



Evolving “Ordinary Purpose” in Article 35(2)(a) CISG: Beyond Physical Conformity

UNCITRAL COLLOQUIUM ON THE LAW OF INTERNATIONAL TRADE
FOR A GREENER FUTURE

23 OCTOBER 2024

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UNIVERSIDAD
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Facutal Issues

Goods Supply Chains & Unsustainable heavens or paradises

Complaiance issues & Parties' Codes of
Conduct with obligations pertaining to:

**Ethics, Environment, Procurement
and Suppliers, etc.**

Growing importance of the CISG



Non-conformity of tainted goods under Art. 35 CISG

1. Article 35 CISG and non-physical features
2. Different approaches under Article 35 CISG
 - ✓ Article 35(1) CISG: Contractual stipulations
 - ✓ Article 35(2)(b) CISG: Particular purpose
 - ✓ Article 35(2)(a) CISG: Fitness for ordinary purpose
 - ✓ Article 35(3) CISG: buyer's knowledge

Contractual Stipulations and Article 35(1)

- If goods are explicitly required to meet sustainable standards, failure to do so is a breach of contract.
- Standards can be derived from:
 - **Public law regulations.**
 - **Industry codes** (e.g., UN Global Compact).
 - **Joint codes of conduct** (based on trade usages or contractual practices).

Sample Policy Areas that Align with the UN Global Compact Ten Principles	Potential International Law Sources	Potential Public Law of Direct Application Sources	
<p>Human Rights and Labour</p> <ol style="list-style-type: none"> 1. Forced labour 2. Child labour 3. Working hours 4. Wages and benefits 5. Humane treatment 6. Nondiscrimination and equality 7. Freedom of association and collective bargaining 8. Occupational health and safety 9. Emergency preparedness 10. Occupational injury and illness 	<p>Environment</p> <ol style="list-style-type: none"> 20. Material toxicity and chemicals 21. Raw material use 22. Recyclability and end of life of products 23. Greenhouse gas emissions 24. Energy use 25. Water use and waste water treatment 26. Air pollution 27. Biodiversity 28. Deforestation 	<p><i>United Nations Global Compact</i> <i>Universal Declaration of Human Rights</i> <i>UN Guiding Principles on Business and Human Rights</i> <i>ILO Declaration on Fundamental Principles and Rights at Work</i> <i>ILO Tripartite declaration of principles concerning multinational enterprises and social policy</i> <i>ILO International Labour Standards on Occupational Safety and Health</i> <i>Women's Empowerment Principles</i> <i>Children's Rights and Business Principles</i></p>	<p><i>German Supply Chain Due Diligence Act</i> <i>EU Corporate Sustainability Due Diligence Directive (EU) 2024/1760) (the CS3D)</i> <i>U.S. Foreign Corrupt Practices Act (FCPA)</i> <i>UK Bribery Act, in their foreign supply chains.</i> <i>UK Modern Slavery Act of 2015</i> <i>California Supply Chain Transparency Act</i></p>
<ol style="list-style-type: none"> 11. Fire safety 12. Building structure and integrity 13. Industrial hygiene 14. Leave entitlements 15. Freedom of speech 16. Human trafficking 17. Privacy 18. Minority rights 19. Rights of specific stakeholder groups. 	<p>Anti-Corruption</p> <ol style="list-style-type: none"> 29. Conflict of interest 30. Gifts, meals and entertainment 31. Bribery and kickbacks 32. Accounting and business records 33. Protecting information 34. Fair competition 35. Reporting misconduct 	<p><i>OECD Guidelines for Multinational Enterprises</i> <i>The Rio Declaration on Environment and Development</i> <i>United Nations Convention Against Corruption</i> <i>ISO 14001</i> <i>ISO 26000</i> <i>SA8000</i> <i>OHSAS 18001</i></p>	



Supplier Code of Conduct



PURPOSE: ETHICAL BEHAVIOR – A SHARED COMMITMENT

This Supplier Code of Conduct from [Tyson Foods, Inc.](#), together with its subsidiaries (collectively, "Tyson" or the "Company") sets forth the principles and ethical standards we strive to achieve and describes our expectations for supplier adherence to the same standards. We are committed to operating our business with integrity, respect, accountability, and honor. Ethical business practices are expected every day at Tyson. Our **Core Values** define who we are, what we do, and how we do it and guide our actions and interactions each day. Accordingly, we choose to do business with suppliers who demonstrate a strong commitment to ethical behavior.



SCOPE

This Supplier Code of Conduct applies to Tyson's service providers, independent contractors, consultants, suppliers, software providers, licensors, and their associated employees, agents, and/or subcontractors.



EXPECTATIONS OF OUR SUPPLIERS

We expect our suppliers to operate with integrity and commit to principles similar to those in the **Tyson Code of Conduct**, which all Tyson team members and Directors affirm annually. It is crucial our suppliers recognize the roles they play in ensuring the satisfaction of our customers and consumers.

This Supplier Code of Conduct supplements but does not supersede any rights or obligations established in the Tyson Purchase Order Terms and Conditions or in any agreement we may have with our suppliers. Not all expectations in this Supplier Code of Conduct may be applicable to each supplier business. To the extent they do apply, Tyson expects each supplier to strive for full compliance and to expect the same of their sub-tier suppliers.



LEGAL COMPLIANCE

We are committed to complying with the law wherever we conduct business. We expect each supplier to work diligently to conduct its business in full compliance with applicable laws, rules, and regulations. Tyson reserves the right to decline future business opportunities or to end existing business relationships with suppliers who do not comply with the law.



PRODUCT SAFETY AND QUALITY

One of the most significant Tyson values is our commitment to providing our customers with trusted food products. We expect our suppliers to value product safety and quality and to comply with government and Tyson food safety requirements and specifications.



LABOR AND HUMAN RIGHTS

We are committed to observing fair labor practices and to treating our employees, whom we call team members, with dignity and respect. Our programs and policies support the principles contained within the **United Nations Universal Declaration of Human Rights**, the **UK Modern Slavery Act**, and the **International Labour Organization's Labour Standards**. We expect our suppliers to make the same commitments in their labor practices by having controls in place that:

- Verify the employment eligibility of their employees
- Prohibit inappropriate recruiting practices and fees
- Ensure no forced labor or child labor is being used or human trafficking is occurring
- Respect the right of employees to freely associate, organize, and bargain collectively
- Ensure compliance with applicable wage and hour laws
- Prohibit discrimination, harassment and workplace violence
- Provide options for employees to report concerns without fear of retaliation.



Tyson Foods

Poultry processing company :

[tysonfoods.com](https://www.tysonfoods.com)

Tyson Foods, Inc. is an American multinational corporation based in Springdale, Arkansas that operates in the food industry. The company is the world's second-largest processor and marketer of chicken, beef, and pork after JBS S.A. It annually exports the largest percentage of beef out of the United States. [Wikipedia](#)

Stock price: TSN (NYSE) \$57.93 -0.62 (-1.06%)

Oct 7, 3:07 PM EDT - Disclaimer

Headquarters: [Springdale, AR](#)

CEO: [Donnie D. King](#) (Jun 2, 2021–)

Founder: [John W. Tyson](#)

Customer service: [1 \(800\) 233-6332](tel:18002336332)

President: [Donnie D. King](#)

Revenue: 53.28 billion USD (2022)

Founded: 1935, [Springdale, AR](#)



Nestlé Good food, Good life

Nestlé Responsible Sourcing Core Requirements



Nestlé Good food, Good life



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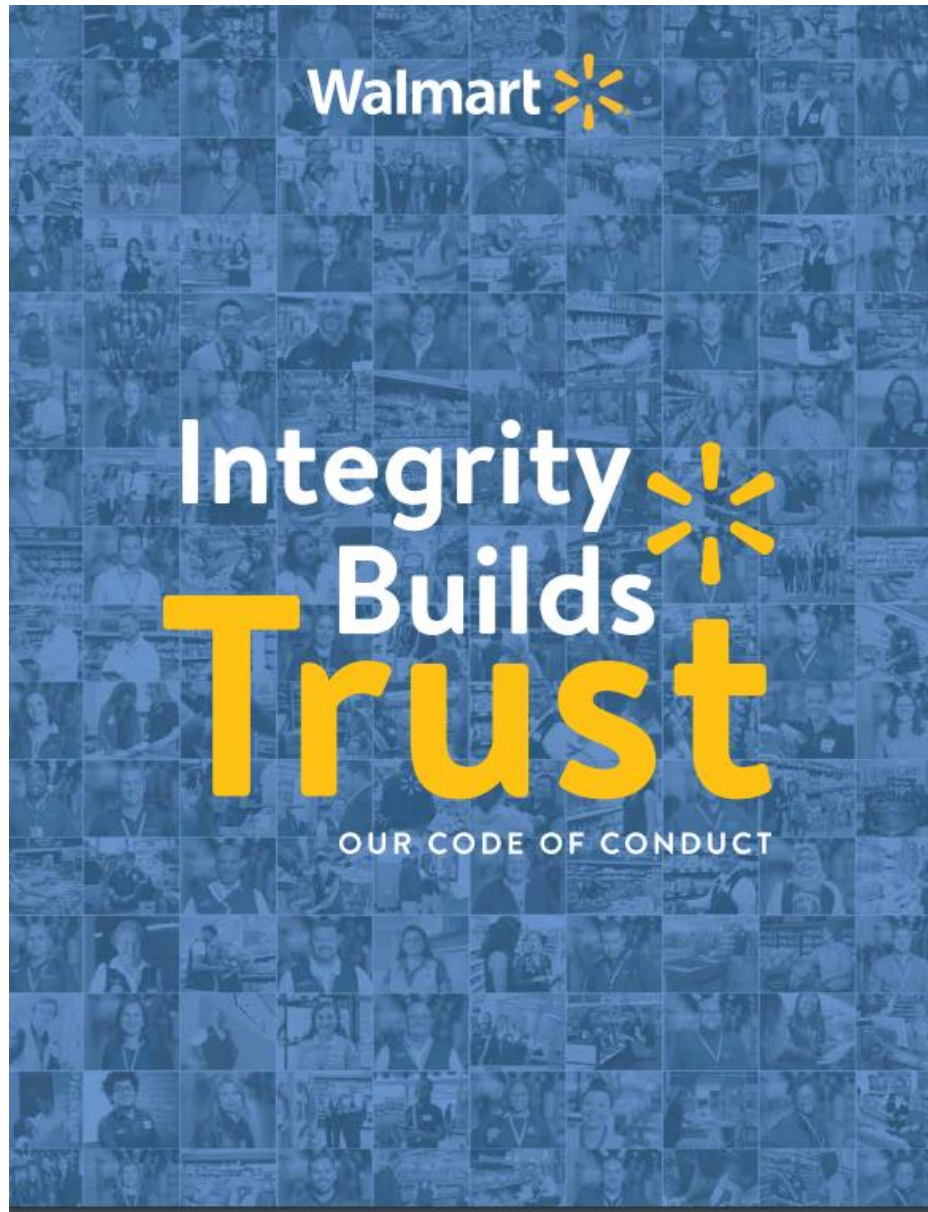
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Responsible sourcing: Our work with suppliers and farmers | Nestlé

Did you know that we work with almost **165,000 direct suppliers and 695,000 individual farmers worldwide?**

We're committed to fostering responsible practices in our supply chain, while ensuring that our sourcing and supplier relationships deliver a competitive advantage.

<https://www.nestle-cwa.com/en/aboutus/supliers>



ESG

ESG Approach ▾ Environmental ▾ Social ▾ Governance ▾ Reporting Data ▾ Resources & Archives ▾ FY2023 ESG Highlights

integrity builds trust in our business.

Relevance to Our Business and Society

Businesses with high standards in ethics and compliance ground their decisions in those standards, acting swiftly to identify and address issues in order to mitigate risk and cultivate trust.

Trust is one of Walmart's competitive advantages, which is why associates, customers, investors, suppliers, and business partners choose Walmart, because they know we are a business they can trust. With more than 10,500 stores and clubs, 2.1 million associates worldwide, and tens of thousands of suppliers, our actions impact and influence far beyond the walls of our stores, clubs, and offices.

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How do sustainable standards in Codes of Conduct become part of a CISG contract?

A Code of Conduct may be incorporated into a CISG Contract

Offer and Acceptance Mechanism (Arts. 14-24 CISG)

Intent to be bound (Art. 6 CISG)



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Main relevance to assess conformity of the goods under Art. 35(1) CISG

Since it includes non-physical features in the goods

How do sustainable standards in Codes of conduct become part of a CISG contract?

1. Standard terms must be made part of the offer or the counteroffer in order to be incorporated into the contract.
2. Article 8(2) CISG: reference be clear enough so that a reasonable person in the shoes of the recipient would understand its application.

- **Front Site Requirement:** Generators and motors case [2004] Oberlandesgericht Düsseldorf (Court of Appeal Düsseldorf) I-23 U 70/03, 821 CISG-Online.
- **No understanding or non-contract language:** Car phones case [2004] Oberlandesgericht Düsseldorf (Court of Appeal Düsseldorf) I-15 U 88/03, 915 CISG-Online.
- **Free access vs up request:** Material for metal covers case [2008] Landgericht Landshut (District Court Landshut) 43 O 1748/07, 1703 CISG-Online.
- **Email attachment ok:** Golden Valley Grape Juice and Wine, LLC v Centriys Corporation / Centriys Corporation v Separator Technology Solutions Pty Ltd [2010] US District Court, Eastern District of California CV F 09-1424 LJO GSA, Unilex.
- **No Extensive search.** Roser Technologies, Inc v Carl Schreiber GmbH [2013] US District Court for the Western District of Pennsylvania 11cv302 ERIE, 2490 CISG-Online.



Terms & Conditions of Sale



Modification of Terms; Express Rejection of Other Terms. These terms and conditions ("Terms") shall control the sale of all Tyson products and services. "Tyson" means Tyson Foods, Inc. or any of its affiliates or subsidiaries. "Party" means each of Tyson and Buyer and "Parties" means Tyson and Buyer. Tyson's acceptance of any order is expressly subject to Buyer's assent to each and all of these Terms. Buyer's assent to these Terms shall be conclusively presumed from Buyer's failure to submit written objection, or from Buyer's acceptance of all or any part of the products or services ordered. No addition to or modification of these Terms shall be binding upon Tyson unless an officer of Tyson agrees to such terms in a signed writing. If Buyer's purchase order or other correspondence contains terms or conditions contrary to or in addition to these Terms, acceptance of any order by Tyson shall not be construed as assent to such contrary or additional terms and conditions, or constitute a waiver by Tyson of any of these Terms. Unless alternate terms are contained in a contract or other writing signed by an officer of Tyson, these Terms shall control. Any reference to Buyer's purchase order by Tyson shall not affect or limit the applicability of these Terms.

<https://www.tysonfoods.com/legal/terms-conditions-sale>

General Terms and Conditions for the Purchase of Products and Services

The agreement between you ("Supplier") and the Unilever group company ("UGC") ordering ("Buyer") (Supplier and Buyer, collectively the "parties" any product and/or service (Products/Services), these General Terms and Conditions for the Purchase of Products and Services as may be amended or added to by any applicable Specific Terms and Conditions (such as but not limited to Supply of Products, Supply of IT Services and Country Specific Clauses) set forth on www.unilever.com/aboutus/suppliers/termsandconditions ("GTC") shall apply to any Buyer purchase order, or other means of buying, requesting or specifying a supply of a service and/or product ("PO", together with the GTCs, the "Agreement").

1. Supplier Acceptance of Terms:

The parties' acceptance is limited to the express terms of the Agreement and does not include any additional or different terms proposed by Supplier or any other party, including but not limited to any general terms and conditions of trade. Any additional or different terms, express or implied, are deemed to be material alterations and are objected to and rejected by Buyer.

2. Supply of Products/Services

2.1. Any items, services, functions or responsibilities not specifically described in the Agreement and which is reasonably necessary for the proper supply of Products/Services are deemed to be included within the scope of the Products/Services to be delivered for the price agreed to in the Agreement.

2.2. Supplier shall comply with all written policies (whether presented electronically or otherwise), recommendations and requirements and reasonable instructions of Buyer provided from time to time. Supplier shall at all times comply with Buyer's quality assurance requirements and shall remain responsible for quality assurance with respect to all Products/Services.

2.3. Without prejudice to any rights of Buyer, Supplier shall immediately give notice to Buyer if it becomes aware or anticipates: (a) that it may be unable to supply all Products/Services at the agreed time; (b) that the Products/Services do not comply with the Agreement; or (c) any matter which may result in a potential safety risk to UGC or to consumers arising from the Products/Services (whether such risk arises as a result of non-conforming Products/Services or otherwise).

2.4. If any Products/Services do not comply with the Agreement or are not provided in full within the agreed time Buyer may, at its discretion reject the non-conforming or late Products/Services and/or require Supplier to re-supply non-conforming Products/Services at Supplier's expense or terminate the PO in whole or in part. These rights to reject and/or require re-supply or terminate shall not affect any other remedy to which Buyer may be entitled, including without limitation, reimbursement by Supplier for incremental costs incurred relating to procurement of replacement Products/Services.

3. Ordering

all UGCs from and against all losses incurred in connection with such Products/Services supplied, shall comply with Applicable Laws in force at the time of manufacture, supply and/or receipt of the Products/Services and any applicable laws that have been notified where Buyer will use the Products/Services or sell the Products and Supplier shall provide Buyer with the information required for Buyer in order for Buyer to utilise the Products/Services in compliance with applicable laws and (f) it has not and will not engage in any anti-competitive or unfair trading practices that may adversely affect Buyer or its customers, and Supplier will promptly investigate and claim by any competition authority or third party applicable to the Supplier.

6. Responsible Business Requirements

6.1. Supplier (including any affiliated group companies) confirms that it has read and understood and associated policies and procedures, that are consistent with Unilever's Responsible Partner Policy requirements: www.unilever.com/partnerpolicy ("RPP"), and warrants that it has conducted regular due diligence on its own codes of conduct, policies and procedures, those of its subcontractors and suppliers, to ensure their consistency with the requirements of this clause.

6.2. At Buyer's request Supplier shall register with the applicable authorities and keep such information updated upon any change or at least on an annual basis.

6.3. Supplier shall undertake third-party Responsible Business audits of its own cost and rectify any non-compliance identified in such audit within the timeframe stipulated by Buyer.

6.4. Where Supplier materially fails to meet the requirements of this clause, Buyer considers that such failure can be remediated then Supplier shall be required to stipulated by Buyer to remedy the failure and ensure further failures do not occur.

7. Conflict Minerals

7.1. At Buyer's request Supplier shall complete a questionnaire identifying the presence of "conflict minerals" (as defined under Applicable Laws) in its Products/Services. If required by Buyer, Supplier shall perform appropriate due diligence to identify the actual presence and origin of conflict minerals in any Product/Service within (30) days following each calendar year.

8. Compliance with laws and regulations

8.1. Supplier represents and undertakes that it will, at all times, comply with all applicable laws and regulations, including, without limitation, all anti-tax evasion, bribery and corruption, and financial sanctions, trade sanctions and export controls ("Applicable Law"). Applicable law shall include all laws of the United Kingdom and United States together with any other applicable laws. Supplier shall use best endeavours to ensure that any person performing services for or on behalf of Supplier complies with Applicable Laws. Supplier further represents and undertakes that it will, at all times, comply with Applicable Laws in force at the time of manufacture, supply and/or receipt of the Products/Services and any applicable laws that have been notified where Buyer will use the Products/Services or sell the Products and Supplier shall provide Buyer with the information required for Buyer in order for Buyer to utilise the Products/Services in compliance with applicable laws and (f) it has not and will not engage in any anti-competitive or unfair trading practices that may adversely affect Buyer or its customers, and Supplier will promptly investigate and claim by any competition authority or third party applicable to the Supplier.

How do sustainable standards in codes of conduct become part of a CISG contract?

Battle of Codes of Conduct



Last Shot Rule

vs



Knock-out Rule



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Type of obligations agreed between food supply chain participants? Best Efforts or Results?



Contracts governed by the CISG and other contract laws may involve obligations of best efforts and obligations of results (**Article 6 CISG: freedom to design their Contract and deviate from the Convention**).

The extent to which an obligation involves any of these two types, should be established by taking into account the rules of interpretation of the applicable law (*eg.* **Art. 8 CISG**), in particular the reasonable person standard and the surrounding circumstances.

H-E-B Suppliers

H-E-B Supplier Code of Conduct

H-E-B and its affiliates (H-E-B) conduct business in accordance with high ethical standards. It is imperative that our customers have confidence that we manage ourselves in a way that demonstrates conscientious conduct with all affected by our business activities and that our vendors are also in full compliance with our commitment to these standards. Consequently, we select vendors that share our philosophy and have processes in place to comply with our defined Code of Conduct.

Standards

- 1) **Compliance with Laws:** Our vendors and their subcontractors, agents and affiliates who **manufacture, sell, distribute or provide any product and/or service to H-E-B ("Vendors") must fully comply with all applicable national, federal, state and local laws and regulations, including but not limited to those related to labor, immigration, foreign corrupt practices and bribery, health and safety, and the environment.**
- 2) **Labor Practices**
 - a. **Voluntary Labor:** All labor must be voluntary. **Child, forced, bonded, prison, or indentured labor will not be tolerated.** Workers must be allowed to maintain control over their identity documents. Vendors must provide workers with rest days and must ensure the working hours are consistent with local regulations

H-E-B Suppliers

- e. **Human Rights:** Vendors must promote equal opportunities for and fair treatment of their employees irrespective of skin color, race, nationality, social background, disabilities, sexual orientation, political or religious conviction, sex or age; respect the personal dignity, privacy and rights of each individual; and work to prevent unacceptable treatment of employees, such as mental cruelty, sexual harassment or discrimination.
 - 3) **Environmental Practices:** Vendors must ensure that each of their facilities complies with national, state, and local environmental laws, treaties and regulations, including those related to air emissions, water discharges, toxic substances and hazardous waste disposal. Vendors must endeavor to minimize environmental pollution through regular review of all input materials and components. Vendors must create and maintain a reasonable environmental management system.
 - 4) **Animal Well-Being:** Vendors must be committed to the well-being and proper treatment of the animals used for any of our products.



Suppliers of Food Products

As a supplier to H-E-B, all vendors are expected to agree to comply with all regulatory requirements identified in:

- The Federal Food, Drug, and Cosmetic Act
- The Food Safety Modernization Act (FSMA)
- All applicable USDA guidelines
- USDA Country of Origin Labeling requirements
- All additional federal, state and local requirements as applicable

Per the FSMA, all suppliers must continuously ensure that they are complying with the following:

- Standards for Growing, Harvesting, Packing, and Holding of Produce for Human Consumption (Produce Safety Rule)
- Sanitary Transportation of Human and Animal Food (SFTA)
- Foreign Supplier Verification Programs for Importers of Food for Humans and Animals (FSVP)
- Good Manufacturing Practice and Hazard Analysis and Risk-Based Preventive Controls for Human and Animal Food (Preventive Controls Rule)
- Mitigation Strategies to Protect Food Against Intentional Adulteration

Supplier Code of Conduct

H-E-B and its affiliates (H-E-B) conduct business in accordance with high ethical standards.

restrictions or duties on any product.

- e. **Supply Chain:** Vendors must use reasonable efforts to promote among their downstream vendors compliance with this Code of Conduct and principles of non-discrimination with regard to vendor selection and treatment.

Strict liability and compliance with Best efforts?

DEFAULT RULE REFLECTED IN ARTICLE 79 CISG: Strict liability requires the compliance with an objective standard of conduct so the debtor may be liable even if he was not guilty of any actual or subjective fault [Saidov].

HOWEVER, a duty of best efforts requires performing an activity with due diligence [Brunner], **redefining the Strict Liability Principle reflected in Article 79 CISG** (which is possible under Article 6 CISG).

The seller may argue that in spite of applying its best efforts to comply with applicable sustainable standards it was beyond its control, it was unavoidable and unforeseeable to deliver conforming goods, and thus, it claims exemption from damages.

Overview of Article 35(2)(b) CISG

- **Article 35(2)(b) CISG:**

- Requires that goods must be fit for any **particular purpose** expressly or impliedly known to the seller at the time of the contract.
- This obligation applies when the buyer has made the particular purpose **known to the seller**, and the buyer reasonably relies on the seller's **skill and judgment**.



Communicating the Particular Purpose

- **Explicit communication:**

- The buyer may directly inform the seller of the specific purpose for which the goods are required (e.g., needing environmentally certified products, that comply with **Fair Trade principles**, etc).

- **Implicit communication:**

- The purpose may be implied from the circumstances, such as:
 - The buyer communicates its reputation in the industry (e.g., **as an organic food retailer**).
 - The seller is informed of the buyer's market or the destination of the goods (e.g., **compliance with local sustainability laws**).



Reasonable Reliance on Seller's Expertise

- The buyer must rely on the seller's skill and judgment to deliver goods fit for the specific purpose.
- The seller is expected to understand and provide goods that meet the particular purpose if it has been made clear.
- **Key Considerations:**
 - The seller's knowledge of the buyer's business or market.
 - The seller's previous dealings or experience in providing goods for similar purposes.



Failure to Meet the Particular Purpose



- If goods do not fulfill the **particular purpose** -of being environmentally friendly- communicated by the buyer:
 - The goods are deemed **non-conforming** under Article 35(2)(b).
 - The buyer is entitled to remedies under the CISG, such as **damages, price reduction**, repair, or substitution or **contract avoidance**.
- **Example:**
 - A buyer informs the seller they need cocoa beans for a **sustainable chocolate brand**, and the seller delivers non-certified beans. This would breach the specific purpose requirement.

Overview of Article 35(2)(a) CISG

- **Article 35(2)(a) CISG:**
 - Defines the requirement that goods must be fit for their **ordinary purpose** unless explicitly stated otherwise in the contract.
 - Focuses on the general **commercial usability** of the goods, including ethical and sustainability standards where relevant.



Fitness for Ordinary Purpose and Commercial Usability



- Goods must be suitable for use, **resale** or further processing, depending on the type of goods.
- In the context of green supply chains, merchantability includes more than the physical attributes of the goods:
 - While not expressly stated: the "ordinary purpose" could involve compliance with technical, ethical, and environmental standards.
 - While not expressly stated: this fitness includes adhering to sustainability expectations (e.g., organic certification, fair trade).
 - Goods that fail sustainability standards (e.g., made using child labor) may be unsellable in markets with stringent ethical norms.

Public and Private Standards Impacting Ordinary Purpose



- **Private standards:**

- Industry codes of conduct, certifications (e.g., Rainforest Alliance, Fair Trade) define ordinary expectations in international trade.
- These standards are commonly applied and expected across industries.

- **Public standards:**

- Local or international laws may impose requirements on the ordinary use of goods (e.g., environmental or safety regulations).
- Example: EU Corporate Sustainability Due Diligence Directive (CS3D) imposes legal obligations regarding sustainability.

EU CODE OF CONDUCT ON RESPONSIBLE FOOD BUSINESS AND MARKETING PRACTICES

A common aspirational path towards sustainable food systems

Abstract

The Code of Conduct for Responsible Food Business and Marketing Practices is one of the first deliverables of the [EU Farm to Fork Strategy](#) and an integral part of its action plan. It sets out common aspirations and indicative actions which actors 'between the farm and the fork', such as food manufacturers, food service operators and retailers, can voluntarily align, commit and contribute to in support of the transition towards sustainable food systems.

June 2021



Written by
Stefan Van Rompaey

In this article

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CONDUCT FOR SUSTAINABLE FOOD CHAIN

📅 Food | 6 July, 2021



65 leading food producers and food retailers have signed a European code of conduct that should make the food chain more sustainable. However, cooperation between actors with divergent interests remains the big challenge.

Facilitating sustainable choices

Yesterday, the European Commission launched its [code of conduct on responsible food business and marketing practices](#). The code is part of the European Green Deal and the 'Farm to Fork' strategy that should lead to a climate-neutral food chain by 2050. At the launch, the code was signed by 65 producers, food retailers and sector organisations -among them big names such as AB InBev, Ahold Delhaize, Carrefour, Colruyt Group, Danone, Mondelez, Nestlé, PepsiCo, Tesco and Unilever. They call on their sector colleagues to join them.

Mandatory Sustainable Standards and Article 35(2)(a) CISG



- **Relevance of Mandatory Standards:**

- Mandatory sustainability standards can impact the **ordinary use** of goods under Article 35(2)(a) CISG.
- **Supply chain legislation** like the EU Corporate Sustainability Due Diligence Directive (CS3D) affects merchantability and fitness for ordinary purpose.

- **Seller's Compliance:**

- The seller may need to comply with local standards, even if not specified as a **particular purpose** under Article 35(2)(b).
- **CISG Advisory Opinion No. 19:** The seller is obligated to comply with standards if it knew or should have known about the place of use or resale of goods.

- **Legal Expectation:**

- Sellers are expected to investigate and understand the local standards impacting goods at their place of use or resale.

Risk Allocation and Green SCs under Article 35(2)(a) CISG

- **Risk Allocation:**

- Article 42(1)(a) and Article 42(1)(b) CISG assign the obligation to deliver goods compliant with local law.
- **Seller's Obligation:** Deliver goods free from third-party claims and intellectual property rights at the buyer's place of business.

- **Challenges in Green SCs:**

- Complexities arise in **Green Supply Chains**, where multiple suppliers and jurisdictions are involved.
- Some suppliers may lack the resources or knowledge to comply with foreign sustainability standards, like the CS3D.

- **Seller's Knowledge:**

- If the seller has prior dealings or has exported goods to a location, they are assumed to be aware of the relevant local standards.



Broadening the Scope of Ordinary Purpose

- **Modern interpretations** of Article 35(2)(a) go beyond basic physical conformity.
- Ordinary purpose now often includes **compliance with ethical, environmental, and social standards.**
- Sellers must understand that **commercial expectations** increasingly align with global sustainability trends.



Overview of Article 35(3) CISG

- Establishes an **exception** to the seller's liability for non-conformity.
- The seller is not liable for any non-conformity if the **buyer knew** or could not have been unaware of the lack of conformity at the time of the contract's conclusion.

Practical Application in Sustainable Supply Chains

- **Examples** of buyer's knowledge impacting the application of Article 35(3):
 - Buyer knowingly purchasing goods from a region with known **labor violations** or **environmental concerns**.
 - **Audits and inspections** that reveal non-conformities prior to the conclusion of the contract but are accepted by the buyer.
- The buyer cannot claim non-conformity later if they were aware of the issues at the time of contract formation.



Implications for Global Buyers and Sellers



- **Due diligence:**

- Buyers in green supply chains must exercise due diligence to ensure goods meet their sustainability expectations.
- If a buyer fails to raise concerns about visible non-conformity (e.g., missing certification or known unsustainable practices), they may lose the right to claim under Article 35.

- **Shared Responsibility:**

- Buyers may be complicit in non-conformity if they ignore obvious red flags, such as low prices suggesting unethical production methods.

Burden of Proof and Buyer's Responsibility

- **Seller's Defense:**

- To invoke Article 35(3), the seller must prove that the buyer knew or should have known about the non-conformity.

- **Buyer's Responsibility:**

- Buyers must document their efforts to ensure conformity, particularly in high-risk areas (e.g., sourcing from regions with **known sustainability issues**).
- Buyers should **address concerns** during contract negotiations if there are **suspicious** regarding sustainability standards.

Challenges in Proving Buyer's Knowledge

- **Difficulties** in proving whether the buyer knew or could not have been unaware:
 - Sellers must present evidence of the buyer's **awareness** (e.g., prior communications, audits, or public knowledge about the goods' origin).
 - **Complicated in cases** where the non-conformity relates to **invisible characteristics**, such as labor violations or environmental harm that are not immediately apparent.

THANK YOU!

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