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1 Introduction

Before addressing the issue of this thesis, it should be explained why ethical defects are important to international trade and contract law.

Not that many years ago, business and ethics did not go hand-in-hand, they were seen as two opposites and were not combined\(^1\). Milton Friedman – winner of the Nobel Memorial Prize in Economics – is famous for stating that “social conscience” has nothing to do with business, and businesses should focus on generating profits for the shareholders\(^2\). It can be said that business has been caught up with ethics and has overtaken law\(^3\). When a customer buys a pair of branded shoes, it is of course important that the shoes are of good physical quality. However, another essential factor is the feeling these branded shoes give you. Nike is often referred to as a lifestyle brand. Nike does not only sell sneakers, socks and shirts – Nike sells a feeling and a lifestyle\(^4\). Nike is not the only company which sells feelings. Basically every industry loads their brand with feelings and emotions. It is seen in the cigarette industry, in the sale of cars, food and fashion\(^5\). It has become frequent in the fashion industry that pop stars and actors design their own perfume or line of clothing\(^6\). The reason for this is, again, to sell a lifestyle and an image. The famous pop star Christina Aguilera sells her own perfume called “Royal Desire” and uses the catchphrase “Feel like a Queen”. Britney Spears has her own lingerie line. Her name is associated with certain feelings and the aim here is obviously to sell more than generic lingerie or a perfume, the aim is to generate a feeling in the customer when he or she buys and wears the lingerie.

The commercial reasoning is that a standard brand, with no feeling to it, are easier exposed to competition and profit margins will go down\(^7\). Companies will have better possibilities for large profits if it succeeds in linking positive feelings with their product and the consumers wish to be associated with

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1 Professor in law Christina Ramberg, SCC Conference, 15 February 2013
3 Professor in law Christina Ramberg, SCC Conference, 15 February 2013
5 *Emotional Non-Conformity in the International Sale of Goods, Particularly in Relation to CSR-Policies and Codes of Conduct* by Professor Christina Ramberg
6 Britney Spears, Midnight Fantasy (perfume). Lady Gaga, Fame (perfume). Pharrell Williams, Billionaire Boys Club (clothing)
7 *Emotional Non-Conformity in the International Sale of Goods, Particularly in Relation to CSR-Policies and Codes of Conduct* by Professor Christina Ramberg
these feelings or emotional value. It is no longer just a pair of shoes Nike sells, it is a way for consumers to communicate a message and convey their personality. Competitors will find it much harder to copy the feelings of a product than a product’s physical features.

1.1 The Issue

When determining the conformity of goods it is important to distinguish between business-to-consumer sales and business-to-business sales.

Business-to-consumer sales are often regulated and designed to protect the consumer. On a national level in Denmark, business-to-consumer sales enjoy contractual freedom, however only to a certain extent. The Danish Sale of Goods Act protects the consumer by regulating certain areas, which there cannot be derogated from, cf. § 1(2) of the act. These are such as rules on conformity, cf. Danish Sale of Goods §§ 75 and 76, damages § 80 and notification § 81.

The same is relevant in other countries. A country such as Turkey has enacted a Consumer Protection Act that ensures consumer protection. Article 6 of the Turkish Consumer Protection Act ensures that a supplier cannot unilaterally include a term into a contract. A unilaterally included term, which causes a significant imbalance detriment to the consumer and the consumer is party hereto, is deemed an unfair term and is not binding on the consumer. This is of course a looser protection compared to the Danish model where some provisions are non-negotiable.

Consumer protection makes it easier for consumers to know how they are protected when they engage in transactions with businesses. However, it does not only help consumers, it also helps businesses to understand which conditions they are engaging in and help them formulate standardized ways of business.

Danish consumers have a certain expectation to goods they purchase. These expectations can be many and different, but they are often dependent on the goods purchased and the price paid. A Danish consumer bought sandals worth DKK 699. However, the sandals were quickly worn out. It was determined that the consumer could rightfully expect to use the sandals often and the supplier should have in-

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8 Emotional Non-Conformity in the International Sale of Goods, Particularly in Relation to CSR-Policies and Codes of Conduct by Professor Christina Ramberg

9 Turkish Act No. 4077 on Consumer Protection as Amended by Act no. 4822, Law No: 4077, Dated: 23/2/1995
http://en.hukuki.net/index.php?topic=70.0;wap2
formed the consumer that the sandals were meant for light use only\textsuperscript{10}. The expectations to the sandals would have been different had they been priced at DKK 50. A pair of sandals for DKK 50 must be considered less sturdy and less resilient to everyday use. However, in countries with a lesser purchase-power and generally cheaper prices, the expectations to a pair of sandals in the price range of DKK 50 might be much higher.

Business-to-business sales enjoy a wider range of contractual freedom. The Danish Sale of Goods Act applies by default to business transactions on a national level in Denmark, cf. Danish Sale of Goods §1. The provision allows for derogation of the act when the parties agree to derogate or when practices or usages calls for such derogation. Derogation is allowed in business-to-business sales because the parties are professionals and believed to be capable of negotiation their own transactions.

It makes it easier to resolve a dispute between two businesses when they operate within the same jurisdiction. There is often a mutual understanding of what can reasonably be expected from a transaction. An example of this could be a transaction between a Danish supplier and a Danish purchaser. They agree on a transaction of 1.000 sandals with delivery date 15 business days after the signing of the contract. The contract does not define the state or the technical requirements of the sandals. There is most likely a mutual understanding between the two merchants what can and should be expected from said sandals. The two merchants know what they can reasonably expect from the goods.

If the very same transaction had taken place in India, with an Indian supplier and purchaser, these two merchants would most likely have a very different perspective of what can and should be expected from the 1.000 sandals. The reasonable expectations of the two merchants are most likely different from their ditto Danish. The reasonable expectations to the requirements of sandals are probably much different in other countries.

If an Indian supplier agrees to delivery of 1.000 sandals to a Danish purchaser, this mutual understanding of standard requirements to goods are not present. A set of standard Indian sandals is probably very different from a Danish set of standard sandals. Another example is sizes of clothing. A Danish medium sized does not necessarily have the same measurements as a medium shirt from USA or Italy.

\textsuperscript{10} http://dokumenter.forbrug.dk/forbrugerjura_2003/kap06.htm
The above mentioned examples are all examples of physical defects. Physical defects are tangible, they can be seen, touched and sometimes repaired. Even so, physical defects can be the source of disputes, both domestic and internationally.

This represents an issue in international trade and an issue participants in international trade must address. The issue can be solved through negotiations, contract stipulations and trades usages and practices.

However, the issue only grows bigger when the focus switches from physical defects to non-physical defects or ethical defects.

If a Danish supplier agrees to deliver goods manufactured under strict safety regulations to another Danish purchaser, the purchaser has a certain expectation to how the goods are manufactured. The Danish purchaser might not need to worry about contractual stipulations regarding safe production methods due to various domestic legislation and different union agreements.

The same trade of goods could take place in India between Indian merchants and the expectations to safety are probably very different. India might have enacted different legislation regulating safety in the workplace. However, these are probably very different from the Danish legislation in the same area.

In a trade between an Indian supplier and Danish purchaser, the expectations from each party to the standard of production safety is most likely very different. The mutual understanding of safe production methods is not necessarily present in an international trade like this.

It has been said that unification of international trade law can establish certainty and predictability and thus ensure an efficient market\(^\text{11}\). Uniformity in the law governing transnational trade helps suppliers and purchasers overcome what have been defined as their worst enemy, which is national borders and the differences in legal systems\(^\text{12}\). These constitute an obstacle in international trade\(^\text{13}\).

It is important to establish a mutual understanding to avoid disputes and possibly long and complex litigation proceedings, but also to ensure easy trades and an efficient market. The importance of certainty and predictability in international trade is a recognized issue and has led to various conventions\(^\text{14}\),


1.2 Practical examples
Below is listed practical examples to give the reader an idea of how the issues might look in real life.

1.2.1 Example 1
A respected and known lamp company has a code of conduct stating that it and its subcontractors may only hire employees aged 16 or older. It turns out that a subcontractor consistently uses employees under that age. This is heavily reported by the media and the company’s brand is substantially harmed. How can the lamp company ensure its code of conduct is not violated?

1.2.2 Example 2
The consumers of a leading smartphone brand are known to be chic, fashionable and stylish. They often pride themselves in being social aware, but at the same time applying the latest technology. The phone producer is exposed in the media to use a supplier that delivers phone screens, but the supplier employs workers in horrible work conditions and is accused of bribing foreign government officials. The brand name subsequently suffers. How can the leading smartphone company protects its brand name in its negotiations with the supplier?

1.2.3 Example 3
It could also be that another supplier to the smartphone company suffers because of the actions by the smartphone company. This supplier works with chemicals and is therefore anxious about its public image. This has caused the supplier to do its business by a strict CSR-policy. How can this CSR-policy form part of the contract with the smartphone company?

Seen in this light, it is important to assess whether or not a product can have an ethical defect under the CISG.
2 Why the CISG?

The CISG is an international set of rules meant to harmonize international trade. It was finalized and agreed on a convention in Vienna in 1980. It is the first international trade treaty to win worldwide acceptance\(^\text{15}\). There are currently 83 signatory states to the convention\(^\text{16}\) which counts some of the highest trading countries such as United States, Russia, Germany and China. The CISG signatories account for more than two-thirds of the world trade\(^\text{17}\) and there are thousands of decisions where the CISG has been applied as the governing law\(^\text{18}\). The CISG even has its own moot court called Annual Willem C. Vis International Commercial Arbitration with 300 participating teams from all over the world\(^\text{19}\). Which all goes to show that the CISG is a widely accepted and often applied as governing law in international contracts and transactions.

It is therefore this thesis concerns itself with the CISG. The CISG is the predominant international sales law and therefore most relevant to examine in questions about the application of contractual interpretation.


\(^{16}\) http://www.cisg.law.pace.edu/cisg/countries/countries.html

\(^{17}\) Joseph Lookofsky, “Understanding the CISG”, page 1 (2012)


\(^{19}\) https://vismoot.pace.edu/
3  Thesis Statement

The physical production of goods is expensive, but charging a good with emotions is another expensive investment often done through clever advertisement and sponsorships of famous people or events. Investments are often protected by law, but is the United Nations Convention on Contracts for the International Sale of Goods able to protect investments in emotions, feelings and ethics? Are ethical defects a part of the CISG? How can ethical defects become a part of contracts under the CISG?
4 Methodology
The thesis statement will be answered through interpretation of relevant sources of law, meaning acts and statutes, case law and legal literature such as articles and books.
The focus will be on international sources of law due to the international character of the CISG. No single country’s sources of law will be given more attention than others. The relevance of the source will prevail.
It is not certain that the relevant legal sources can provide a definite answer. Statements on how the law should be (de lege ferenda) might therefore occur.
The terms ethical standard and ethical defect will in this thesis encompass everything that has not to do with the mere physical quality of goods. Meaning the terms will encompass: labor rights, environmental standards and any part of the supply chain and brand equity. Ethics will be used generic and cover emotions and feelings toward a product as well.
This thesis will address if and how ethical defects can become part of the CISG. The thesis will focus on private initiatives such as the UN Global Compact, trade usages and practices and the CISG convention itself.
Governments are often the first body that can legislate, secure and uphold ethical standards. It is up to each government to ratify human rights and other international conventions that helps to secure ethical standards. Even though it is a big responsibility that the states hold, human rights will not be part of this thesis.
It is in the end up to courts and tribunals to render a judgment or an award. This thesis will discuss issues within the thesis statement and try to offer the relevant answers. It will not elevate itself to the position of a judge, thus this thesis is not concerned with onus of proof.
The CISG is not concerned with all matters in regards to contracts agreed to under the CISG. Article 4(a) excludes the “validity of the contract or of any of its provisions or of any usage”. This thesis will therefore not assess the validity of any usage, provisions or practices.
The sale of emotions is targeted at consumers, who are also the end users of products. It is often necessary for the whole supply chain to be set up with the goal of creating emotional value, which the end user ultimately is willing to pay for. This thesis will focus on relations between suppliers and purchasers and not the relations between suppliers and end users, the consumer. The focus of this thesis is
therefore international business-to-business contracts and not consumer law or domestic business trades.

There is plenty of critique of CSR-policies and ethical considerations. Critics claim that CSR-policies are implemented to create an illusion of good behavior from companies\textsuperscript{20}. This thesis will not discuss such issues.

The CISG is an international set of rules meant to govern international trade. Article 7(1) of the CISG states “\textit{regard is to be had to its international character and to the need to promote uniformity in its application}”. The CISG is meant to promote uniformity in cross-border transactions. Interpretations should therefore not be based upon domestic law\textsuperscript{21}, thus, the analysis of the thesis issue will not focus on domestic interpretations methods, however, it will draw on examples for domestic systems of law.

\textsuperscript{20} http://online.wsj.com/news/articles/SB10001424052748703338004575230112664504890 and http://www.corporatewatch.org/content/whats-wrong-corporate-social-responsibility-arguments-against-csr

5 Goods under the CISG

Article 1 states that the Convention applies to the sale of goods. However, the term “goods” is not defined in the Convention. It is stated in the Convention’s article 30 that the supplier must deliver goods as required by the contract. It is relevant to consider how to qualify the sale of goods with a large ethical value.

Article 2 and 3 limits the ambit of the CISG. Article 2 excludes sales which are not business-to-business, sale by auction and things such as aircrafts and ships. It furthermore excludes intangible property such as stocks, shares and money.

If a Nike shoe is priced at DKR 1,000 it can be assumed that a predominant part of the value stems from ethical value. Perhaps as much as 75 % of the purchase price is ethical value and the last 25 % is physical value. This premium to the physical value is added because of extensive marketing over the course of many years. Tangible characteristics are those which can be seen, touched, experienced or somehow measured – physical attributes. Intangible characteristics are such as reputation, image and non-physical attributes. They are understood “using cognitive processes and also often contain an emotional dimension”.

Article 3(2) states that the CISG is not applicable when the predominant part of the obligation consists of labor or other services. Ethical values are intangible and seem closely related to services.

The term brand is a commercial term that describes “the impression of a product in the minds of potential users or consumers”. Nike has invested a vast amount in bringing its brand to its current level in the minds of the users. Nike is ultimately sold based on its brand and reputation.

Kristian Maley believes that both tangible and intangible variables are part of the perception of the economical value of a product. Hence should non-physical – and therefore ethical value – be regarded as part of the goods.

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22 Emotional Non-Conformity in the International Sale of Goods, Particularly in Relation to CSR-Policies and Codes of Conduct by Professor Christina Ramberg, point 4
Christina Ramberg argues that if the ethical value is more than 50% of the purchase price, the CISG might not be applicable. However, she does not believe that a contract would be split in two, one for the physical product and one for the transfer of ethical value. In her opinion courts and arbitrators will apply the CISG, irrespective of whether the ethical value supersedes the physical value\textsuperscript{26}.

Actors in the market may specifically address their branding value – ethical value – in their contractual agreements. However, there will be cases where the parties neglect to do so. Kristian Maley mentions that this may occur in industrial settings where the parties may have less knowledge and experience in marketing\textsuperscript{27}. It is therefore relevant to examine the options of inclusion of ethical defects under the CISG.

\textsuperscript{26} Christina Ramberg: “Emotional Non-Conformity in the International Sale of Goods, Particularly in Relation to CSR-Policies and Codes of Conduct” point 4

6 Ethical Standards in International Sales Contracts

6.1 Clear Contractual Obligations

When going through the CISG there is no mentioning of the words “ethics” or “ethical”. The legislative history of the CISG is also absent any mentions of ethics. Article 35(1) of the CISG states that a “supplier must deliver goods which are of the quantity, quality and description required by the contract”. It is the parties’ obligation to stipulate a contract as to which features a contract must contain.

Henschel has stated the following: “The starting point is that there are no limits to the contractual requirements which the parties may agree with respect to the goods, for example, that the goods may not be made by child workers, that the goods should be produced in an environmentally-friendly way (…) that the goods should satisfy the special safety and environmental requirements of the purchaser’s country, etc. Only the imaginations of the parties and mandatory public law rules can set limits to what can be validly agreed.”

It does not follow from Henschel that anything may be incorporated in a contract agreed upon under the CISG. There are certainly obligations which cannot be agreed upon. It is natural that contracts containing clauses with the purpose of achieving an illegal end cannot be agreed upon under the CISG. However, it seems clear that the parties may agree that goods must possess certain ethical standards. The first and most obvious way to incorporate ethical standards into an international sales contract is to stipulate certain ethical standards in the contract. This can be done by stating that the contractual parties have to adhere to ethical standards concerning labor conditions, environmental standards and/or human rights. By making these standards a part of the contract and making sure the other party must adhere to these, the interested party can enforce them and sanction a violation of the standards.

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It is important that the parties draft the paragraphs of the article clear and certain. An ineffective contract containing uncertain or unclear contractual terms is exposed to interpretation and might be construed in conflict with the original meaning. A party can unwittingly be in breach of the contract, or the party might breach the contract and then claim that it was not a contractual obligation but merely a best effort clause. The lack of contract effectiveness makes it difficult for the parties to comply with the contract, which can be the cause of a long, expensive and litigious process. An effective and clearly stipulated contract is paramount if one party wishes to contractually bind the other party and make that party obligated to adhere to ethical standards. However, even a clearly drafted contract can represent an issue. The contract might list different environmental standards which must be adhered to. A contract with a list of standards to be followed can easily seem exhaustive. The issue is then a dispute over the intent of the party and the black letter law of the contract.

If goods do not live up to the stipulated contractual specification there is no problem in finding non-conformity in the sense of article 35(1) of the CISG.

6.2 Contractual Obligation through Article 8

Article 8 lays out the rules to be followed when interpreting the meaning of any statement or other conduct made by a party.

Article 8 of the CISG has its focus on the intent of the parties. Article 8(1) focuses on the subjective intent of one of the parties. Meaning if one of the party’s intent was to incorporate standard term and the other party knew this, the contract must be interpreted in the light of this. However, in cases where the subjective intent is unclear, Article 8(2) provides a legal basis for an objective interpretation, the reasonable person. Articles 8(3) states that "due consideration is to be given to all relevant circumstances of the case". All relevant circumstances are mentioned to be: Negotiations, any practices which the parties have established between themselves, usages and any subsequent conduct of the parties”. Article 8(3) sets out a liberal approach to interpretation. Courts and tribunals may give way to evidence about the parties’ interests, ideas for the contract and decent conduct of international business when they interpret on the basis of article 8(3)

31 International Købelov (CISG), Gomard og Henschel, page 106, Jurist- og Økonomforbundets Forlag
and conducts in general. It does not matter how the statement or conduct is performed, thus silence and inactivity is within the scope of article 8\textsuperscript{32}.

The analysis of article 8 in relation to this thesis will take its outset in situations where there has been an exchange of documents. These documents can be such as standard terms and CSR-policies. However, before the discussion of article 8, it is necessary to define standard terms and CSR-policies. Article 8 must be read in connection with article 9, which is concerned about practices and usages. Article 9 will be discussed immediately after article 8.

6.2.1.1 Standard Terms and CSR-Policies

6.2.1.2 Definition

There is no clear definition of standard terms and there is no internationally widely recognized definition of standard terms\textsuperscript{33}. There are different definitions from different jurisdictions to protect consumers, but the CISG does not have a definition of standard terms\textsuperscript{34}.

Below is given a definition of standard terms for the sake of this thesis and clarification. Standard terms are a set of terms which are drafted prior to an agreement between two parties. Standard terms have not been subject to negotiations between the parties\textsuperscript{35}. By using the name “standard” it derives that the terms are meant to be a standard used multiple times. However, the name should not be the defining factor. A party might wish to alter its standard terms depending on the transaction and the counterparty. It does not matter to the counterparty whether a set of standard terms have been used once or multiple times – the standard terms holds the same value to the counterparty regardless. There are also situations where there cannot be plurality of contracts. This might be the case in situations in the sale of goods which are highly specialized, for example parts of a sale of specific goods. It does not matter that the standard terms are only used once, as long as the standard terms are not negotiated with the counterparty prior to the agreement\textsuperscript{36}.

Novartis is one of the leading companies in the business of pharmaceuticals. Novartis uses this guideline when contracting with third parties to their supply chain. “Novartis gives preference to Third Par-

\textsuperscript{32} International Købelov (CISG), Gomard og Henschel, page 102, Jurist- og Økonomforbundets Forlag
\textsuperscript{33} Standardbetingelser i Internationale Kontrakter, Kasper Steensgaard, page 7, Thomson Reuters
\textsuperscript{34} Standardbetingelser i Internationale Kontrakter, Kasper Steensgaard, page 7-8, Thomson Reuters
\textsuperscript{35} Standardbetingelser i Internationale Kontrakter, Kasper Steensgaard, page 9, Thomson Reuters
\textsuperscript{36} Standardbetingelser i Internationale Kontrakter, Kasper Steensgaard, page 9, Thomson Reuters
ties that share the societal and environmental values required by the Global Compact. As a consequence, Third Parties are expected to comply with minimum standard requirements concerning ethics, labor, health, safety and environmental protection and management systems, specified in the Novartis Third Party Code of Conduct and set forth in paragraphs 9 – 13 of this Guideline.”

The paragraph mentioned encompasses certain ethical standards such as: Animal welfare, child labor, worker protection and different environmental standards. It is part of a general guideline Novartis uses when it selects its suppliers and a good example of how a CSR-policy is part of a set of standard terms. Standard terms can also be agreed documents or drafted by a third party, such as the UN or a trade association. The UN has drafted the UN Global Compact, which is a broad initiative open for businesses worldwide to adopt. Trade associations might draft initiative which its members adhere to and operate by. These agreements can be a code of conduct the members must abide by.

6.2.1.3 Different Approaches to Incorporation

When the parties fail to draft a contract which contains clear contractual obligations, the question of whether standard terms may become part of a contract becomes relevant.

Under the CISG, the requirements to make a contract are an offer and acceptance of that offer. There are no specific rules dealing with the incorporation of standard terms or arbitration clauses. In order to incorporate standard terms as part of a contract The CISG Advisory Council has determined that “standard terms are included in the contract where the parties have expressly or impliedly agreed to their inclusion at the time of the formation of the contract and the other party had a reasonable opportunity to take notice of the terms”.

Each party is free to incorporate any provision into a contract. Therefore any set of standard terms may be attached to a contract. The validity of a party’s incorporation of standard terms into a contract is subject to the other party’s consent. This follows from Articles 14, 18 and 23 of the CISG. Without consent, no contract is agreed and also no standard terms are incorporated.

Whether there has been consent – and a contract is concluded with standard terms – is determined from the viewpoint of a reasonable person in the same situation. This is derived from Article 8 of the CISG.

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The CISG Advisory Council explains that a party is deemed to have had a reasonable opportunity to take notice of the standard terms where the terms are attached to a document used in drafting the contract or printed on the reversed side of that document, where the terms are available to both parties during the negotiations of the contract, where the terms are available for download by the other party or finally where the terms have been used in prior agreements between the parties.  

However, the approach and willingness to include standard terms in contracts differ from different jurisdictions.

The leading case on this subject is the German Machinery case. The German Supreme Court holds that it is a requirement, that the recipient of a contract offer has the possibility to become aware of the standard terms in a reasonable manner. This can follow from the negotiations between the parties, practices established between them or international customs. To ensure effective inclusion of the standard terms, the offeror must make his intent to include the standard terms apparent to the recipient of the offer. The offeror must make the standard terms available for the recipient.

The French Appellate Court presents a strict view on incorporation in the Isea case. The purchaser had sent order forms to the supplier. These order forms contained standard terms written on the back. However, there was no incorporation clause at the front of the document. The Court held that the standard terms written on the back had no legal relevance because of the lack of incorporation clause on the front of the document.

The French approach is contradicted in the American case Golden Valley Grape Juice. The supplier sends the offer in an e-mail containing various attached documents. Amongst these was a set of standard terms. The offer did not specifically refer to the incorporation of the standard terms. According to the French approach this would mean that the standard terms had no legal relevance. However, the American Federal District Court held that the offeree could not simply pick and choose between documents and it was the clear intention of the offeror to include the standard terms in the contract.

41 Germany 31 October 2001 Supreme Court (Machinery case) http://cisgw3.law.pace.edu/cases/011031g1.html
42 My emphasis
In a Dutch case between a Dutch purchaser and a Swedish supplier a reference to the supplier's standard terms was insufficient to make the standard terms binding on the purchaser. The Court held that it cannot be assumed that the purchaser accepted the standard terms even though the purchaser received the standard terms and the use of them was typical in the field of business in which the parties operated.

The approaches differ from different jurisdictions. Common for all these cases is that the standard terms have somehow been mentioned during the negotiations or the standard terms were transmitted to the other party. However, the CISG Advisory Council states that the German approach should be favored. This means that if a party makes it apparent to the counterparty, that it wishes to incorporate a set of standard terms and the terms are transmitted to the counterparty, the standard terms will be an explicit contractual obligation.

In the Isea case from the French Appellate Court we see how the Court turns down incorporation, even though the standard terms were printed on the back of the order form. As this is a transaction between two businesses, the supplier should have reacted to the standard terms. If a party prints its standard terms on the back of an order form, it should be apparent that the party wishes to incorporate these terms, it shows a clear intent. The lack of an incorporation clause cannot change that. Standard terms are not excluded where the terms are transmitted and where intent to incorporate them, are apparent to the counterparty. A party is bound by standard terms if they are conspicuous. They cannot be ignored and a failure to read the terms will not exclude them.

As mentioned above, common for these cases is that the standard terms where all somehow communicated or transmitted to the counterparty. There might be situations or cases where the offeror hides or conceals its standard terms. It cannot be concluded that consent is reached in such situations. Hidden or concealed standard terms can therefore not form part of a contract.

### 6.3 Incorporation of Ethical Standards through other means

As mentioned above it is important to make sure that the ethical standards are stipulated clearly and that consent is reached. However, a problem may arise for small and medium-sized companies. They might not hold the bargaining power to insist on incorporating clear terms concerning ethical values in-

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to the contract. The terms might be vague or even absent. However, through contract interpretation and supplementation, the contractual parties may reach results similar to those reached with expressly stipulated contractual terms.

The CISG offers various tools for contractual interpretation and supplementation.

6.3.1.1 CISG article 9
The CISG article 9 offers a tool to incorporate absent terms into a contract. The hierarchy of forms states that the contract is at the top of the hierarchy followed by usage and lastly, in this case, the CISG. Practices and usages are not law. A party is either bound by it because it accepts to it, in which case it is an express contractual term, or because it must be expected from a party in the given line of business that it will follow a pattern used by others who engage in the same business. However, article 9 of the CISG allows for practices and usages to be binding unless otherwise agreed in the contract cf. article 9(2). This is based on the party autonomy the parties enjoy by virtue of Article 6. Article 6 allows the parties to opt out of the CISG and fit it to their needs.

The discussion of article 9 will focus on situations where there has been no exchange or transmitting of standard terms or CSR-policies. The focus will be on the actions taken by the parties.

The parties are bound by any usage and practice between them. However, it must be the intent of the parties to include a usage or practice, which is determined under Article 8 as described above. For the sake of the analysis of article 9, it is given that the respective party or parties intended to include a practice or usage into the contract, because whether or not there is intent, is a question of proof.

Five situations where there are no explicit ethical terms in the contract will be analyzed:

1. The current contract lacks stipulated ethical standards, but previous contracts between the parties contain ethical standards.
2. Both parties generally communicate that they apply the same CSR-policy. This could be the UN Global Compact.
3. Only the purchaser makes a general communication.

47 GUIDE TO CISG ARTICLE 9 Secretariat Commentary (closest counterpart to an Official Commentary) http://www.cisg.law.pace.edu/cisg/text/secem/secem-09.html Comment by Eric Bergsten
48 GUIDE TO CISG ARTICLE 9 Secretariat Commentary (closest counterpart to an Official Commentary) http://www.cisg.law.pace.edu/cisg/text/secem/secem-09.html Comment by Eric Bergsten
4. Only the supplier makes a general communication.
5. None of the parties make a general communication.

6.3.1.2 The current contract lacks stipulated ethical standards, but previous contracts between the parties contain ethical standards

There might be situations where the parties have previously agreed and consented on a CSR-policy, however, a new contract is finalized and none of the same parties have mentioned the CSR-policy during the negotiations, e-mailed it or otherwise mentioned it.

Article 9(1) might lead to incorporation of ethical standards, albeit there has been no mentioning of them during the negotiations of a new contract. However, Article 9(1) opens up for two situations that must be distinguished between. The first one derives from the wording of the article: The parties are bound by (...) any practices which they have established between themselves.

The practice does not have to be internationally recognized in order for it to be binding. Parties are bound by any established practice agreed between them, internationally as well as locally known or only known to the contractual parties. However, it is ultimately only the practice established between two parties that is relevant, whether or not the practice is widely accepted does not matter.

A practice between the parties may arise when the parties have repeatedly agreed on express ethical standards in previous contracts. Even though a new contract might lack of an express term or lack of a stipulated obligation, the contract may be interpreted in accordance with the previous conduct of the parties in the justified expectation that the parties will continue accordingly in the future.

If there is such a justified expectation, the practice can lead to a contractual obligation.

The question of how much it takes to establish a practice between two parties must be considered. In a case from the Austrian Supreme Court, between a plaintiff from Hong Kong and a defendant from Austria, the Court interpreted how much is required to establish a practice between two parties. The Court held that a practice between parties, in the sense of Article 9(1), is established where behav-

\[^{50}\] Ingeborg Schwenzer & Benjamin Leisinger Ethical Values and International Sales Contracts http://cisg3.law.pace.edu/cisg/biblio/schwenzer-leisinger.html#iii
\[^{53}\] Austria 31 August 2005 Supreme Court http://cisgw3.law.pace.edu/cases/050831a3.html
ioral patterns in the relationship between the parties are upheld with a certain frequency over some time. It must be so that a good faith interpretation leads to a justified expectation.

In another case from a Chinese Appellate Court, between a Chinese party and a party from Hong Kong, the Court held that two transactions cannot establish a practice between the parties. The number is too low.

According to an arbitral tribunal the requirements in Article 9(1) are met when the parties have agreed and concluded a dozen contracts.

The different cases available seem to agree that it takes more than a few contracts to establish a practice between two parties. I agree that it takes more than two contracts to establish a practice. However, 12 contracts alone do not make the case and establish a practice. Relevant literature does not offer a definite answer to when a practice is established under the CISG. However, there must be a justified expectation from the parties that they will live up to this practice. A justified expectation should derive from a conduct that has been upheld with regularity and observance. If 12 contracts are concluded over the course of 20 years, it is not proven that a justified expectation to a practice can be established, albeit the same practice have taken place every time. The time-span is too wide to establish a practice and there is therefore no regularity.

Observance means that the alleged practice is repeated in every single transaction. There must be a strict observance of the practice. If the practice divagates just a little from each transaction a justified expectation is not present. The parties must be able to identify the practice and they cannot do so if the practice is not observed.

It is ultimately up to the courts and tribunals to decide the exact number of transactions, how often and how closely a practice is observed. However, each trade sector is different from the other and it can be difficult to make up a golden rule. The requirements to regularity and observance will most likely differ from each trade sector. Some trade relationships might make it unnecessary to conclude more than one contract a year. Regularity and observance can be accomplished through the continuous and ongoing contractual relationship. So even though there is only one contract over a long time span, a practice can

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54 China 2005 (exact date cannot be determined) Appellate Court  [http://cisgw3.law.pace.edu/cases/050000c2.html](http://cisgw3.law.pace.edu/cases/050000c2.html)

be established if observance and regularity is upheld in each transaction. Whereas other trade sectors might require at least two transactions a year and then a close observance to the practice is required.

6.3.1.3 Both parties generally communicate that they apply the same CSR-policy

There might be situations where both parties generally communicate externally that they apply a CSR-policy or a set of standard terms. General communication is here defined as when a party has signed a policy, code of conduct or CSR-policy it then communicates to the outside world. The communication can be through the party’s website, marketing or other means of communication.

When the parties do not include or refer to such a policy in their contract, the questions of whether there is a reasonable understanding that the contract is subject to the policy and ethical standards arises. Article 9 uses the wording: “The parties are bound by any usage to which they have agreed (…)” this opens up for the second situation in article 9(1). The second situation is where both parties individually have entered into a certain usage through private initiatives. The article does not call for an international recognition of the private initiative. The initiative can be internationally known, locally known or only known within a specific business. The widespread knowledge of the private initiative does not matter. What matters is that the private initiative lays down a usage.

Private initiatives can be the UN Global Compact or more specialized initiatives such as the Equator Principles\(^\text{56}\).

Ingeborg Schwenzer and Peter Slechtriem, both are considered to be highly influential in the interpretation of the CISG, argue that if both parties have agreed to e.g. the UN Global Compact (or other private initiatives), it must be presumed that the parties have, at least implicitly, made this standard a part of their contract in their inter partes relationship\(^\text{57}\). Ultimately the UN Global Compact can become a usage without ever being mentioned by the parties.

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\(^{56}\) Equator Principles are directed at financial institutions. A party to the Equator Principles commits to not lend money where the borrower will not or is unable to comply with certain ethical standards. Mostly focused on environmental and social risks. [http://www.equator-principles.com/index.php/about-ep/about-ep](http://www.equator-principles.com/index.php/about-ep/about-ep)

The Swedish professor Christina Ramberg is hesitant to agree with Schwenzer and Slechtriem\textsuperscript{58}. She states that sponsoring a general initiative by the United Nations is not the same as contractually agreeing on a set of ethical standard, which allows for remedies in case they are breached. At first, Schwenzer and Slechtriem’s argument seems most reasonable. It seems only reasonable that companies should be bound by ethical standards which they individually have entered into. After all, the companies enjoy the goodwill from the public which follows from being a member to an ethical standard. This goodwill will most likely amount to more customers, higher earnings and higher profits for the shareholders.

However, it must be considered if there can be distinguished in the selection of ethical standard a company has signed up for. The UN Global Compact is a wide-ranging initiative which operates on most keys; from human rights, elimination of discrimination to bribery and environmental issues\textsuperscript{59}, while other initiatives might be more specialized and narrow. It is difficult to draw a general assumption of all private initiatives. The differences in the available selection are too vast. The following will present a few examples of different initiatives.

It can be argued that the UN Global Compact is too broad in its application and the wording of the terms is only of suggestive character. The wording of the UN Global Compact’s ten principles is articulated as “businesses should”. It is not “businesses shall, must, will or are required to”. The current wording suggests that the ten principles are merely suggestive. Member companies commit to make an annual report on their progress in implementing The UN Global Compact’s 10 principles. However, The UN does not penalize or sanction member companies if they fail to report on their progress or possible failure to fulfill the 10 principles. There are no limitations to which kind of businesses that might sign up for The UN Global Compact. Every kind of manufacture, service provider or shop may participate and adopt the principles. This will naturally call for an expansive scheme and some of the principles are most likely without meaning for many businesses. A small shop is probably not worried about environmental issues in a distant country,

\textsuperscript{58} Emotional Non-Conformity in the International Sale of Goods, Particularly in Relation to CSR-Policies and Codes of Conduct by Professor Christina Ramberg, point 5.3.

\textsuperscript{59} https://www.unglobalcompact.org/aboutthegc/TheTenprinciples/index.html
just like a car insurance provider is not concerned about child labor in a third world country. These issues are outside their sphere of the mentioned businesses.

It is difficult to apply a set of such broad, elaborate and suggestive terms to a contract when they are not explicitly mentioned in the contract.

The Equator Principles is a trade-specific code of conduct. The Equator Principles is a risk management framework developed for financial institutions. It sets out a minimum standard for due diligence when financial institutions provide loans. The minimum standard of due diligence focus on environmental and social risks.

The drafters of the Equator Principles have chosen the word “will” in their initiative. This suggests a commitment to the principles. Furthermore, the approach is that the participants will only provide the services defined in the initiative, to projects which meet the principles of the initiative. Whereas the UN Global Compact does not stop a company from conducting its business, even though it is incomparable with the 10 principles of UN Global Compact.

The Equator Principles has a thoroughly defined scope. It is narrowed to certain types of financial services and is specifically defined to its trade.

It seems more likely to accept the Equator Principles as contract terms when both parties have signed these individually. This is due to its narrow definitions and application and the wording and approach, which is committing.

There is reason in the arguments from the three scholars, Schwenzer, Slechtriem and Christina Ramberg, however, they fail on certain points. Schwenzer and Slechtriem are too lenient in accepting private initiatives as contractual terms. Christina Ramberg recognizes that sponsoring a general initiative by the United Nations is not the same as accepting contractual terms. However, she fails to address other more narrow and committing initiatives, such as Equator Principles.

There are a vast number of different private ethical initiatives. Every initiative is different from the other. The wording can be broad, narrow, suggestive or committing. This presents difficulties when deciding on the legality of third party initiatives’ legal effect. Therefore should every initiative be interpreted

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60 http://www.equator-principles.com/index.php/about-ep
61 http://www.equator-principles.com/resources/equator_principles_III.pdf
62 http://www.equator-principles.com/resources/equator_principles_III.pdf
on a case-by-case basis when courts and tribunals decide whether the initiative can form contractual terms or not.

This, of course, invites to a litigious process and environment, however, so do disputes over individual contracts and clauses. They too are subject to case-by-case litigation or arbitration. Furthermore, to ensure the correct application of CSR-policies and the like, case-by-case decisions – with respect to international uniformity under CISG cf. article 7 – would be the best practice.

This approach might create some uncertainties for businesses. Most businesses will most likely be unaware that there can be legal ties once a third party initiative is signed and adopted by the business. However, it should not come as a surprise for professionals that signing a paper which calls for commitment has binding obligations.

6.3.1.4 Only the purchaser makes a general communication about a CSR-policy

The purchaser and supplier often have a different approach to the implementation of ethical standards terms and CSR-polices. The supplier is often interested in limiting the number of ethical liabilities in a contract and by doing so limiting its overall liability. The purchaser will often have to resell the purchased goods. The purchaser’s goods might have a “feeling” to it, like Nike and the “Nike feeling”. It is therefore often in the interest of the purchaser to include ethical standards into the contract and expand the scope of damages which may be claimed.

This can be done through a general communication of a CSR-policy. A purchaser might have drawn up its own CSR-policy or adopted a general initiative. The question is then to what extent a general communication of a CSR-policy regarding ethical behavior can create liabilities for a supplier.

Christina Ramberg does not believe that a purchaser’s general communication of its ethical behavior is enough to form liabilities for a supplier, even when the supplier was aware of the policy. It is agreeable with the professor that a general communication in itself is not sufficient to form a basis of non-conformity liabilities for a supplier.

It is necessary that the supplier understands that it is the purchaser’s intent to include the CSR-policy in the contract and that this particular sale fits with the policy. A general communication should not be enough to create such an understanding. The purchaser might do more than generally communicating a CSR-policy. Purchasers might have implemented audit procedures of their suppliers. Such procedures

\[63\] Emotional Non-Conformity in the International Sale of Goods, Particularly in Relation to CSR-Policies and Codes of Conduct by Professor Christina Ramberg, point 5.4
might entail visits to the supplier’s factory or other of the supplier’s premises by the purchaser itself or a hired third party. Such a procedure indicates that the purchaser has a CSR-policy which should form part of the contract between the two parties. However, a supplier could just as easy argue that the auditing was meant to assess whether or not the purchaser wishes to continue the contractual relationship, and not as a means to determine if the supplier was liable for breach of a CSR-policy. Furthermore, the supplier is not aware that its production is meant to fall under the CSR-policy unless the purchaser says so. The supplier cannot know that the purchaser’s intent is to resell the goods in an area or country where the customers are willing to pay a higher price for ethically produced goods. The purchaser might strongly communicate that ethical standards and a CSR-policy is supposed to be part of the contract. If ethical standards and the purchaser’s CSR-policy are part of the purchaser’s core business and it is obvious to everyone that this is paramount to the purchaser, then it can be argued that the ethical standards outlined in the CSR-policy should form contractual non-conformity. Purchasers which parade e.g. the Fairtrade brand on their website, products, advertisements and in their general marketing might reasonably expect that their suppliers inform the purchaser if it is unable to deliver goods which honor the Fairtrade brand. However, this will most likely work in theory only. Practical settings contain too many uncertainties. It seems unreasonable to let the supplier carry contractual obligations based on its purchaser’s marketing strategy or executive decisions. The supplier would be subject to contractual terms it is not fully aware of. It is likely that the supplier is not aware of the Fairtrade Brand and therefore is unfamiliar with its content.

Thus, a purchaser’s mere general communication of a CSR-policy should not form contractual non-conformity due to too many uncertainties for the supplier and because the purchaser’s intent is not clear to the supplier. In cases where the core business of the purchaser is high ethical standards and this is communicated to the general public, it should be considered that in some cases, a general communication of ethical standards can form contractual obligations. However, practical settings render this practice unviable due to unreasonableness in letting the supplier carry obligations it was not fully aware of.

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64 *Emotional Non-Conformity in the International Sale of Goods, Particularly in Relation to CSR-Policies and Codes of Conduct* by Professor Christina Ramberg, point 5.4
65 Formerly known as Max Havelaar [http://www.fairtrade.net/361.html](http://www.fairtrade.net/361.html)
6.3.1.5 Only the supplier makes a general communication about a CSR-policy

When a dispute about conformity of goods arises, it is most often the purchaser that wishes to rely on a CSR-policy to hold the supplier liable\(^{66}\). The question is then, in cases where the supplier has generally communicated a CSR-policy, and the purchaser has read the policy, is the purchaser then entitled to rely on the supplier’s own policy?

Christina Ramberg believes it is insufficient that the purchaser has read and relied on information about a supplier’s ethical behavior\(^ {67}\). However, consideration should be given to how this information is communicated. A supplier’s general communication to certain ethical standards or a CSR-policy can be made in different ways. It can be at the core of the supplier’s identity and obvious to everyone coming in contact with the supplier, while other suppliers might put less light on their ethical standards and policies.

Ingeborg Schwenzer believes that an advertisement with references to the quality of the goods may form contractual liabilities\(^ {68}\). A mere advertisement should not be enough to form contractual liabilities. An advertisement can be part of an assessment of contractual liabilities, however, an advertisement cannot stand alone with a binding effect.

Before a supplier can be held responsible for its own CSR-policy, the supplier must have communicated a willingness to let the policy form contractual liabilities in the contract between purchaser and supplier. A view Christina Ramberg supports\(^ {69}\). There can be cases where such communication is made implicit and therefore has become part of the contract as an implicit term. Naturally can a supplier’s ethical policies not form contractual responsibility in cases where the supplier’s ethical policies are hidden or less obvious. However, if the core identity of the supplier is its CSR-policy and ethical standards, it might implicitly become part of the contract between a purchaser and supplier.

Schlectriem presents an opposite view. He argues that in cases where the purchaser has not ascertained that the policy forms part of the contract, the purchaser can explicitly moderate the supplier’s contrac-

\(^{66}\) Emotional Non-Conformity in the International Sale of Goods, Particularly in Relation to CSR-Policies and Codes of Conduct by Professor Christina Ramberg, point 5.5

\(^{67}\) Emotional Non-Conformity in the International Sale of Goods, Particularly in Relation to CSR-Policies and Codes of Conduct by Professor Christina Ramberg, point 5.5


\(^{69}\) Emotional Non-Conformity in the International Sale of Goods, Particularly in Relation to CSR-Policies and Codes of Conduct by Professor Christina Ramberg, point 5.5
tual liabilities in the contract and therefore should the supplier’s generally communicated CSR-policy not implicitly form contractual liabilities for the supplier. Schlectriem is correct that the purchaser has the option of drafting a contract which contains provisions on the production methods the supplier must adhere to. This option should be limited in order to give fairness to the supplier. The whole policy should be part of the contract, not just bits and pieces.

Thus, if the supplier signals that the core of its business is adhering to ethical standards and a willingness to have its CSR-policy form contractual obligations, then it must be ascertained that the supplier’s policy is included in the contract. I then agree with Christina Ramberg in having the ethical standards form part of the contract. If deference is given to Schlectriem’s arguments, it should be the policy as a whole which forms part of the contract. The purchaser should not be allowed to pick and choose which provisions in the policy it finds most desirable or beneficial at a given time.

6.3.1.6 None of the parties make a general communication

Article 9(2) is irrelevant in cases where parties have signed a private initiative which makes it up for a trade usage or certain trade standards. However, in cases where none of the parties have signed a private initiative, article 9(2) may become of high relevance.

Article 9(2) is a codification of the *lex marcatoria* and ethical standards might become part of a contract via article 9(2). However, that requires that the ethical standard can be regarded as an international trade usage. It is furthermore a requirement that it is “a usage 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”. However, it must be noted that in certain circumstances local usages can become part of a contract. This will be the case where a locally applied usage, in e.g. at a warehouse or at a fair, is also observed and applied when foreign businesses participate in the locale trade. It is still a requirement that the usage is “widely known and regularly observed” by the parties. This was also stated in a case from the Austrian Provincial Court of Appeals.

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70 Emotional Non-Conformity in the International Sale of Goods, Particularly in Relation to CSR-Policies and Codes of Conduct by Professor Christina Ramberg, point 5.5
72 CISG article 9(2), 1980
73 Perales Viscasillas, in Kröll/Mistelis/Perales Viscasillas, UN Convention on Contracts for the International Sale of Goods (CISG) Commentary, art. 9 page 166.
involving an Italian plaintiff and an Austrian defendant. The Court furthermore states that it is not excluded that a foreign business, which is continuously active in another country and there has engaged in multiple transactions, is bound by a national usage.

Party autonomy is the prevailing factor of the CISG, cf. article 6. This means that a usage cannot prevail over a clear contractual obligation. The U.S. District Court for the Southern District of New York held that usages and practices of the parties or within an industry are automatically part of the contract, unless the parties expressly exclude the usage or practice in their contract76. In this regard it must be mentioned that, in contracts and dealings where the parties choose to derogate from ethical standards, CISG art. 9(2) can of course not incorporate minimum ethical standards. That would be incomparable with party autonomy.

There is different case law outlining the vast landscape of different trade usages and practices. An ICC arbitral tribunal held that a sales price may be adjusted because it is a usage that is regularly observed by parties in the concerned industry77. It has also been held in a Swizz District Court that trade usages and practices may impose form requirements that does not exist in the CISG78.

The Austrian Supreme Court held that goods must present a minimum of quality if there is an international trade usage which calls for such qualities. If the goods does not present the minimum quality required by the international trade, the goods are in non-conformity79.

The case law shows that a trade usage or practice can be many different things. It also shows it does not have to be codified.

An example of a trade usage and practice which has been codified is the Danish AB92. On national level in Denmark, there is the AB 92. AB 92 is a set of provision drafted by the majority of the Danish engineering and craftsman industry80. Even though AB 92 is not law, it still has a contractual and gap filling effect – on a national level in Denmark – on the parties’ agreements, due to widely acceptance of its usage and practice.

75 Austria 9 November 1995 Provincial Court of Appeal http://cisgw3.law.pace.edu/cases/951109a3.html
76 USA 10 May 2002 S.D.N.Y http://cisgw3.law.pace.edu/cases/020510u1.html
77 Court of Arbitration of the International Chamber of Commerce http://cisgw3.law.pace.edu/cases/958324i1.html
79 Austria 27 February 2003 Supreme Court http://cisgw3.law.pace.edu/cases/030227a3.html
80 General Conditions for the provision of works and supplies within building and engineering AB 92, http://www.danskyggeri.dk/files/Servicebutik/Love%20og%20regler/Byggeriets%20love%20og%20regler/AB%2092/17065.ab92engelsk.pdf
In determining which trade usages and practices that are relevant for implementing ethical standards, the focus should be given to private initiatives which are specialized for certain branches. The Equator Principles as mentioned above could be such. 80 financial institutions divided into 35 countries from every part of the world have adapted The Equator Principles. The 80 members cover more than 70% of international debt financing in emerging markets. It could be argued that The Equator Principles have become, or are close to becoming, a trade usage or practice for any financial institution which works within the areas covered by The Equator Principles. This is because of the great representation in number of members, the multitude in countries and the substantial coverage of the market.

If there are no trade usages or practices in a specific sector, broader and widely accepted trade usages might come into play. General private initiatives such as the UN Global Compact might become a factor in the interpretation and supplementation of a contract. At the time of writing, UN Global Compact has 12,991 participants from all over the world and from different businesses. Even though the UN as an organization is probably the most widely accepted international organization in the world, the member count of UN Global Compact is still relatively small compared to the number of businesses worldwide. Furthermore, the provisions are rather broad and unspecified. Therefore, it seems most likely that the UN Global Compact can only – if not ratified by both parties – be applied as guidelines and gap filling and not binding to contracts. However, even though the UN Global Compact should serve as a guideline due to the relatively low member count and broad terms, it is the view of Schwenzer and Leisinger that there can be no doubt that provisions about minimum ethical standards should always be safeguarded in international trade. The minimum ethical provisions are regarding the prohibition of child labor and safeguarding humane labor conditions. The CISG article 9(2) may incorporate these minimum ethical standards – as implied terms – to every international sales contract. Christina Ramberg disagrees with Schwenzer and Leisinger. Ramberg believes that courts and arbitral tribunals

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84 [UN Global Compact, Participants and Stakeholders, 8th of June 2015](https://www.unglobalcompact.org/participants/search?utf8=%E2%9C%93&commit=Search&keyword=&joined_after=&joined_before=&business_type=all&sector_id=&listing_status_id=all&cop_status=all&organization_type_id=&commit=Search)
would find that it is sufficient if a party only acts in accordance with its country’s own domestic rules. This would even be the case where the domestic law allows child labor or poor labor conditions.\textsuperscript{86}

Schwenzer and Leisinger believe in an approach with a minimum set of ethical standards which is applicable all over the world. Such a general assumption should only be assumed with care. A lot of parties from third world countries do not have the necessary resources to safeguard a minimum of ethical standards, or perhaps they do not wish to do so in fear of impairing their country’s competitiveness and export. Manufactures in rich countries are often better equipped to protect its workers, and perhaps forced to do so by its citizens and unions. Therefore, if a party chooses a producer from a rich western country, it can be argued that minimum ethical standards should apply to the transaction, despite the lack of any contractual provisions. However, this would also be in line with Ramberg’s opinion since most of the rich western countries have stipulated domestic laws, which contains certain minimum protection of ethical standards. Schwenzer and Leisinger make too broad an assumption by stating that it can be expected that minimum ethical standards are always to be safeguarded in international trade. Encompassing developing third world countries is overreaching.

Schwenzer and Leisinger soften their argument by stating that in cases where the situation clearly shows that no ethical standards can be incorporated into the contract, art. 9(2) cannot supplement the contract with such. An example could be a situation where the purchase price is so low that it is obvious no level of ethical standards can be safeguarded. Another example could be that an audit of the production plants shows conditions which cannot carry a minimum of protection of ethical standards. The CISG article 9(2) can in such a situation not incorporate minimum ethical standards.\textsuperscript{87} This is in line with the argumentation made above. Parties which choose to enter into a contract with a producer from a developing country are looking for the cheapest price available. It cannot be expected that the cheapest produced garments or other goods will be produced under a minimum ethical standard.

It is relatively easy for most businesses to identify a trade usage or practice when these are codified. However, uncodified usages and practices might present a problem to newly started companies, small and medium enterprises and companies with small or non-existing legal departments. Common for all companies in a given area of business is that they freely choose to operate within this area. It must be

\textsuperscript{86} Emotional Non-Conformity in the International Sale of Goods, Particularly in Relation to CSR-Policies and Codes of Conduct by Professor Christina Ramberg, point 6.

\textsuperscript{87} Schwenzer & Leisinger, Ethical Values and International Sales Contracts, page 265

\url{http://cisgw3.law.pace.edu/cisg/biblio/schwenzer-leisinger.html#iii}
assumed that businesses have a minimum of understanding of the business they enter into and therefore an idea of which recognized usages and practices applies. It must further be noted that running a business is done by professionals and they should act accordingly and therefore familiarize themselves with usages and practices within their line of business. The size or novelty of a business should not be part of the assessment done by arbitral tribunals and courts. Thus, ethical standard may become part of a contract absent party agreement in cases where there is a widely recognized usage or practice. A usage or practice may be codified as well as uncodified. In situations where there are no widely recognized usages and practices, the UN Global Compact might apply as a guideline of ethical standards. It can be assumed that a minimum of ethical standards are always safeguarded. However, it should only be assumed in cases where the party is from a developed country and the circumstances regarding the contract proves that it is possible to safeguard minimum ethical standards.
7 Absent ethical standards

7.1 CISG Article 35

The notion of non-conformity is linked with physical defects. The legislative history of the CISG does not point towards any thoughts about ethical defects. Article 35(1) is concerned about the contract and what is agreed under the contract. The supplier must deliver goods as described in the contract. This can be agreed through express or implied terms. If such a term is present and the supplier fails to adhere to it, non-conformity follows from article 35(1).

The term quality in article 35(1) encompasses emotional quality. Schwenzer and Leisinger states: "Quality must be understood as not just the goods’ physical condition, but also as all the factual and legal circumstances concerning the relationship of the goods to their surroundings...The agreed origin of the goods, which necessarily comprises issues of ethical standards, also forms part of the quality characteristics." In Schwenzer’s commentary to the CISG she states that discrepancies in quality include “all factual and legal circumstances concerning the relationship of the goods to their surroundings”. Schwenzer further references to Huber and Mullis, who argue a “wide interpretation which is not restricted to the physical characteristics of the goods”.

Despite the lack of thought given to ethical defects and the focus on contractual terms in article 35(1), the wording of articles 35(2)(a-b) does not exclude that ethical defects may form part of the contract. As stated above quality encompass ethical characteristics. The notions of “fit for purpose” and “fit for any particular purpose” are therefore not limited to a mere physical test, but are also subject to ethical characteristics.

7.1.1 CISG article 35(2)(a-b)

When a contract is absent of any indications of the characteristics the goods must have or when such indications are too vague or imprecise and there is no usage or practice which can establish characteristics, it is article 35(2) that form the requirements the goods must meet not to lack conformity. Article 35(2) is concerned with the contract and what is agreed under the contract. The supplier must deliver goods as described in the contract. This can be agreed through express or implied terms. If such a term is present and the supplier fails to adhere to it, non-conformity follows from article 35(1).

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35(2) lays down objective minimum requirements the goods must meet. Article 35(2) applies secondarily to article 35(1) when the parties have failed to set out sufficiently detailed conditions in their contract according to article 35(1). The parties are free to derogate from the minimum requirements. Article 35(2) is – like most of the articles in CISG – dispositive.

Article 35(2) sets out objective criteria goods must have absent any usage or practice established between them or absent an agreement of the parties to disregard such criteria.

Article 35(2)(a) of the CISG states that goods must be “fit for the purposes for which goods of the same description would ordinarily be used”. The CISG applies to contracts between businesses and not from business to consumer. In the light of this, article 35(2)(a) must be used objectively to assess what a reasonable business person in the same situation would expect of the goods. Businesses’ main objective is to sell their goods. The goods must at least, according to article 35(2)(a), be fit for commercial purposes which means that it must be possible to resell the goods. Resaleability is one part of the being fit for purpose in terms of article 35(2)(a). This was confirmed in the Frozen Pork case from the German Supreme Court where the mere suspicion that Belgium pork was contaminated with dioxin, and therefore unfit for human consumption, was enough to constitute lack of conformity due to the loss of resaleability.

Resale of goods is increasingly depending on compliance with certain manufacturing standards and practices. There is the European CE mark, different ISO certifications and different domestic laws. Relevant literature discusses whose standard should apply, should it be the supplier’s or the purchaser’s state public law? It is relevant to establish the applicable standard in order to determine which characteristics the goods must have in order to be fit for their ordinary purpose. The discussion is often whether it should be the supplier’s country’s standard or the state where the goods are meant to be

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98 http://www.iso.org/iso/home/standards/certification.htm
used. Scholars and various courts seem to agree that fitness for resale is to be determined from the law in the supplier’s country. However, full consideration must be given to the interpretation of the contract in order to determine the relevant standard. As mentioned earlier in this thesis, trade usages and practices may include ethical defects into the contract. If there is a widely recognized usage as to the production or the characteristics of the goods, these must be regarded as a standard to be followed. However, public-law must be taken into consideration since provisions under domestic public law often protects consumers, workers and the environment and can rarely be derogated from.

States are often the first entity that can define which standards are to be applied in different sectors, also in international trade. Other entities, such as the European Union, are lawmaking bodies which can safeguard attainment of ethical defects. The European Union requires certain product groups to be labeled with the CE mark. The CE mark ensures that the product can be sold throughout the European Union because the product is produced in accordance with relevant standards and requirements. The standards and requirements are such as health and environmental requirements. It must be expected that a public law standard which applies in both supplier’s and purchaser’s country must be complied with. The European Union or other trade unions are good examples in this regard. However, even within trade unions, some countries choose to have a broader protection or stricter practice in regards to the protection of ethics. In countries where the purchaser’s country has a higher standard than the supplier’s country, the purchaser must draw the attention of the supplier to that fact. The German Supreme Court established in *The New Zealand Mussels case* that the supplier cannot be expected to be informed about special requirements or legislation in the state which the goods will be used. Nor does it create obligations for the supplier if the purchaser informs the supplier about the destination of the goods.

102 German Federal Supreme Court, 8 March 1995, “New Zealand Mussels” – case. [http://cisgw3.law.pace.edu/cases/950308g3.html](http://cisgw3.law.pace.edu/cases/950308g3.html)
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This approach seems sensible. It seems almost impossible for a supplier to know various public law regulations in another country. It was illustrated in *The New Zealand Mussels case* how rules can be an administrative guideline thus difficult to find for a foreign party. In contrast to a costly process for supplier, the option for the purchaser is to inform the supplier about relevant legislation the goods must adhere to. It seems sensible from an economic standpoint to let the purchaser carry the liability of informing the supplier. The amount of due diligence into another market – possible many different markets – supplier would have to do, to make sure it is in compliance with relevant rules, would be costly.

Where the purchaser does not inform the supplier about special legislature and requirements, the supplier can only be assumed to have accepted the standards of purchaser’s country where the supplier was aware of such standards. This could be the case where the supplier has previously done business in purchaser’s country, exports to purchaser’s country or has a branch of its own in said country. The question is then how well established must the above mentioned circumstances be to create an exception to the rule – public law of supplier’s country apply. For how long must a business relationship have been going on? How many times must supplier export to purchaser’s country? What requirements are there to supplier’s branch in purchaser’s country? This cannot be answered with one simple answer. The number of deals, exports, size of a branch and time-span are just some of the factors which must be considered in determining an exception to the rule. Observance and regularity should be considered when determining if an exception to the rule should apply, however not as strict as in article 9(1) situations. The article 35(2) situations allow for more flexibility since it is a more general knowledge of legislation in a country that is required, whereas article 9(1) situations are specific to a certain trade usage or practice.

Any exception (country of purchaser’s law apply) to the main rule must be decided case-by-case. This also seems to be the favored opinion in legal literature such as Schwenzer and Alastair Mullis. Any exception (country of purchaser’s law apply) to the main rule must be decided case-by-case. This also seems to be the favored opinion in legal literature such as Schwenzer and Alastair Mullis. Any exception (country of purchaser’s law apply) to the main rule must be decided case-by-case. This also seems to be the favored opinion in legal literature such as Schwenzer and Alastair Mullis. Any exception (country of purchaser’s law apply) to the main rule must be decided case-by-case. This also seems to be the favored opinion in legal literature such as Schwenzer and Alastair Mullis. Any exception (country of purchaser’s law apply) to the main rule must be decided case-by-case. This also seems to be the favored opinion in legal literature such as Schwenzer and Alastair Mullis. This means, as a starting point, that ethical standards only apply if they apply in the supplier’s country. However, taking the exception into account, the purchaser can as well as the supplier, apply ethical standards through article 35(2)(a) of the CISG. However, the exception mentioned above seems to be outside the purchaser’s sphere of control. The purchaser cannot influence which public law standards

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apply in its country, nor can it influence how many other contracts – with the intent of resale in purchaser’s country – supplier has entered into. If the purchaser wishes for ethical standards to apply in the contract under article 35(2)(a), it will be based on objective reasons and not by actions taken by the purchaser himself.

However, the purchaser may have informed the supplier about a particular purpose of the goods in the sense of article 35(2)(b). If so, it is no longer article 35(2)(a) which determines the standards to be met, but article 35(2)(b).

According to article 35(2)(b) goods must be “fit for any particular purpose expressly or impliedly made known to the supplier at the time of the conclusion of the contract, except where the circumstances show that the purchaser did not rely, or that it was unreasonable for him to rely, on the supplier's skill and judgment”. Where article 35(2)(a) is based on objective reasons, 35(2)(b) is based on subjective reasons – actions taken by purchaser. If the purchaser has expressly or impliedly made known to the supplier that the purpose of these goods can only be fulfilled, if certain ethical standards or public law are adhered to, then this must be fulfilled.

It is only necessary for the purchaser to transmit the particular purpose to the supplier. The provision only requires that it is “made known” to the supplier and not “contractual agreed”, which is harder to fulfill. The article does not define how the purchaser fulfills the requirement of making it known to the supplier. In this case the purchaser is not communicating a general CSR-policy to the supplier, the purchaser is transmitting a message about certain use of the goods. The use might be for resale in a country with highly political consumers. However, to whom must the purchaser transmit its purpose? Article 35(2)(b) is about a particular purpose. The specific is often used to moderate the general. Whereas a generally communicated CSR-policy might create obligations for the parties, a specific intended use must be transmitted specifically to the supplier before it can create obligations for the supplier.

Thus an agreement in writing between the parties is not required to make the provision apply. Had an agreement between the parties been necessary, the case will fall under article 35(1). If the supplier has been made aware of a particular purpose, the supplier is responsible for any of these special uses are met in the product. A particular purpose could be use in severe climate conditions, religious traditions or observance of ethical principles.
This means that whenever a purchaser has transmitted a particular purpose to the supplier, the supplier is bound to fulfill this requirement. The supplier must object if it does not wish to be bound under article 35(2)(b). This gives the purchaser the power to unilaterally dictate the contract. This is why this provision must be interpreted strictly. It can only be information of the purpose, which has come to the attention of the supplier before the conclusion of the contract that can form a contractual obligation. Any later notification of the purpose cannot be taken into account. If it could, it would effectively rob the supplier of his possibility to assess the risk associated with the particular purpose and the agreement.

If goods have to be produced in a certain way, e.g. without the use of child labor or only produced with cleantech, for them to live up to a certain purpose, the purchaser can incorporate these standards by stating this before the conclusion of the contract. The supplier will then be bound to adhere to these standards unless it objects. If the purpose of the goods is to be sold in an environmental friendly country, and the public consists of political consumers, the goods will have to live up to certain ethical standards for them to fulfill their purpose. The supplier’s obligations could also consist of selling goods to a purchaser who prides himself as being concerned with labor rights. If this has been made known to the supplier, the purpose of the goods would not be fulfilled if child labor was involved in the production, since a purchaser concerned with labor rights could not accept such goods.

However, the last part of Article 35(2)(b) addresses the seller’s skill and judgement and offers a helping hand to suppliers. The mere fact that the purchaser has informed the supplier about a particular purpose is not always relevant where circumstances show that the purchaser did not, or that it was unreasonable of it to rely on the supplier’s skill and judgment. The purchaser cannot accommodate himself with transmitting a specific use and purpose of the goods, if the purchaser did not rely on the special skills and judgment of the supplier, or that it would be unreasonable of the purchaser to trust that the supplier knows and is capable of delivering desired qualities. Thus, if a security firm requires armored trucks for VIP transportation, the mere indication of the specific use is probably not enough if the security firm chooses to rely on a used car dealership to deliver and modify the cars of the intended use. In such a case, if the purchaser does not want to rely on interpretation, the purchaser should meticulously draft the contract with clear stipulations of the intended use.
Future of Ethical Defects in the CISG

As it can be derived from the above passages it can be a hurdle to argue that the CISG contains ethical defects. The options are there, however, they demand some legal ground work and are not as easy accessible as physical defects.

Professor in law Christina Ramberg has expressed an interest in ethical defects under the CISG. In a speech given during a conference at the Swedish Chamber of Commerce she said that lawmakers behind the CISG moves slow and it will be years before the black letter law of the CISG will contain ethical defects. Given the international character of the CISG with many signatory states, which all have to agree on a new text, it makes sense that it will take years.

Where everybody can agree that a button shirt without buttons is defect, it can prove more difficult for international parties to agree on what ethical defects are, thus making it difficult for the signatory states to the CISG to agree on a new text and agree on how to interpret this new text. The question of what is ethically wrong is perceived differently around the world.

The current text of the CISG presents a set of rules which can incorporate ethical defects. However, the current text does not offer a definite stance on ethical defects, as it does with physical defects. A legal uncertainty gives lawyers work, both with contract drafting and in a potential following dispute. Carefully written contracts are of course preferred and expected. However, with an uncertain legal standpoint which takes its basis in a text which does not offer a definite standpoint, careful and meticulous contract drafting is required. In a legal sense a lot can be done to incorporate ethical defects, however, it requires very accurate contract drafting.

In a practical setting this means higher requirements to lawyers who are tasked with drafting ethical defects into contracts under the CISG. It also means higher expenses for companies focusing on incorporating ethical standards into their overall business.

An uncertain area of law combined with higher expenses can be a hindrance for especially small and medium sized businesses to take the step into a more ethical concerned line of production.

Change is desirable. It will clarify the law and make it easier for businesses to incorporate an ethical focus on their business. A possible change could be an addition to article 35. Article 35 describes physical defects, but an addition on ethical defects could be added here. It would then be up to courts and tribunals to define what ethical defects are. The international character of the CISG and the regard that
is given to promote uniformity – cf. article 7 – will ensure ethical defects will be defined the same in the application of CISG around the world.

Should parties find ethical defects to be meaningless, too much of a burden or impossible to adhere to, the parties have the option of derogating from the provision, cf. article 6. It requires less work to derogate from an article than it does defining ethical defects in a contract.
9 Conclusion

Rooted in the chapters above, the conclusion is as following:

With more and more focus on ethics it is important for some businesses to secure a way of remedy an ethical defect.

A carefully written contract can prove an effective tool to include ethical standards into a transaction. This can be done through expressed terms in a contract where focus is given on very careful drafting. However, even with meticulous drafting, a carefully written contract might open up for disputes. The contract can easily seem exhaustive and leave out options for inclusive interpretation, but limit itself to the black letter law of the contract. Ethical defects can become part of the CISG through Article 35, as the article protects ethical defects in a contract as long as they are included in the final draft.

In cases where parties have established a practice between them the CISG can protect ethical defects through article 9(1), even though the parties have not transmitted any documents between them regarding the practice. It requires that observance and regularity of the practice is upheld in each transaction between the parties. Observance and regularity is defined by the trade sector the parties engage themselves in.

Private initiatives can become part of through article 9(1) of the CISG. The CISG will include and protect ethical standard when the initiative is adopted by both parties and said initiative is tailored narrowly and calls for commitment from the signatures. However, each initiative’s legal binding effect must be decided on a case-by-case basis due to the vast amount of different private initiatives.

A general communication by a purchaser of a CSR-policy cannot fall under the CISG. It is unreasonable to let the supplier carry contractual terms which it was not made aware of. Thus, the CISG cannot protect ethical standard where these are generally communicated solely by the purchaser.

A communication of ethical standards by the supplier alone can lead to the implementation of ethical liabilities for the supplier in certain situations. This requires that the purchaser has read and relied on the supplier’s CSR-policy, the whole policy must form part of the contract and the supplier must somehow have proved a willingness to let the policy form part of the contract. Willingness can be shown through a business that is determined to adhere to ethical standards and advertise to do so. In such cases, the CISG does protect ethical standards.

Trade usages and practices can call for different obligations in trades. Where an ethical standard is protected by a trade usage or practice, the CISG protects the standard via article 9(2), which allows for
trades usages and practices. A trade usage or practice does not have to be codified for it to apply in a contract as long as it is widely known and regularly observed. Certain private initiative can apply as a trade usage or practice. If a private initiative is widely represented in a business and covers a substantial part of the market, it might be regarded a trade usage or practice and therefore add ethical standards to a contract. Broader and less trade specific initiatives should only apply as a gap-filling instrument which is not binding on a contract, unless the initiative is adopted as a trade usage or practice within a specific trade.

Article 35(2)(a) of the CISG protects ethical defects in cases where the goods are only fit for a purpose for which goods of the same description would ordinary be used. This means that the goods must be fit for resale. If there is a public-law initiative – e.g. the European CE mark –, which requires goods to fulfill ethical standards, then the goods are only fit for resale if they adhere to the initiative.

In situations where a purchaser has made the supplier aware of a purpose the ordered goods must possess, article 35(2)(b) of the Convention protects ethical standards, if the purpose, which must be fulfilled, is an ethical standard. However, this must be transmitted to the supplier before the final signing of the contracts. Otherwise the purchaser would have the power to unilaterally modify the contract. Where the purchaser did not, or it was unreasonable of it to rely on supplier’s skill and judgment, the goods delivered are not non-conform to the contract.
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