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## *Introduction*

### I. A BRIEF INTRODUCTION TO THE CISG

EVERY COMMERCIAL AND contract lawyer today will be aware of the United Nations Convention on Contracts for the International Sale of Goods (hereafter referred to as the ‘CISG’ or the ‘Convention’), an international instrument governing international sales transactions. The CISG was adopted in 1980 and has been in force for more than 25 years.<sup>1</sup> As at the time of writing, it has been ratified by 83 countries.<sup>2</sup> The Convention seeks to facilitate and promote international trade. It is based on the idea that the adoption of uniform rules governing contracts for the international sale of goods will contribute to the removal of barriers to trade,<sup>3</sup> which include transaction costs<sup>4</sup> and the need to resort to conflict of laws rules, that may give rise to opportunities for forum shopping.<sup>5</sup> The CISG is intended to be a neutral sales law, which creates a common legal language for those participating in international trade and makes it easier for them to enter into sales contracts. The Convention has been drafted bearing in mind ‘the broad objectives in the resolutions adopted by the sixth special session of the General Assembly of the United Nations on the establishment of a New International Economic Order’.<sup>6</sup> These objectives include equality, fairness, economic advancement and social growth of all people and eliminating the gap between the developed and developing world.<sup>7</sup> The CISG is also based on the view that ‘the development of

<sup>1</sup> The CISG entered into force on 1 January 1988 after 11 countries ratified the CISG in December 1986. See J Honnold (updated and revised by H Flechtner), *Uniform Law for International Sales under the 1980 United Nations Convention*, 4th edn (The Netherlands, Wolters Kluwer Law & Business, 2009) 3.

<sup>2</sup> See [www.uncitral.org/uncitral/en/uncitral\\_texts/sale\\_goods/1980CISG\\_status.html](http://www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG_status.html).

<sup>3</sup> See the Preamble to the CISG.

<sup>4</sup> Costs are meant to be understood broadly and include costs in terms of time, effort and uncertainty as regards, for example, applicable law and its content.

<sup>5</sup> See, generally, L Mistelis, ‘Is Harmonisation a Necessary Evil? The Future of Harmonisation and New Sources of International Trade Law’ in I Fletcher, L Mistelis and M Cremona (eds), *Foundations and Perspectives of International Trade Law* (London, Sweet & Maxwell, 2001) 3–27.

<sup>6</sup> See the Preamble to the CISG.

<sup>7</sup> See United Nations General Assembly Resolution 3201 (S-VI): ‘Declaration on the Establishment of a New International Economic Order’, 1 May 1974, available at [www.un-documents.net/s6r3201.htm](http://www.un-documents.net/s6r3201.htm).

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international trade on the basis of equality and mutual benefit is an important element in promoting friendly relations among States'.<sup>8</sup>

Although imbued with high aspirations, the CISG is not exhaustive in its coverage of sales law. It governs only the formation of a sales contract and the rights and obligations of the buyer and seller arising from the contract.<sup>9</sup> Unless otherwise expressly provided for in the CISG, the validity of the contract, of any of its provisions or of any usage is not governed by the Convention.<sup>10</sup> The issue of the passage of property in the goods is also not covered by the CISG.<sup>11</sup> Certain types of transactions and goods are outside its scope.<sup>12</sup> The contracts which the Convention regards as those where the seller provides a service to the buyer also fall outside the CISG.<sup>13</sup> The Convention will not apply to the 'liability of the seller for death or personal injury caused by the goods to any person'.<sup>14</sup>

The CISG is rooted in the principle of party autonomy, reflected primarily in Article 6.<sup>15</sup> According to this provision, the parties 'may exclude the application of the Convention' or 'derogate from or vary the effect of any of its provisions'. The prevailing view today is that such an exclusion or derogation can be either express or implied.<sup>16</sup> Whether or not the parties intended to depart from a provision of the CISG, as well as any other inquiry into the parties' intentions, is to be resolved in accordance with Article 8. This provision sets out the rules for interpreting the parties' statements and conduct. Article 8(1) provides that 'statements made by and other conduct of a party are to be interpreted according to his intent where the other party knew or could not have been unaware what that intent was' (the so-called 'subjective' test). In practice, this test will often not be used.<sup>17</sup> One reason is that disputes tend to arise precisely because the parties had different expectations in respect of each other's rights and duties, which means that their intentions genuinely differed. That, in turn,

<sup>8</sup> See the Preamble to the CISG.

<sup>9</sup> See Art 4.

<sup>10</sup> See Art 4(a). For further discussion, see V below.

<sup>11</sup> See Art 4(b).

<sup>12</sup> See Art 2.

<sup>13</sup> These will be contracts where: (1) 'in a contract for the supply of goods to be manufactured or produced', 'the party who orders the goods undertakes to supply a substantial part of the materials necessary for manufacture or production' (Art 3(1)); or (2) 'the preponderant part of the obligations of the party who furnishes the goods consists in the supply of labour or other services' (Art 3(2)).

<sup>14</sup> Art 5.

<sup>15</sup> See also Arts 14, 18, 23 and 29.

<sup>16</sup> See I Schwenzer and P Hachem in I Schwenzer (ed), *Schlechtriem and Schwenzer, Commentary on the UN Convention on the International Sale of Goods (CISG)*, 3rd edn (Oxford, OUP, 2010) Art 6, paras 3, 25 (with further references); L Mistelis in S Kröll, L Mistelis and P Viscasillas (eds), *UN Convention on Contracts for the International Sale of Goods (CISG): Commentary* (Munich, CH Beck/Hart Publishing, 2011) Art 6, para. 16 (with further references).

<sup>17</sup> See, eg M Schmidt-Kessel in Schwenzer (n 16) Art 8, para 18.

means that the parties could not have known of each other's intentions. Another reason is that even if a party knew of the other party's intention, proving one's actual state of mind would be difficult. Consequently, Article 8(1) will often be invoked to establish a party's 'implied knowledge' of the other party's intention; that is to say, that the former party 'could not have been unaware' of the latter's intention. But then, this 'implied knowledge' test would largely overlap with the next, so-called 'objective', test in Article 8(2) which relies on an understanding of a reasonable person, unless the application of Article 8(1)<sup>18</sup> would reveal an understanding that is different to that which a reasonable person would have had.<sup>19</sup> More specifically, Article 8(2) stipulates that if Article 8(1) is not applicable, 'statements made by and other conduct of a party are to be interpreted according to the understanding that a reasonable person of the same kind as the other party would have had in the same circumstances'. It is this test that usually forms the basis for evaluating the parties' statements and conduct, which, in turn, are indicative of their intentions. For this reason, Article 8(2) is, in essence, a test for interpreting the parties' intentions.

Both paragraphs (1) and (2) of Article 8 need to be applied with due consideration to be given to 'all relevant circumstances of the case including the negotiations, any practices which the parties have established between themselves, usages and any subsequent conduct of the parties' (Article 8(3)). This provision shows that the CISG was not intended to provide hard and fast solutions. It is a flexible instrument seeking to achieve just, fair and reasonable outcomes in the particular circumstances of an individual case. As seen from Article 8(3), a practice that the parties may have established between themselves or a usage that may exist in a particular trade sector are part of the context against which contracts are interpreted. Whilst being presented in Article 8(3) as merely factors to be taken into account in interpreting the parties' intentions, a practice, if proved to exist, is binding on the parties; and so is a usage, if the parties have agreed to it.<sup>20</sup> If there is no express agreement between the parties as to the applicability of a usage, but a relevant usage does exist, the parties will be taken to have implicitly agreed to its applicability to their contract and its formation, unless there is an agreement to the contrary.<sup>21</sup> A usage is defined as one 'of which the parties knew or ought to have known and which in international trade is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade concerned'.<sup>22</sup>

<sup>18</sup> What a party in question 'could not have been unaware of' can be different to an understanding that a reasonable person would have had in the circumstances.

<sup>19</sup> See Schmidt-Kessel (n 17).

<sup>20</sup> See Art 9(1).

<sup>21</sup> See Art 9(2) (first sentence).

<sup>22</sup> Art 9(2) (second sentence).

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In addition to these rules aimed at interpreting the *contract*, the CISG contains the provisions on how the Convention itself must be interpreted. Article 7(1) provides that the Convention must be interpreted having regard to ‘its international character and to the need to promote uniformity in its application and the observance of good faith in international trade’. This provision reveals the Convention’s nature as an international instrument and underscores its autonomy from domestic legal systems. The Convention must be interpreted solely with reference to *its own* rules, principles, concepts and terms. It invites an ‘international’ way of legal reasoning and, by enunciating the need to promote uniformity in its application, requires judges and arbitrators to take into account prior cases, decided under the CISG and involving issues similar to those that they face. This requirement falls short of creating a system of binding precedent, but the starting point is that prior cases are ‘persuasive authority’.<sup>23</sup> Another way through which the CISG aims to develop an autonomous international sales law is through its rules on gap-filling in Article 7(2) which provide that:

Questions concerning matters governed by this Convention which are 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 virtue of the rules of private international law.

When it comes to matters governed by it, the Convention’s preference lies, therefore, with attempting to find solutions within its framework by means of identifying the relevant ‘general principles’. This mechanism was intended to enable the CISG to grow in terms of its substantive content and autonomy from domestic legal systems. There are several ways in which such general principles can be developed. First, they can be derived from a particular provision.<sup>24</sup> These can be provisions of general applicability,<sup>25</sup> such as Article 6, reflecting the principle of party autonomy, or, more controversially, Article 7(1) referring to the notion of good faith.<sup>26</sup>

<sup>23</sup> See, eg District Court Vigevano, no 405, 12 July 2000 (Italy), available at <http://cisgw3.law.pace.edu/cases/000712i3.html>; PP Viscasillas in Kröll, Mistelis and Viscasillas (n 16) Art 7, para 41 (with further references); G Bell, ‘Uniformity through Persuasive International Authorities: Does *Stare Decisis* Really Hinder Uniform Interpretation of the CISG?’ in CB Andersen and UG Schroeter (eds), *Sharing International Commercial Law Across National Boundaries, Festschrift for Albert H Kritzer on the Occasion of his Eightieth Birthday* (London, Wildy, Simmonds & Hill Publishing, 2008) (advocating ‘the civilian concept of “*jurisprudence constant*”—non-binding precedents which become even more persuasive if they are “*constants*” ie consistent over time’). For the discussion of related issues, see V below.

<sup>24</sup> See A Janssen and SC Kiene, ‘The CISG and Its General Principles’ in A Janssen and Meyer (eds), *CISG Methodology* (Munich, Sellier European Law Publishers 2009) 270–71.

<sup>25</sup> See *ibid.*

<sup>26</sup> The primary objection to treating good faith as a general principle is that doing so would contravene the compromise made by the drafters prior to the adoption of the Convention, whereby good faith was intended to be nothing more than a method of interpreting the Convention. This is confirmed by Art 7(1) where good faith is mentioned in the context of the interpretation of the Convention.

Alternatively, these can be non-generalist provisions concerned with a specific legal issue.<sup>27</sup> The relevant examples include: Article 57,<sup>28</sup> which can be used to construct a general principle as regards the place for the performance of monetary obligations; or Article 74,<sup>29</sup> from which the principle of full compensation can be derived. Secondly, a general principle can be inferred by drawing on a number of provisions, which, taken together, may reflect one common purpose.<sup>30</sup> The preservation of contracts,<sup>31</sup> a general duty to cooperate,<sup>32</sup> reasonableness,<sup>33</sup> protecting a party's reasonable reliance<sup>34</sup> are some examples of general principles that were developed through this method.<sup>35</sup>

Attention now needs to be turned briefly to the more specialist parts of the Convention. The Convention's approach to the formation of contracts is based on a traditional 'offer and a corresponding acceptance' model,<sup>36</sup> used by so many legal systems. The central idea underpinning the Convention's rules on the formation of contracts is the need for an agreement between the parties<sup>37</sup> in respect of the essential terms, such as the goods, the quantity and the price.<sup>38</sup> The CISG naturally differentiates between the obligations of the seller and the buyer. The key obligations of the seller are to 'deliver the goods, hand over any documents relating to

<sup>27</sup> See Janssen and Kiene (n 24) 271.

<sup>28</sup> Art 57(1): 'If the buyer is not bound to pay the price at any other particular place, he must pay it to the seller: (a) at the seller's place of business; or (b) if the payment is to be made against the handing over of the goods or of documents, at the place where the handing over takes place.'

<sup>29</sup> Art 74 (first sentence): 'Damages for breach of contract by one party consist of a sum equal to the loss, including loss of profit, suffered by the other party as a consequence of the breach'.

<sup>30</sup> See Janssen and Kiene (n 24) 271.

<sup>31</sup> See, eg Arts 25, 47, 63, 48, 49(2) and 82 CISG.

<sup>32</sup> 'This duty is deduced from the duties provided in the CISG in addition to the central performance obligations of the parties: from the duty to preserve goods to be returned which has just been explicated above (Art 85/86), the extensive duty to accept cure (Arts 34, 37, 48), the duty to avoid damages (Art 77), the numerous direct or indirect duties to notify the other party. These duties as well as Arts 32 and 60 CISG can be interpreted to express the general principle that every party is obligated to enable the other party to perform and not to jeopardize the contractual purpose' (U Magnus, 'General Principles of UN-Sales Law' (1995) *Rebels Zeitschrift für ausländisches und internationales Privatrecht* 469, also available at [www.cisg.law.pace.edu/cisg/biblio/magnus.html](http://www.cisg.law.pace.edu/cisg/biblio/magnus.html)).

<sup>33</sup> The idea of reasonableness is mentioned in more than 30 provisions of the CISG.

<sup>34</sup> See Arts 16(2)(b) and 29(2).

<sup>35</sup> For a much more detailed discussion of this issue, see, eg Schwenzler and Hachem (n 16) paras 31–41; Janssen and Kiene (n 24) 271–81; Magnus (n 32).

<sup>36</sup> See Arts 14–24.

<sup>37</sup> See Arts 14, 18, 19 and 23.

<sup>38</sup> See Art 14(1) ('A proposal for concluding a contract addressed to one or more specific persons constitutes an offer if it is sufficiently definite and indicates the intention of the offeror to be bound in case of acceptance. A proposal is sufficiently definite if it indicates the goods and expressly or implicitly fixes or makes provision for determining the quantity and the price'). But see Art 55 which allows for the possibility of a contract being validly concluded without fixing a price.

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them and transfer the property in the goods, as required by the contract and this Convention'.<sup>39</sup> So far as the seller's duties in respect of the goods are concerned, there are rules providing for: what constitutes delivery;<sup>40</sup> the time for delivery;<sup>41</sup> giving notice of consignment to the buyer, specifying the goods, under certain circumstances;<sup>42</sup> the need to arrange carriage of the goods on specified terms, if the seller is bound to arrange for carriage;<sup>43</sup> the need to communicate, in certain cases, information to enable the buyer to effect insurance;<sup>44</sup> conformity of the goods;<sup>45</sup> freedom of the goods from third parties' rights or claims,<sup>46</sup> including those based on intellectual property.<sup>47</sup> As to the seller's obligations in respect of the documents, the CISG merely provides that '[i]f the seller is bound to hand over documents relating to the goods, he must hand them over at the time and place and in the form required by the contract'.<sup>48</sup> The main duties of the buyer are to 'pay the price for the goods and take delivery of them as required by the contract and this Convention'.<sup>49</sup> The remaining provisions concerned with the buyer's duties elaborate on the content of the obligations to pay the price<sup>50</sup> and to take delivery,<sup>51</sup> and provide for the time<sup>52</sup> and place of payment<sup>53</sup> of the price.

The CISG provides for an elaborate system of remedies for breach of contract and of the Convention. This system allows an innocent party to choose any remedy or remedies,<sup>54</sup> subject to them not being incompatible with each other.<sup>55</sup> The available remedies<sup>56</sup> are generally symmetrical as between the buyer and the seller. Both parties have the right to specific

<sup>39</sup> Art 30.

<sup>40</sup> Art 31: 'If the seller is not bound to deliver the goods at any other particular place, his obligation to deliver consists: (a) if the contract of sale involves carriage of the goods—in handing the goods over to the first carrier for transmission to the buyer; (b) if, in cases not within the preceding subparagraph, the contract relates to specific goods, or unidentified goods to be drawn from a specific stock or to be manufactured or produced, and at the time of the conclusion of the contract the parties knew that the goods were at, or were to be manufactured or produced at, a particular place—in placing the goods at the buyer's disposal at that place; (c) in other cases—in placing the goods at the buyer's disposal at the place where the seller had his place of business at the time of the conclusion of the contract'.

<sup>41</sup> Art 33.

<sup>42</sup> Art 32(1).

<sup>43</sup> Art 32(2).

<sup>44</sup> Art 32(3).

<sup>45</sup> Art 35.

<sup>46</sup> Art 41.

<sup>47</sup> Art 42.

<sup>48</sup> Art 34 (first sentence).

<sup>49</sup> Art 53.

<sup>50</sup> Art 54.

<sup>51</sup> Art 60.

<sup>52</sup> Arts 58 and 59.

<sup>53</sup> Art 57. See also n 28 above.

<sup>54</sup> See Arts 45 and 61.

<sup>55</sup> See, eg Arts 46(1), 48(2), 62.

<sup>56</sup> See also IV below.

performance;<sup>57</sup> to fix an additional time for performance of the other party's obligations;<sup>58</sup> to avoid the contract;<sup>59</sup> to exercise remedies for an anticipated non-performance<sup>60</sup> and for a breach of an instalment contract;<sup>61</sup> to claim damages;<sup>62</sup> and to claim interest on a 'sum that is in arrears'.<sup>63</sup> Some remedies are relevant only to one party. The remedies which are available only to the buyer are the right to reduce the price for the goods;<sup>64</sup> to demand replacement or repair of the goods;<sup>65</sup> the remedies for short delivery;<sup>66</sup> and the remedies available in cases where only part of the goods is in conformity with the contract,<sup>67</sup> where goods are delivered before the date fixed for delivery<sup>68</sup> and where the seller delivers quantity greater than that specified in the contract.<sup>69</sup> A breaching seller has the right to cure any failure to perform its obligations even after the due date for delivery.<sup>70</sup>

The remaining provisions of the CISG are concerned with the passage of risk of loss of or damage to the goods;<sup>71</sup> exemptions from liability;<sup>72</sup> consequences of avoidance of the contract;<sup>73</sup> preservation of the goods;<sup>74</sup> and the final provisions<sup>75</sup> that contain diplomatic clauses and deal with reservations, temporal aspects of the Convention and the relationship between the Convention and other instruments.

## II. THE CISG TODAY AND THE PURPOSE AND SCOPE OF THIS BOOK

Thousands of cases have been decided under the Convention by courts and arbitration tribunals around the world. It is the subject of countless commentaries and continues to attract the interest of comparative contract and commercial law scholars worldwide. It has triggered and has been used as a model for law reforms in a number of countries, both developed and

<sup>57</sup> Arts 46 and 62.

<sup>58</sup> Arts 47 and 63.

<sup>59</sup> Arts 49, 64 and 25.

<sup>60</sup> Arts 71, 72 and 73(2).

<sup>61</sup> See Art 73(1) and (2). But see Art 73(3) which is applicable to the buyer.

<sup>62</sup> Arts 74–77.

<sup>63</sup> Art 78.

<sup>64</sup> Art 50.

<sup>65</sup> Art 46(2) and (3).

<sup>66</sup> Art 51.

<sup>67</sup> *Ibid.*

<sup>68</sup> Art 52(1).

<sup>69</sup> Art 52(2).

<sup>70</sup> Art 48. See also Art 65 which is applicable only to the seller.

<sup>71</sup> Arts 66–70.

<sup>72</sup> Arts 79–80.

<sup>73</sup> Arts 81–84.

<sup>74</sup> Arts 85–88.

<sup>75</sup> Arts 89–101.

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developing.<sup>76</sup> It would seem that these facts would force even the greatest sceptic of international efforts to unify and harmonise commercial law to admit that overall the CISG has been a great success, which no other existing substantive commercial law instrument has been able to achieve. However, the value, viability of the CISG and the quality of its legal regime and its experience to date are sometimes criticised or even thrown into doubt.<sup>77</sup> The question of whether the CISG has proved to be a successful international sales law and has a future is therefore very much alive. In fact, this question seems more relevant than ever considering the increasingly complex commercial realities and a rapidly changing legal scene, with the apparently limitless imagination and energy of the legal community producing new global or regional initiatives and instruments, some of which can potentially rival the CISG.<sup>78</sup> This question requires a continuous assessment of the Convention and the dynamics of its development.

Much has been written about the CISG, but an in-depth examination of some of its core areas is still lacking. The strength of the Convention's regime, its ability to effectively govern and facilitate modern trade, with all its variety and complexity, cannot be adequately understood if its experience is not brought out and analysed fully. This book seeks to do just that by providing a detailed study of two areas of the CISG: the seller's obligations in respect of the goods and the documents. These areas lie at the very heart of sales law because it is the seller's duties that largely characterise the nature of a sales contract. Delivery of goods and documents relating

<sup>76</sup> See I Schwenzer and P Hachem, 'The CISG: Successes and Pitfalls' (2009) *American J Comparative L* 457, 461–62.

<sup>77</sup> See, eg CP Gillette and RE Scott, 'The Political Economy of International Sales Law' (2005) 25 *Int'l Rev L Economics* 226; G Cuniberti, 'Is the CISG Benefiting Anybody?' (2006) 39 *Vanderbilt J Transnational L* 1511; also M Bridge, 'A Law for International Sales' (2007) 37 *Hong Kong LJ* 17, arguing that the CISG is not as well suited to the trade in commodities as English law.

<sup>78</sup> See the UNIDROIT Principles of International Commercial Contracts 2010, available at [www.unidroit.org/instruments/commercial-contracts/unidroit-principles-2010](http://www.unidroit.org/instruments/commercial-contracts/unidroit-principles-2010); European Commission, Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law, COM(2011)635 final (11 October 2011), available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2011:0635:FIN:en:PDF>; Draft Common Frame of Reference (DCFR) in C von Bar and E Clive (eds), *Principles, Definitions and Model Rules of European Private Law: Draft Common Frame of Reference (DCFR)* (Munich, Sellier European Law Publishers, 2009) vol II; The Principles of European Contract Law 2002 (PECL), available at [www.jus.uio.no/lm/eu.contract.principles.parts.1.to.3.2002/portrait.pdf](http://www.jus.uio.no/lm/eu.contract.principles.parts.1.to.3.2002/portrait.pdf); OHADA (Organisation for the Harmonisation of Business Law in Africa) Uniform Act Relating to General Commercial Law, available at [www.ohadalegis.com/anglais/audrtcomgb1.htm](http://www.ohadalegis.com/anglais/audrtcomgb1.htm). For the discussion of regional harmonisation of contract law in Asia, see S Han, 'Principles of Asian Contract Law: An Endeavor of Regional Harmonization of Contract Law in East Asia' (2013) 4 *Villanova L Rev* 589. See also United Nations Commission on International Trade Law (UNCITRAL), Possible Future Work in the Area of International Contract Law; Proposal by Switzerland on Possible Future Work by UNCITRAL in the Area of International Contract Law (2012), available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/V12/534/54/PDF/V1253454.pdf?OpenElement>.

to the goods are two modes of performance by the seller. The question of whether the seller has fulfilled its duties in relation to the goods and documents arises very frequently. The experience of the CISG and of domestic legal systems shows that the issue of whether conforming goods have been delivered is one of the most frequently litigated.<sup>79</sup> The seller's obligations in respect of goods and documents are, in short, of great practical significance to the contracting parties.

The book is concerned with *what* the seller has to deliver to the buyer. In respect of goods, there are two sets of requirements. One is what the Convention calls 'conformity' of the goods. These are the requirements that the goods must meet in relation to 'quality, quantity, description and packaging'.<sup>80</sup> The relevant provisions are contained in Article 35 which consists of three paragraphs. Article 35(1), examined in Chapter 2 of this book, reflects the primacy of party autonomy by providing that the goods must meet the contractual requirements as to their conformity. Article 35(2) provides for several implied terms as to conformity where the parties have not agreed otherwise. According to Article 35(2)(a), explored in Chapter 4, the goods are to be 'fit for the purposes for which goods of the same description would ordinarily be used'. Article 35(2)(b), discussed in Chapter 3, provides that the goods are to be 'fit for any particular purpose expressly or impliedly made known to the seller at the time of the conclusion of the contract'. Pursuant to Article 35(2)(c), the goods ought to 'possess the qualities ... which the seller has held out to the buyer as a sample or model'. Article 35(2)(d) requires the goods to be 'contained or packaged in the manner usual for such goods or, where there is no such manner, in a manner adequate to preserve and protect [them]'. Finally, Article 35(3) contains an exemption from liability of the seller under paragraph (2) in the case where, at the time of the conclusion of the contract, the buyer knew or could not have been unaware of a relevant lack of conformity. Article 35(3)(c) and (d) will be examined in Chapter 5.

The second set of requirements flows from the need for the goods to be free from rights or claims of third parties.<sup>81</sup> Article 41, discussed in Chapter 6, requires the seller to deliver goods 'which are free from any right or claim of a third party, unless the buyer agreed to take the goods subject to that right or claim'. This provision does not cover those rights or claims of third parties, which stem from intellectual property. The requirement that the goods be free from such rights or claims is contained in Article 42 which provides 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, of

<sup>79</sup> See, eg S Kröll, 'The Burden of Proof for the Non-Conformity of Goods under Art 35 CISG' (2011) 3 *Belgrade L Rev* 162; CJ Murrow, 'Warranty of Quality: A Comparative Survey' (1940) 14 *Tul L Rev* 327.

<sup>80</sup> See Art 35(1).

<sup>81</sup> See Arts 41 and 42.

which at the time of the conclusion of the contract the seller knew or could not have been unaware'.<sup>82</sup> Article 42 will be addressed in Chapter 7.

As to the seller's documentary duties, the provisions reproduced above (Articles 30 and 34)<sup>83</sup> show that the Convention is not nearly as elaborate as it is in the case of the goods. It largely contains a self-evident proposition that the seller's duties regarding documents must comply with the contract.<sup>84</sup> The questions that this book explores are these: What documents must the seller deliver and what constitutes a 'good' or 'conforming' document under the CISG? This discussion can be found in Chapter 8.

### III. RULES ON CONFORMITY OF THE GOODS: UNDERLYING CONSIDERATIONS

Considering that a substantial part of this book is dedicated to conformity of the goods, it is helpful to explain, at the outset, the significance of the rules as to conformity of the goods not only with reference to their role in practice, but also on the basis of their underlying rationale and functions. The reasons for the existence of the seller's obligations as to conformity of the goods are many and of a different order. They are also tied to and reflect a broader economic, legal, intellectual and moral environment. For example, the well-known idea of *caveat emptor* ('let the buyer beware'), whereby the buyer is to bear the risks of any non-conformity in the goods, is often associated with rather primitive economies where trade occurred primarily at a market place where the buyer had an opportunity to examine a specific item.<sup>85</sup> *Caveat emptor* is also at times viewed as an ingredient in the individualistic philosophy and as being in harmony with the spirit of the *laissez-faire* economy:<sup>86</sup> with minimum state intervention and public control, individuals, left to their own devices, are expected to be self-reliant and stoic.<sup>87</sup> However, as the economy grew and commerce became more complex, sophisticated and important in terms of its role in a society, *caveat emptor* has lost much of its prominence as legal systems imposed conformity obligations on the seller,<sup>88</sup> expanding its liability. Whilst the ideals have not shifted to the opposite idea of *caveat venditor* ('let the seller beware'), in the modern world sellers are generally

<sup>82</sup> Arts 41 and 42 are not reproduced here in full. See Chs 6 and 7 for a complete and detailed discussion of these provisions.

<sup>83</sup> See nn 39 and 48 above and the accompanying main text.

<sup>84</sup> But see also Art 58.

<sup>85</sup> See M Bridge, *The Sale of Goods*, 3rd edn (Oxford, OUP, 2014) para 7.03.

<sup>86</sup> See E Zamir, 'Toward a General Concept of Conformity in the Performance of Contracts' (1991) 52 *La L Rev* 1, 12; Murrow (n 79) 330. Not all writers accept the link between *caveat emptor* and *laissez-faire* (see, eg K Llewelyn, 'On Warranty of Quality, and Society' (1936) 36 *Col L Rev* 699, 718).

<sup>87</sup> See WH Hamilton, 'The Ancient Maxim Caveat Emptor' (1931) 40 *Yale LJ* 1133, 1186.

<sup>88</sup> See Zamir (n 86) 23.

expected to bear a greater burden of ensuring a certain level of conformity of the goods than they have borne in the past.<sup>89</sup> In our largely consumerist age where the buyers' expectations are higher than ever before and where the goods traded are not just simple wares and natural products but also, among other things, mass produced goods, sales laws, even those not concerned with consumer transactions, cannot afford not having some kind of a minimum benchmark of quality and other aspects of conformity.<sup>90</sup> At this point, commercial sales law may become a conduit through which quality control in a society is promoted.<sup>91</sup> Some cases, discussed in this book,<sup>92</sup> demonstrate that sometimes a sales law may even be used as a vehicle through which some other broad societal and moral<sup>93</sup> considerations, such as equality of nations, are promoted.

The role of the rules on conformity in modern economies is therefore not insignificant and reaffirmed by a number of economic functions that these rules perform. First, by affording a level of protection (effectively a form of insurance) to the buyer, they provide the buyer with a certain level of confidence and security, thereby encouraging trade.<sup>94</sup> Secondly, by providing the rules on conformity, which are often said to mimic what the parties would have agreed to in the absence of transaction costs, the law saves the parties the costs of bargaining over the matters covered by these rules, again facilitating sales contracts.<sup>95</sup> Thirdly, the existence of these rules saves the buyer the costs of investigating conformity of the goods that it is

<sup>89</sup> See JJ White, 'Freeing the Tortious Soul of Express Warranty Law' (1998) 72 *Tul L Rev* 2089, 2102 ('the post-war academic literature has been much more sympathetic to the expansion of liability than to its restriction').

<sup>90</sup> '[T]he goods should conform to certain basic quality norms' (Appellate Court Antwerp, 2001/AR/1737, 16 December 2002 (Belgium), available at <http://cisgw3.law.pace.edu/cases/021216b1.html>). See also J Lookofsky, *Understanding the CISG*, 3rd Worldwide edn (The Netherlands, Kluwer Law International BV, 2008) 78 ('default rules in Article 35(2) affirm that today international buyer is entitled to expect goods which possess some basic qualities').

<sup>91</sup> In the context of English law, regulatory undertones were apparent as early as in the first half of the nineteenth century (see *Jones v Bright* (1829) 5 Bing 533). See further Bridge (n 85) paras 7.90, 7.96 and 7.107; JC Reitz, 'A History of Cutoff Rules as a Form of *Caveat Emptor*: Part I: The 1980 UN Convention on the International Sale of Goods' (1988) 36 *AJCL* 437, 438. For the discussion of this issue, see Chapters 2 and 3. For an emphatic view to the contrary, see HM Flechtner, 'Decisions on Conformity of Goods under Article 35 of the UN Sales Convention (CISG): The "*Mussels Case*", Evidentiary Standards for Lack of Conformity, and the "Default Rule" vs. "Cumulative View of Implied Conformity Obligations"' in I Schwenzer, Y Atamer and P Butler (eds), *Current Issues in the CISG and Arbitration* (The Hague, Eleven International Publishing 2014) 189.

<sup>92</sup> See the discussion of Appellate Court s-Gravenhage, 99/474, 23 April 2003 (The Netherlands), available at <http://cisgw3.law.pace.edu/cases/030423n1.html> in Chapter 2 and the discussion of Federal Supreme Court, VIII ZR 67/04, 2 March 2005 (Germany), available at <http://cisgw3.law.pace.edu/cases/050302g1.html> in Chapter 4.

<sup>93</sup> See also Appellate Court Barcelona, Recurso No. 764/2006; 357/20073, July 2007 (Spain), available at <http://cisgw3.law.pace.edu/cases/070703s4.html>, where the CISG was said to reflect 'a universally accepted sense of justice'.

<sup>94</sup> Reitz (n 91) 438.

<sup>95</sup> *Ibid.*

## 12 Introduction

thinking of purchasing, since these rules either signal the quality and related aspects of the goods that the buyer can expect and/or induce the seller to share the information, directly or indirectly, with the buyer.<sup>96</sup> Fourthly, the existence of a standard against which the seller's performance can be measured reduces the risk of the so-called 'lemons problem', which refers to a situation where the sellers are not able to sell their products described as products of high quality.<sup>97</sup> Since buyers have no information regarding the products, they have no means of distinguishing between high and low quality products. In the absence of the rules on conformity, buyers have an incentive to treat all products as being of low quality,<sup>98</sup> which would result in high quality goods not being able to command appropriate prices<sup>99</sup> and ultimately being driven out of the market. This, in turn, results in the fall of quality of the goods, reduction<sup>100</sup> or even a total failure of the market.<sup>101</sup> The ability of the rules on conformity to perform all these functions is often thought to promote economic efficiency.

These rules are also necessary on practical and conceptual levels. Although there have been attempts to detach the seller's conformity obligations from the main sales contract,<sup>102</sup> from sales law<sup>103</sup> or even to give birth to them from outside contract law altogether,<sup>104</sup> it is clear that goods are the very subject matter of a sales contract and the rules on conformity are

<sup>96</sup> See CP Gillett and SD Walt, *Sales Law: Domestic and International*, 2nd edn (New York, Foundation Press/Thomson West, 2009) 317–21; F Parisi, 'The Harmonisation of Legal Warranties in European Sales Law: An Economic Analysis' (2004) 52 *AJCL* 403, 411.

<sup>97</sup> See GA Akerlof, 'The Market for "Lemons": Quality Uncertainty and the Market Mechanism' (1970) 84 *Quarterly J Economics* 488.

<sup>98</sup> C Gillette and F Ferrari, 'Warranties and "Lemons" under CISG Article 35(2)(a)' (2010) 1 *Internationales Handelsrecht* 2, 3.

<sup>99</sup> All goods will be sold at the same price since the buyer has no means of distinguishing between the quality of the goods (see Akerlof (n 97) 490).

<sup>100</sup> Akerlof (n 97) 488.

<sup>101</sup> See TJ Holdych and BD Mann, 'The Basis of the Bargain Requirement: A Market and Economic Based Analysis of Express Warranties—Getting What You Pay for and Paying for What You Get' (1996) 45 *DePaul L Rev* 781, 795.

<sup>102</sup> By using, for example, the concept of a collateral contract (an agreement separate from the main sales contract) (see Zamir (n 86) 33; for the possibility of a collateral contract in English law, see *Benjamin's Sale of Goods*, 9th edn (London, Thompson-Sweet & Maxwell, 2014) paras 10-012–013); or, as was the case at some points in legal history (eg Roman law), where warranties of quality and title were created separately from the sales contract upon the seller making a solemn promise which was not included in the 'sale' itself (see E Rabel, 'The Nature of the Warranty of Quality' (1950) 24 *Tul L Rev* 273, 274; Murrow (n 79) 347).

<sup>103</sup> It has been reported that in some legal systems (eg France), an action for breach of an implied-in-law warranty is based on the law of mistake (see Murrow (n 79) 548; Rabel (n 102) 283). For a criticism of mistake being the conceptual basis for liability for non-conformity, see Zamir (n 86) 38–39.

<sup>104</sup> The tort origins of the warranty law in the United States are widely recognised (see, eg White (n 89) 2090 ('Warranty law started as tort but progressively, from sometime in the nineteenth century, has moved step-by-step from tort to contract'); Murrow (n 79) 331–32). For the explanation of the position in the United States that a breach of warranty and a breach of contract are distinct causes of action, see T Davis, 'UCC Breach of Warranty and Contract Claims' (2009) 61 *Baylor L Rev* 783.

what *defines* that subject matter:<sup>105</sup> ‘a contract is normally a contract for a sale of something describable and described’.<sup>106</sup> Without these rules, it would be impossible to say what it is that the seller has agreed to deliver.<sup>107</sup> That is why they are not only an integral part of sales law, but they also lie at the core of the seller’s primary obligations by being inextricably linked to its obligation to deliver the goods.<sup>108</sup>

The rules on conformity are also essential in terms of the function, performed by both a sales law and a sales contract, of allocating commercial risks between the parties. It is inevitable that buyers will complain about conformity of the goods, allege a breach and invoke remedies. It is essential therefore that there should be fairly clear legal rules, particularly those applicable by default, which are capable of allocating the risk between the parties, thereby producing legal certainty and reducing litigation.<sup>109</sup> Such allocation must also be guided by the right principles and one such principle is this: a party who is in the better position to reduce or to bear the risk of non-conformity or to insure against and/or to deal with the adverse consequences arising from non-conformity, should be the risk bearer. The conformity obligations are imposed on the seller because it often controls the manufacturing process or has the ability to bargain effectively with the manufacturer. In any case, often being better informed than the buyer, the seller can calculate the possible ‘failure’ rates.<sup>110</sup> This information, in turn, enables the seller to invest in product quality<sup>111</sup> and to set the price in a way that factors in the possible ‘failure’ rates and the resulting need to deal with the buyer’s claim.

The idea that the risk should be placed on the party in the best position to reduce and to bear it has also been couched in terms of its fairness, which shows that the arguments used to justify the existence of the rules on conformity are not too far from the moral realm. In fact, the imposition of conformity obligations on the seller reflects, to a degree, some other moral considerations. It has been suggested that the move away from *caveat emptor*, a product of the age of individualism, is the move towards altruism.<sup>112</sup> The seller does not simply promise to deliver the goods, it also

<sup>105</sup> See point 6 of the Official Comment on § 2-313 of the Uniform Commercial Code (UCC) in *Uniform Commercial Code: 2009–2010 Edition* (West-Thomson Reuters, 2009) (‘the whole purpose of the law of warranty is to determine what it is that the seller has in essence agreed to sell’); Bridge (n 85) para 7.11.

<sup>106</sup> Point 6 of the Official Comment on § 2-313 UCC (n 105).

<sup>107</sup> This statement is particularly true in respect of the notion of ‘description’, which is an aspect of conformity of goods under the CISG (see the main text accompanying n 80 above and Chapters 2 and 4).

<sup>108</sup> See Commercial Court Zürich, HG 930634/O, 30 November 1998 (Switzerland), available at <http://cisgw3.law.pace.edu/cases/981130s1.html> (‘The seller’s liability for the defect of goods follows from its primary obligations under the contract, ie delivery of the agreed goods’).

<sup>109</sup> See, similarly, Bridge (n 85) para 7.02.

<sup>110</sup> See Gillett and Walt (n 96) 317–18.

<sup>111</sup> ‘[I]mposing on the seller an obligation to deliver the goods of a particular quality will induce the party in the best position to assure quality to achieve an optimal level of care’ (ibid 318).

<sup>112</sup> See Zamir (n 86) 50.

promises, expressly or implicitly, to bear responsibility for a lack of conformity in the goods. Viewed in this way, the law can be said to make the seller have regard to the buyer's interests. A related point flows from the nature of promise keeping, another moral consideration. If the above point, that without the rules on conformity it is impossible to know what it is that the seller has agreed to sell, is accepted, it arguably follows that the promise to deliver the goods entails a promise that some standards of description and quality will be observed. Further, because these rules are able to encourage the sharing of information they promote communications between the parties and in this way facilitate trust.<sup>113</sup> Another point where morality is lurking behind the rules on conformity is when the 'lemons problem' is raised. This problem can be seen as one where the sellers of low quality products do not shy away from passing off their products as being of higher quality. Whilst economists view this as a problem because of the resulting 'major costs of dishonesty',<sup>114</sup> dishonesty can also be seen as a moral problem. From this point of view, the rules on conformity fight potential dishonest practices.

#### IV. THE SELLER'S LIABILITY AND THE BUYER'S REMEDIES

This book is concerned with the content of the seller's obligations in relation to goods and documents. It does not seek to examine remedies available to the buyer. Nevertheless, it is helpful to give a brief overview of the nature of the buyer's remedies for a lack of conformity because an understanding of remedies will at times influence the analysis of whether a seller has committed a breach in respect of goods or documents. If conforming goods and documents have been delivered, the seller has fulfilled its obligations in respect of them and the question of the seller's liability does not arise. If, however, the requirements as to conformity of goods or documents have not been met, the seller becomes liable and the buyer is entitled to invoke a number of remedies, set out earlier.

First, the buyer may be able to avoid the contract provided that a breach by the seller is 'fundamental'.<sup>115</sup> A breach is fundamental 'if it results in

<sup>113</sup> See Parisi (n 96) 412.

<sup>114</sup> Akerlof (n 97) 495 (the costs are the inability of high quality products to command adequate prices and the gradual driving out of these products, reduction of the market, and a general fall in product quality).

<sup>115</sup> See, generally, CISG Advisory Council Opinion No 5, 'The Buyer's Right to Avoid the Contract in Case of Non-Conforming Goods or Documents', available at [www.cisg.law.pace.edu/cisg/CISG-AC-op5.html#iva](http://www.cisg.law.pace.edu/cisg/CISG-AC-op5.html#iva); M Bridge, 'Avoidance for Fundamental Breach of Contract under the UN Convention on Contracts for the International Sale of Goods' (2010) 59 *ICLQ* 911; D Saidov, 'Remedies for a Documentary Breach: English Law and the CISG' in K Rowley, L DiMatteo, S Saintier and Q Zhou (eds), *Commercial Contract Law: Transatlantic Perspectives* (Cambridge, CUP, 2013) 434; BK Leisinger, *Fundamental Breach Considering Non-Conformity of the Goods* (Munich, Sellier European Law Publishers, 2007).

such detriment to the other party as substantially to deprive him of what he is entitled to expect under the contract, unless the party in breach did not foresee and a reasonable person of the same kind in the same circumstances would not have foreseen such a result'.<sup>116</sup> The threshold meeting this definition has been set at a high level by the courts. For example, they have held that there was no fundamental breach where the buyer could still use or resell non-conforming goods (even if at a discount)<sup>117</sup> or where the seller could repair the goods,<sup>118</sup> despite the Convention expressly subjecting the seller's right to cure any failure to perform its obligations to the buyer's right to avoid the contract.<sup>119</sup> In the case of a lack of conformity in the documents, some courts have gone as far as to hold that there was no fundamental breach if the *buyer* was in the position to cure a lack of conformity in the documents.<sup>120</sup> Whilst this approach arguably lacks a basis in the CISG and essentially rewrites the contract between the parties, shifting a burden of procuring a conforming document to the buyer, this decision, together with others, underscores the fact that the CISG is often interpreted as based on the idea of the preservation of contracts and that contracts should be kept alive as long as possible.<sup>121</sup> As a result, avoidance of the contract has often been seen by the courts as a remedy of last resort.

Secondly, the notion of a fundamental breach is also relevant if the buyer wishes to exercise its right to specific performance which can take the form of a right to demand 'delivery of substitute goods'<sup>122</sup> or that the seller 'remedy the lack of conformity'.<sup>123</sup> If the buyer wishes to demand that non-conforming goods be replaced with conforming ones, a lack of conformity must amount to a fundamental breach.<sup>124</sup> Otherwise, the buyer is confined to the right to require the seller to remedy the lack of conformity, 'unless this is unreasonable having regard to all the circumstances'.<sup>125</sup>

<sup>116</sup> Art 25.

<sup>117</sup> See, eg Supreme Court, 4C.179/1998/odi, 28 October 1998 (Switzerland), available at <http://cisgw3.law.pace.edu/cases/981028s1.html>.

<sup>118</sup> See, eg Commercial Court of the Canton of Aargau, OR.2001.00029, 5 November 2002 (Switzerland), available at <http://cisgw3.law.pace.edu/cases/021105s1.html>.

<sup>119</sup> See Art 48(1), stating that the seller's right to cure (provided for in Art 48) is subject to Art 49, which provides for the buyer's right to avoid the contract. This does not mean that this interpretation by the courts necessarily violates the wording of Art 48(1). It can be argued that, in these cases, the seller's ability to cure is used as a factor in determining whether a breach is fundamental under Art 25. Strictly speaking, the seller's right to cure is applied in the context of Art 25 and not Art 49.

<sup>120</sup> See Federal Supreme Court, VIII ZR 51/95, 3 April 1996 (Germany), available at <http://cisgw3.law.pace.edu/cases/960403g1.html>.

<sup>121</sup> See, eg Commercial Court of the Canton of Aargau (n 118). See also n 31 above.

<sup>122</sup> Art 46(2).

<sup>123</sup> Art 46(3).

<sup>124</sup> Art 46(2).

<sup>125</sup> Art 46(3).

Thirdly, the buyer has the right to reduce the price in the case of a lack of conformity. This remedy is exercisable whether or not the price has been paid,<sup>126</sup> but it is particularly valuable if the price has not been paid because then the buyer can exercise it unilaterally, by simply paying the seller the reduced price. The price can be reduced ‘in the same proportion as the value that the goods actually delivered had at the time of the delivery bears to the value that conforming goods would have had at that time’.<sup>127</sup> It is evident from this formula that, in contrast with damages, whether the buyer has suffered any loss is irrelevant.

Fourthly, the buyer has the right to claim damages for all losses suffered as a consequences of the seller’s breach.<sup>128</sup> The measure of damages is based on the principle of full compensation or the protection of the ‘expectation’ or ‘performance’ interest.<sup>129</sup> Simply put, damages are recoverable to the extent that they were foreseeable by the breaching party<sup>130</sup> and avoidable by the innocent party.<sup>131</sup> If the buyer avoids the contract, damages can be claimed for the difference between the contract price and the price in a substitute transaction provided that it was made within a reasonable time and in a reasonable manner.<sup>132</sup> If the contract is avoided, but a substitute transaction has not been made or it has not been made in a reasonable manner and within a reasonable time, damages can be claimed for the difference between the contract price and the current price at the time of avoidance.<sup>133</sup> The CISG is silent as to how damages are to be assessed if the contract has not been avoided, with the buyer having the goods on hand. In principle, there are a number of ways in which damages can be assessed in such cases.<sup>134</sup> If the buyer resells non-conforming goods at a reduced price, damages can be calculated as the amount by which the buyer’s profit margin on a sub-sale has been reduced. Where the buyer cures a lack of conformity, the costs of cure can be a convenient and accurate measure of the buyer’s loss. Damages can also be measured as the difference between the value of non-conforming goods actually delivered and the value of conforming goods that ought to have been delivered under contract.<sup>135</sup>

<sup>126</sup> See Art 50.

<sup>127</sup> Ibid.

<sup>128</sup> See Art 74.

<sup>129</sup> See *ibid* (first sentence).

<sup>130</sup> See *ibid* (second sentence).

<sup>131</sup> See Art 77.

<sup>132</sup> Art 75.

<sup>133</sup> Art 76(1) (first sentence). See also Art 76(2) (second sentence) (‘If, however, the party claiming damages has avoided the contract after taking over the goods, the current price at the time of such taking over shall be applied instead of the current price at the time of avoidance’).

<sup>134</sup> See D Saidov, ‘Calculating Damages for Delivery of Non-Conforming Goods’ in I Schwenzer, Y Atamer and P Butler, *Current Issues in the CISG and Arbitration* (The Hague, Eleven International Publishing 2014) 263.

<sup>135</sup> For further discussion, see *ibid*.

V. CONFORMITY OF GOODS AND DOCUMENTS:  
BROADER INSIGHTS INTO THE CISG

**A. General**

Any assessment of the Convention must draw on its experience in *all* of its key areas. Being confined to several specific questions, this book is not the place for a comprehensive evaluation of the CISG. An in-depth look into some specific issues nonetheless reveals much about the Convention's strengths and weaknesses, as well as throws up insights and questions whose significance goes beyond the issues at hand. What will the examination of conformity of goods and documents tell us about the Convention as a whole?

**B. Is the CISG a Well-Developed Sales Law?**

The discussion in this book will show that, particularly in the area of conformity of the goods, the Convention has grown into a well-developed legal regime. However, it can still be argued that the CISG cannot rival some major domestic legal systems. One reason for this argument is that the CISG has not been in existence as long as them and, therefore, cannot have the same richness of experience, and hence maturity, as they have. Another reason is that the CISG is interpreted and applied in numerous fora in different parts of the world. It is impossible to ensure consistency in its application and, as a result, the CISG can never provide a coherent and predictable body of sales law.

It is true that the CISG does not yet have the long history of some of its major domestic counterparts, but at the same time its reach is much wider and consequently it is used with much greater frequency. Time runs very differently in the world of the CISG, with each unit of time carrying greater weight and intensity than it does in the context of any domestic law. For example, as at the time of writing there were more than 450 cases reported just on the issue of conformity of the goods. Very few domestic legal systems would be able to generate such a substantial body of cases on such a specific sales law issue within the 25-year period. The strength and maturity of the law lies, of course, not only in the sheer number of cases, but in the quality of legal reasoning and substantive outcomes. The quality and rigour of legal reasoning in cases decided under the CISG vary greatly, but the discussion in this book will show that the outcomes reached in the vast majority of the decisions are generally fair, reasonable and in line with what traders would probably expect from a modern and developed sales law.

The argument that it is difficult to achieve uniform application of the CISG is more serious. Indeed, the long-term future and credibility of the

Convention is dependent on whether it is perceived by the business community as being a predictable and coherent sales law. The significance of this point is recognised by the CISG which requires that in its interpretation, 'regard is to be had to its international character and to the need to promote uniformity in its application'.<sup>136</sup> Absolute uniformity is not achievable in the absence of one centralised institution entrusted with ensuring consistency in the Convention's application, but there is room for moderate optimism. The Convention's experience in some areas such as the definition of a fundamental breach (a key concept in the Convention's remedial scheme)<sup>137</sup> has already been one where relatively uniform approaches have developed. The discussion in this book will reveal that the experience regarding conformity of the goods is similar. Considering the high number of cases on this issue, there are not that many instances where distinct non-uniform paths are identifiable. Moreover, conformity of goods is one of the few areas in the Convention which has given rise to the idea of a 'leading' case; that is to say, a case which has become well-known within the international legal community, far beyond its jurisdictional origin, and due to the persuasiveness of the decision in it has influenced the interpretation and application of the CISG in other jurisdictions and by arbitration tribunals. The case in point is what has become known as the *New Zealand Mussels* case, decided by the German Supreme Court.<sup>138</sup> This decision shows that despite all the challenges on the path to achieving uniformity, the CISG is capable of creating a global community which can ensure that sound and well-reasoned approaches to the interpretation of sales law are promoted internationally.

A few instances of this kind are unlikely to be sufficient to persuade sceptics about the viability and effectiveness of international instruments like the CISG. Therefore, much more work is needed to facilitate an understanding of the Convention and the continued growth of the international legal community around it. This resonates with what can be seen from the examination in this book. Only in very few cases, discussed here, have judges and arbitrators shown their awareness of or willingness to engage with prior decisions under the CISG addressing similar issues to those at hand. This shows that the international community (an essential condition for achieving a reasonable degree of uniformity in the Convention's application)<sup>139</sup> has not yet developed to include fully those who ultimately interpret and apply the Convention: judges, arbitrators and lawyers representing the parties in legal proceedings. With this in mind, this book consolidates and systematises the existing body of cases in order to bring all

<sup>136</sup> Art 7(1).

<sup>137</sup> See nn 115 and 122 above and the accompanying main text.

<sup>138</sup> Federal Supreme Court, 8 March 1995, VIII ZR 159/94 (Germany), available at <http://cisgw3.law.pace.edu/cases/950308g3.html>. See further Chapters 3 and 4.

<sup>139</sup> See, generally, C Andersen, 'The Global Jurisconsultorium of the CISG Revisited' (2009) 13 *Vindobona J Int'l Commercial L Arbitration* 43 (with further references).

these ‘atomised’ and apparently disconnected experiences of applying the CISG into an integrated, comprehensive and distinctive CISG legal regime on conformity of goods and documents.

Perfect uniformity is neither achievable nor desirable. Even within a domestic legal system, tensions within the law are not infrequently encountered. The law sometimes needs to accommodate various policies, which may all be valuable but conflicting at the same time. The ability of the law to absorb and balance between competing ideas or ideologies is probably an important characteristic of a mature and viable legal regime. This book will show a number of instances where the CISG is a battlefield of competing ideas<sup>140</sup> and that is a sign of a healthy instrument as long as it retains, as it does, its key characteristics, fulfils its overall objectives and provides a reasonable degree of legal certainty.

### C. Developing Substantive Content Within a ‘Minimalist’ Structure

Many of the Convention’s rules are not formulated with great detail and are open-ended and general. These features raise questions about how to turn the CISG into an instrument capable of governing wide-ranging sales transactions, with their multitude of factual scenarios, in a predictable manner. How can the minimalist and imprecise nature of the Convention’s provisions be injected with meaning that does justice to each individual case *and* provides legal certainty? How creative must the legal community be in reading more detailed meaning into the CISG?

Beginning with the rules dealing with conformity of the goods,<sup>141</sup> it can be objected that, by the Convention’s standards, they are one of the more elaborate provisions and therefore these questions are not applicable to them. However, it will be seen that these rules are just as incapable of having precise meaning in the abstract as many other parts of the CISG. In fact, what characterises the rules on conformity of the goods is that they are highly flexible and fact-sensitive. The challenge of injecting real meaning into them and providing guidance as to how they will be interpreted in a particular case is not easy to meet.

The same is true when it comes to the rules on the freedom of the goods from third parties’ rights or claims<sup>142</sup> and, much more so, in the case of the seller’s documentary obligations<sup>143</sup> on which the CISG says very little. Two conflicting considerations are at play. On the one hand, the Convention

<sup>140</sup> See, eg the debate about whether the CISG is based on an underlying quality standard and, if so, what it should be in Chapter 4.

<sup>141</sup> See Art 35 and the discussion in Chapters 2–5.

<sup>142</sup> See Art 41, which is exceptionally brief in its formulation, and Art 42. For the discussion of these provisions, see Chapters 6 and 7.

<sup>143</sup> See Arts 30 and 34 and the discussion in Chapter 8.

requires that every case be decided in its particular context. This openness to the particularities of the case is its strength because otherwise the Convention will not be able to achieve fairness in individual circumstances. On the other hand, certainty is part of justice and more specific meaning than that which is discernible from the text of the Convention has to be developed.

The approach that balances these considerations is, generally, two-fold. First, where possible, as is the case in the context of the question of whether the seller must comply with the public law requirements in a place where the goods are intended to be used or sold,<sup>144</sup> guidelines, based on the Convention's policies and rationale underlying the relevant rule, are proposed. These guidelines are neither binding nor do they constitute a presumption to be rebutted by a party against whom they operate. They are, however, valuable in signalling a starting point for how risks should be allocated between the parties. Secondly, in many other cases, where no structured framework of guidelines can be given, the approach is to identify various factual patterns that arise in practice and to put forward relevant factors to be taken into account in allocating duties and risks between the parties in each of these cases.

Some questions that arise under the CISG simply require a 'yes' or 'no' answer. For example, should a seller be able to claim exemption from liability, as it is normally entitled to do,<sup>145</sup> where the buyer knew or could not have been unaware of a lack of conformity *if* the seller was fraudulent? Or should the seller who, as a result of complying with the buyer's drawings and specifications infringed a third party's intellectual property right and suffered harm, be able to claim that the buyer owed a duty to ensure that its specifications/drawings would not infringe a third party's intellectual property rights? These questions are not specifically addressed by the CISG, but courts and writers have developed specific solutions to them. To some extent, these are instances of legal creativity, where the CISG is injected with precise meaning developed in accordance with its underlying considerations and framework.

#### **D. Is the CISG the Best Law for International Sales?**

It is sometimes said that the CISG is superior to domestic sales laws because, in contrast with the latter, it has been specifically designed to address the needs of international trade. How accurate is this proposition in the context of conformity of goods and documents? It is true so far as the Convention's provision, requiring the goods to be free from intellectual

<sup>144</sup> See Chapters 2–4.

<sup>145</sup> See Art 35(3).

property rights or claims (Article 42), is concerned. This provision is unique to the CISG and it has been drafted with reference to the considerations which are specific to international transactions.<sup>146</sup> The proposition is more debatable in the context of other issues. There is nothing in the provisions, containing requirements as to freedom of goods from third parties' rights or claims (Article 41)<sup>147</sup> or as to the goods' quality, quantity, description and packaging (Article 35), that would reflect features or problems unique to international trade. These provisions are broadly similar to their counterpart provisions in some domestic legal systems.

The question then arises as to whether the Convention's legal regime should simply be viewed with reference to its text and framework or whether the cases in which it has been applied should also be regarded as its integral part. If the latter is the case, it is arguable that, notwithstanding any weaknesses that may be inherent in the Convention's experience to date, its legal regime is still more advanced and appropriate for international transactions. The cases decided under the CISG are, by definition, 'international'<sup>148</sup> and any problems peculiar to international sales are necessarily addressed in these cases. On this view, what really makes the CISG an effective global sales law is its *experience* of governing international transactions.

Adopting this view has its dangers. Some decisions made in cases governed by the CISG are not sound or well-reasoned, as will be seen, for example, in the context of the seller's documentary performance.<sup>149</sup> Treating such cases as part of the CISG will only undermine the strength and credibility of the Convention. Therefore, there must be a gradual process of 'natural selection'<sup>150</sup> where only the best reasoned cases, or those that identify valuable commercial or legal considerations or reveal unusual factual patterns, survive and represent the Convention's regime and evolution.<sup>151</sup> What ultimately predetermines the quality of decisions under the CISG is the level of expertise and professional experience of judges and arbitrators, as well as how internationally minded they are.

<sup>146</sup> See Chapter 6.

<sup>147</sup> Other than those stemming from intellectual property.

<sup>148</sup> As defined by the CISG; that is, that both parties have their places of business in different states (Art 1(1)).

<sup>149</sup> See Chapter 8.

<sup>150</sup> See MG Bridge, 'Issues Arising under Articles 64, 72 and 73 of the United Nations Convention on Contracts for the International Sale of Goods' (2005–2006) 25 *J L Commerce* 405, 406. The process is arguably taking place primarily through scholarly writings and private initiatives, such as the CISG Advisory Council (CISG AC) which seeks to promote uniform application of the CISG by preparing and promoting opinions on various topical issues under the CISG (see [www.cisgac.com](http://www.cisgac.com)). See also the discussion of *New Zealand Mussels* in the main text above and in Chapters 3 and 4.

<sup>151</sup> See, similarly, Bridge (n 150) 406–7; also Viscasillas (n 23) ('a line needs to be drawn between "plainly wrong cases" on the CISG, as opposed to different legitimate views on the CISG').

## 22 Introduction

In the area of conformity of goods (Article 35), the Convention's regime, based on many of its cases and scholarly commentary, is strong and well-developed. This makes the CISG a highly competitive legal instrument for governing international sales. The Convention's provisions on the goods' freedom from third parties' rights or claims (Articles 41 and 42) have so far generated a very small number of cases, compared to what has been reported under Article 35. Still, a considerable body of knowledge has been developed under these provisions thanks to scholarly writings. The Convention's experience in the area of documentary performance is, as will be demonstrated, in need of improvement. Otherwise, it will be difficult for the CISG to be an effective international sales law because documents are of special importance in *international* trade, particularly in such sectors as trade in commodities.

### E. Defining the Boundaries of the CISG

#### (i) General

Despite the drafters' attempt to delimit the scope of the issues that are governed by the CISG, the boundaries beyond which the Convention does not extend are still very uncertain. This uncertainty regarding the Convention's scope remains a major obstacle to achieving uniformity in its application. There are not many provisions in the CISG that are as closely and extensively linked with the problem of defining the Convention's boundaries as are its provisions on conformity of the goods. The discussion in this section as well as in other chapters will identify at least two sets of issues in this regard. One relates to the questions flowing from the need to prove a claim. The other concerns the meaning of 'validity' of contract and of its provisions which, as explained,<sup>152</sup> is not intended to be governed by the CISG. The examination of these issues in the context of conformity of the goods will be valuable to a broader understanding of and debate about how far the Convention's reach should extend.

#### (ii) Proof

One controversial issue that arises in connection with the need to prove a claim is burden of proof. The Convention contains no express provisions as to how burden of proof is to be generally allocated and there is no agreement as to whether it is a matter governed by the CISG. That said, the view that is increasingly gaining recognition is that it is a matter governed by

<sup>152</sup> See n 10 above and the accompanying main text.

the CISG<sup>153</sup> and it is the view that is taken in this book, for two reasons. First, there are some specific provisions, such as most notably Article 79,<sup>154</sup> which seem to reveal the principle within the CISG as to the allocation of burden of proof. Secondly, the allocation of burden of proof will have a direct impact on the ways in which the rights *under the CISG* are exercised. If this issue is left to the applicable domestic rules, which vary significantly, the Convention's provisions will, in reality, be prevented from being applied in a uniform way. In contrast, developing and promoting an autonomous solution within the CISG will reduce the risk of the very same rights under the CISG not being exercised in the same way. An autonomous solution that flows from provisions such as Article 79 is that a party who asserts a right must prove the necessary preconditions for the existence of that right; whereas a party who invokes an exception to the other party's right must prove the necessary preconditions for the existence of that exception.

Similar considerations apply to a related issue of the standard of proof. The CISG is silent on the degree of precision with which the existence of a right must be established. In spite of the absence of an express legal basis, the position taken here is that the CISG should govern this issue for the same reason as has just been stated in respect of burden of proof. The standard of proof has a considerable impact on the exercise of rights under the CISG. Leaving this matter to domestic rules would lead to the very same rights being exercised in different ways depending on which rules are applicable.<sup>155</sup> This outcome would undermine the purpose of the CISG as an international uniform law instrument.

One objection to this position, both in respect of burden and standard of proof, is that these are usually treated as matters of procedural, rather than substantive law, whereas the CISG is about substance, not procedure.<sup>156</sup> A reply to this objection is that whilst this may be true in one legal system, the opposite may be the case in another. In other words, the distinction between procedural and substantive law matters is relative, as is widely

<sup>153</sup> See, eg Federal Supreme Court, VIII ZR 304/00, 9 January 2002 (Germany), available at <http://cisgw3.law.pace.edu/cases/020109g1.html>; District Court Vigevano, 12 July 2000 (n 23); Schwenzer and Hachem in Schwenzer (n 16) Art 4, para 25 (with a detailed list of further references).

<sup>154</sup> Art 79(1): 'A party is not liable for a failure to perform any of his obligations *if he proves* that the failure was due to an impediment beyond his control and that he could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome it or its consequences' (emphasis added). See also Arts 2(a) and 35(2)(b).

<sup>155</sup> For further discussion, see Chapter 3.

<sup>156</sup> See, eg *Zapata Hermanos v Hearthsides Baking*, 313 F3d 385 (7th Cir 2002) ('The Convention is about contracts, not about procedure'). See also H Flechtner and J Lookofsky, 'Viva Zapata! American Procedure and CISG Substance in a US Circuit Court of Appeal' (2003) 7 *Vindobona J Int'l Com L Arbitration* 93.

recognised.<sup>157</sup> Finding a solution within the CISG cannot depend on how domestic law categorises a given problem. Each issue needs to be resolved on a case-by-case basis having regard for the Convention's nature, purpose, framework and functions, on the one hand, and the interests and policies protected by the applicable domestic rules, on the other.

The discussion in this book will show that some cases involving a lack of conformity in the goods pose a unique challenge to the need to delimit the boundaries between the CISG and the applicable domestic rules. This challenge arises from domestic rules on the admissibility of evidence. This issue is probably treated as procedural by most legal systems,<sup>158</sup> in which case there is hardly any difficulty in the parties to a contract, governed by the CISG, being subject to these rules. After all, it is true that the CISG is an instrument of substantive law and the admissibility of evidence is widely perceived as a procedural law issue. Any non-uniformity in the exercise of rights under the CISG, arising from differences in the applicable rules as to the admissibility of evidence,<sup>159</sup> is therefore an inevitable result of the Convention being a substantive law instrument.

However, there are cases decided under the CISG that appear to suggest that in some systems the rules on the admissibility of evidence regarding a lack of conformity in the goods are rules of substantive law.<sup>160</sup> This situation, which again underscores the relativity of the substance-procedure distinction, poses a new challenge to defining the relationship between the CISG and domestic law. Should the CISG displace these domestic rules because, this time, they are substantive law rules? Or should these rules dictate what evidence the buyer must present to prove a lack of conformity under the CISG? As explained, a categorisation given by the applicable domestic law cannot be the basis for answering these questions. The function of these rules and the interests they protect need to be balanced against the Convention's aspiration of being an autonomous instrument which is applied uniformly. If the interests and policies that these domestic law rules protect are not those that the CISG is capable of protecting, these rules should apply. The CISG was never designed to protect and is incapable of protecting the policies and interests covered by the rules on the admissibility of evidence.<sup>161</sup>

<sup>157</sup> See, eg CG Orlandi, 'Procedural Law Issues and Law Conventions' (2000) 5 *Uniform L Rev* 23; I Schwenzer and P Hachem, 'The CISG: Successes and Pitfalls' (2009) *American J Comparative L* 457, 470–71.

<sup>158</sup> See Chapter 3.

<sup>159</sup> A buyer who seeks to prove its claim of a lack of conformity by means of evidence other than that stipulated in the applicable domestic law, will not be able to establish the seller's liability; whereas it would have been able to do so had a different domestic law, which admits the type of evidence presented by the buyer, been applicable.

<sup>160</sup> For a detailed discussion, see Chapter 3.

<sup>161</sup> See *ibid.*

*(iii) Validity*

The issues of the validity of the contract and of its provisions are excluded from the CISG.<sup>162</sup> Given that many legal issues can be categorised by domestic law as those of ‘validity’, the question is whether it is up to domestic law or up to the CISG to define the meaning of ‘validity’.<sup>163</sup> This book takes the position that defining validity cannot be left to domestic legal systems because otherwise the Convention will not be capable of being applied uniformly. However, with the CISG not containing a definition of validity, how should its meaning be determined? It is argued that matters which are functionally dealt with by the CISG should not be treated as matters of ‘validity’, even if they are treated as such by the applicable domestic law. This competition between domestic rules on validity, on the one hand, and the CISG, on the other, will be evident in the context of clauses seeking to exclude or limit the rules implied under Articles 35,<sup>164</sup> 41 and 42, or in the case of domestic rules on validity treating the sale of goods that do not belong to the seller as being void.<sup>165</sup>

Another challenge to which a lack of conformity in the goods gives rise is the possibility of a buyer invoking, on the same set of facts, remedies under both the CISG and the applicable domestic law. One situation where the buyer may want to do so is where what the CISG conceptualises as a lack of conformity in the goods also gives rise to domestic law remedies for mistake. Even though in practice a buyer would normally prefer to invoke such CISG remedies for breach of contract as damages, in some cases, such as where the time limit for bringing a claim for a lack of conformity under the CISG has expired,<sup>166</sup> the buyer may want to escape from the contract by relying on the domestic law on mistake which may render the contract void. Should the buyer be allowed to do so? The question remains controversial,<sup>167</sup> but the majority and, it is submitted, a preferable view is that buyers should not be able to invoke domestic law remedies in respect of a mistake as to conformity of the goods.<sup>168</sup> Where the remedies under the CISG and under domestic law arise from substantially the same facts,<sup>169</sup> the remedies under the CISG

<sup>162</sup> See Art 4(a).

<sup>163</sup> See HE Hartnell, ‘Rousing the Sleeping Dog: The Validity Exception to the Convention on Contracts for the International Sale of Goods’ (1993) 18 *Yale J Int’l L* 1.

<sup>164</sup> See Chapter 5.

<sup>165</sup> See Chapters 6 and 7.

<sup>166</sup> See Art 39 and the discussion of this provision in Chapter 5.

<sup>167</sup> See, eg CR Heiz, ‘Validity of Contracts under the United Nations Convention on Contracts for the International Sale of Goods, April 11, 1980, and Swiss Contract Law’ (1987) 20 *Vanderbilt J Transnational L* 639.

<sup>168</sup> Kröll in Kröll, Mistelis and Viscasillas (n 16) Art 35, para 204; I Schwenzer in Schwenzer (n 16) Art 35, para 47; Schwenzer and Hachem (n 76); PC Leyens, ‘CISG and Mistake: Uniform Law vs Domestic Law, the Interpretative Challenge of Mistake and the Validity Loophole’ available at [www.cisg.law.pace.edu/cisg/biblio/leyens.html](http://www.cisg.law.pace.edu/cisg/biblio/leyens.html).

<sup>169</sup> Honnold (n 1) 80.

should displace those available under the domestic law on mistake. This is essential to preserve the integrity of the Convention's legal regime and to protect its ability to unify the law of international sales. The CISG contains an exhaustive system of remedies for a lack of conformity and remedies under domestic law should not be allowed to disrupt and undermine this system.<sup>170</sup>

The possibility of a buyer invoking remedies for a seller's innocent<sup>171</sup> or negligent misrepresentation<sup>172</sup> is another instance where domestic law remedies can, in principle, be triggered by the same facts as those giving rise to the buyer's claim for a lack of conformity under the CISG.<sup>173</sup> The argument presented in the case of mistake is, to a considerable extent, relevant here; that is, the Convention's remedial scheme should not be undermined by domestic law remedies provided that the two sets of remedies arise from the same facts.<sup>174</sup> The Convention's rules are also functionally equivalent to the domestic law remedies for misrepresentation. In the case of innocent and negligent misrepresentation, these remedies are concerned with what the *buyer knew* about aspects of conformity of the goods at the time of the conclusion of the contract.<sup>175</sup> The Convention's rules have been designed to divide the risks between the parties with reference to their reasonable expectations, which, in turn, are derived from *their actual or implied knowledge*.<sup>176</sup> As one commentator has rightly observed, the CISG contains 'a delicate web of awareness-related rules which are based on a balanced distribution of informational risks' and '[t]his distribution should not be disturbed by the application of rules of domestic law which may (and often will) allocate these risks differently'.<sup>177</sup>

<sup>170</sup> See Schwenzer in Schwenzer (n 16) Art 35, para. 47.

<sup>171</sup> In the context of English law, see *Chitty on Contracts*, 31st edn (London, Sweet & Maxwell, 2014) para 6-005, defining 'innocent' misrepresentation as one which is neither fraudulent nor negligent.

<sup>172</sup> In English law, negligent misrepresentation is defined as one 'made carelessly and in breach of a duty owed by the representor to the representee to take reasonable care that the representation is accurate' (E Peel, *Treitel: The Law of Contract*, 13th edn (London, Sweet & Maxwell, 2011) 376). See also Misrepresentation Act 1967, s 2(1) (UK).

<sup>173</sup> Suppose that the seller makes a false statement about an aspect of conformity of the goods which induces the buyer to enter into the contract, with the seller's representation becoming a term of the contract. In this case, both domestic remedies for misrepresentation and the Convention's remedies for breach of contract can potentially be invoked.

<sup>174</sup> It has been noted, for example, that there is a high threshold to be met in order for the contract to be avoided under the CISG whereas rescinding the contract under domestic law for misrepresentation may be much easier (see, eg M Bridge, 'Uniform and Harmonized Sales Law: Choice of Law Issues' in JJ Fawcett, JM Harris and M Bridge, *International Sale of Goods in the Conflict of Laws* (Oxford, OUP, 2005) 947).

<sup>175</sup> See UG Schroeter, 'Defining the Borders of Uniform International Contract Law: The CISG and Remedies for Innocent, Negligent, or Fraudulent Misrepresentation' (2013) 58 *Villanova L Rev* 553, 572.

<sup>176</sup> See Arts 8, 9, 35, 38–44 and the relevant discussion in Chapters 2–6.

<sup>177</sup> Schroeter (n 175) 575.

This argument should apply regardless of whether a misrepresentation has become a term of the contract. To begin with, the CISG is not entirely unconcerned with a pre-contractual phase, as may appear to be the case.<sup>178</sup> It addresses the issue of the formation of contracts. In addition, pre-contractual circumstances are relevant as factors in interpreting the parties' intentions and their statements and conduct.<sup>179</sup> To that extent, it is arguable that the CISG has its own regime for governing the legal consequences flowing from pre-contractual representations. In any case, it is clear that the CISG was not intended to concede all legal issues at the pre-contractual stage to the applicable domestic law.<sup>180</sup> But these points are probably insufficient to prove that the CISG should pre-empt domestic law remedies for a misrepresentation, which has not become a term of the contract. What may point to this conclusion more strongly, apart from the above argument that the Convention's remedial scheme must not be undermined, is the fact that it is the CISG that decides whether a representation becomes a term of the contract.<sup>181</sup> This fact, in turn, can be seen as the Convention's implicit indication that the seller will not be subject to any remedies arising from pre-contractual circumstances.<sup>182</sup>

There is a general agreement<sup>183</sup> that the position should be different in the case of fraudulent misrepresentation,<sup>184</sup> even if the facts giving rise to domestic law remedies and to those under the CISG<sup>185</sup> are the same.<sup>186</sup> A duty not to defraud exists in domestic laws independently of the agreement between the parties<sup>187</sup> and may flow, for example, from

<sup>178</sup> Cf Bridge (n 174) 947–48.

<sup>179</sup> See Art 8(3).

<sup>180</sup> Schroeter (n 175) 570.

<sup>181</sup> Ibid 577.

<sup>182</sup> Ibid.

<sup>183</sup> See, eg Schroeter in Schwenger (n 16) Arts 14–24, para. 59; Schwenger in Schwenger (n 16) Art 35, para. 49; Kröll (n 168) para. 205; P Schlechtriem, 'The Borderland of Tort and Contract: Opening a New Frontier?' (1988) 21 *Cornell Int'l LJ* 467.

<sup>184</sup> In English law, for example, a statement is fraudulent if made '(i) with knowledge of its falsity, or (ii) without belief in its truth, or (iii) recklessly, not caring whether it is true or false' (Peel (n 172) 374–75, discussing *Derry v Peek* (1889) 14 App Cas 337).

<sup>185</sup> The applicability of Arts 35, 41 and 42 does not depend on whether the seller had knowledge of a lack of conformity when making a representation about the goods. The seller's knowledge is only relevant to the seller's ability to rely on the buyer's failure to give notice of a lack of conformity under Art 39 (see Arts 39 and 40 and the discussion of these provisions in Chapter 5).

<sup>186</sup> There is a view that the facts giving rise to remedies under domestic law and the CISG are not the same (see Schroeter (n 183) para 59). However, this position does not seem to be correct. Suppose that the seller makes a representation as to conformity of the goods to the buyer, knowing that the representation is false, and the statement becomes a term of the contract. It is this very same scenario that can give rise to remedies under both domestic law on fraudulent misrepresentation and the Convention's provisions on a lack of conformity.

<sup>187</sup> Schlechtriem (n 183).

the extra-contractual<sup>188</sup> obligation of ‘honesty’<sup>189</sup> or from pre-contractual ‘fault’.<sup>190</sup> The CISG was not intended to displace the application of these areas of domestic law.<sup>191</sup> This should not mean, however, that domestic law remedies displace the remedies for a lack of conformity under the Convention. The preferable view is that both sets of remedies should be applicable concurrently and the buyer should have a choice as to which remedies to invoke. There is no reason why a buyer should be deprived of remedies for breach of contract under the CISG just because it can also invoke domestic law remedies for fraud.<sup>192</sup>

<sup>188</sup> ‘Domestic rules granting remedies for fraudulent conduct often ... do so by way of an extra-contractual (tort) liability, and may also provide compensation for purely economic loss’ (Schroeter (n 183) para 59).

<sup>189</sup> See, eg Comment (a) on § 552, Restatement (Second) of Torts (1977).

<sup>190</sup> See, eg *Chitty* (n 171) para 1-156 (‘Some legal systems consider that cases of fraud or duress are merely examples of a wider category of “fault in the formation of contract”, a category famously termed *culpa in contrahendo* by the German jurist, Ihering. In French law, despite its general rule against allowing delict to intrude between contractors (a rule known as *non-cumul*), pre-contractual fault can give rise to a claim for damages in delict, there being a very general principle of delictual liability based on fault’).

<sup>191</sup> Art 89 of the Convention relating to a Uniform Law on the International Sale of Goods 1964 (ULIS), the predecessor of the CISG, expressly provided that ‘[i]n case of fraud, damages shall be determined by the rules applicable in respect of contracts of sale not governed by the present Law’. This provision was not included in the CISG, but this omission was not intended to indicate a different approach (see Schlechtriem (n 183)).

<sup>192</sup> See Schroeter (n 175) 585–86, advocating this position on the basis that depriving a buyer of remedies under the CISG would be ‘irreconcilable with the promotion of good faith’ under Art 7(1).