

REMARKS CONCERNING THE IMPLEMENTATION OF THE CISG  
BY THE COURTS  
(THE SELLER'S PERFORMANCE AND ARTICLE 35)

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1. A GENERAL OVERVIEW. THE PERSPECTIVE FROM A ROMANISTIC  
BACKGROUND.

In browsing through the case law applying the Vienna Convention, a European observer, especially one trained in the civil law tradition, is due to focus her attention on the requirement of conformity of the goods delivered by the seller. This sort of instinctive attention is obviously connected with our past tradition and the rather innovative stance taken by the negotiators of the Convention (as well of the Uniform Law on the International Sale of Goods (ULIS) in 1964). The departure of the final text, Article 35 and those following, from the previous experience familiar to many codifications of the law of sale is so significant as to justify a certain apprehension of the commentators at the time when the Convention was approved and some anxiety in the readers of the case-law following the provisions coming into force. How can we state the general balance of our observations after a significant span of time?

Each of the observers may have been struck by different signs that have emerged in the practical and actual application of the statutory provisions. For my part, I must confess that from an Italian perspective, a specific point of difficulty or anxiety may be connected with the change of traditional views concerning the nature of the seller's liability. In order to clarify this proposition I simply remind you of the fact that our code follows the pattern of the French solution concerning the passing of property when a contract of sale is concluded. Therefore, the general rule is that as soon as the parties agree on the goods to be transferred and the price to be paid, the property passes to the buyer, as long as the goods are identified and cannot be mixed with similar goods.<sup>1</sup>

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1. Codice Civile [C.c.] arts. 1376, 1378 (Italy). The alternative solution, that followed by German civil law, would have made things easier from certain points of view as it provides that the contract will only create a duty, an obligation to transfer the property of the goods sold: therefore the delivery of goods

From this circumstance, Italian lawyers have drawn the conclusion that once the goods have been selected and separated from the larger group to which they belong, the property passes to the buyer and, from that moment, the only conceivable obligation for the seller is to deliver those goods, however defective they may be. Authors often insist that it's hard to justify an obligation for the seller of selecting different goods to be delivered or to perform a second delivery with conforming goods.<sup>2</sup> That would mean to substitute the performance of an obligation which does not exist; where would such an obligation come from? In addition, some authors ask how many times should the seller correct his delivery to bring the result up to the expectations of the buyer? How long would it take for professional traders to include in their written general conditions an exemption from such an obligation?<sup>3</sup>

Obviously, according to domestic law, the buyer is not quite deprived of all protection. He may avail himself of the guarantee provided by a default rule that grants him the right of complaining of the defects existing at the moment of the conclusion of the contract, within a short term of time (eight days from their discovery) and to start an action in court within the time limit of one year from the delivery.<sup>4</sup> The guarantee works strictly, that is to say it operates "objectively," apart from any allegation that the defect was due to any fault by the seller, but it is limited within a short period of time and subject to some conditions (the complaint about the defects must be notified immediately and damages may be recoverable unless the seller can provide evidence that he innocently ignored the defects).

Scholars have often described the mechanism of the guarantee by reference to a sort of collateral insurance. The seller cannot promise that the goods have certain qualities, as this is beyond his reach. He cannot change the reality of things, but he can promise to make good for a defect existing before the transfer of property occurred.<sup>5</sup> In substance, he may promise to act in a certain way if a definite event arises. He can take back the goods and give back the price or he can accept a smaller payment (a reduction of price) if the buyer wants to keep the goods notwithstanding their poor quality.

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conforming to the contract is simply an obligation following from the contract. Italy has not agreed to this pattern.

2. C.M. BIANCA, *LA VENDITA E LA PERMUTA* (1993); *see also* ANGELO LUMINOSO, *LA COMPRAVENDITA* (4th ed. 2004).

3. GINO GORLA, *LA COMPRAVENDITA E LA PERMUTA* 89-90 (1937).

4. C.C. art. 1490.

5. GORLA, *supra* note 3, at 89-90; Ernst Rabel, *Nature of Warranty of Quality*, 24 *TUL. L. REV.* 273, 278 n.16 (1950) ("warranty is the promise to make good for a statement").

What seems impossible (by traditional Italian legal standards) is to conceive a duty to deliver goods that are different from those that have already passed into the buyer's property. The Civil Code does order the seller to deliver, but it says that the "seller must deliver the good(s) in the condition in which it was at the moment of the sale."<sup>6</sup>

The only further duty the legislator sets on the seller is that he has to keep custody of the goods with care once they are sold. If a defect results from negligent behaviour that occurred during that custody (e.g. the goods have not been properly stored during the time running between the sale and the delivery), the seller will be liable, according to general provisions on the performance of obligations. The strictness of the domestic rules on guarantees in sales has caused a visible effort to limit their operation, by means of the well-known instrument of *aliud pro alio*.

Often lawyers have argued that the delivery of goods substantially different from those expected is comparable to a total defect of delivery, the latter being governed by the ordinary rules on performance (with a longer period of limitation for the action, no need to notify the seller immediately, damages as a general result or, but it is more doubtful, specific performance). The courts have been rather liberal in accepting the buyer's qualification, creating case law where it is sometimes really difficult to distinguish why a certain imperfection is classified as "defect" or *aliud*.

What is missing in Italian case-law and literature is the French solution of an *obligation de conformité*. The strict literal meaning of the rules written in the civil code is not overcome by any judicial construction implying a duty or obligation to deliver goods that are up to the expectation of the buyer. Once the goods are chosen, those are the ones to be delivered and if they fail to reach the standard fixed by Article 1490 of the Civil Code, the buyer has to act according to the guarantee of Roman origin (*actio redhibitoria*).

## 2. THE CISG RULES IN ITALIAN CONTEXT

Obviously everyone has realized that the CISG takes a different approach. The delivery of defective goods does not fulfill the performance; the seller may be in breach of contract and the buyer may have recourse to the remedies provided by Article 45 and those following. Unfortunately, some writers in Italy seem to experience a great deal of difficulty in connecting these international rules with the previous ones and therefore a fragmented picture

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6. C.c. art. 1477.

arises. Some scholars have been puzzled by the statement of an “obligation of conformity”; some have expressed concern about a strict liability of the seller in the period between the transfer of title and delivery. The remedies, including substitution or repair of the defective good, have also met some criticism.

Now, looking at the case-law reported in the data banks on the CISG, one of the striking features for us is how often the judges of various jurisdictions of European tradition have been willing to declare the autonomous nature of the obligation of conformity set out by Article 35 CISG. I have come across such declarations in Swiss decisions, a few of which had been reached in cases involving an Italian party.<sup>7</sup> Also, some Italian decisions have enforced Article 35, but without spending any real thought about the domestic classifications of the law of sale. No express statements about the specific nature of the liability of the seller have been formulated. The judge in one of the instances simply speaks of *inadempimento contrattuale* (non-performance of the contract) bypassing the long discussions in Italy that have seen authors classifying the liability under the Romanistic guarantees separately from a

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7. See CLOUT Case No. 219 [Tribunal Cantonal Valais, Switzerland, 28 Oct. 1997] (concerning the sale of a second hand Caterpillar bulldozer from an Italian seller to a Swiss buyer). “As to the buyer’s claim of damages for non-conformity, the Court held that the CISG has abandoned the notion of guarantee in some domestic laws, in favor of a new, common notion of non-conformity (Art. 35 CISG).” *Id.* In terms almost literally corresponding, see also CLOUT Case No. 256 [Tribunal Cantonal du Valais (Ile Cour Civile), Switzerland, 29 June 1998] (litigation concerning the reciprocal sale of winter sports equipment between an Italian company and a Swiss one). The Court held that the notion of warranty (*garantie*) to be found in the various domestic laws is abandoned by the Convention and replaced by a unitary notion of conformity, provided by Article 35 CISG. *Id.*

The UNCITRAL Digest does record this information. “Two courts have stated that the unitary notion of conformity defined in article 35 displaces the concepts of ‘warranty’ found in many domestic laws.” UNCITRAL Digest of Case Law on the United Nations Convention on the International Sale of Goods art. 35, U.N. Doc. A/CN.9/SER.C/DIGEST/CISG/35 (8 June 2004) [hereinafter Digest].

Further annotations by Anna Veneziano inform us that an arbitral award by the International Chamber of Commerce has expressed the same attitude denying the need to distinguish according to previous French tradition between non-conformity and *vices cachés*. Anna Veneziano, *Non-Conformity of Goods in International Sales: A Survey of Current Caselaw on CISG*, 13 INT’L BUS. L.J. 39, 41 n.6 (1997) (citing CLOUT Case No. 103 [Court of Arbitration of the International Chamber of Commerce, Case No. 6653, 26 Mar. 1993], published in JOURNAL DU DROIT INTERNATIONAL 1040 (1993)).

contractual liability.<sup>8</sup> The paradox is that the most worrying effect that the literature had announced is quite neglected at the practical level.

### 3. AND MORE GENERAL CONSIDERATIONS

If I may add another general consideration, while reading the UNCITRAL Digest I think one is bound to notice a certain parallelism with what happens so often in domestic practice. Many decisions are focused on *preliminary* issues, connected with Article 39, such as the timeliness of the notice by the buyer signifying that a non-conformity was discovered, or the specificity of the complaint, or the manner in which the complaint has been forwarded (by phone or by written form, to whom, whether the person in question was competent to receive the notice, whether any difference arises from the fact that an agent of the seller inspects the goods delivered, the consequence of the negotiations for a composition between the seller and the buyer etc.).<sup>9</sup> Reading U.S. case law, one is also struck by the number of decisions delivered on an instance of summary judgment, while in other countries we do not meet an equivalent situation. There may be specific procedural reasons for this difference that may be worth investigating.

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8. Tribunale di Busto Arsizio, Italy, 13 Dec. 2001, *available at* <http://www.unilex.info/case.cfm?pid=1&do=case&id=927&step=Abstract> (concerning the selling of an industrial equipment to process the packaging of bananas in Equador). Curiously the judge connects the requisite that the breach be fundamental to Article 35 rather than Article 49 CISG to reach the rescission of the contract; CLOUT Case No. 378 [Tribunale di Vigevano Italy, 12 July 2000], *available at* <http://cisgw3.law.pace.edu/cases/000712i3.html> (sale of rubber to be processed in order to produce shoe's soles). The court does not spend many considerations on the nature of the liability, identified as "contractual"; the final decision insists on the period of time for the seller to notify the lack of conformity, considered in this case to have been "unreasonable."

9. Camilla Baasch Andersen, *Reasonable Time in Article 39(1) of the CISG—Is Article 39(1) Truly a Uniform Provision?*, in *REVIEW OF THE CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS (CISG) 1998*, at 63-176 (Pace Int'l Law Review ed., 1999), *available at* <http://www.cisg.law.pace.edu/cisg/biblio/andersen.html> ("Art. 39 judgements represent more than 20% of reported practice: in the Pace CISG database of 453 reported judgements . . . , a total of 118 cases concern Art. 39, i.e., 26%"). See also Albert Kritzer, Editorial Note to CLOUT Case No. 230 [Oberlandesgericht Karlsruhe, Germany, 25 June 1997], *available at* <http://cisgw3.law.pace.edu/cases/970625g1.html> ("issues associated with examination of the goods and notice of lack of conformity . . . have been litigated in almost 200 cases—over 20% of all CISG cases thus far reported"). Peter Schlechtriem, *Uniform Sales Law in the Decisions of the Bundesgerichtshof*, in *50 YEARS OF THE BUNDESGERICHTSHOF. A CELEBRATION ANTHOLOGY FROM THE ACADEMIC COMMUNITY* (Todd J. Fox trans., 2001), *available at* <http://www.cisg.law.pace.edu/cisg/biblio/schlechtriem3.html>. "The abundance of cases in which German courts have had to decide on questions of timely and sufficiently substantiated notice on the part of German buyers shows, however, that German merchants could have difficulties with these provisions as well." *Id.* § IV(2).

A relatively smaller number of reported cases seem to concern the identification of the lack of conformity.<sup>10</sup> The probable reason of this asymmetry of case law is the same as in national practice where one finds plenty of decisions on procedural questions (whether the defendant has been correctly informed of the action issued by the plaintiff, whether the court has jurisdiction on the case, whether the appeal is admissible etc.). Courts tend to look with a sympathetic eye at those issues that may avoid long investigations and close the case rapidly on a black and white question (either you have served the summon in time or not, either you have complained promptly or not, either you have started your case within the time limit or not, etc.).<sup>11</sup>

This of course may also explain a tendency to transform a flexible indication into a stiff definition that will be easier to verify. Much has already been written on the predilection of courts for definite time-limits and the excess of rigidity that some courts have shown in appreciating the “reasonable time” (Article 39) granted to the buyer in order to inform the seller of the defects that he has found in the goods delivered.<sup>12</sup>

Two considerations follow from these observations. First, everyone is interested in uniformity in the application of the Convention. The goal of the Convention itself is to reach a higher level of coherence between the laws of different states. But it is true that single divergences between decisions delivered by judges belonging to various legal cultures are not so worrying as long as they do not aggregate into homogeneous trends firmly established in one country rather than in another. The real danger of “forum shopping” arises when a specific interpretative attitude takes root in one jurisdiction. If

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10. Veneziano, *supra* note 7, at 43. “Case law interpreting Article 35 CISG is scarcer than one would think. Many decisions leave in fact open the question of the existence of a defect and are solved on the basis of lack of examination and/or notice by the buyer, or lack of evidence regarding those requirements.” *Id.* SONJA KRUISINGA, (NON) CONFORMITY IN THE 1980 UN CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS: A UNIFORM CONCEPT? 299 (2004).

11. See Barkley Clark, *The First Line of Defense in Warranty Suits: Failure to Give Notice of Breach*, 15 UCC L.J. 105, 116 (1982) (I find the title of this article concerning the UCC rather illuminating).

12. Schlechtriem, *supra* note 9 (commenting on CLOUT Case No. 319 [Bundesgerichtshof, Germany, 3 Nov. 1999] where the “regular” time period is set at one month). German courts are seen as being rather strict on this requirement while American, Dutch and French courts have a more relaxed attitude. See also Danielle Alexis Thompson, *Buyer Beware: German Interpretation of the CISG Has Led to Results Unfavourable to Buyers*, 19 J.L. & COM. 245 (2000). It is not a surprise that the French Cour de Cassation tends to rely on the discretion of lower courts. This is quite coherent with a general tendency of the highest court not to interfere with facts appreciation by tribunals (as far as contract interpretation is concerned it is well known that the Cassation will not interfere unless the lower court has actually reached the point of a *dénaturation des clauses claires et précises*).

the litigant can reasonably expect a favourable attitude towards his demand he will struggle to bring the case in front of a court agreeing with this trend. But that effort by the plaintiff implies a certainty or a reasonable expectation. It is not justified by a single or a few favourable decisions in one state.

Second, we are concentrating our interest on the uniformity/harmonization of substantive law, on the application of a convention providing material rules on the sale of goods, but we cannot forget that a uniform application will never be reached as long as procedural rules are left completely un-harmonized, non-coherent, at divergent levels of efficiency.

On various occasions we have seen courts dealing with the problem of the burden of proof and trying to attract also this profile within the range of the Convention, a very reasonable attitude to avoid contradictions.<sup>13</sup> But many other profiles cannot be absorbed within the Convention and they may cause differences in its application that may be rather relevant.<sup>14</sup> Somehow the

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13. CLOUT Case No. 378, *supra* note 8 (the plaintiff has the burden of proving that the goods are of bad quality, and that they don't last as long as it would normally be expected; principle mentioned: *ei incumbit probatio qui dicit, non qui negat*); Anna Veneziano, *Mancanza di conformità delle merci ed onere della prova nella vendita internazionale: un esempio di interpretazione autonoma del diritto uniforme alla luce dei precedenti stranieri*, DIRITTO DEL COMMERCIO INTERNAZIONALE 509 n.405 (2001); see also Tribunale di Rimini, Italy, 26 Nov. 2002, published in GIURISPRUDENZA ITALIANA 896 (2000), available at <http://cisgw3.law.pace.edu/cases/021126i3.html>; CLOUT Case No. 251 [Handelsgericht Zürich, Switzerland, 30 Nov. 1998], available at <http://cisgw3.law.pace.edu/cases/981130s1.html>.

If the buyer has accepted the goods without complaints, it is up to the buyer to bring evidence of the existence of a defect, of the timely examination of the goods according to Art. 38(1) CISG and of the timely and sufficiently precise notice of lack of conformity given to the seller according to Art. 39(1) CISG.

*Id.*

14. A local rule in Italy (C.C. art. 1513) provides that the party unsatisfied by the quality of the goods may, according to the code of civil procedure, ask the judge to put the goods under judicial custody in order to have an official control of their qualities. The notification of such a judicial order is considered sufficient to inform the seller of the complaint of the buyer. Could such a procedure be sufficient to comply with Article 38 CISG? Probably not, even though the question could be said to concern procedural aspects excluded from the scope of CISG. Franco Frattini, *Vendita internazionale di beni mobili, Art. 39, in NUOVE LEGGI CIVILI COMMENTATE* 179 (1988). As far as the appreciation of proofs is concerned, one is due to investigate on the relevance of official testing carried out by local institutions. Courts of different countries may have very different opinions on the weight of an official foreign testing presented during the discussion of a case where the goods are no longer available to be checked by an expert selected by the court or by the opposite party. See, e.g., *Chicago Prime Packers, Inc. v. Northam Food Trading Co.*, 320 F. Supp. 2d 702 (N.D. Ill. 2004), available at <http://cisgw3.law.pace.edu/cases/040521u1.html>; Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, Russian Federation, 22 Jan. 1997, available at <http://cisgw3.law.pace.edu/cases/970122r1.html> (butter containing a percentage of lead according to Russian testing but not according to German officials). The Digest also refers to the problem of the expert opinion in trial (citing CLOUT Case No. 50 [Landgericht Baden-Baden, Germany, 14 Aug. 1991]) and different legal traditions in various States (for instance in Finland where a trade usage may require the other party's expert to be present as well). Digest, *supra* note

consideration that I am suggesting is that by reading decisions in the vacuum, apart from the context where they are given, we may be brought to stress exceedingly single material divergences, and to underestimate procedural and remedial aspects that can really make a difference in results sought by litigants.

Finally, at the same level of introductory considerations, I feel one should also add a comment on the question of how far the judges of one country look at foreign case-law concerning the Convention. I have the impression that some critical comments may have been rather strict on the limited impact that foreign interpretations have had on judges.<sup>15</sup> I am referring to a number of commentaries that have pointed out a certain reluctance of U.S. courts to look at non-American decisions. Obviously one is thinking of an unfortunate remark in *Delchi Carrier SpA v. Rotorex Corp.*, 71 F.3d 1024 (2d Cir. 1995), where the judge writing the opinion first mentions Article 7 CISG, then adding “[c]aselaw interpreting analogous provisions of Article 2 of the Uniform Commercial Code (‘UCC’), may also inform a court where the language of the relevant CISG provisions tracks that of the UCC.”<sup>16</sup> “However, UCC case law ‘is not per se applicable.’”<sup>17</sup>

The expression was unfortunate, but it could be compared with a Swiss case where the judge argues similarly in relation to Swiss case law, without much reaction from commentators.<sup>18</sup> The point of interest is that in both situations the judge does not take it for granted that he may read the

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7, at 10 n.47.

15. See, e.g., John E. Murray, Jr., *The Neglect of CISG: A Workable Solution*, 17 J.L. & COM. 365 (1998); Jeffrey R. Hartwig, *Schmitz-Werke & Co. v. Rockland Industries Inc. and the United Nations Convention on Contracts for the International Sale of Goods (CISG): Diffidence and Developing International Legal Norms*, 22 J.L. & COM. 77 (2003), available at <http://www.cisg.law.pace.edu/cisg/biblio/hartwig.html>; Larry A. DiMatteo et al., *The Interpretive Turn in International Sales Law: An Analysis of Fifteen Years of CISG Jurisprudence*, 24 N.W. J. INT'L. L. & BUS. 299, 397-98, 437-38 (2004) (on the U.S. Circuit Court decision in *Schmitz-Werke GmbH & Co. v. Rockland Industries, Inc.*, 37 Fed. Appx. 687 (4th Cir. 2002)).

16. *Delchi*, 71 F.3d at 1028.

17. *Id.* at 1028 (quoting *Orbisphere Corp. v. United States*, 726 F. Supp. 1344, 1355 (Ct. Int'l Trade 1989)).

18. CLOUT Case No. 56 [Pretore della giurisdizione di Locarno-Campagna, Switzerland, 27 Apr. 1992], available at <http://cisgw3.law.pace.edu/cases/920427s1.html>. “As far as the notification of defects is concerned, the Vienna convention provides almost the same principles as Swiss law so that a look at our literature and case-law is relevant.” The standing of the two courts is obviously not the same as a U.S. decision delivered by a United States Court of Appeals, a circumstance that certainly explains the different effect that the two sentences have had in the comments written on the subject. It goes without saying that the rule of *stare decisis* makes any decision by a U.S. Court of Appeals much more visible and possibly worrying.

Convention through his ordinary glasses but takes some precaution comparing the structure of the international rule with the local principles. At least he pays lip service to the idea that the Convention is not quite the same thing as a national legislative act. As a matter of fact, I have the impression that later decisions have correctly understood the reference to local case law. Some recent opinions in the U.S. have mentioned a large number of German, Austrian, and Italian precedents<sup>19</sup> and references to the *Delchi* case, I should say, were rather meant to deny that local case-law may be consulted “per se” than to apply it to issues deriving from the CISG.<sup>20</sup> What might also be worth mentioning is the number of cases where the parties seem to argue in relation to domestic law, somehow ignoring all together the existence of the CISG.<sup>21</sup>

As far as Italian cases reported in databases are concerned, I must say I was struck by the amount of references to foreign cases included in the opinions written by our judges, especially considering the relevant number of quotations regarding texts written in German, which is certainly not the most practiced foreign language in Italy. I see the importance of having accessible databases where abstracts of the decisions are translated into English. Of course one may also be concerned by the accuracy of the reporting and one is

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19. *Chi. Prime Packers, Inc. v. Northam Food Trading Co.*, 320 F. Supp. 2d at 712 n.12, 714. The court cited the decision by the Tribunale di Cuneo, Italy, 31 Jan. 1996, a comment by Alessandro Rizzieri (Alessandro Rizzieri, *Decision of the Tribunal of Vigevano, Italy, July 12, 2000*, 20 J.L. & COM. 209, 217 (2001)), and refers to UNILEX as a source of information.

20. *Northam*, 320 F. Supp. 2d at 709 n.11 (“The Convention directs that its interpretation be informed by its ‘international character and . . . the need to promote uniformity in its application and the observance of good faith in international trade.’”); *Delchi*, 71 F.3d at 1028 (referencing CISG art. 7(1)). “Case law interpreting analogous provisions of Article 2 of the Uniform Commercial Code (‘UCC’) may also inform the court where the language of the relevant CISG provisions tracks that of the UCC.” *Id.* “However, UCC caselaw ‘is not *per se* applicable.’” *Id.* (quoting *Orbisphere Corp. v. United States*, 726 F. Supp. 1344, 1355 (Ct. Int’l Trade 1989)). Even the decision in *Medical Marketing Int’l, Inc. v. Internazionale Medico Scientifica, S.r.l.*, No. 99-0380 Section “K” (1), 1999 U.S. Dist. LEXIS 7380, \*1 (E.D.La. 1999) (CLOUT Case No. 418 [U.S. District Court, 17 May 1999]), available at <http://cisgw3.law.pace.edu/cases/990517u1.html>, did not disregard foreign decisions. The American district court presupposed the applicability of the importing country’s (U.S.) safety regulations by reference to Bundersgerichtshofs’ decision of 1995 and to the third exception described there (“if due to ‘special circumstances,’ such as the existence of a seller’s branch office in the buyer’s state, the seller knew or should have known about the regulations at issue”). *Id.* at \*6.

21. *See, e.g., Northam*, 320 F. Supp. 2d at 702. The invoice intimated that the buyer must complain for defects immediately, but the document was not signed by the parties; yet the seller discusses on its basis. The court has to state that the Convention comes into play and prevails. It’s hard to say how far lawyers in various countries are actually unaware that the Convention governs or whether they pretend to ignore it, when it is not favourable to their clients. CLOUT Case No. 378, *supra* note 8. The judge has to state that *jura novit curia* and that even though the parties have discussed their case referring only to Italian law, the applicable provisions are those of the CISG.

due to sympathize with the disclaimer that UNCITRAL has attached to this Digest advising people to read the full account of the decision before quoting from it.

If I may introduce a practical suggestion, it is much easier for readers to remember quoted cases when parties' names are included. Citing simply the authority delivering the decision makes it much harder to file the record in your mind. For instance, German decisions, usually omitting the parties names, stick to the readers mind if they are connected with very characteristic facts (e.g. the "mussels case"), while a name, such as the *MCC-Marble* case in the U.S., may be easier to recollect or recognize while reading. Some issues concerning privacy may of course interfere with the publication of parties' names.

#### 4. NON-CONFORMITY AND *ALIUD PRO ALIO*

If we revert to comments regarding more strictly and technically the application of the Convention I should mention another feature of the case-law that seems worthwhile to notice, the ruling out of the *aliud pro alio* pleading by the buyer.<sup>22</sup> This claim, as I said, has been popular in Italy (as in some other jurisdictions, such as Germany) in order to escape the strict requirements of *actio redhibitoria* (or *quanti minoris*). Immediately after the signing of the Vienna Convention, a number of commentators in Italy were still considering that the delivery of something entirely different from what had been agreed might be considered as "non-delivery" and that it may give way to an immediate right to avoid the contract.<sup>23</sup> Time has shown that Article 35 can be interpreted as including such an event even if, contrary to the previous provision of ULIS, the CISG does not explicitly mention the delivery of a

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22. CLOUT Case No. 422 [Oberster Gerichtshof, Austria, 29 June 1999] ("[D]elivery of goods of a different kind (*aliud*) does not constitute non-delivery but amounts to delivery of non-conforming goods" (CISG art. 35)); see also CLOUT Case No. 425 [Oberster Gerichtshof, Austria, 21 Mar. 2000]; CLOUT Case No. 171 [Bundesgerichtshof, Germany, 3 Apr. 1996], available at <http://cisgw3.law.pace.edu/cases/960403g1.html>.

23. C.M. Bianca, *Art. 35*, in COMMENTARY ON THE INTERNATIONAL SALES LAW, THE 1980 VIENNA SALES CONVENTION 268, 273-74 (C.M. Bianca & M. J. Bonell eds., 1987). Bianca did record the fact that the convention avoids "the distinction between delivery of defective goods and delivery of goods of a different kind," but he also mentioned the example by the Secretariat (the delivery of potatoes instead of corn), where no delivery of the goods can be assessed. *Id.* at 273. These statements are contrary to what has been written by many commentators, including Schlechtriem quoted *infra* note 24.

different thing as a case of lack of conformity.<sup>24</sup> The UNCITRAL Digest does not specifically insist on this point as it may be considered quite obvious.<sup>25</sup>

In Italy we are especially alert about this point because it keeps coming into discussion and resurrecting every now and then. As an instance, I should mention that now some writers are arguing, once more, that the *aliud pro alio* claim may represent a specific case not covered by the ordinary rules established in the 99/44/European Directive concerning certain aspects of guarantees in sale of consumer goods.<sup>26</sup> I am not going to deal extensively with this point but I am sure it will be a sensitive issue in the future as some scholars argue that the Directive allows certain differences between the local disciplines of the various states in order to promote the interest of the consumers. Where the local law is more protective of the consumers' interest, according to this interpretation, it should be allowed to survive to the uniformity process. Personally, I have doubts that the Court of Justice will allow a great margin of difference. The experience with previous Directives, such as the producer's liability discipline, does not justify the idea that the Commission and the Court are willing to put up with differences that might result in obstacles to the internal market.

##### 5. CONFORMITY TO THE CONTRACT AND PAROL EVIDENCE RULE: THE INTERPLAY BETWEEN GENERAL PRINCIPLES AND SPECIFIC RULES

Finally I should mention a source of perplexity that actually borders on other fields of competence, possibly in connection with Article 8 CISG, the *parol evidence rule* issue. In searching the case law on conformity of the goods I have repeatedly come across the question of how much can negotiations previous to the stipulation of the contract concur to identify the

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24. Peter Schlechtriem, *Conformity of the Goods and the Absence of Third Party Claims (Articles 35-44)*, in UNIFORM SALES LAW—THE UN-CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS 66 (1986), available at <http://www.cisg.law.pace.edu/cisg/biblio/schlechtriem-35.html> (“[I]t is clear that the case of delivery of entirely different goods should still be considered as a deviation from the ‘description’ of the goods in the contract.”).

25. “The Convention rejects terminology relating to a specific legal system and does not adopt . . . the distinction drawn in domestic laws between . . . defects and *aliud pro alio*. . .” Veneziano, *supra* note 7, at 41.

26. C.M. Bianca, *Consegna di aliud pro alio e decadenza dai rimedi per omessa denuncia nella direttiva 1999/44/CE.*, in CONTRATTO E IMPRESA/EUROPA 16 (2001); Enrico Gabrielli, *Aliud pro alio e difetto di conformità nella vendita di beni di consumo*, in RIV. DIR. PRIV. 657 (2003); Council Directive 1999/44, Certain Aspects of the Sale of Consumer Goods and Associated Guarantees, 1999 O.J. (L 171) 12 (EC), available at [http://www.icomia.com/library/library.asp?Page=2&view=Category&LC\\_ID=18&FT\\_ID=&CT\\_ID=&sort=#](http://www.icomia.com/library/library.asp?Page=2&view=Category&LC_ID=18&FT_ID=&CT_ID=&sort=#).

expected qualities of the goods. Article 35 requires the goods to conform to the contract. One has to decide whether oral exchanges between the parties, before the contract was written, have some influence on what is legitimate for the buyer to expect.

The Convention specifically considers that the goods must be “fit for any particular purpose expressly or impliedly made known to the seller at the time of the conclusion of the contract.”<sup>27</sup> Is the buyer completely free to prove what has been said during the negotiations?

Some U.S. decisions seem to have dealt rather superficially with this problem, and in one instance the court may have qualified the contract differently from a sale to avoid the application of Article 8 CISG.<sup>28</sup> Elsewhere, American judges have argued that they ought to take an “independent approach,” a more liberal attitude towards the weight that such circumstances could have on the meaning of the contract.<sup>29</sup>

The question is rather controversial because in civil law jurisdictions as well the legislator draws some restrictions to admissible evidence where the contract has been written down. In France, the problem may have special features where merchants are concerned because of the interaction between Article 1341 of French Civil Code<sup>30</sup> and Article 109 of the Code de Commerce. In Italy Article 2722 of the Civil Code limits evidence by witnesses of oral agreements where the contract has been written down.<sup>31</sup> The

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27. CISG art. 35(2)(b).

28. I am referring to the decision delivered in *Beijing Metals & Minerals Import/Export Corp. v. American Bus. Center, Inc.*, 993 F.2d 1178 (5th Cir. 1993). The court qualified the contract independently and excluded the application of the CISG (even if commentators have often expressed reservations on the point of view adopted by the court). *Id.* See Hartwig, *supra* note 15, at 77; Rod N. Andreason, *MCC-Marble Ceramic Center: The Parol Evidence Rule and Other Domestic Law Under the Convention on Contracts for the International Sale of Goods*, 1999 BYU L. REV. 351; Harry M. Flechtner, *Recent Developments: CISG: More U.S. Decisions on the U.N. Sales Convention: Scope, Parol Evidence, “Validity” and Reduction of Price Under Article 50*, 14 J.L. & COM. 153 (1995); Harry M. Flechtner, *The U.N. Sales Convention (CISG) and MCC-Marble Ceramic Center Inc. v. Ceramica Nuova D’Agostino, S.P.A.: The Eleventh Circuit Weighs in on Interpretation, Subjective Intent, Procedural Limits to the Convention’s Scope, and the Parol Evidence Rule*, 18 J.L. & COM. 259 (1999); Bruno Zeller, *The Parol Evidence Rule and the CISG—A Comparative Analysis*, 36 COMP. & INT’L L.J. S. AFR. (2003), available at <http://www.cisg.law.pace.edu/cisg/biblio/zeller6.html>.

29. *MCC-Marble Ceramic Center, Inc. v. Ceramica Nuova D’Agostino, S.P.A.*, 144 F.3d 1384 (11th Cir. 1998); see also *Mitchell Aircraft Spares, Inc. v. European Aircraft Service AB*, 23 F. Supp. 2d 915 (N.D. Ill. 1998) (the question to be considered was whether restrictions on evidence concerning negotiations were applicable when long exchanges of messages had taken place before the issuing of a purchase order by the buyer).

30. C. CIV. art. 1341 (*il n’est reçu aucune preuve par témoins contre et outre le contenu aux actes, ni sur ce qui serait allégué avoir été dit avant, lors ou depuis les actes*).

31. C.C. art. 2722 contains an exclusionary rule for oral testimony when it concerns *patti aggiunti*

solution for the courts obviously depends on the rather subtle distinction of a proof meant to contradict a clause (forbidden) or to clarify or interpret it (allowed). The line is far from clear.

My observation on this point, that I touch on only incidentally, is that American judges, struggling to comply with Article 8 CISG and by admitting oral evidence contrary to the traditional limits of common law, may ironically find that they have gone further than their civil law colleagues would have.<sup>32</sup>

Somehow, the safest strategy may work through reliance on general principles such as the prohibition of *venire contra factum proprium*. Both in common law (by way of the estoppel doctrine) and in civil law (by the “bona fides” clause), it may be possible to react to the unfair conduct of one of the parties who pretends to enforce the literary meaning of a contract, forgetting representations or assurances given in the preliminary stage of the contract.

If I understand correctly some of the common law exceptions to the parol evidence rule, including *rectification* and *waiver*, they seem to have roots in the estoppel doctrine.<sup>33</sup> In some instances, common law judges may find it reasonable to justify their derogation from evidentiary restrictions invoking this traditional tool. On a parallel line, civil law judges may have recourse to the *bona fides* general clause which often lies in the background of the judicial reasoning.

The uniformity process, at the judicial level, may work through similar devices that are traditionally classified under different titles, but actually work in an analogous way. Both estoppel and *bona fides* may be said to belong to principles underlying the Convention and available to interpreters by the mention of Article 7.

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*o contrari al contenuto di un documento, per i quali si allegli che la stipulazione è stata anteriore o contemporanea.*

32. I am referring to the special facts of *MCC-Marble*, 144 F.3d at 1385. The buyer chose the goods (ceramic tiles) at a commercial fair in Italy, discussed the contract orally and then signed a contract written in Italian (which he did not understand). He was encouraged by the employee of the seller who, apparently, affirmed that the signing would not be binding for all the clauses of the standard contract. When the buyer complained of the defect, the seller opposed, arguing that claims should have been notified according to the specification written in the standard clauses of the contract (time limit to notify: within 10 days from receipt). The buyer asked to introduce oral witnesses to confirm that he was originally told that the written clauses would not be binding. The Court allowed oral testimony by the employee (who had assisted at the signing of the contract but who, in the meantime, had been dismissed).

33. Some hints at a reception of the principle of estoppel in the Convention are seen in CISG Article 16(2)(b) and Article 29(2). See Schlechtriem, *supra* note 9 (speaking about the weight that negotiations about claims of defects may have on the term to notify the complaints by Article 39).

I should also mention briefly the hypothetical case discussed at the Pennsylvania workshop held in 1998.<sup>34</sup> It was drafted on the experience of the *MCC-Marble* case. The authors were supposing a very likely situation. During negotiations, a buyer mentions orally the need for a certain packaging of the goods. The seller drafts the written document in a language inaccessible to the buyer and forgives (or omits) the clause concerning the packaging. The buyer signs the contract without noticing the omission. One possible interpretation offered by lawyers discussing the case was that of the English rectification and, if I understand it correctly, of *reformation* in the U.S.<sup>35</sup> Some commentators have mentioned the idea of a mistake incurred by the buyer because of the language difficulty, but it might be hard to reach a consensus on how far rules on mistake can interact with specific international sales rules.<sup>36</sup> Should we not look at this instance as a case where one of the parties is trying to contradict himself? As a *venire contra factum proprium*? The evocation of a general principle may reach the same results in a less controversial way.

## 6. PUBLIC POLICY REQUIREMENTS IN A NATIONAL SYSTEM

Finally I may connect the last consideration to the problem concerning the fact that local public prescriptions may require some qualities or precautions in the goods if they are to be resold or manufactured in the state of the buyer.

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34. Harry M. Flechtner, *Transcript of a Workshop on the Sales Convention: Leading CISG Scholars Discuss Contract Formation, Validity, Excuse for Hardship, Avoidance, Nachfrist, Contract Interpretation, Parol Evidence, Analogical Application, and Much More*, 18 J.L. & COM. 191, 238 (1999) (specifically a hypothetical case drawn by Professor Fletchner and attorney Walter in which the drafters were supposing a case where the buyer had orally mentioned the need for the goods to be packaged in recyclable paper while the seller had later inserted—in the written version of the contract—a standard form term saying that the goods would be enveloped in the usual manner in the trade).

35. *Id.* at 245-46.

36. Veneziano, *supra* note 7 (citing CLOUT Case No. 47 [Landgericht Aachen, Germany, 14 May 1993], available at <http://cisgw3.law.pace.edu/cases/930514g1.html> (a German decision has ruled out domestic rules on mistake when the CISG is concerned)).

In the 1998 discussion, according to one of the scholars (Professor Kazuaki Sono of Tezukayana University, Japan) an underlying principle is also detectable in Article 42(1)(a) ([W]here it is said that the “seller must deliver goods free from any right or claim of a third party” . . . “under the law of the State where the goods are to be resold or otherwise used.”). Flechtner, *supra* note 34, at 243-44. According to Professor Kazuaki Sono “[a]rticle 42 deals with industrial property or intellectual property, which is not what is involved here, but this principle could be applied by analogy.” *Id.* at 244. The seller should consider the buyer’s needs (contrary to some other case law). The prevailing opinion seems to be contrary to any analogical application of Article 42. See especially C.M. Bianca, *La nuova Convenzione di Vienna sul contratto di vendita internazionale di beni mobili*, in LE NUOVE LEGGI CIVILI COMMENTATE 151 (C.M. Bianca ed., 1989).

The question is whether the seller should bear the liability of the conformity of goods to such requirements or if this liability should arise only if the buyer has actually pointed out to the seller that the goods had to comply with these needs.

The issue has emerged several times in case law, receiving different answers that may be reconciled through the distinction as to whether the parties have had or have not had previous dealings. Here, too, one can justify different results by reference to general principles, such as interpretation in light of prior dealings, trade usages, etc.

As it is well known, a German case decided by the Bundesgerichtshof in 1995 has stated that the seller is not generally required (if no express agreement has been reached on the point) to provide goods that are in conformity with specific requirements of the local market. Mussels containing a percentage of cadmium higher than the level recommended by German health protection laws (for marketing in Germany) are not lacking in conformity and the buyer may not complain under Article 35 and those following<sup>37</sup> since he did not specify that the goods would be resold in Germany (a different approach would be too harsh in imposing such a duty on the seller).<sup>38</sup> Elsewhere judges deciding similar cases have reached different conclusions, so that cheese not wrapped conforming to French law was considered as not conforming.

The *ratio* of the different conclusions reached by the courts may be connected to the fact that in the French case the seller knew (or ought to have known) that the goods were to be sold in France and should have considered

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37. CLOUT Case No. 123 [Bundesgerichtshof, Germany, 8 March 1995]. The court found that the seller had not impliedly agreed to comply with recommended (but not legally mandatory) domestic standards for cadmium in shellfish existing in the buyer's country (for the court the mere fact the seller was to deliver the shellfish to a storage facility located in the buyer's country did not constitute an implied agreement under Article 35(1) to meet the standards for resale in the buyer's country or to comply with public law provisions of the buyer's country governing resale). It may be of some interest to notice that the sale of New Zealand Seafood was carried by a Swiss seller to a German buyer. The connection of seller and buyer with the sea could not have been more remote (traders are not anymore in close connection with the goods they deal with).

38. See Schlechtriem, *supra* note 9, § IV(1) (commenting on the Bundesgerichtshof decision): In the Court's reasoning, public law regulations in the importing country are only important when they correspond to those of the exporting country, or when the buyer refers the seller to them . . . . [But] the just solution for these cases, where no clear party agreement can be discerned, should be developed from Art. 35(2)(b) CISG. Decisive is the particular purpose for the goods; thus, first of all whether the goods are to be used or resold in the importing country or whether they are to be further exported to a third country. If the seller knows where the goods are intended to be used, then he will usually be expected to have taken the factors that influence the possibility of their use in that country into consideration.

French legal requirements. The difference may also depend on the existing relations between the parties. If the parties know each other from previous dealings, Article 35(d) may be taken to mean “usual in the place where the goods are to be resold.”<sup>39</sup> In this instance one can, once more, think in terms of general principles and reflect on the *common law* experience with *implied terms*. An implication traditionally can depend on what is necessary to give business efficacy to a contract (terms *implied in fact*) or it may depend on *custom* (including in this context previous dealings or practices established between the parties). If we look at the cases decided up to now, we can ascribe decisions where the judges have considered that the local requirements had to be met to two sets of reasons. Either to the need that the goods be saleable (the defect may have prevented the sale not only in the state where they had been delivered, but elsewhere too)<sup>40</sup> or to the circumstance that the parties knew each other from previous exchanges and the seller was presumed to know that the buyer would market the goods where certain specifications in themselves or in their packaging were necessary.<sup>41</sup>

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39. Veneziano, *supra* note 7, at 47 (referring to CLOUT Case No. 202 [Cour d’appel Grenoble, France, 13 Sept. 1995]). See also Digest, *supra* note 7, art. 35 n.25 (citing Landgericht Ellwangen, Germany, 21 Aug. 1995).

The court, citing article 35(1), found that pepper products containing ethylene oxide at levels exceeding that permitted by German food safety laws did not conform to the contract; it therefore ruled in favour of the buyer, who had argued (presumably on the basis of article 35(2)(a)) that the pepper products “were not fit for the purposes for which the goods would ordinarily be used and not fit to be sold in Germany.”

*Id.* at n.25. According to the Digest, the *rationale* may be connected with the factual background. “[T]he seller had a long-standing business relationship with the German buyer; the seller regularly exported into Germany; and in a previous contract with the buyer the seller had agreed to special procedures for ensuring compliance with German food safety laws.” *Id.*

40. The relevant provision would be CISG Article 35. “Goods will not conform to the contract unless they (a) are fit for the purposes for which goods of the same description would ordinarily be used.” CISG art. 35(2)(a).

41. In this interpretation of what the buyer expected from the contract the reader may resort to Article 8(3). “In determining the intent of a party or the understanding a reasonable person would have had, due consideration is to be given to all relevant circumstances of the case including the negotiations, any practices which the parties have established between themselves, usages and any subsequent conduct of the parties.” CISG art. 8(3).

I found a hint at the same reasoning by Franco Ferrari. Franco Ferrari, *Divergences in the Application of the CISG’s Rules on Non-Conformity of Goods*, 68 RABELS ZEITSCHRIFT FUER AUSLANDISCHES UND INTERNATIONALES PRIVATRECHT 473 (2004). The author suggests that the relevant provision may be Article 9 concerning the role of usages (“The parties are bound by any usages to which they have agreed and by any practices which they have established between themselves”). *Id.* at 477. The provisions of Articles 8 and 9 may have an overlapping effect. I would rather think of Article 8 as the proper rule to insert an implied term in the contract stipulated by the parties.

In this context, where one is lead to think in terms of “implied warranties” or “implied clauses,” a specific role may be played by uniformity instruments of regional scope. For instance, European directives or regulations setting certain technical standards for some trade fields will be relevant to assess what terms may be implied in sales taking place within that commercial area. But one can also wonder what will be the consequence, at the global level, of a case law that will soon be developing in Europe in the application of the 99/44 European Directive, a legal instrument that on certain subjects is more specific or detailed than its model, the CISG Convention.<sup>42</sup> We might soon see an interpretative trend grown in the shade of the daughter-legislation influence the reading of its source or matrix. Obviously the analogy may be limited by the fact that the European Directive is aimed at relations between merchants and consumers, but it is difficult to say how far interpretation trends grown in one area may affect a nearby field.

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42. Council Directive 1999/44, *supra* note 26. The European directive explicitly states the fact that advertisements published by the seller (or the producer, or his agent) may cause a legitimate expectation in the buyer that the goods provided will have certain qualities. *Id.* at art. 2(d). The directive mentions also the fact that minor defects will not be relevant in order to rescind the contract. *Id.* at art. 3(6). The right of redress of the final seller against the producer or a previous intermediate seller is stated at art. 4.