manner, in a manner adequate to preserve and protect the goods.» This provision which sets forth a minimum standard is not intended to discourage the seller from packaging the goods in a manner that will give them better protection from damage that would the usual manner of packing.[198] The seller is free to provide better protection for the goods at his own cost. This is influenced not only by the category of the goods themselves, but also the means and duration of transport, the route, and the country of destination. Whether or not interior packaging is required, or whether the goods are contained instead of packaged also depends on the means of transportation used and the category of goods involved. The concept of "an adequate manner" also includes that the seller reckoned with a foreseeable delay in transport and the possibility of a redirection in transit or a redispatch in case where he became aware of delay or redirection or redispatch at the time of concluding the contract.[199]

It does not matter whether the packaging is part of the goods, but the obligation to package the goods depends on what is customary. The seller has an obligation to package the goods not only when the goods are dispatched, but also under CISG Article 31, subparagraphs (b) and (c) if the seller only has to place the goods at the disposal of the buyer. Also in these cases, the goods have to be packaged so as to allow the buyer to load and transport them. If the buyer himself is to provide the packaging, a clear relevant clause has to be agreed in the contract. This may relate in particular to new goods, but also to such goods that have to be manufactured in a special way. [200]

5.5.2 Finland

It has been disputed on whether the defects in the package may be considered as a defect of the goods. As usually the answer cannot be plainly positive or negative; it needs further analysis. Attention must be paid to the goods themselves and how is the packaging. If the package exists only to render the delivery possible, it forms no such a part of the goods that, when defective, could render the goods defective. If the packaging is a substantial part of the goods or their merchantability, or if the conservation of the goods depends on it, it is surely deemed to have effect on the conformity of the goods. Also when the package is erroneous for the information it provides, it will fall into the category »defect of goods.»

5.6 Buyer's knowledge of non conformity

The obligations in respect of quality in subparagraphs (1) (a) to (d) are imposed on the seller by the Convention because in the usual sale the buyer would legitimately expect the goods to have such qualities even if they were not explicitly stated in the contract. However, if at the time of the contracting the buyer knew or could not have been unaware of non-conformity in respect of one of those qualities, he could not later say that he had expected the goods to conform in that respect. This rule does not go to those characteristics of the goods explicitly required by the contract and, therefore subject to the first sentence of paragraph (1). Even if at the time of the conclusion of the contract the buyer knew that the seller would deliver goods that would not conform to the contract, the buyer has a right to contract for full performance from the seller.

[198] At the 1980 Vienna Diplomatic Conference the words »or where there is no such manner, in a manner adequate to preserve and protect the goods» were added to Article 35. The explanation is the observation of a representative of Australia, Mrs. Kamarul, who asked »What would happen if the goods were of a new type and there was no usual container or packaging for them?» The provision proposed by her delegation provided that in cases of new standards had not been established, the manner in which the goods would be contained or packaged should be adequate to preserve and protect them. Secretariat commentary, comma 12. See also Many European domestic sales laws and ULIS

[199] *Enderlein - Maskow*, p. 147

[200] *Enderlein - Maskow*, p. 147

If the seller does not perform as agreed, the buyer may resort to any appropriate remedies at his disposal.[201]

The CISG provides no information on the yardstick against which «have to be aware» should be measured. There are several formulations in regard to it. Apart from «knew» and «has become aware» there is «could not have been unaware» as well as «knew or ought to have known.» The wording «could not have been unaware» is often qualified as a gross negligence.[202] According to some legal scholars[203] this should not suffice. It has been held that there should be an objective and clearly recognizable deficiency of the goods, which must be obvious to the average buyer. Circumstances, which suggest that the buyer could not have been unaware, would be given, for instance, if the seller had in the past sold to the buyer goods of poor quality without complaints from the buyer; or if the price corresponds to the price generally paid for poor quality goods. It is, however, not absolutely excluded for the seller to bear responsibility. If the buyer is aware of the non-conformity of the goods at the time of the conclusion of the contract, but insists on faultless quality, the responsibility will remain with the seller for he must be expected to remedy the deficiency.[204]

There are no express rules dealing with the case where the lack of conformity is attributable to the buyer himself, as, for example, defects in raw materials supplied by the buyer resulting in the lack of conformity of the goods manufactured by the seller. In the course of the 1977 UNCITRAL session it was considered whether there should be a rule exempting the seller from the liability for the lack of conformity in such a case, if he was not aware and could not have been aware of the defect in the buyer's material or if the buyer insisted on its use after having been warned by the seller. The proposal was not accepted since the position was considered to be obvious. Exemption of a seller who was unaware of the defect in materials delivered by the buyer follows necessarily from Article 80. However, if the seller is aware of the defect in material, good faith requires him to inform the buyer of that fact.[205]

CISG Article 35 does not lay down any express rules for the case where the seller has specifically warranted the existence of a quality or fraudulently concealed the defect. In the case of a specific warranty of quality there will in any event be a contractual agreement to that effect under CISG Article 35(1), so that CISG Article 35(3) will not apply. In the case of a fraudulent concealment of a defect, it can be inferred from the principle underlying Article 40 (seller unable to rely on the buyer's conduct if he is acting in bad faith), in conjunction with CISG article 7(1), that the seller is liable even where the buyer could not have been unaware of the defect. A buyer is unaware of a defect merely on account of his gross negligence seems to be more worthy of protection than a seller who deliberately sets out to deceive the buyer.[206]

CISG Article 35(3) relates only to cases of lack of conformity under CISG Art. 35(2), and not to contractually agreed qualities of the goods or to their packaging under CISG Art. 35(1). Nor it is possible to apply it by analogy. This is appropriate having regard to the substance of the matter. Prior knowledge of the buyer is inconceivable where there is a discrepancy in quantity or a delivery of an *aliud*. But also if the buyer is aware of a discrepancy in quality at the time of

[201] Secretariat Commentary, commas 13 - 14
[202] *Herber, R.* in Das UNCITRAL-Kaufrecht im Vergleich zum österreichischen Recht, p. 141.
[203] See *Huber, U.* in Der UNCITRAL-Entwurf eines Übereinkommens über internazionale Warenkaufverträge, p.423
[204] *Enderlein - Maskow*, p. 149
[205] *Schlechtriem*, p. 284
[206] *Schlechtriem*, p. 286

the conclusion of the contract there can be no overall exemption from liability in the terms of CISG Art. 35(3). In such circumstances, which characteristics were actually agreed for the purposes of CISG Art. 35(1) must be determined in each case through interpretation. It may be that the quality of which the buyer was aware has become a term of a contract. However, it is also possible that the seller ought to produce the characteristics as required by the contract by the date for delivery or that he has to remedy their absence after delivery. That applies in particular where the buyer has no positive knowledge of the discrepancy in quality, but could merely «not have been unaware» of it. [207]

Bianca[208] states that the seller is not liable for defects of the goods directly or indirectly resulting from their description. Nor is he liable for the defects the buyer should reasonably expect. Circumstances from which the buyer should reasonably deduce that the goods do not conform to the Convention standards are, for example: (a) the seller had usually sold in the past to the buyer poor quality goods without complaints from the buyer; or (b) the price corresponds to the price generally paid for poor quality goods.[209] The example (a) could well be extended to any kinds of goods: if the buyer already knows the product because of the previous acquisitions and afterwards orders more of it, he can hardly allege not to have been aware of the defects. Views differ when it comes to another extension:[210] possibility to extend the rule of CISG Art. 35(3) to the lack of conformity covered by Art. 35(1). *Bianca* states, quite on the contrary, that the distinction must be kept clear between lack of conformity according to the Convention's criteria (or usages), and according to express contractual provisions (an implied provision about the quality of the goods). This distinction does not introduce different rules based on different types of lack of conformity. When there is a special contractual provision, the seller's liability is instead based on the principle that the party may always rely on the engagement undertaken by the other party. The fact that the buyer knows or ought to know of the real condition of the goods is irrelevant because it does not change the content of what the seller has promised to the buyer nor can free him from his promise.[211]

The determination of whether the goods conform to the contract in the sense of CISG Art. 35 is made at the moment the risk passes to the buyer. This is regulated in CISG Article 36 of the Convention. [212] The possibility remains that an implied warranty concerning the suitability for ordinary purposes will extend beyond the time the goods are accepted. The court determines the life of the warranty [213] or whether some provision must be made in the contract - whereby, of course, CISG Art. 8 may be consulted - has not been clearly decided. Hence the CISG Article 36 may be applied in different fashions.[214]

[207] *Schlechtriem*, p. 286
[208] *Bianca - Bonell*, p. 279
[209] *Bianca - Bonell*, p. 279
[210] See *Enderlein*, in Enderlein - Maskow, p. 146
[211] *Bianca - Bonell*, p. 280
[212] However, the question of burden of proof was not decided. The position taken by the British delegate - that the question could be left to the courts - was not contradicted.
[213] Of course with due consideration to all of the circumstances.
[214] *Schlechtriem 2*, p. 68

5.7 Conformity to Requirements of the Law in Buyer's Country

5.7.1 The CISG and the merchantability

We may doubt that the seller should be bound to know all governmental provisions in the country where the goods will be traded; it's the buyer who should draw the seller's attention to them, as he is in a position to find and give information at lower costs. A different solution would infringe the need of uniform application of the Convention (Art. 7(1)). The seller is expected to comply only where he is expected to be aware of them, either because the buyer draws his attention to them, so that they become part of the contract, or else because analogous provisions also exist in the seller's country.[215] On the other hand, the operation of national directives often leads to considerable damages to a buyer. The goods maybe destroyed or their sale is prohibited by order of public authority.[216]

In the doctrine, various interpretations can be found. *Schlechtriem* is of the opinion that the «ordinary use« should be defined according to the standards of the country where the goods are directed. [217] *Bianca* doesn't share the said opinion; according to him the reference should be made to the place of the seller, because only this view will lead to systematic interpretation of the Convention. [218]

An examination of current case law shows that the question is still unresolved. In the famous decision of German Supreme Court concerning the sale of contaminated mussels[219], the goods were deemed to be conforming because they were «fit for the purposes for which goods of the same description would ordinarily be used». The Court excluded that the seller should take into account special government provisions regarding merchantability of food products issued in the country where the goods are treated. [220]

The starting point of the decision was that food regulations, to the extent that they should even have been applicable here, could be decisive for the determination of the quality of the goods required by the contract, and their violation is a defect in quality and not a defect in title. It is

[215] This latter exception is not problematic: where the infringed provisions exist in both countries, the seller is expected to comply. In a case concerning wine mixed with water and declared unmarketable in Germany by public authorities in application of EC-law, the violation of EC-provisions was considered relevant; the same provisions also applied in the seller's country, which was Italy. LG Trier 12.10.1995.

[216] The change of the law of the buyer's country lead to a collapse of a long-term contract between a German brewery and an Iranian importer after the new fundamentalist regime in Iran had totally forbidden the importation of alcoholic drinks. BGH, NJW 84, 1746.

[217] *Schlechtriem* in The Seller's Obligations under the United Nations Convention on Contracts for the International Sale of Goods, in International Sales 1984, pp. 6-21

[218] *Bianca* in Conformità dei beni e diritti dei terzi in «Convenzione di Vienna sui contratti di vendita internazionale di beni mobili»

[219] BGH 8.3.1995. The case concerned New Zealand mussels sold to a German buyer. The mussels contained a quantity of a harmful substance significantly greater than the advised levels published in directives of the German Federal Health Department. The Supreme Court confirmed the finding of the lower court which, in order to deny that the mussels were unfit for consumption, took into account that they are usually eaten in special occasions and only in small quantities. See the Finnish commentary on the case, *Huber - Sundström*, p. 756

[220] However, there have been contrary opinions concerning this decision. *Karollus*, for example doesn't agree with the court. From his point of view, it was essential, that the buyer didn't intend to eat the mussels but to resell them. The real issue under Art. 35 (2)(a) is the quality a buyer can expect in the absence of detailed agreements. In his opinion, a buyer can expect a quality that is reasonably merchantable. For him it also seems clear that a buyer should neither be obliged to accept mussels with a bad taste nor to take heavily contaminated mussels. In both cases the goods are edible but probably unsaleable. The buyer's purpose was to resell the goods, and this purpose was frustrated. Therefore it would have been correct to say that the mussels lacked the conformity. *Karollus*, p. 51-94

true that public law regulations, just as technical standards, cultural traditions or religious convictions, are circumstances that have an influence on the goods. These circumstances interact with each other; for instance, ideological and other convictions are often converted into governmental rules and prohibitions. The violation of government regulations concerning the use of goods must not necessarily represent a defect in quality because the relevant area can perhaps disregard such governmental regulations - for instance, in environmental law - and readily consume and trade goods that violate a prohibition. [221]

However, there are other decisions more sympathetic to buyers. A French company ordered from an Italian seller various kinds of cheese including Parmesan, in the framework of an existing business relationship. The buyer complained because the cheese was not wrapped and labelled conforming to French law on merchantability of goods. The Court held, as the parties were in a business relationship, that the seller knew that the goods were to be sold in France. Therefore, it should interpret the buyer's statements in the sense that the buyer would purchase only goods wrapped according to French law.[222] The same result is reached in a German case concerning sale of paprika by a Spanish seller. In the court's opinion, the parties, also in view of their previous commercial relationship, had impliedly agreed that the goods should comply with the standards provided by the German law of food. Accordingly, the seller could not invoke lack of knowledge of such provisions.[223]

The solution cannot be properly deduced from the rule of Article 42(1), which states that the seller must deliver goods which are free from any right or claim of a third party based on industrial property or other intellectual property under the law of the State where the goods will be resold or otherwise used (if it was contemplated by the parties that the goods would be resold or otherwise used in that State) or under the law of the State where the buyer has his place of business. However, this rule does not concern our problem. The existence of rights and claims of a third party is indeed normally relevant because the seller fails to transfer the full property of the goods and the buyer is therefore deprived, totally or partially, of what he is surely entitled to under the contract and the Convention.[224]

Under the Convention the right solution has to be found on a case by case basis according to the circumstances. In general terms it may be said that the fact that the buyer makes known to the seller the country where the goods are to be used, is insufficient to bind the latter to deliver goods meeting the administrative and statutory requirements of that country.[225] In practice, the

[221] *Schlechtriem*, p. 12, in Uniform Sales Law in the Decisions of Bundesgerichtshof. It is rather interesting to note the effects of the mussel case; in a dispute between an Italian seller and an American buyer, the plaintiff challenged the arbitral award alleging that the arbitrators exhibited manifest disregard of international sales law and that they refused to follow a German Supreme Court case interpreting the CISG. The plaintiff's claim was, however, dismissed. U.S. District Court, Eastern District of Louisiana 17.5.1999.

[222] Cour d'Appel de Grenoble 13.9.1995

[223] LG Ellwangen 21.8.1995, Further to the delivery of the second installment the German buyer received an official warning by a German association of spice traders that paprika imported from Spain could contain traces of a harmful substance in a quantity greater than the levels admitted by a German law. A subsequent examination of the paprika delivered by the seller confirmed the suspicions. See *Veneziano*, p. 45 When drafting the Convention, there were several suggestions *pro e contro.* ICC stated that the seller cannot be responsible for the conformity of the goods with administrative regulations in the buyer's country. Such non-conformity would not touch on the purpose for which they are ordinarily used and the question whether they would be fit for the particular purpose of being used in the buyer's country would have to be answered by application of paragraph (1)(b).

[224] *Bianca - Bonell*, p. 282

[225] *Bianca - Bonell*, p. 283

sellers of international commerce tend to include in their general conditions of sale clause «the Products are manufactured in conformity of the State of manufacture.» Of course this is just one effort trying to avoid problems deriving from national legislations and their diversity, but it has proved to be a rather useful one.[226] Certainly the mussels' case is important not only for the application and interpretation of the CISG, but also for cases to be decided under the *Bundesgesetzbuch.*[227] However, one must nonetheless hope that this decision is not yet the final word on this question. [228]

In principle, the buyer has to require performance of the contract if there is any lack of conformity under Article 35 CISG. If an insufficient quantity has been delivered he may therefore first of all demand delivery of the missing quantity (Articles 51(1) and 46(1)). If the lack of conformity takes another form (wrong quality, delivery of an *aliud*), the right to require performance, in the form of the delivery of substitute goods, exists only in so far as the lack of conformity represents a fundamental breach of the contract. Repair of the goods may be required, unless it is unreasonable to do so. Avoidance of the contract on the grounds of lack of conformity is only possible if the lack of conformity amounts to a fundamental breach of contract. In the case of goods intended for resale, even slight defects in quality in respect of which a repair is not possible or is unreasonable or is not performed by the seller, are likely to amount to a fundamental breach of contract. However, if the buyer can reasonably sell the imperfect goods elsewhere, there has been no fundamental breach. Moreover, in the case of lack of conformity under CISG Art. 35, also in the case of delivery of an insufficient amount, the buyer has a right to a price reduction under CISG Art. 50 and to damages under CISG Art. 74. As regards lack of conformity as a defense to a claim for payment of the price, the rules are laid down in CISG Art. 58. [229]

In the Finnish jurisprudence it has been stated, that the mere fact that the buyer let the seller know the destination of the goods (*i.e.* the country) the seller is obliged to provide the goods conforming the circumstances of the destination.[230] It has to be emphasized that the seller actually couldn't have been unaware of the destination. Determining point is the moment of the conclusion of the contract. The reasoning behind this approach is the simple fact that the seller has to be in a situation to be able (1) to assess on which conditions he wants and can deliver the goods or (2) inform the buyer of his inability to deliver the goods conforming with the contract. [231] This view differs to some extent from the international approach.

5.7.2 The UK: Merchantability of the goods

The case *Summer Permain & Co v Webb & Co Ltd*[232] reflects the English position. The sellers sold Webb's Indian Tonic to the buyers, which they knew the buyers intended for resale in Argentina. The tonic contained a quantity of salicylic acid that, unknown to both parties, made its sale illegal in the Argentine. When the tonic reached Argentina, it was seized and condemned by the authorities as unfit for human consumption. It was held that there had been

[226]Another problem is, whether the general conditions of sale ever really became a part of the contract, since they are regrettably often enclosed to the invoice. It can be successfully argued, that the contract is concluded at the moment of acceptation of the offer, on conditions given above and that the conditions added afterwards do not bind the buyer.

[227]Bundesgesetzbuch (BGB) is the German Civil Code

[228] *Schlechtriem*, p. 12, in Uniform Sales Law in the Decisions of the Bundesgerichtshof

[229] *Schlechtriem*, p. 287

[230] When the goods lack a certain character that the goods of that kind do not usually have, the buyer is entitled to consider the goods non-conforming if that certain character was agreed upon. *Aaltonen*, p. 102

[231] *Wilhelmsson - Sevòn - Koskelo*, p. 105

[232] (1922) 1 KB 55

no breach of section 14(2) as the goods could not be said to be non-merchantable by virtue of the provisions of Argentinean law. There was nothing wrong with the quality of goods, which could have been resold by the buyers anywhere except in the Argentine. Goods were not non-merchantable merely because they were not fit for the particular purpose. The buyer's complaint was really that the goods were not fit for the purpose they were sold, but they also failed under section 14(3) because they had ordered them under their trade name. *Atiyah* claims that it is quite unreasonable to expect sellers to know the rules of law in operation in every country from which orders emanate, or into which a buyer wishes to export. These are matters within the sphere of knowledge of the buyer/exporter. It would be different if the seller had taken active steps to penetrate a target market so that the seller could be said to be exporting *into* that market. [233]

Merchantability of the goods is an important aspect of a contract for the sale of goods. The Sale of Goods Act of 1979 included merchantability in two separate sections. These are:
14(2) Where the seller sells goods in the course of business, there is an implied condition that the goods supplied under the contract are of merchantable quality, except that there is no such condition:

(a) as regard defects specifically drawn to the buyer's attention before the contract is made; or
(b) if the buyer examines the goods before the contract is made, as regards defects which that examination ought to reveal.

15(2) In the case of contract for sale by sample there is an implied condition -

(a) that the goods shall be free from any defect, rendering them non-merchantable, which would not be apparent based on a reasonably undertaken examination.

The Sale of Goods Act of 1893 did not define what «merchantability» meant, leaving it to be determined on a case-by-case basis. This led to an accumulation of case law of some considerable proportion surrounding the term «merchantability.» Those who opposed defining merchantability argued that any definition of that word in a statute would result yet again in the accumulation of case law, interpreting the statutory definition. Despite the force of this argument, the legislature defined merchantability in the 1979 statute as stated previously.

The 1994 Act substituted the «merchantability» by «satisfactory» but the importance of the merchantability in the sale of goods cannot be underestimated. It is the key to finding an obligation of the seller to provide goods of the quality that is commercially saleable. Another thing important to note is that the merchantability provisions apply only when the seller is in the course of a business. The Act of 1893 had no such a provision. Therefore, the merchantability provision in the 1979 Act would not apply to a sale if the sale was a private sale or if the agent who is selling were to inform the buyer that he was acting as an agent for a private seller. However, in international sale, it is most unlikely for a buyer to deal with a private seller. Sales of the type considered here are always with an established company or suppliers or manufacturers who sell in the course of their business. It might also be pointed out that where the sale is by sample, the merchantability provisions apply whether or not the sale was made in the course of business. It is most unusual that a sale by sample could take place

[233] *Atiyah - Adams*, p. 143

with a private seller. Private sellers are not in the habit of submitting samples at the pre-contractual stage. [234]

The celebrated decision of *Ashington Piggeries Ltd v. Christopher Hill*, laid down the implications of merchantability under the Sale of Goods Act of 1893. The decision is applicable to the same provisions in the 1979 Act. In that case, the appellants contracted with the respondents to prepare a particular type of food for feeding mink, from a formula supplied to them. The respondents had been in the business of manufacturing feed for poultry, pheasants, calves and pigs, but never before for mink. However, they accepted the challenge and agreed to produce the feed for which herring meal was one of the ingredients. The earlier preparations caused no problems but the later preparations for which Norwegian herring meal was used, did. It was later found that the meal was contaminated with DMNA. This contaminant caused the deaths of a number of minks. The appellants successfully sued the respondents for a breach of section 14(2) of the 1893 Act, which required the goods to be merchantable. The House of Lords held that the requirement that the goods bought for the purposes of section 14(2) should have been bought from the seller who sold goods »good of that description» was satisfied when the goods in question were bought from a seller who sells »goods of that kind.» The respondents were in business of selling animal feed to poultry, pheasants, calves and pigs, and these were goods of the same kind as those that the appellants ordered. The courts held that there was also a breach of section 14(1). The buyer had informed the seller of the particular purpose for which the goods were required so as to show that the buyer proposed to rely on the skill and judgment of the seller who dealt with goods of that description. Having first decided that the goods of that description in the statute were tantamount to goods of that kind, the court held that the mink feed provided by the seller did not reasonably fit the purpose which the buyer had communicated to the seller, this being that the buyer intended them to be used for feeding the mink. This breached section 14(1).

The buyer was free under section 14(1) to rely wholly on the seller's skill and judgment or rely partially on it. In the present instance, the reliance was partial and the seller's liability was to the extent to which the reliance was placed. It was partial because the seller was required to provide the meal according to a formula supplied by the buyer. In international sales transactions, the buyer normally deals with the seller and vice versa, at a distance. The buyer would, therefore, usually prefer to rely on the skill and judgment of the seller. The seller would be left to select the best possible product for the purpose that the buyer would expressly or impliedly make known to the seller. The seller in such a situation will be bound by both subsections 14(1) and 14(2) of the 1893 Act. [235]

[234] (1972) AC 441 1 All ER 847

[235] *Ashington Piggeries* may be compared with Henry Kendall & Sons v. William LiliCo & Sons Ltd (1968) 2 All ER 444, 2 AC 31, 3 WLR 110. The plaintiffs bought, for feeding their pheasants, animal feeding stuff from the defendants. The feeding stuff contained Brazilian groundnuts which were suitable for feeding cattle but not other animals. The plaintiffs lost some of the pheasants and alleged that the feed sold was non-merchantable. The House of Lords held against the plaintiffs. The point made by the House of Lords was that unless the buyer had made the seller aware both of the purpose for which the goods were required, and that the buyer was relying on the seller's skill and judgment to produce such goods, the goods supplied would not be non-merchantable because they did not suit the purpose which the buyer had in mind when the goods were bought. As long as the goods were suitable for some other purpose the goods were clearly merchantable. Alluding to this line of thinking, Lord Reid wrote: »He ought either to have taken the necessary steps to bring sub-s (1) into operation or to have insisted that a more specific description must be inserted in the contract.» The alternative which the buyer had, other than invoking subsection (1) of section 14 of the 1893 Act, was to ensure that a specific description of the goods he required was clearly included in the contract. That too would be sufficient to protect the buyer's interest in receiving the type of goods he desired to receive. »Fitness for the purpose» is thereby linked to »merchantability» of the product. *Marasinghe*, p. 154

Thus, there were two approaches to the issues of deciding what the meaning of «merchantable quality» was. On the one hand, there was the view that the statutory definition really had little substantive content. The basis for this view was that vague, general terms like «merchantable» tend to be meaningless in practice - indeed, a substantial degree of flexibility is needed in applying such general terms because of the very varied transactions that come within the law of sale of goods. The same can be said of the term «satisfactory.» All vague statements or definitions of the standard of quality required by law, it may be suggested, are somewhat vacuous in practice. They tend to be replaced with concepts of reasonableness that have substantial flexibility. Most such standards give little guidance as to what kind of defects or damage will render goods unsatisfactory (non-merchantable under the former provisions), and are not of assistance in the practical application of the law. All rely heavily upon the test of reasonableness: would a reasonable buyer, if he knew the condition of the goods, accept them under the contract? Would a reasonable buyer expect goods of that condition to be delivered under that sort of contract? Tests, which depend so heavily upon standards of reasonableness, need to be somewhat circular in practice. What is the buyer entitled to expect under the contract? Answer - goods of satisfactory/merchantable quality. What is satisfactory/merchantable quality? Answer - goods of that quality - roughly speaking - which can reasonable be expected. What would the buyer reasonable expect? Answer - goods suitable for reasonable use. What is reasonable use? Answer - the sort of use which a reasonable buyer would intend, but also the use that was disclosed to the seller in the moment of the conclusion of the contract. And so on. [236]

On the other hand, there was a Court of Appeal decision *Rogers v. Parish (Scarborough) Ltd*[237] which suggested that the statutory definition of «merchantable quality» could in most cases be applied by a fact finder without any detailed analysis of old case law. It must be suggested that the reasoning in this case was fallacious. The Court assumed here that the application of any statutory definition in the old section 14 was a question of fact, but the introduction of reasonableness into the definition meant that questions of evaluation were necessarily involved. It is not possible to posit the «reasonable man» and ask how he would behave as though that were a question of fact. How a reasonable man would behave in any given circumstances is not a fact, but an evaluation. Questions of reasonableness require the court to provide the answer based on its sense of justice, but that means that detailed analysis and illustration must remain necessary unless every case is to be disposed of by an appeal to the court's idiosyncratic views on what justice demands. That would surely be quite unacceptable in such a large and important area of law as this. This same point can be made in relation to the new section, which provides that goods are satisfactory if they meet the standards that a reasonable person would regard as satisfactory.[238]

6 CONCLUSION: THE CISG AND ENGLISH LAW COMPARED

According to Article 35(1) of the CISG, the seller is bound to deliver goods that are of the quality and description required by the contract. Without analyzing the distinction between quality and description, Article 35(2) then goes on to provide that the goods do not conform unless they satisfy the following four cumulative requirements: fitness for the purpose for which

[236] *Atiyah - Adams*, p. 140
[237] (1987) QB 933
[238] *Atiyah - Adams*, p. 141

the goods of the same description would commonly be used; fitness for any particular purpose expressly or impliedly made known to the seller at the time of the conclusion of the contract, except where the buyer either does not rely or unreasonably relies upon the seller's skill and judgment; possession of the qualities of goods held out as a sample or model; and packaging or containment in a manner adequate to preserve and protect the goods. A buyer who succeeds under paragraph (2) will nevertheless fail under paragraph (3) if actually or imputedly aware of the lack of conformity of the goods at the contract date.[239] The material on fitness for purpose in CISG Article 35 substantially tracks its counterpart in English law. An English court, in the spirit of internationalism imposed as a rule of interpretation by Article 7(1) of the CISG, should be open to the interpretation of other courts and sensitive to features of English law that have lent a slant to the interpretation of fitness for purpose in the Sale of Goods Act. For example, other courts might interpret «particular purpose» as special purpose and not as a commonplace purpose, in the way that English courts have. Given the other elements of the CISG Article 35, however, this point may have no great particular importance.[240]

6.1 Fitness for all ordinary purposes

Until changes in the law brought om by the Sale and Supply of Goods Act 1994, it could have been said that a seller, in order to comply with what was then the implied term of merchantable quality, needed to supply goods that were fit for only one of their ordinary purposes.[241] A buyer seeking their fitness for a particular one or more of these ordinary purposes therefore had an incentive to make this known to the seller so as to display the reliance on the seller's skill and judgment under section 14(3). This position accorded with the remnants of the *caveat emptor* rule. The onus was on the buyer to disclose and not on the seller to interrogate. The revised merchantable, now satisfactory, quality term requires the goods «in appropriate cases» to be fit for all the purposes for which goods of the kind in question are commonly supplied. No such qualification, however, is to be found in the CISG Article 35. Suppose that the goods are not fit for one of these purposes and that the buyer either states at the contract conclusion date that he needs goods for another purpose, or states that he has no intention to apply the goods for the purpose for which they are unfit (and further does not use them for that purpose). In the former case, the buyer changes his mind and, in the latter, he opportunistically pounces on their selective unfitness in order to reject the goods and avoid the contract. An English court applying section 14 should conclude that liability is not appropriate in these two cases. A court applying CISG Article 35 has no such resort but might interpret that provision in accordance with good faith to conclude that the buyer has no claim. [242]

6.2 Variable standard

Although there is no cross-reference of paragraph (2) to paragraph (1) of CISG Article 35, the general rule of contractual conformity is to be found in the latter provision that measures the compliance with quality and description by reference to what is «required by the contract.» The express requirements of the contract will vary from case to case but there is no reference in paragraph (1) to an implied standard that is equivalent to satisfactory quality in section 14(2) of the Sale of Goods Act, which takes into account of description and all relevant considerations,

[239] The relationship between paragraphs (1) and (2) of Art. 35 could be clearer. The latter paragraph cannot be regarded as a particular restatement of the former. In particular, the former requires the seller to deliver the agreed quantity; nothing in the latter speaks to quantity.
[240] *Bridge*, p. 80
[241] Note previously *Kendall v. LilliCo*
[242] *Bridge*, p. 81

which may include the price. Taking account of fitness for all ordinary purposes and giving a broad reading to description, it may be that in the absence in CISG Article 35 of a broad, implied variable quality standard makes no practical difference. Suppose, for example, that inferior goods are sold as a discounted price in a way that may persuade an English court that there has been a breach of section 14(2). It is very likely that some descriptive language will permit a court applying CISG Article 35 to reach the same result. If there is no such qualifying language, a court might determine the scope of ordinary use by reference to the price paid. [243]

6.3 Description

As stated before, description in the English law of sale is a difficult and technical concept. At one time, it was capable, in the case of unascertained goods, of embracing more or less all attributes of those goods. Since the implied term of correspondence with description was a statutory condition, this meant that each and every descriptive statement was tantamount to an express contractual condition, so that the buyer could reject the goods and terminate the contract no matter how trivial the injury. As reaction set in against this position, description was confined to the essence or identity of the goods. [244] The practical consequence of this was that the law on description was brought into line with law on express warranties, where a breach in matters of quality and condition was treated as the breach of an intermediate stipulation, with the result that the buyer could reject the goods only if able to demonstrate a substantial deprivation of benefit. [245] In the case of Article 35 of the CISG, however, it should be understood that description came into the text without its English history. The avoidance rules of the CISG do not allow for a technical exercise of rejection rights. In consequence, there is no reason to give anything other than a straightforward reading to the word in CISG Article 35.[246]

6.4 Reliance and examination

CISG Article 35 contains no exception based upon the buyer's examination of the goods, in the way that section 14(2C) of the Sale of Goods Act does.[247] It does however state in paragraph (3) that the buyer may not complain of a lack of conformity pursuant to CISG Article 35(2) where there is actual or imputed notice of lack of conformity. This test may be somewhat more generous to the buyer who carelessly examines the goods than is English law. A further point concerns descriptive statements where the buyer does not in fact rely upon the seller. This was sufficient to persuade a majority of the court in *Harlingdon and Leinster Enterprises Ltd v. Hull Fine Art Ltd*[248] that the seller had not committed a breach of the description condition in section 13 of the Sale of Goods Act, which took the law in a new direction. There does not appear to be any warrant in CISG Article 35 for so restricting the seller's liability. Arguably, if the buyer has paid a certain price for goods described in a particular way, he should be entitled to reject the goods or claim a reduction of the price if a painting like that sold in the above case proves to be a forgery. There are few signs of any commitment to the *caveat emptor* ethic in the CISG.[249]

[243] *Bridge*, p. 81
[244] Note previous *Ashington Piggeries v. Christopher Hill*
[245] See earlier presented Cehave NV v. Bremer Handelsgeschellschaft mbH
[246] *Bridge*, p. 82
[247] This covers both actual examination and defects especially drawn to the buyer's attention.
[248] (1991) 1 QB 564
[249] *Bridge,* p. 82

6.5 Express warranty and misrepresentation

The Sale of Goods Act contains no provision on express warranty. It is submitted that CISG Article 35 should be read expansively to catch express warranty: goods are of the quality and description «required» by the contract if they conform to the seller's express warranties. [250] This will minimize discord between English courts and foreign tribunals if the latter do not recognize express warranties as such in those terms. Misrepresentation presents a more challenging problem. One possibility is a statement made by the seller about the goods which is not incorporated as a term. Another is a statement that is incorporated as a term but, under English law, also retains its separate identity as an inducing misrepresentation.[251] Under domestic English sales law, it is a matter of some difficulty to accommodate the law on misrepresentation and the law on breach of the contract of sale. According to section 1(a) of the Misrepresentation Act 1967, the victim of a misrepresentation that becomes a term does not thereby lose the right to rescind if otherwise he would be able to rescind the contract. In the case of misrepresentation that does not become a term, any incongruity in allowing the drastic remedy of rescission for a statement not important enough to constitute a contractual term can be dealt with by an exercise of the court's discretion under section 2(2) to declare the contract subsisting and award damages in lieu of rescission. Where the misrepresentation becomes a contractual term, the Court of Appeal has, in one case[252] declined to allow rescission when the higher right of rejection for breach of condition had been barred by an acceptance of the goods under section 35 of the Sale of Goods Act. [253]

6.6 Misrepresentation and the CISG

If the English courts were to exercise their discretion under section 2(2) of the Misrepresentation Act 1967 to declare the contract existing consonantly with the test of a fundamental breach in Article 25 of the CISG, there would be no true discord between misrepresentation and the CISG. That discretion, however, was never meant to be exercised so extensively in a system of law that such a generous range of express and implied terms permitting contractual termination in the event of any breach would exist. If the law on misrepresentation were to run parallel to the CISG in English law, it would undermine the treatment by the latter of contractual avoidance for breach, unless English courts were able to take the approach in *Leaf v. International Galleries* and apply it imaginatively to a case where under the CISG, there never was a right of rejection and contractual avoidance. It is not easy to take this extra step when section 1(a) of the Misrepresentation Act is so clear on the survival of a misrepresentation as a misrepresentation despite its incorporation in the contract is a term. Failing a solution along the lines of Leaf, there does not appear to be an answer in the CISG itself. It cannot be said that the contract requires goods of a certain quality or description when a misrepresentation dealing with quality or description does not become a contractual term.

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[250] It is more difficult to fashion a role for express warranty in the CISG where the seller's statement does not deal directly with the goods. It may, for instance, relate to the existence of servicing facilities or spare parts. To avoid the difficulties of dépeçage, i.e. one agreement is governed by several legal systems, with express warranties being divided between the CISG and the otherwise applicable law, a court should not demand too direct a link between the statement and the very goods supplied.

[251] In the case of both warranties and misrepresentations, the CISG permits an objective interpretation of the seller's statement in a way familiar to common law lawyers: Article 8. Nevertheless, Art. 8(3) permits interpretation on the basis of subsequent conduct of the parties, not the case in English law.

[252] *Leaf v. International Galleries* (1950) 2 KB 86

[253] *Bridge*, p. 83 Is this consistent now with section 1(a) of the 1967 Act, or may the language of that provision be interpreted broadly to catch, not just the ordinary rescission bars, but also the particular bar introduced in Leaf v. International Galleries? The approach taken in the said case could, where the term is an intermediate stipulation whose breach does not go to the root of the contract, be mimicked by deeming it to be a condition for the purpose of the acceptance bar on rejection.

The best approach would be to exclude the doctrine of misrepresentation and not to apply the Misrepresentation Act in the case of contracts governed by the CISG that, since implementation of the CISG requires primary legislation, could be achieved on that occasion.

For practical purposes misrepresentation operates parallel with the rules on breach of contract in English law. There would also be scope for the law of mistake in cases of serious misrepresentation if the doctrine of misrepresentation had not already occupied the field. To say that all misrepresentations go to validity would breach the spirit of the CISG, but to allow the law of the mistake of present scope to fill any gap in English law vacated by misrepresentation would not. The matter would then be removed from the scope of the CISG by Article 4(a). This, of course, highlights another difficulty with the CISG and uniformity: different Contracting States will have doctrines of mistake of varying scope. Until uniformity of contract law is reached on the international stage, this problem will not be resolved. The difficulty of an expansive law of mistake overlapping the law on breach of contract, which can occur within a legal system, is addressed by Article 3.7 of the UNIDROIT Principles, which states that a party may not avoid a contract on the ground of a mistake in circumstances where there is a contractual remedy for non-performance. If a contract dispute were to be governed by both the CISG and the UNIDROIT Principles, it could be a difficult question whether Article 3.7 defers to the non-performance rules of the CISG as well as the non-performance rules of the UNIDROIT Principles themselves.[254]

7 FINLAND: CONCLUSIONS

According to Finnish writers, deficiency of the goods can bee seen as a two-fold concept, the first layer being an objective (abstract) level and the second being a subjective (concrete) level. However, a view this narrow can hardly bring a satisfying result; a more in-depth analysis is required. In the Finnish doctrine have been studies among others, the following aspects of deficiency: visible/hidden; relevant /irrelevant, discrepancies in the quantity agreed upon and the quantity actually delivered.

In search of a solution when it comes to visibility of a mistake, the answer could be found studying the parties' obligations to examine the goods. It is here when the professionalism or ignorance of the parties do count. While it can be concluded that the professional party can be deemed liable when reasonable diligence has been neglected, it cannot be alleged that the ignorance of a contracting party could be a valid excuse in doing so. This approach would discourage diligent commerce; the more one is diligent, the more would be required and vice versa. When assessing the relevance or irrelevance of the defect, the non-conformity is usually considered irrelevant if the defect does not hinder the ordinary use of the goods. If a contracting party could reject the goods, discharge the contract or even claim damages even for a minor deficiency, the certainty of law would be endangered.[255] Defining what is «relevant» has to be established on a case-by-case basis; it may seem rather futile to try to construct artificial rules while they do not serve *in concreto*. [256]

[254] *Bridge*, p. 84 See also his analysis on the differences between the two regulations in »The International Sale of Goods Revisited» , p. 143 onwards.
[255] *Godenhielm*, p. 119
[256] *Godenhielm*, p. 123

In practice, the importance of assessing the deficiency of the goods lies on its sequences; whether the buyer may rely on the non-conformity or not, and thereafter rely on the remedies provided by the rules of law. In order to evaluate the non-conformity, *Aaltonen* has prepared a two-picture-construction, which clarifies his thought. The construction consists of, two circles, first of which is actually a composition of one small and one big circle, which have the same counterpoint. The space outside the bigger circle reflects the conformity of the goods, while the space between the bigger and the smaller circle indicates the position of a minor defect of the goods. As long as we remain in these two zones the deficiency is of minor nature and the buyer can hardly rely on it, but when we move inside the smaller circle, we enter the zone of a kind of deficiency which *does* matter and to which the buyer *can* rely on. In order to point out the significance of the seller's guarantees and warranties, *Aaltonen* draws his second circle; this one is divided into sectors, each of which reflects a certain character of the goods. Thus, if we think of the position of a buyer who has contracted on a fabric of a certain color, his possibilities to rely on alleged defects is not anymore limited to the inside of the inner circle, but has enlarged till the border of the outer circle. It is prudent to note here that this construction does not allow us to take into account consequences, which would render the construction aleatory, since the relevant sector of our picture being from the remedies' point of view is rather variable. This is proved, for instance, by assuming that the buyer of non-conforming goods accepts the delivery, despite of the defects. In the event of the acceptance, the buyer cannot rely on non-conformity at all. Hence, we can conclude that the concept of conformity - and non-conformity - should be constructed remaining strictly on the ambit of the defect. The concept is, however destined to remain somehow vague and thus renders the exact definition impossible. Non-conformity may be described and analyzed from various points of view. It may vary according to the objectivity or subjectivity of the narrator, but still remain largely beyond exact legal definitions, not least for the enormous variety of the situations where it may appear. *Aaltonen* withdraws himself from further definitions and simply states that the goods are defective if they are not as they were bought. [257]

8 THE U.K. VS. THE CISG

There has been much debate of late as to whether the United Kingdom should ratify the Convention; critics on the Convention have not merely asserted the superiority of English sales law, but have argued that the Convention itself is incomplete and uncertain. By the time of the ratification of the newly prepared CISG, the Law Society of England and Wales made the following objections to the Convention:

1. The Convention will not produce uniformity because it will be subject to differing national interpretations;
2. Sophisticated commercial traders will find it easy to avoid the provisions of the Convention;
3. The Convention will more commonly apply by default, given the working of the Convention's «opt-out» provision;
4. The Convention will result in a diminished role for English law within the international trade arena.
5.

[257] *Aaltonen*, p. 148

One must assume that the latter reason is a major explanation for the dislike of the Convention in the United Kingdom.[258] Some commentators believe that the Convention represents «a sensible compromise» incorporating «a prodigious amount of work and international collaborations spread over years» or simply «as good as can be expected.» On the other side, as the list of contracting states grows, an organized regulation of sales contracts at an international level begins to develop and this has obvious attractions as the business community across differing economic and political systems begins to speak in the same legal language. Indeed, one of the strengths of the Convention is that it is based upon accepted practices of international transactions and is ready to incorporate trade usages into its framework. Again it is strongly driven by a policy that the parties should be free to contract and is not overbearing in its regulation of international sales. This is a delicate balancing act, but the Convention seeks to achieve a form of *lex mercatoria* that sets the boundaries of commercial sales transactions in a clear, well-defined fashion leaving the parties to divide the middle ground. Indeed the autonomy of the parties is recognized in its final form by the Convention permitting the parties to exclude, in whole or in part, the application of its provisions. Proponents of this viewpoint can argue legitimately that where the legal, economic and political systems vary as widely as those of the signatories to the Convention, attempts at the total unification of sales law would be absurd. Rather what is needed is a law that governs international sales as a separate species of transaction. Such contracts do attract particular legal problems - not least conflict of laws. The vagaries of private international law may leave business parties in considerable doubt as to the law applicable to the contract. On this view, the Convention provides an island of certainty amid the stormy seas of international law.[259]

However, an extra effort is needed to emphasize advantages of the Convention to businesses and lawyers in the U.K. As Lord Steyn noted in 1994, English lawyers, judges and politicians have a history of hostility towards multilateral conventions in general, which has already in the last century resulted in delayed ratification by the UK of some international treaties and conventions which have subsequently proved to be extremely successful. Nevertheless, the lawyers in the U.K. have a duty to be able to advise their clients on the suitability of the CISG for a particular transaction and this requires a knowledge of the substantive law contained in the CISG in addition to an understanding of how the CISG is viewed in other countries involved in the transaction.[260]

One of the criticisms leveled against the CISG in the U.K. is that it does not match up to English standards of precision and drafting. It is well known characteristic of the common law that it favors concrete legal solutions to specific problems as opposed to general broad principles. In contrast, the drafting style of the CISG is often left open, firstly to encourage the development an application of general principles and secondly because in some cases, a more concrete solution could not be agreed upon the Diplomatic Conference. However, the extensive use of indefinite legal concepts and the abstract nature of many norms in the CISG does not lie well with the expectations of the English legal community, who argues that ambiguity in legislation leads to uncertainty in the law, which is especially undesirable in the tradition of commercial law.[261]

[258] *Lee*, p. 132
[259] *Lee*, p. 146
[260] *Williams*, p. 10
[261] *Williams*, p. 10

The drafting style of the CISG also belies a more fundamental difference with the English law. The emphasis on the general principles, allows for a more subjective approach to the interpretation of the contract in contrast to the objectivity of the English courts when interpreting the contract. The emphasis is on finding justice in the individual case as opposed certainty in contracts. This is similar to the approach taken in civil law countries, where a contract is enforceable if the court can find a subjective agreement between the parties (*consensus ad idem* - meeting of the minds).[262]

9 COMMENTS

The distinction among the various categories of lack of conformity is certainly not easy. This is confirmed by the criticisms made by several authors. The in-depth analysis made by many authors, and the tormenting case law, do not always allow us to keep the general framework clear. The following remarks are consequently intended to serve for this purpose.

The delivery of goods other than those agreed upon seems to remain an entirely different concept from the delivery of the goods agreed upon. Examples include the delivery of a painting by an unknown painter instead of one from a specific painter that had been warranted, or of wine instead of liqueur, or of a goat instead of a sheep. One may be tempted to point out that this will not happen very often, but it may happen and has happened. It has been put forward against this distinction that in case of delivery of other goods the seller *a fortiori* should be protected by a duty of a buyer to give an immediate notice of complaint, such as it is provided for in the case of defects and lack of quality, instead of being subject to the longer terms for the general action for breach of contract. However, if the purpose of the complaint is to allow the seller to immediately check the merits of the complaint, it seems much more difficult and urgent to establish the existence of a defect or lack of quality than it is a total difference, in the goods delivered since, as a rule, the delivery of other goods does not have to be ascertained immediately.

The proper functioning, which has been contractually warranted, is also a sufficiently clear notion and, in fact, it has given rise to fewer disputes than the other classes of lack of conformity. The class of «defects», seen as a deficiency of the sold assets is also homogenous. As we have seen, bad wine, chipped bricks, and a scratched painting are typical examples of defects. It is suggested that the category of lack of quality may remain homogenous if its notion remains centered on the concept of quality as a merit of the goods being of a superior level in the desired attributes of the goods. In other words, they may be goods without defects but also without a certain quality. Likewise there may be goods without defects that possess a quality, and it is possible that there are goods that possess a quality, but also a defect of deterioration. A classic example of quality is presented by first choice goods compared with others which are also free from defects but do not possess a specific quality. Certainly when one confronts individual cases, it is possible to be faced with ambiguous situations. Setting foot on the dangerous territory of exemplification, the delivery of a cheese of the requested type, but not of the requested variety of cheese, or the supply of wine produced in a different year, seem to constitute lack of promised quality, while the delivery of a type of normal lambskin instead of astrakhan seems to be the delivery of another type of goods because of their different origins,

[262] Williams, p. 11

the same conclusion must be made if a wine of a different producer is delivered. An example of a quality essential for use, which is made by the doctrine, is the minimum length of a pair of trousers. [263]

In the framework of the international organizations and the conventions, the emphasis must be placed on the uniform interpretation and application. Indeed, the wide acceptance and effective implementation of existing texts might be of greater value than the elaboration of new texts. Thus, although it is important to keep on eye on the real challenges that lie ahead, a new approach must be taken to allow successful interpretation and application of substantive unified rules.

However, in the application of unified rules the parties desire the same outcome as they would seek in a purely domestic matter - that is, predictability, efficacy, equity and finality. Furthermore, they also expect that their dispute will be solved in an identical manner in all Contracting States. Although much has been done in order to achieve this goal - uniformity of solutions - diversity continues. Often the expectations of the parties involved in a dispute that must be solved in reference to unified rules clashes with the actual application of unified rules by municipal courts. This implies that the search for the most favorable forum is not yet over and the main objective of the unification has not yet been achieved. [264]

The questions as to the necessity of general principles of law, such as the principle of good faith, in international trade law have been resolved by international arbitration The experience of international arbitration in relation to general principles of law demonstrates that the classical view of contracting parties as antagonistic individuals seeking to make maximum profits without any regard for the other party has been rejected by the international business community. Although certainty and stability are needed in international dealings, flexibility has become increasingly important. It has been submitted that international trade conventions should acknowledge new complex reality and endorse the principle of good faith despite its inherent vagueness. However, it is important not only that the parties observe the good faith in their dealings but that national courts make use of the requirements of the principle of good faith while interpreting international trade conventions.[265]

In the case of the CISG the question of uniformity in application and interpretation of its provisions acquires a special importance. According to Article 1(1)(b) for its application it is no longer necessary that a transaction has some connection with a Contracting State. It suffices that conflict of law rules of the court before which the dispute is brought lead to the application of the law of a Contracting State and that the places of business of the parties are in different states. Under those circumstances, it is certainly wiser to adopt the CISG and make it familiar to the business community of a non-Contracting State than to go against the mainstream.[266]

Uniform law may also lead to benefits at both the macro and the micro level. Uniform law reduces legal differences between countries and, hence, creates *a level playing field* between competitors in different countries that no longer have cost advantages or disadvantages based on the level of the regulation in their respective countries. Uniform law thus avoids regulatory

[263] *Rubino-Sammartano*, p. 255
[264] *Kaczorowska*, p. 54
[265] *Kaczorowska*, p.127
[266] *Kaczorowska*, p. 56

competition between different countries and forces competitors to compete on terms (such as price and quality) other than legal terms of the transaction.[267]

Finally, the unification may be used or might bring about an improvement of the law existing in the countries participating in the unification effort. In the former case, unification is used indirectly to achieve objectives of domestic policies of justice departments where one fears that otherwise objection to change in the law may be too great or where one lacks necessary resources to embark upon a re-codification venture. In most cases, however, national policies are aligned to the policies of the unification-formulating agency but may as a side effect lead to an improvement of the present state of law. However, there are no guarantees that uniform texts will *per se* be better than existing national law. Uniform law is not by necessity better law than national law. Sometimes the argument is advanced that uniform law is better than domestic law because it is specifically written for international situations and thus, takes the interests of international commerce into account. The argument that uniform law is better suited for international transactions since its substantive provisions give due and better consideration to the needs and interests of international commerce remains to be verified. For instance, some uniform texts[268] have been extended in some countries or are being contemplated to be extended to domestic relations. This argument proves that texts relating to international situations can sometimes be extended without any problem to domestic transactions and casts some doubt regarding the specific features of these uniform instruments in relation to international situations. [269]

[267] However, in the European Union context, one has seen the opposite direction, particularly in the field of financial services where regulatory competition and deregulation and not total harmonization have been policy objectives. One might say that unification policies in this respect represent a tendency to centralize rule making at the international level where deregulation expresses a liberal, decentralized attitude towards unification. The former is based on the belief that unification matters and that the international scene should provide for a basis of cooperation between nation states. In commercial law, this would imply the need for a framework within which transactions and operations of merchants are encouraged. On the other hand, deregulatory policies would leave it to the market place to decide whether or not to develop uniform rules. Theoretically, this would ultimately lead to a *race to the bottom* and *Delaware effects* meaning that the market operators would choose rules that are least protective and least expensive. Both models in their extreme forms are *Idealtypen* which have been subject to scant empirical research. In the real world, one doesn't find either form but rather mixtures of both models in which these may be found in different degrees. *De Ly*, p. 528

[268] For example the 1929 Warsaw Convention, or the 1956 CMR

[269] *De Ly*, p. 529.