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## Fitting the “Situation”: The CISG and the Regulated Market

Andrea L. Charters

*Washington University School of Law*

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## FITTING THE “SITUATION”: THE CISG AND THE REGULATED MARKET

ANDREA L. CHARTERS\*

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\* Andrea L. Charters is an Adjunct Professor of Law at Washington University School of Law. She received her J.D. from Harvard Law School, an M.S.W. in social work from Washington University, and an A.B. from Yale College. Thanks go especially to Steven R. Lowy and Alan D. Viard, who each read more than one draft with fast turn-arounds, and to Frances H. Foster and William S. Dodge. I have had many conversations about contract law and the CISG with colleagues and friends around the United States. All errors are mine.

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I. INTRODUCTION

This Article considers what kind of market analysis appears when “objective intent” rules and standards are used to help decide international sales cases adjudicating quality of goods disputes and whether and how these decisions are consistent with the goals of uniformity, good faith, and international character. These goals are expressed in standards under the Convention on Contracts for the International Sale of Goods (“CISG” or “Convention”),<sup>1</sup> a treaty entered into by a group of states that account for over two-thirds of world trade.<sup>2</sup> The Convention’s usefulness in achieving article 7’s three standards: uniformity, good faith, and international character—along with a fourth goal, benefiting international trade,<sup>3</sup>—has been extensively debated in the literature.<sup>4</sup> Critiques of the efficacy of the

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1. United Nations Convention on Contracts for the International Sale of Goods (1989), 15 U.S.C. App. (2003) [hereinafter CISG]. References to the CISG will be in the text as “article 7” etc.

2. Pace Law School, *CISG Database: CISG by State* (2002), at [www.cisg.law.pace.edu/cisg/text/casedit.html](http://www.cisg.law.pace.edu/cisg/text/casedit.html) [hereinafter CISG Database] (last visited Jan. 27, 2005).

3. See C. BIANCA & M.J. BONELL, COMMENTARY ON THE INTERNATIONAL SALES LAW (CISG) 9 (1987) (“[The Convention’s] other objective consists in offering rules that will be more responsive than the traditional national laws to the effective needs of international trade.”).

4. See *infra* Part II.A for a brief description of major debates regarding these four objectives of the CISG.

CISG include the divergent legal systems, the broad standards, the meaning of “good faith,” and the criteria for “international character.”

I will argue that the “situation” of international trade is well fit by the tribunals’ choices of analysis based on a particular type of market, discussed *infra*, which works with the social-political-economic system in which the CISG operates. By looking systematically at the way the market and other factors appear in the cases and at the institutional “system” that influences international trade, a new perspective can be adopted that illuminates the functioning of the CISG in terms of its goals.

The CISG is interesting to study for at least two primary reasons. The practical reason is that international traders will not always agree to the governance of the Uniform Commercial Code.<sup>5</sup> The theoretical reason is that the CISG is formed from a blend of legal systems.<sup>6</sup> Thus, the CISG is an international system for private transactions that will potentially raise many questions as to its interpretation and how its objectives can be attained.

This Article approaches these issues by examining the “objective intent” rules of articles 8(2) and 8(3). These rules are useful for interpreting the quality of goods standards expressed under article 35, and for analysing the “systems” that come into play in rendering the decisions. “Objective intent” means the understanding of a party’s intent that can be constructed by the deciding tribunal from the party’s statements and conduct, using the references of a reasonable person and certain article 8(3) “circumstances,”<sup>7</sup> a concept that will be discussed *infra*. The term “objective intent” is used here because it is common in United States legal education. Many other standards under the CISG could also be analyzed using “objective intent”; for instance, articles 8(2) and 8(3) are useful for interpreting standards of reasonableness throughout the Convention.<sup>8</sup>

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5. Secretary of State George P. Schultz noted a similar point when he submitted the CISG to the White House in 1983: “[O]ur sellers and buyers cannot expect that foreign trading partners will always agree on the applicability of United States law.” CISG, *supra* note 1, Letter of Submittal.

6. See *infra* Part II.C.2 for a discussion of this blending of legal systems.

7. See, e.g., E. ALLEN FARNSWORTH, *Article 8*, in BIANCA & BONELL, *supra* note 3 (discussing mistakes and related issues, such as plausible and implausible price mistakes); Michael P. Van Alstine, *Consensus, Dissensus, and Contractual Obligation Through the Prism of Uniform International Sales Law*, 37 VA. J. INT’L L. 1, 57–59 (1996) (the goal under the CISG is to give effect to actual intent, through external expressions of intent). Although the CISG interprets objective intent more narrowly than traditional U.S. common law definitions, where “objective intent” means what a reasonable person generally in that society would believe, act, or conclude, the term will be used here with reference to article 8 to avoid introducing more complex terminology. See generally Bruno Zeller, *Determining the Contractual Intent of Parties under the CISG and Common Law—A Comparative Analysis*, 4 EUR. J.L. REFORM 629 (2002) (comparing subjective and objective intent in common, civil, and CISG law).

8. See Larry DiMatteo et al., *The Interpretive Turn in International Sales Law: An Analysis of*

Quality of goods has been chosen for a case study because the standards are broad and the underlying issue of quality is especially subject to litigation<sup>9</sup> regardless of whether the provisions pertaining to quality per se were highly disputed in the drafting of the CISG.<sup>10</sup> This Article analyzes and assesses the ways in which courts and arbitral tribunals use the “facts” of the cases to select the appropriate rules and standards from articles 8(2) and 8(3) in order to interpret the standards of article 35 as needed understandings that the parties have not addressed.<sup>11</sup>

The first step in analyzing this decision-making system is to consider whether the “facts” and article 35 standards are associated in a way which is consistent. If there is a consistent association, then the conclusion reached has both theoretical and practical significance. Legal scholars and law reformers would like to know whether there is consistency in order to evaluate whether the goals of the CISG are being achieved. Practicing lawyers would like to know whether the principle that the facts of the case drive the outcome is borne out in the CISG. If it is, practice under the CISG will look more predictable and manageable, another sub-part of the goal of facilitating international trade. If particular types of facts or interpretive rules, such as market principles, are used often in the cases, it will be an important indication to scholars and practitioners of what arguments win, and will help to describe the system in which the CISG cases are decided.

The second step in analyzing this system of decision-making is to consider whether the cases demonstrate that there is a “situational system” for deciding cases under the CISG. This consideration involves whether there is a consistent “text system” of the CISG-provisions that make logical and intuitive sense together.<sup>12</sup> In order to implement the text system, an

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*Fifteen Years of CISG Jurisprudence*, 24 Nw. J. INT'L L. & BUS. 299, 318 n.74 (2004) (collecting examples of the use of the term “reasonable”).

9. See JOHN O. HONNOLD, UNIFORM LAW FOR INTERNATIONAL SALES UNDER THE 1980 UNITED NATIONS CONVENTIONS 222 (3d ed. 1999) (“Most sales controversies grow out of disputes over whether the goods conform to the contract.”).

10. See *infra* notes 60–63 and accompanying text for a discussion of the major controversies and compromises in the drafting of the Convention.

11. HONNOLD, *supra* note 9, at 222 (“Consequently, courts and codifiers [sic] have had to try to describe, in general terms, those understandings that would have been written into the contract if the parties had drafted a contract provision to deal specifically with the question that led to dispute.”). For a complementary analysis regarding the “sphere of influence” of buyer and seller, see generally René Franz Henschel, *Conformity of Goods in International Sales Governed by CISG Article 35: Caveat Venditor, Caveat Emptor and Contract Law as Background Law and as a Competing Set of Rules*, NORDIC J. COMM. L. (2004), [http://www.njcl.fi/1\\_2004/article2.pdf](http://www.njcl.fi/1_2004/article2.pdf) (last visited Nov. 1, 2004).

12. See, e.g., Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685, 1722 (1976) (stating that ideas may or may not form an intellectual system); Klaus Peter Berger, *The Lex Mercatoria Doctrine and the Unidroit Principles of International Commercial Contracts*, 28 LAW & POL'Y INT'L BUS. 943, 971 (1997) (pointing out that the UNIDROIT Principles

international “institutional system” of some type is needed.<sup>13</sup> Finally, the text and institutional components of this system need to be unified in a way suited to the international setting in which the decisions are made. To evaluate whether this is so, the cases are evaluated for whether the decisions are consistent with the “situation” in which they are made.<sup>14</sup> This “situation” is comprised of the economic, political, and social components of the world in which international traders make their business decisions. This world is, loosely speaking, a regulated market economy in which institutions are critical to the functioning of markets, and markets are recognized as being prone to failure.<sup>15</sup>

The two aspects of analysis of the system—whether the facts and legal standards and rules of the cases are systematically interrelated and whether there is an international “situational system” for deciding the cases—are themselves part of an interrelated whole. I will argue that the “text” system level of the cases, what we read as the decisions, will be significantly bolstered in consistency and efficacy if the text system is part of a “situational system” that is consistent with the world in which the cases are decided.

The remaining four parts of this Article will consider these issues. Part II considers the nature of the text, institutional, and unified “situational” systems of the case decisions. This will include a consideration of where the CISG resides on the spectrums of certain dichotomies between legal systems and legal theories, and a discussion of the intellectual antecedents of the “situational” system. In Part III, a framework for analyzing the case law on “objective intent” in cases dealing with quality will be discussed. Part IV considers the quality standards and systematic associations of intent rules according to the “situational system” framework developed in Part II, with particular attention paid to what types of facts, standards, and rules are evident. In particular, Part IV examines the types of market analyses used in these cases, and how the mode of analysis affects their outcomes. The Conclusion considers whether the case facts are systematically associated

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can “assist the legal institutions to be seen . . . as a group with meaning and therefore as a ‘system.’”).

13. *See infra* Part II.B.

14. *See infra* Part II.C.

15. *See, e.g.*, R. H. COASE, *THE FIRM, THE MARKET, AND THE LAW* 14–15 (1988) (stating that markets are imperfect due to transactions costs); CHARLES E. LINDBLOM, *POLITICS AND MARKETS: THE WORLD’S POLITICAL-ECONOMIC SYSTEMS*, 76–89 (1977) (discussing the ways markets fail); DOUGLASS C. NORTH, *INSTITUTIONS, INSTITUTIONAL CHANGE AND ECONOMIC PERFORMANCE* 3 (1990) (“[institutions] structure incentives in human exchange, whether political, social, or economic.”); John H. Jackson, *The Impact of China’s Accession on the WTO*, in *CHINA AND THE WORLD TRADING SYSTEM* 19–39 (Deborah Z. Cass et al. ed., 2003) (stating that markets will not work without institutions, citing the foregoing).

with the quality standards according to the rules of “objective intent”; whether there is an international “situational” system for deciding the cases; and, if they are systematically decided, whether the “situational” system buttresses the decisions. Finally, the Conclusion considers how the market figures into the decisions, as this is of special interest to scholars and practitioners.

## II. A SITUATIONAL SYSTEM FOR QUALITY

### A. Text

#### 1. Good Faith, Uniformity and International Character (Article 7(1))

The text system of the CISG is built upon the three-pronged provision of article 7, which calls for “interpretation” with regard to three factors: “its international character and . . . the need to promote uniformity in its application and the observance of good faith in international trade.”<sup>16</sup> I argue that these three provisions form part of a whole that should be considered together as part of a text system.<sup>17</sup> This sub-part of the text system will be considered together with the provisions of articles 8 and 35 as part of a larger text system.

The most problematic provision to be discussed here concerns good faith. Should this be regarded as good faith in interpretation,<sup>18</sup> or good faith in performance, or even good faith in negotiations?<sup>19</sup> If there is to be good faith

16. CISG, *supra* note 1, art. 7.

17. See Harry M. Flechtner, *The Several Texts of the CISG in a Decentralized System: Observations on Translations, Reservations and Other Challenges to the Uniformity Principle in Article 7(1)*, 17 J.L. & COM. 187, 205 (1998) (recognizing the triumvirate of interpretive objectives in article 7).

18. See John Felemegas, *Comparative Editorial Remarks on the Concept of Good Faith in the CISG and the PECL*, 13 PACE INT’L L. REV. 399, 400 (2001) (good faith in the CISG is limited to interpretation, not additional positive duties on the parties); Honorable Ulrich Magnus, *Remarks on Good Faith: The United Nations Convention on Contracts for the International Sale of Goods and the International Institute for the Unification of Private Law, Principles of International Commercial Contracts*, 10 PACE INT’L L. REV. 89, 94 (1998) (CISG does not contain a provision to imply good faith in contractual obligations).

19. See generally Phanesh Koneru, *The International Interpretation of the UN Convention on Contracts for the International Sale of Goods: An Approach Based on General Principles*, 6 MINN. J. GLOBAL TRADE 105, 133–41 (1997) (reviewing theories of good faith in interpretation and good faith of the parties and concluding that both apply as “dual roles” of good faith); BIANCA & BONELL, *supra* note 3 (stating that most civil law systems have both a rule requiring good faith in performance and a rule requiring good faith in formation and interpretation of the contract, but which differ substantially); FRITZ ENDERLEIN & DIETRICH MASKOW, *INTERNATIONAL SALES LAW: CONVENTIONS AND COMMENTARY* 56 (1992) (“Observance of the principle of good faith means to display such conduct as is normal among businessmen. . .”—i.e., not a heightened level of behavior or material justice); Rolf

in negotiations, how is pre-contractual liability to be avoided, which calls into question the matter of “validity” of the contract, which is, unless expressly provided for, generally to be decided under domestic law pursuant to article 4?<sup>20</sup> From the international trader’s point of view, is good faith in negotiations, or some assurance of redress for the lack of it, an essential part of dealing, particularly where the usual domestic, non-legal mechanisms of reputation and custom may be less operative? Thus, the question of whether good faith in negotiations will be observed is, loosely speaking, a question central to the international character of the CISG. Further along, we will see whether article 8 helps resolve these issues.<sup>21</sup> Having joined these two provisions of article 7, which are often considered separately, it is important to consider how uniform provisions are to be observed.

As Professor John Honnold, one of the drafters of the CISG, has put it, uniform “international words” are not enough to achieve the objective of uniformity.<sup>22</sup> The CISG faces interpretation under different legal systems, by different types of tribunals; as a result, adequate uniformity is all that can be expected.<sup>23</sup>

Herber, *Article 7*, in COMMENTARY ON THE UN CONVENTION ON THE INTERNATIONAL SALE OF GOODS (CISG) 63 (Peter Schlechtriem ed., Geoffrey Thomas trans., 2d ed. 1998) (“Despite its narrow wording, Article 7(1) cannot be confined to the interpretation of the CISG’s express rules.”).

20. See, e.g., Larry A. DiMatteo, *The CISG and the Presumption of Enforceability: Unintended Contractual Liability in International Business Dealings*, 22 YALE J. INT’L L. 111 (1997); Larry A. DiMatteo, *An International Contract Law Formula: The Informality of International Business Transactions Plus the Internationalization of Contract Law Equals Unexpected Contractual Liability L+(ii)*, 23 SYRACUSE J. INT’L L. & COM. 67 (1997); Diane Madeline Goderre, *Comment & Casenote, International Negotiations Gone Sour: Precontractual Liability Under the United Nations Sales Convention*, 66 U. CIN. L. REV. 257 (1997).

21. See *infra* Part II.A.2.

22. See generally John Honnold, *The Sales Convention in Action—Uniform International Words: Uniform Application?*, 8 J.L. & COM. 207 (1988) (describing the hurdles to uniform application that remain despite accepted terminology); see also Franco Ferrari, *The Relationship Between the UCC and the CISG and the Construction of Uniform Law*, 29 LOY. L.A. L. REV. 1021, 1022–23 (1996) (explaining that similar terms such as “good faith” and “trade usages” in the CISG and the U.C.C. do not mean similar law).

23. See, e.g., Honnold, *supra* note 22, at 211–12 (“We cannot expect perfect uniformity in applying the Convention—or, for that matter, any other statute. But we can look forward to international commercial law that is more helpful and predictable than the present Babel of competing systems.”); Fletcher, *supra* note 17, at 205 (“[Article 7(1)] does not mandate absolute uniformity of results under the Convention. It provides only that, in interpreting the CISG, ‘regard is to be had . . . to the need to promote uniformity in its application . . .’”) (quoting CISG, *supra* note 1, art. 7(1)); Philip Hackney, *Comment, Is the United Nations Convention on the International Sale of Goods Achieving Uniformity?*, 61 LA. L. REV. 473, 485–86 (2001) (concluding that the Convention has resulted in adequate, but not absolute uniformity).



The question of international character focuses mainly on “autonomous interpretation” with reference to CISG and other international or comparative sources, rather than with regard to domestic law.<sup>24</sup>

As part of the “international character” of CISG jurisprudence, two questions arise. Are analogies needed to other parts of the CISG, or are decisions based solely on the directly relevant provisions sufficient? Second, is it necessary for CISG decisions to cite decisions of other jurisdictions? These issues will be considered in Part IV.D.

In order for the CISG to function, it must be regarded as meeting the practical needs of international sales law.<sup>25</sup> It is not enough to have an elegant text system; a practical application for the CISG is also necessary.<sup>26</sup> The diversity of opinion during the CISG’s drafting evidences the need for provisions concerning areas of international sales law that are not covered by wide-spread, existing practices.

The three objectives of article 7—uniformity, international character and good faith—figure heavily into the broader question of whether the CISG facilitates international trade and, in that sense, these three provisions are a “text system” that forms a sub-system of the CISG. In order to provide predictability and a foundation for planning, the decisions must have an adequate level of uniformity. As previously noted, some assurance that parties will negotiate in good faith would substantially benefit international

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24. See, e.g., Camilla Baasch Andersen, *Furthering the Uniform Application of the CISG: Sources of Law on the Internet*, 10 PACE INT’L L. REV. 403, 404 (1998) (describing the need to look to international precedents); Peter M. Gerhart, *The Sales Convention in Courts: Uniformity, Adaptability and Adoptability*, in THE INTERNATIONAL SALE OF GOODS REVISITED 77, 82–84 (Peter Sarcevic & Paul Volken eds., 2001) (stating that international character should be viewed as “legitimacy goals” of interpretation, including gap-filling and sovereignty); BIANCA & BONELL, *supra* note 3, at 72–75 (stating international character means that interpretation should not be made with reference to the traditional techniques used to interpret domestic law).

25. See, e.g., Jorge Barrera Graf, *John Honnold and the Vienna Convention on the International Sale of Goods*, 132 U. PA. L. REV. 943, 946 (1984) (describing Mexico’s ratification of the CISG as a great benefit to Mexican law and Mexico’s international trade).

26. See, e.g., Harold J. Berman, *The Law of International Commercial Transactions (Lex Mercatoria)*, 2 EMORY J. INT’L DISP. RESOL. 235 (1988) (commenting that common customary practices for international trade are widespread); Peter B. Maggs, *International Trade and Commerce*, 42 EMORY L.J. 449, 469 (1993) (paraphrasing Berman as arguing that “The goal of unification . . . should be to overcome these minor differences.”); *id.* at 466 (warning that codification can freeze the law and may not have been done well); Monica Kilian, *CISG and the Problem with Common Law Jurisdictions*, 10 J. TRANSNAT’L L. & POL’Y 217, 219 (2001) (stating “statute law, such as CISG, does not best serve *lex mercatoria*”); Paul B. Stephan, *The Futility of Unification and Harmonization in International Commercial Law*, 39 VA. J. INT’L L. 743, 796 (1999) (warning that it is prudent to guard against bad unification of the law); James E. Bailey, *Facing the Truth: Seeing the Convention on Contracts for the International Sale of Goods as an Obstacle to a Uniform Law of International Sales*, 32 CORNELL INT’L L.J. 273, 276 (1999) (stating, “the CISG is actually an obstacle to uniformity in the law of international sales”).

traders. In order to achieve some level of uniformity, the decisions need to be made with reference to international, as opposed to domestic, law. Otherwise, each jurisdiction would develop its own diverse law for the CISG. Finally, the CISG needs to be accessible to traders and their lawyers in order to be of any use, which would be facilitated by an “institutional” system.

Part II.A.2 addresses the ways in which the three objectives of article 7 and the facilitation of international trade are served by articles 8(2) and 8(3) and, together, form a larger text system.

## 2. *Objective Intent (Articles 8(2) and 8(3))*

Articles 8(2) and (3) are tools to accomplish the objectives of article 7. The three sub-sections of article 8 give context to how an international approach to interpreting the CISG is to proceed. First, sub-section 1 addresses subjective intent and sets forth when article 8(2) will apply: “statements made by and other conduct of a party are to be interpreted according to his intent where the other party knew or could not have been unaware what that intent was.”<sup>27</sup>

Thus, the issue of intent is raised by article 8(2). But what happens when the intent of the other party was not known or when the applicable party could not have been aware of the other party’s intent? The issue of objective intent is addressed in the next paragraph, which provides, “statements made by and other conduct of a party are to be interpreted according to the understanding that a reasonable person of the same kind as the other party would have had in the same circumstances.”<sup>28</sup> This sub-section sets forth a standard of a reasonable person in the circumstances.

Finally, the third sub-section sets out how the circumstances are to be determined: “In determining the intent of a party or the understanding a reasonable person would have had, due consideration is to be given to all relevant circumstances of the case including the negotiations, any practices which the parties have established between themselves, usages and any subsequent conduct of the parties.”<sup>29</sup> The limits of the “circumstances” are not delimited. Furthermore, other factors may be considered as part of the “circumstances” for determining intent—for example, the market.

These factors for determining what the applicable party or a reasonable person would have understood as the intent of the other party are standards under the CISG. In one sense, these are the facts of the case. In another sense,

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27. CISG, *supra* note 1, art. 8(1).

28. CISG, *supra* note 1, art. 8(2).

29. CISG, *supra* note 1, art. 8(3).

these factors themselves blur into the law. This ambiguity underscores that these factors should not become rigid precedents and instead should be interpreted with flexibility in order to maintain the “fit” of the CISG to the world situation into the future.<sup>30</sup> As such, the content of these provisions need to be regarded as “standards,” not “rules.”

These circumstances, again, can be considered part of either the law or part of the facts. This may be the reason that, in CISG decisions, these factors are often labeled neither as part of the law nor as part of the facts.<sup>31</sup> Because these principles of decision are widely applied, the need for flexibility is served by not labeling the “circumstance” criteria in any way. The quality of goods case law generally sees the “circumstance” criteria come into play regarding certain types of matters, such as the market.

The case law on quality of goods deals largely with partial disagreements that occur after the contracts have been formed.<sup>32</sup>

Article 8(2) is derived from the rule of interpretation that ambiguities should be construed against the sender, the drafter, or the speaker.<sup>33</sup> Article 8(2) is thus about communication. And though its subject is vague, article 8(2) is a “rule,” not a “standard,” to the extent that meaning will be construed “against” the sender. Beyond that, however, what it means to “construe against” the sender may still be open to interpretation, thus making article 8(2) both a “rule” and a “standard.”<sup>34</sup>

Article 8(3) provides standards for addressing the “circumstances” of the case.<sup>35</sup> Some of these standards are open-ended and leave ample room for considering markets or other criteria. Like the decision to apply article 8(2), deciding whether to apply article 8(3) is a rule. Article 8(3)’s enumerated

30. See Maggs, *supra* note 26, at 465–66 (noting hazards of codification are mainly from rules, not standards); HONNOLD, *supra* note 9, § 18 (stating that a statute or code must be short and general to have longevity).

31. See *infra* Part IV.

32. See Van Alstine, *supra* note 7, at 57–59 (discussing use of the term “partial dissensus” to conceptualize such disagreement).

33. See HONNOLD, *supra* note 9, § 107.1 (“Article 8(2) places the burden on one who prepares a communication or who drafts a contract to communicate clearly to a reasonable person in the same position as the other party.”); Harry M. Flechtner ed., *Transcript of a Workshop on the Sales Convention: Leading CISG Scholars Discuss Contract Formation, Validity, Excuse for Hardship, Avoidance, Nachfrist, Contract Interpretation, Parol Evidence, Analogical Application, and Much More*, 18 J.L. & COM. 191 (1999).

It’s your obligation to make clear what you mean, your real intention. If you don’t, then the objective meaning from the view point of the person to whom the statement was addressed will be controlling. I think that’s a general rule you will find in many jurisdictions concerning the interpretation of declarations of intention.

*Id.* at 250 (transcribing comments of Dr. Peter Schlechtriem).

34. See *infra* Part II.C.2.

35. CISG, *supra* note 1, art. 8(3).

factors and its open phrasing make its contents “standards” open to interpretation. The enumerated factors and the parties’ negotiations, practices, usages, and subsequent conduct may be supplemented by additional factors such as market conditions, the need for experts, the nature of the relevant manufacturing process, the needs for health or other regulations, and the nature of any particular uses for the goods. Professor Amy Kastely once urged that courts and tribunals consider the parties’ characteristics as this would render the CISG capable of being used by parties from different backgrounds and cultures.<sup>36</sup>

The cases will show, however, that articles 8(2) and 8(3) are most widely used to identify relevant features of the market, either directly or through the use of experts or custom. Market conditions prevail in CISG jurisprudence. How those market conditions may be characterized is examined in Parts IV and V.

The tools of articles 8(2) and 8(3) are thus available to advance the goals of article 7, forming a partial “text system.”<sup>37</sup> Having a means by which to interpret intent furthers the goal of good faith in negotiations, even though that goal is probably not a part of article 7, which is limited to good faith in interpretation.<sup>38</sup> This helps the international trader to obtain recourse where traditional domestic, non-legal enforcement mechanisms, like reputation, may not function as well. Interpreting intent through specific criteria allows an internal reference<sup>39</sup> that will advance autonomous interpretation, the other portion of international character. With a guide to interpreting intent, uniform decisions will be likely. The preceding two goals are further advanced by the mechanism used for determining intent. The combination and advancement of good faith, international character, and uniform decisions will thus help to further the goal of facilitating international trade. The interrelationship of these provisions, both on logical and intuitive levels, makes article 7 and articles 8(2) and 8(3) part of a “text system.”

Article 35, which concerns the quality of the goods issue, enables this interrelationship. Article 35 is introduced in the next sub-part. The cases will be discussed in Part IV.

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36. Amy H. Kastely, *Unification and Community: A Rhetorical Analysis of the United Nations Sales Convention*, 8 NW. J. INT’L L & BUS. 574, 608–20 (1988).

37. See Werner Junge, *Article 8*, in Schlechtriem, *supra* note 19, at 72 (“Article 8(2) [takes] into account good faith and prevailing practice . . . in conformity with Article 7(1).”).

38. See *supra* Part II.A.1.

39. See Flechtner, *supra* note 33, at 249 (resolving gaps through internal references).

### 3. *Quality of Goods (Articles 35(1) and 35(2))*

Quality of the goods is a ubiquitous issue<sup>40</sup> and is thus the focus of the cases analyzed in this Article. In this sense, quality is a case study for the operation of articles 8(2) and 8(3).

The quality of the goods issue under the CISG is governed by articles 35(1) and 35(2). Article 35(1) provides: “The seller must deliver goods which are of the quantity, quality and description required by the contract and which are contained or packaged in the manner required by the contract.”<sup>41</sup> Thus, the specifications must be met and the packaging must be secure.

Articles 35(2)(a) and 35(2)(b) provide warranties for ordinary use and use for a particular purpose, respectively. Article 35(2) provides

Except where the parties have agreed otherwise, the goods do not conform with the contract unless they:

(a) are fit for the purposes for which goods of the same description would ordinarily be used;

(b) are fit for any particular purpose expressly or impliedly made known to the seller at the time of the conclusion of the contract, except where the circumstances show that the buyer did not rely, or that it was unreasonable for him to rely, on the seller’s skill and judgment.

...<sup>42</sup>

Samples and models are addressed in Article 35(2)(c), which requires that they must “possess the qualities of goods which the seller has held out to the buyer as a sample or model.”<sup>43</sup>

Packaging must adequately protect the goods. Article 35(2)(d) provides that goods be “contained or packaged in the manner usual for such goods or, where there is no such manner, in a manner adequate to preserve and protect the goods.”<sup>44</sup>

The quality provisions are standards; a computer could not decide an issue of quality without further rules and data. These standards, unlike the reasonableness standards, provide guidance without reliance on other provisions.<sup>45</sup>

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40. See *supra* note 9 and accompanying text.

41. CISG, *supra* note 1, art. 35(1).

42. CISG, *supra* note 1, art. 35(2)(a) and (b).

43. CISG, *supra* note 1, art. 35(2)(c).

44. CISG, *supra* note 1, art. 35(2)(d).

45. See *supra* Parts II.A.1 and II.A.2.

The article 8(2) and 8(3) provisions, particularly those pertaining to the “circumstances” that may bear on the decision, such as the market, pervasively affect the results in cases dealing with quality, as will be shown in Part IV and discussed in conclusion. The extent to which the article 35 quality standards are part of a text system with articles 7 and 8 will be seen throughout the argument of Parts IV and V, regarding the total “situational system” created by these provisions.

The cases that show how the quality issues are handled under the CISG are decided in domestic courts and international arbitration tribunals. To what extent are these fora part of an international community able to apply the CISG?

#### *B. Institutions: A Growing Community Around the CISG*

International arbitral tribunals and domestic courts around the world have access to databases regarding the CISG. This factor unifies a community of people around the text of the CISG.<sup>46</sup> The CISG is being taught in law schools in the United States.<sup>47</sup> Decisions are published in the Pace, Unilex, and Clout databases, and a variety of scholarly treatises. The databases also reference an abundance of scholarly articles.

Professor Kastely once called for an international community of lawyers and scholars using the CISG, in addition to the sources and databases.<sup>48</sup> This is now the case. The CISG is accepted by international lawyers in the United States, per the commentary of V. Susanne Cook, a practitioner and long-time author on the CISG.<sup>49</sup> The Pace database shows extensive case law in Europe, suggesting that the CISG is widely accepted there as well.<sup>50</sup> In China, the new contract law is partly based on the CISG.<sup>51</sup> All of this suggests that the CISG is widely accepted in most jurisdictions where it was adopted.<sup>52</sup> Jurisdictions like Japan, which have not adopted the CISG, have produced interesting scholarship, including a Japanese study of artificial

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46. For a comprehensive summary of the major sources available on the CISG, see HONNOLD, *supra* note 9; CISG Database, *supra* note 2.

47. See William S. Dodge, *Teaching the CISG in Contracts*, 50 J. LEGAL ED. 72 (2000) (choosing selections for inclusion in contracts classes).

48. See Kastely, *supra* note 36, at 620–21.

49. See V. Suzanne Cook, *CISG: From the Perspective of the Practitioner*, 17 J.L. & COM. 343 (1998). “There is little hesitation to embrace CISG as a solid compromise position if the application of the U.C.C. is not available.” *Id.* at 353.

50. See cases cited *infra* in Part IV; see also John O. Honnold, *The Sales Convention: From Idea to Practice*, 17 J.L. & COM. 181, 183 (1998) (describing the extensive case law in central Europe).

51. See DETLEV F. VAGTS, WILLIAM S. DODGE & HAROLD HONGJU KOH, *TRANSNATIONAL BUSINESS PROBLEMS* 286 (3d ed. 2003).

52. Cook, *supra* note 49, at 353.

intelligence and the CISG.<sup>53</sup> Given the effectiveness of the Convention in countries adhering to the Convention since 1988, approximately sixteen years at this writing, the growth in the CISG community is striking. With access to databases and scholarly writings, the people and institutions working with the CISG can genuinely be called a community. The uniformity of the cases from many jurisdictions discussed in Part IV suggests a high awareness of each other's work.

The nature of the institutions and this community around the text of the CISG is open to question. Whose law is this? Is it truly international, or is it a product of one or another legal system or jurisdiction? Is it a law of rules or standards or both? Does that affect whose law it is?

C. *"Situation" Analysis: A Dovetailing of Social Work and Contract Theory*

1. *Rules and Standards*

To show the ubiquitous nature of "standards," for the purposes of this Article, "rules" will initially be considered to be operations that could be performed by a computer, that is, binary operations. An example of a rule might sometimes be stated as a statutory provision that notice must be given within ten days. However, even that provision could be open to some interpretation. Maybe a provision for 240 hours or 14,400 minutes or 864,000 seconds might be more accurate. Similarly, such a provision could be open to some interpretation because the parties might not accurately record when the time-period was to begin and end. Another example would be a contract specification that the tram attain a particular normal operating speed, or withstand certain levels of strain on the engine. It may also specify what constitutes "normal operating," including the road conditions and grade upon which the train would be operated.<sup>54</sup>

"Standards," in this line of argument, are every other type of provision,<sup>55</sup> and they come into play particularly where flexibility in or development of the law are important.<sup>56</sup> For instance, a standard may require a good to be fit for a particular purpose.<sup>57</sup> An example of such a standard in a contractual

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53. See Flechtner, *supra* note 33 (reproducing a discussion of the effects of Japanese artificial intelligence on the CISG).

54. Cf. the *Tram* case, *infra* notes 140–47 and accompanying text.

55. Rules and standards are subject to a vast literature and to wide-spread discussion at law schools. For a look into this literature, see Kennedy, *supra* note 12.

56. See *supra* note 30 and accompanying text.

57. CISG, *supra* note 1, art. 35(b).

provision is “suitable for use as a tourist tram.” Many questions could arise from a provision like this regarding the tram’s size, speed, seating, or safety.

Article 8(2) is thus a “rule,” in which meaning is construed against the sender, subject to applicable standards.<sup>58</sup> If a clear meaning cannot be determined, the issue will be resolved against the sender. What constitutes “resolved” may, however, be subject to a standard. If the issue at hand is the suitability of a vehicle for use “as a tourist tram” and no speed requirement is specified, then the ambiguous or missing provision may be construed against the buyer and any reasonable speed may be considered adequate. One court determined that a tourist tram’s actual speed, twenty-five kilometers per hour, sufficed even though the buyer, in retrospect, had demanded a speed of forty kilometers per hour.<sup>59</sup> But what if the speed of the tram had been only ten kilometers per hour? Or what if the tram had gone forty kilometers per hour on the flat, but the tram was intended for use in San Francisco?

Thus, “rules” and “standards” are not merely black and white, but are on a spectrum. The only “bright line” meaning for “rule” that could be rigorously defended, however, would be a provision that is a binary operation (thus, one that can be performed by a computer).

In this Article, provisions such as “construe against,” or “apply market criteria,” will be called rules. The content of the provisions applied will be the standards.

To the extent that article 8(2) can be applied as a “rule,” article 8(2) can be used to decide cases within its terms. In other cases, article 8(2) needs the help of article 8(3). This is not to say that article 8(2) relies on analogy to other CISG provisions; the reference is to the application of article 8(3). There is thus an interplay of “rules” and “standards” in articles 8(2) and 8(3). The interplay of rules and standards will be seen again in the following section.

## *2. The CISG is a Compromise Along Many Dimensions: The Spectrums of Certain Dichotomies*

The drafting of the Convention resulted in compromises along many dimensions: Common Law/Civil Law/Socialist Law systems, North/South, East/West and developed/developing countries.<sup>60</sup> Today, the former Soviet

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58. See *supra* Part II.A.2.

59. See *infra* notes 140–47 and accompanying text.

60. See Gabrielle S. Brüssel, *The 1980 United Nations Convention on Contracts for the International Sale of Goods: A Legislative Study of the North-South Debates*, 6 N.Y. INT’L L. REV. 53, 54 (1993) (noting that the South wanted protection as purchasers and that North wanted freedom of contract); Gyula Eorsi, *A Propos the 1980 Vienna Convention on Contracts for the International Sale*



bloc is no more and China's markets have become much more flexible.<sup>61</sup> The character of the compromises suggests that it is not meaningful to speak of the CISG as a compromise along any one dimension.<sup>62</sup> Rather, it is truly an international law contained in a truly international text.<sup>63</sup>

On another plane, however, it is interesting to look at one classic contract law article, Professor Duncan Kennedy's 1976 *Form and Substance in Private Law Adjudication*,<sup>64</sup> which suggested that there was a dichotomy between individualism and altruism, of which one aspect was the debate between rules and standards.<sup>65</sup>

The dichotomy between individualism and altruism has four components: "regulation vs. facilitation," a bargaining power issue; "community vs. autonomy," a validity issue; "paternalism vs. self-determination," dealing with mistake and related issues; and the "standards vs. rules" dichotomy.<sup>66</sup> The CISG by its terms legislates neither side of the four component dichotomies. Through the article 4 exclusion of issues like voiding contracts, torts, and consideration, some features of altruism are often legislated out in the three "substantive" dichotomies.<sup>67</sup>

In each of the three, however, substantial examples of legislating *in* altruism are present. Between "regulation vs. facilitation," the issue is bargaining power,<sup>68</sup> which is often an issue when deciding whether to void the contract; yet, "reasonableness," a major issue of fairness, is pervasive in the CISG,<sup>69</sup> and interpreting reasonableness is a major issue concerning article 8. Between "community vs. autonomy," torts and voidness issues are again legislated out of the CISG in article 4, but the article 8 issues of

*of Goods*, 31 AM. J. COMP. L. 333, 341–56 (1983) (describing competing points of view from Socialist and Western legal systems, from the North and the South, and from the continental and common law systems); Alejandro M. Garro, *Reconciliation of Legal Traditions in the U.N. Convention on Contracts for the International Sale of Goods*, 23 INT'L LAW. 443, 467 (1989) (discussing good faith compromises). This may suggest that the development of CISG case law has been facilitated by the growing level of technological production in countries of the South.

61. See Deborah Z. Cass, Brett G. Williams & George Barker, *Introduction, in THE WORLD TRADING SYSTEM 1* (2003) (describing China's hybridization of Marxism and free-market principles).

62. See Eorsi, *supra* note 60, at 346–56 (stating that because there are so many dimensions of compromise, there is no meaningful line for a continuum).

63. See DiMatteo, *supra* note 20, at 78 (describing the CISG as containing a hybrid of Civil, Socialist and Common Law systems of contract).

64. Kennedy, *supra* note 12.

65. *Id.* at 1766 ("Indeed, I hope I have shown that the dimension of rules vs. standards is no more than a fourth instance of the altruist-individualist conflict of community vs. autonomy, regulation vs. facilitation and paternalism vs. self-determination.").

66. *Id.*

67. *Id.*

68. *Id.* at 1735–36.

69. See *supra* note 8 and accompanying text.

“controversies not covered or ambiguously covered by the parties,”<sup>70</sup> the subject of the cases examined here, are pervasive. Finally, between “paternalism vs. self-determination,”<sup>71</sup> mistake is generally limited within the CISG,<sup>72</sup> but “reasonableness,” again, is pervasive. The structure of the Convention thus does not come out on one side or the other of any of these dimensions.

Given the broad use of “reasonableness” and the criteria of article 8 for interpreting intent, the CISG is, with few exceptions, firmly on the side of “standards” rather than “rules.”<sup>73</sup> This may be a question of interpretive flexibility, given the difficulty of amending an international convention,<sup>74</sup> or it may be a political and legal theory phenomenon intended to guide interpretation of the Convention.<sup>75</sup>

Professor Kennedy argued that altruism had chipped away at individualism without developing any logical or intuitive appeal as an overall system for organizing society.<sup>76</sup> I suggest that the current world situation is just such a reconciled system, a system in which the advances of political science and economics have established a regulated market of institutions and recognized that markets may fail.<sup>77</sup>

That the CISG was a compromise among legal and economic systems raises a puzzle. How should we regard the development of CISG case law?

It will be seen that the CISG is a law of markets and regulation—a unified picture going forward—that steps out of the paradigms of conflict along spectrums. The Convention thus adopts a flexible structure that allows for interpretation in light of whatever type of social-political-economic system is prevalent at the time. Article 8(3) does not mandate any particular worldview; a regulated market emerges as the paradigm that fits the world surrounding the CISG.

The markets envisioned are not idealized, efficient, perfectly informed, and perfectly competitive; rather, they are the markets of the “real world.”<sup>78</sup>

70. Kennedy, *supra* note 12, at 1734.

71. *Id.* at 1736–37.

72. See CISG, *supra* note 1, art. 79 (containing limited provisions on exemptions).

73. See *supra* Parts II.A.2 and II.C.1.

74. See HONNOLD, *supra* note 9, § 18 (stating that a statute or code must be short and general in order to have longevity).

75. See *supra* note 65 and accompanying text.

76. See Kennedy, *supra* note 12. “[A]ltruism has not emerged as a comprehensive rational counter theory able to accomplish the task which has defeated its adversary.” *Id.* at 1766.

77. See *supra* note 15 and accompanying text.

78. Cf. David Charny, *Hypothetical Bargains: The Normative Structure of Contract Interpretation*, 89 MICH. L. REV. 1815, 1820–21 (1991) (creating a matrix with four spaces for evaluating the application of market principles to “hypothetical bargains”). See *infra* Parts IV and V regarding real world markets.

The late Professor Charny offered two spectra for assessing market arguments regarding “hypothetical bargains”: “generalized vs. particular” and “idealized vs. real-world.”<sup>79</sup> The CISG cases, it will be seen, use “real-world” markets. Sometimes the markets are “particular”—for instance, an inquiry into the article 8(2) intent of transactors.<sup>80</sup> Sometimes, the markets are “generalized,” in the sense of traders generally. Extensive inquiries into the nature of and knowledge base of traders are rare. All of this is described in Part IV.

In *Hypothetical Bargains: The Normative Structure of Contract Interpretation*, Professor Charny reconciled the poles of his spectra by offering a mechanism for dispute resolution that focused on whether parties could bargain around rules set forth by the courts of the United States, which operate under a common law, precedential system.<sup>81</sup>

The function of standards, as opposed to rules, refocuses this method for the CISG, where decisions are considered authority, though arguably not even precedent within the United States.<sup>82</sup> Rather than asking parties to bargain around rules set forth by the courts, the CISG decisions call issues to the attention of traders, such as the speed of a tram,<sup>83</sup> or the life span of a display globe.<sup>84</sup>

Parties do not have to bargain around these decisions. In fact, the decisions are extremely fact-specific. They are decisions of law only because of the operation of article 8(3), which brings many observations about the world into the “law.” This is possible because of the flexible nature of the prior decisions’ authority: they do not serve as precedent. Rather, these decisions call issues to the attention of traders, though the trader who wishes to rely on the court for a fair decision may choose to preserve a trading relationship without addressing these issues. It may be more congenial not to address issues that seem obvious to the trader.

Thus, the reason for complex and lengthy contracts in the United States may be not the jury system, as Professor Charny suggested;<sup>85</sup> rather, the reason might be the use of rules and precedent to secure decisions. After all,

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79. See *id.* (setting forth four possible outcomes of the four approaches to hypothetical bargaining).

80. See Van Alstine, *supra* note 7, at 44 (“[T]his form of objective interpretation does *not* impose a normative resolution.”); see also *id.* at 60 (elaborating an objective standard for article 8).

81. See Charny, *supra* note 78, at 1877–79 (exploring use of bargaining around decisions for parties who will or will not bargain around the rules).

82. See Hackney, *supra* note 23, at 484 (considering whether case law under the CISG should ever be binding precedent).

83. See *infra* notes 140–47 and accompanying text.

84. See *infra* notes 156–58 and accompanying text.

85. See Charny, *supra* note 78, at n.24.

someone else's case decided a few months earlier might secure an undesired rule that the U.S. trader seeks to avoid.

In this sense, legal standards, suitability, and CISG quality apply the CISG's text and institutions in a new "situation." Duncan Kennedy's article regarding altruism and individualism termed the judge as a "person-in-situation,"<sup>86</sup> which also happens to be a social work term of a vintage a few years prior to his 1976 article.<sup>87</sup> What can be learned about rules, standards, the market, and the CISG from applying social work analysis to these questions?

### 3. *CISG Quality "In Situation": Markets of Imperfect Information and Regulation*

Rules and standards interact in an environment, or "situation," of the international trade deal. Quality is decided through standards that rely on rules, which in turn rely on standards. What then is the "situation" in which the market operates?

First, consider the decision to apply market standards, a binary decision. What environment does the tribunal find if it decides to apply market principles? The answer is a globalized market, in which western goods, trademarks, and styles are apparent.<sup>88</sup> Thus, the economic, social, and political environment in which traders find themselves is largely, but not entirely, a market organized "situation." The market recognized by the CISG, however, is not a market organized in terms of efficiency and idealized, perfect information. Rather, it is a market of imperfect information, of institutions, and market failure;<sup>89</sup> in short, the late Professor Charny's "real-world" markets.<sup>90</sup> The social work "situation" is just such an economic, social, and political milieu.<sup>91</sup> It can even be diagrammed to represent the

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86. See Kennedy, *supra* note 12.

[Altruism] asserts that we can gain an understanding of the values people have woven into their particular relationships, and of the moral tendency of their acts. These sometimes permit the judge to reach a decision, after the fact, on the basis of all the *circumstances*. . . .

*Id.* at 1773 (emphasis added).

87. For a discussion using the phrase "person in situation" prior to 1976, see generally BEULAH R. COMPTON & BURT GALAWAY, *SOCIAL WORK PROCESSES* 3–4 (6th ed. 1999).

88. See generally Lawrence M. Friedman, *Erewhon: The Coming Global Legal Order*, 37 *STAN. J. INT'L L.* 347 (2001) (discussing the spread of U.S. brands and the growing international market).

89. See *supra* note 15 and accompanying text.

90. See *supra* notes 78–81 and accompanying text.

91. See COMPTON & GALAWAY, *supra* note 87, at 28–34 (describing a shift from cause and effect to person and situation, forming an integrated whole); K. ASHMAN & GRAFTON H. HULL, JR., *UNDERSTANDING GENERALIST PRACTICE* 14–15 (2d ed. 1999) (discussing terms, including: social environments, the person-in-environment concept, adaptation, and coping).

social worker as analogous to the judge or arbitrator, the lawyers, and the resources such as businesses, organizations, and materials—that communities can bring to bear on a particular issue.<sup>92</sup> Drawing an analogy between social work and business law highlights the experiences of a related discipline that must also face decisions about real world problems without certainty.<sup>93</sup>

Thus, looking at the international trade situation from the perspective of the social work “situation,” the CISG’s success in problematic, unclear quality cases may simply be because the CISG is developing standards and rules that are suited to the market “situation.”<sup>94</sup> Or, it may be that the CISG structure is sufficiently open to one or another form of societal organization; in other words, its success may be due to the fact that more than one type of economic organization may be applied under the terms of the Convention’s structure.

The advantage of the social work person-in-situation approach is that it calls upon the worker, or here, the legal author, to look at and observe the situation surrounding the relevant party, here, the international trader, rather than approach the situation with a preconceived theoretical framework.<sup>95</sup> This calls for an approach that observes the cases *and* the world situation.

Finally, there is the question of whether the “fit” between the cases and the world situation is close. If it is close, the other workers—the deciding tribunals—have done their work well. For if the goal of the CISG is, broadly speaking, to facilitate international trade, then this goal will only be served if the Convention is applied in a manner that “fits” the world around it.<sup>96</sup>

This is not to say that the general norms or behaviors of traders are viewed as the norms that should be enforced by the Convention.<sup>97</sup> Rather, I

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92. See generally MARK A. MATTAINI, MORE THAN A THOUSAND WORDS: GRAPHICS FOR CLINICAL PRACTICE (1993) (illustrating various diagrams intended specifically for the field of clinical social work); THE FOUNDATIONS OF SOCIAL WORK PRACTICE: A GRADUATE TEXT 24–26 (Carol H. Meyer & Mark A. Mattaini eds., 1995) (describing the resources available for children within a neighborhood, including business resources backing sports teams).

93. See COMPTON & GALAWAY, *supra* note 87, at 54 (discussing the process of coping with uncertainty).

94. See BRADFORD W. SHEAFOR ET AL., TECHNIQUES AND GUIDELINES FOR SOCIAL WORK PRACTICE 91–92 (5th ed. 2000) (stating that niche and adaptation are critical to the client); FOUNDATIONS OF SOCIAL WORK PRACTICE, *supra* note 92, at 20–26 (describing a social construction of reality and processes that bind people); *Competence-Oriented Social Work Practice: An Ecological Approach*, in PROMOTING COMPETENCE IN CLIENTS: A NEW/OLD APPROACH TO SOCIAL WORK PRACTICE 7–19, 46–52 (Anthony N. Maluccio ed., 1981) (noting the client’s need to fit with their environment).

95. The social work sources cited *supra* at notes 91–94 are based on observations of the situation and draw out what is seen; they are not applying preconceived theories.

96. See *supra* notes 91–94 and accompanying text.

97. See *supra* note 26 and accompanying text.

argue that the CISG fits the social-political-economic world in which it is applied today, and could fit the world as it will appear tomorrow were the world's organizing structure to change. By fitting the "situation," the CISG allows the circumstances in which it finds itself to show through its structure, primarily through the open nature of article 8(3) and the extensive use of standards, rather than rules, for interpretation.

The current world situation appears through the CISG to be a market tempered by concerns of equity and regulation,<sup>98</sup> roughly in line with our general understandings of the current organization of the world's economies.<sup>99</sup>

The suitability of the CISG's market-oriented jurisprudence may account for the high level of uniformity seen in the decisions. Thus, fitting the situation is largely due to the market as it exists, rather than being due to the overcoming of ethnocentricity with regard to particular parties.<sup>100</sup> This may account for the high percentage of decisions that come from Western Europe and the United States.<sup>101</sup> Some authors have argued that Western Europe's higher percentage is due to its prior experience with international trade law,<sup>102</sup> though this may be too simple an explanation.

The CISG decisions' international character may be accounted for by the CISG's suitability to the "situation." The market is globalized, and it is possible to make "autonomous" decisions—that is, without reference to domestic law,<sup>103</sup> but perhaps with reference to market considerations under the CISG quality decisions.

The objective of good faith in interpretation can also be achieved through market suitability to the "situation." A version of good faith in negotiations is achieved under article 8(2) by construing ambiguities against the message sender.<sup>104</sup> Thus, the traders know that they need to communicate clearly during their transactions. This limited version of good faith in negotiations thus provides structure to interactions governed by the Convention.

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98. See *infra* Part IV.

99. See *supra* note 15 and accompanying text.

100. See Kastely, *supra* note 36 and accompanying text; see also V. Susanne Cook, *The U.N. Convention on Contracts for the International Sale of Goods: A Mandate to Abandon Legal Ethnocentricity*, 16 J.L. & COM. 257, 261 (1997).

101. See John O. Honnold, *The Sales Convention: From Idea to Practice*, 17 J.L. & COM. 181, 183 (1998).

102. *Id.*

103. See *supra* note 24 and accompanying text (stating that the CISG is designed for autonomous decisions under its own terms, with reference to domestic law only in matters not covered by the CISG).

104. Schlechtriem, *supra* note 19, at 72 ("Article 8(2) [takes] into account good faith and prevailing practice . . . in conformity with article 7(1)").

#### 4. *Advancing International Trade*

Do these three factors—uniformity, international character, and good faith—promote the fourth objective of advancing international trade? Given the regulated market’s wide acceptance, the answer is, probably yes. With uniform, autonomous decisions, some limited version of good faith, and reliance on some source of a widely accepted applicable market, CISG jurisprudence is poised to foster international trade, building upon the growing globalization of the world economy.<sup>105</sup> That is not a normative statement, or a prediction that this condition will continue. Rather, this is a description that employs the interpretive techniques of scholars from the perspectives of altruism, globalization, and the CISG by using law and a framework drawn from the “situation” of social work.

The cases discussed herein will shed light on just what sort of market is envisioned by the CISG jurisprudence.

### III. FRAMEWORK FOR CASE LAW ON OBJECTIVE INTENT IN QUALITY CASES

#### A. *Study of the “Market” Emerged from the Cases, Not Preconceived Theories, Due to “Situation” Analysis*

Using the “situation” analysis of studying what is seen, not preconceived theories,<sup>106</sup> the “market” emerged from the cases as the critical unit of analysis. In preparing this Article, the market was not initially sought out as an expected phenomenon in the cases. Rather, it emerged from looking at the facts of the cases. Thus, the “situation” of a legal author examining the facts of the case allowed the market to emerge as an entity for study.

#### B. *The CISG Sources*

The cases analyzed here are drawn primarily from the *Pace University Law School Electronic Library on International Trade Law and the CISG*, an Internet database.<sup>107</sup> This database contains over 1200 cases, thousands of abstracts, and many secondary sources. The Pace database has a large number of translations into English and overlaps to some extent with other CISG databases.<sup>108</sup> This Article discusses approximately twenty cases, a

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105. See *supra* note 88 and accompanying text.

106. See *supra* notes 91–95 and accompanying text for a discussion of social work methodology.

107. *CISG Database*, *supra* note 2.

108. See, e.g., the *Steel Billets* arbitration by the Court of Arbitration of the International Chamber

number that suffices to analyze in legal, not statistical, methodology, a very discrete issue.

The criteria for choosing decisions was as follows. First, the article 35 cases and reports of arbitrations were selected. Approximately 185 article 35 cases were present at the time research was conducted.<sup>109</sup> The twenty decisions discussed herein were selected on the basis of quality being the central issue, without significant attention in the case to notice and other issues that were available to form the basis of decision. Thus, the quality issues were central and formed the dispositive holdings of the cases. Choosing decisions required some amount of lawyer's judgment. Arbitral decisions are included because the point of analyzing the decisions is not precedent but rather guidance for future decisions. In general, full text decisions or substantial extracts were relied on, and abstracts were not used, except as noted.

What then, was the analytical framework for looking at these decisions?

### *C. Interplay of Facts, Objective Intent Reasoning and Legal Provisions Regarding Quality*

The framework for analyzing the decisions consisted of looking at archetypal facts, objective intent reasoning, and legal provisions regarding quality. Archetypal facts here include: manufacturing processes; the markets for specific purposes and for goods; the feasibility of using experts; the expertise of the buyer; and the market needs for health or other regulation. Archetypal facts are chosen by examining the "situation" to see what economic, social, and political factors are present and how they interact.

Characteristics of the Pace database suggested a focus on facts rather than default rules within each article. The database does not categorize decisions in the same manner as Westlaw or LexisNexis. I concluded that it was better to use "brute force" and look at all the cases indexed under article 35 rather than to attempt a keyword search. This facilitated looking at facts rather than rules within each article.

Careful inspection shows that archetypal facts are also generally critical to a decision concerning the standards for quality. The characteristic that links the key archetypal facts with the article 35 quality standards is objective

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of Commerce [hereinafter ICC], digested by Albert H. Kritzer (Executive Secretary of the Pace database), who organizes the database, in the Pace Database and reproduced more fully by the Unilex database. These sources are available, respectively, at <http://cisg.law.pace.edu/cases/958213il.html> (last visited Nov. 2, 2004), and <http://www.unilex.info/case/cfm?pid=1&do=case&id=520&step=FullText> (last visited Nov. 2, 2004).

109. CISG Database, *supra* note 2.



intent reasoning. The objective intent reasoning under article 8(3) links the archetypal facts with the standards for quality. As will be seen, the primary link under article 8(3) is the concept of the market.

*D. Interplay of Archetypal Facts and Legal Rules: Not an Exclusive Association*

Decisions are grouped according to the standard—such as a warranty for merchantability—that governed the decision in formal terms, except for the health and conformity decisions, which are grouped separately at the end of Part IV. These decisions are built around a rule within the article 35 provisions for dealing with regulation in the buyer’s country.<sup>110</sup> Notable arguments on article 35 grounds that were rejected are discussed. Arguments on article 8 grounds that influenced the decision, whether explicitly referenced as article 8 arguments or not, are highlighted.

The decisions show that facts, combined with the article 8 series of standards, such as the market, are the driving factors that make the decisions consistent or inconsistent. Under the article 35 standards, cases can go either way. In combination with the article 8 factors, however, in the form of archetypal facts, the cases are consistent.

The “market” archetypal facts thus are not limited to merchantability and a warranty of fitness for ordinary use. The market archetypal facts influence different categories of legal rules, even as to specifications. This was discovered through application of the social work aspect of “situation” analysis, of looking at the facts without preconceived theories, and was facilitated by the Pace database construction, without the rigid categories of United States case digests.

Part IV is not about whether the default rules developed under article 35 are consistent. Rather, Part IV is about whether the decisions are consistent with the archetypal facts that are discussed in the decisions. As such, the decisions are about the implementation of standards under articles 35 and 8, not about the formation of additional rules.

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110. See DiMatteo et al., *supra* note 8, at 432 for a discussion regarding the importance of default rules within the provisions of article 35.

#### IV. QUALITY STANDARDS AND SYSTEMATIC ASSOCIATIONS OF INTENT RULES

##### A. *Manufacturing and Specifications: Communications and the Market*

Inquiry under article 35 begins with paragraph (1), which deals with whether an agreement under the contract governs the issue. The first four cases considered address the issue of specifications in a straight-forward communications situation.

It is useful to consider first a case in which communication under article 8(2), along with the circumstances of the machinery and the nature of the buyer's expertise under the standards of article 8(3), was the reason for decision. In the *Used Textile Machine* case, the buyer was deemed to have agreed to the specifications, according to article 8(2), because of circumstances regarding the machinery, the buyer's expertise and inspection, and the material nature of the machine.<sup>111</sup> It was an argument of specifications versus specifications, with an emphasis on agreement, manufacturing processes and the nature of the buyer's expertise. It is similar to Professor Kastely's arguments about recognizing differences, though it is not developed along the same lines.<sup>112</sup> The seller came from Switzerland and the buyer from Germany. The buyer lost and, indeed, other cases will show a tendency for the buyer to lose when the argument becomes a case of the specifications versus the specifications or a case of a market tempered by equity.<sup>113</sup>

A second decision in which communication was the determinative issue considered the role of agreement to specifications versus warranty issues, where the practice of the parties was used to show that there was no industry standard.<sup>114</sup> In the *Steel Billets* arbitration, the lack of agreement regarding use of steel billets defeated the warranty issue.<sup>115</sup> The agreement as to specifications reigned. Here, there was no issue as to the market for the

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111. Entscheidung des Schweizerisches Bundesgerichts [BGE], available at <http://www.cisg.law.pace.edu/cases/001222s1.html> (last visited Sept. 20, 2004) [hereinafter BGer. Switzerland]. The Federal Supreme Court of Switzerland addresses an international contract law issue in this case.

112. *Id.*

113. See *infra* notes 126–35 and accompanying text.

114. *Steel Billets* arbitration, *supra* note 108. The digest, by Professor Kritzer at Pace, is particularly full and raises many issues. For that reason, I searched outside the Pace database to Unilex to obtain the full text of the decision. The arbitration looks at both the CISG, as Swiss law, governing part of the transaction, and the New Jersey Uniform Commercial Code, governing another part of the transaction. The two laws are compared. The arbitral tribunal and the ICC thoroughly analyzed these transactions.

115. *Steel Billet* arbitration, *supra* note 108.

specific uses. There was no reason the generally stated use for a particular purpose could not succeed;<sup>116</sup> thus, the buyer lost. The specifications, with an emphasis on agreement, triumphed.<sup>117</sup>

In the *Sheep* case, testimony was used again to bolster the specifications argument.<sup>118</sup> The buyer complained that the sheep were “too raw boned,” needing to be fattened up.<sup>119</sup> The court attached great weight to the testimony of an employee whose job was to fatten up the sheep for the buyer.<sup>120</sup> Thus, the buyer’s claim that the sheep were to be mature enough to be slaughtered when purchased was defeated.<sup>121</sup> The buyer lost on a specifications versus specifications issue.

Specifications can also be addressed through samples, for which a separate CISG provision, article 35(2)(c) applies. In the *Canned Fruit* arbitration, the buyer prevailed in a dispute over a sample.<sup>122</sup> Non-conformity of the sample meant the buyer won, despite the evidence contained in the agreement supporting the opposite conclusion. The tribunal addressed whether either the cans holding the fruit or the boxes containing the cans was responsible for the lack of conformity.<sup>123</sup> The tribunal blamed the problems on the faulty cans, not the faulty boxes.<sup>124</sup> Thus, the problems were attributed to non-conforming cans, for which there was no appropriate sample.<sup>125</sup> This case also illustrates the application of article 35(2)(d) regarding packaging.

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116. *Id.* § D, paras. 7, 9. The identity of the end-customers was intentionally kept from the supplier for commercial reasons, so problems with rolling the steel billets at that customer’s site were unknown to the seller. This had been the course of dealing of the parties. As such, it was a course of dealing issue, not a market issue pertaining to the needs of end-users. Rather, the issue was whether end-users came into play in the decision at all. *Cf. infra* notes 130–31 and accompanying text (regarding retail end users and the market).

117. *Steel Billet* arbitration, *supra* note 108, § c. For the counterclaim, the burden was on the seller. *Id.*

118. OLG Schleswig, 11U40/01 (2002), at <http://www.cisg.law.pace.edu/cases/020822g2.html> (last visited Sept. 20, 2004). After the specifications discussion, the court went on to consider a warranty issue, which was dismissed on notice grounds. *Id.*

119. *Id.* § 2, para. 2.

120. *Id.* “Since the witness D was on duty to fatten up the sheep and was already informed about this duty before the actual delivery of the sheep, it seems to be almost impossible that the [buyer] ordered 400 sheep, mature to be slaughtered immediately.” *Id.* § 4, para. 5.

121. *Id.* § 4, para 5.

122. *Compromex*, M/21/95 (1996), reprinted in 17 J.L. & COM. 427–43 (1998), available at <http://www.cisg.law.pace.edu/cases/960429m1.html> (last visited Oct. 20, 2004). See also Alejandro M. Garro, *The U.N. Sales Convention in the Americas: Recent Developments*, 17 J.L. & COM. 219, 222–33 (1998) (discussing packaging standards and need in maritime transit).

123. *Compromex*, M/21/95, *supra* note 122, at 438–40.

124. *Id.* at 440.

125. *Id.*

Thus, where communications, including samples, were issues, sellers won three out of four times. The next case involved specifications bolstered by the circumstances of the production process.

In the *Clothes Dye* case, in the Appellate Court of Barcelona, Spain, an agreement regarding specifications was bolstered by the circumstances of the production process and defeated an argument regarding the particular purpose and a possible hidden defect.<sup>126</sup> Again, the buyer lost. The emphasis was on the circumstances of manufacturing, not the agreement. A hidden defects argument was rejected<sup>127</sup> due to the importance of the production process.<sup>128</sup>

Thus, in the first five cases, we can observe that no market information was relied upon as the reason for decision. It was communication versus either communication alone, or communication and the production process. In all but one case, the seller won.

In sharp contrast, in the following two cases, the buyer won. The decisions' formal issue was specifications, but the decisions involved fact patterns influenced by market issues.

Market information can be used to bolster specifications arguments. In the *Sports Clothes* case, market information was used to support the specifications argument used to decide the case.<sup>129</sup> The goods were non-conforming because they did not meet the size requirements when washed, which could be a major detriment to the retailers as the end customers would "no longer buy goods from this retailer."<sup>130</sup> The retail end consumers were not satisfied with the goods because the goods would shrink excessively when washed.<sup>131</sup> This was an unusual case in which the buyer won on a

126. STS, TranspR-IHR 26-27, 755/95-C (1997), at <http://cisg.law.pace.edu/cases/970620s4.html> (last visited Sept. 20, 2004).

127. *Id.* § III, para. 4.

128. *Id.*

The use of expert evidence on that would add nothing to the resolution of this case. The merchandise supplied by [seller] only constitutes part of [buyer's] production process. That merchandise is the ink that, with heat, is printed on the fabric supplied by other parties. The final product depends on the fabric base, the atmospheric and conservation conditions, the printing temperature, etc. It is, therefore, difficult to see how any examination of the resulting fabric, could show the origin of the defect.

*Id.* § III.

129. LG Landshut 54 O 644/94 (1995), at <http://cisg.law.pace.edu/cases/950405g1.html> (last visited Sept. 20, 2004).

130. *Id.* § II(1)(b). "The [seller] had to deliver goods of the quality and description required by the contract. By delivering goods that shrank by 10-15%, i.e., one to two sizes, the [seller] has breached its contractual obligations." *Id.* § II(1)(b) (alterations in original).

131. *Id.* (emphasis added) "[T]he end customer could no longer wear these clothes after having washed them for the first time. The end customer, thus, would either complain to the retailer or would no longer buy goods from this retailer. Thereby, the retailer suffers a substantial detriment." *Id.*

specifications issue, but only because the buyer also had a very strong market argument.

In *Delchi Carrier v. Rotorex Corporation*, the U.S. Court of Appeals for the Second Circuit decided a case for breach of an agreement and relied on evidence contained in letters of the seller's executives.<sup>132</sup> The letters contained admissions that the cooling power and energy efficiency of air-conditioner compressors—critical technical factors bearing on the market viability of the compressors—did not meet the contractual standards.<sup>133</sup> This decision, though criticized for other reasons,<sup>134</sup> was highly influenced by market information pertaining to the promised specifications regarding the “value” of the compressors.<sup>135</sup> The court relied on the agreement and its specifications.<sup>136</sup>

Thus, these cases go either way based on the presence or absence of certain archetypal facts. These facts are mediated through the principles found in article 8(3).<sup>137</sup> A straight challenge of specifications versus specifications will tend to favor the seller.<sup>138</sup> Manufacturing information will also generally help the seller.<sup>139</sup> In the *Sports Clothes* and *Delchi Carrier* cases, however, the market supported the specification arguments and the buyer won.

### *B. Use and Particular Purpose: Communications and the Market, Redux*

A warranty for a specific purpose is, like a specification, an issue concerning statements. The cases are about what has been agreed to, with market information being admitted in some cases. This is illustrated by the *Tram* case.<sup>140</sup>

Deciding to include market analysis is a decision to include the rhetoric of the market. This is not, however, the market of efficiency. It is the market of

132. *Delchi Carrier v. Rotorex Corp.*, 71 F.3d 1024, 1029 (2d Cir. 1995).

133. *See id.* at 1028 (discussing the letters from Ernest Gamache, dated May 13, 1988, and John McFee, dated May 17, 1988, prior to the May 23, 1988 cancellation of the contract by the buyer).

134. Cook, *supra* note 100, at 261 (criticizing the court's reference to sparse U.S. case law on the CISG, when, at a minimum, extensive foreign case law is available).

135. *Delchi Carrier*, 71 F.3d at 1029. “[T]he cooling power and energy consumption of an air conditioner compressor are important determinants of the product's value . . . .”

136. *Id.*

137. CISG, *supra* note 1, art. 8(3).

138. *See, e.g., Steel Billets*, *supra* note 108; BGer. Switzerland, 4C 296 (2000), *supra* note 111.

139. *See, e.g., STS*, Transp. R-IHR 26–27, 755/95-C (1997), *supra* note 126.

140. *Rechtbank van Koophandel of Veurne*, Belgium, A/00/00665 (Apr. 25, 2001), at <http://www.cisg.law.pace.edu/cases/010425b1.html> (last visited Sept. 20, 2004). A hidden defect claim was also rejected. *Id.*

the “real world.”<sup>141</sup> These are not normative statements. Scholars and practitioners of any political persuasion would like to know how the rhetoric and analysis of the market appears in these cases. To recognize the market employed in the cases is to be able to push for more, less, or the same and to be able to use a similar analysis strategically.

In the *Tram* case, the buyer was left without recourse when market arguments filled gaps in the agreement where communication between the parties failed.<sup>142</sup> There were no relevant specifications and no discussion of use for a particular purpose. The buyer lost, because the buyer failed to provide any specifications about the tram’s speed, and the court found that both the tram’s ordinary and specific purpose was to serve as a “small tourist tram” that could travel at a speed of about twenty-five kilometers per hour.<sup>143</sup> Articles 35(2)(a) and 35(b) were cited by the court with regard to the ordinary and specific purposes, respectively.<sup>144</sup> During litigation, the buyer claimed he had demanded a speed of forty kilometers per hour. Here, the absence of a contractual statement by the buyer was construed against the buyer. Although uncited by the court, this was an application of article 8(2). The only relevant requirement was that the tram be a “small tourist tram.”<sup>145</sup> This specification was met, in the court’s view, even at the slower speed.<sup>146</sup> In the absence of a statement to protect the buyer, market information about the nature of the tourist tram industry, the use for “promotional purposes,” was used to show that the slower speed was adequate for the purposes for which the tram was generally intended.<sup>147</sup> Thus, the market was used to support the argument in favor of the seller.

The *Sheepskin* case involved leather that was supposed to conform with a sample and was to be fit for the particular purpose of being dyed by the buyer’s customers and used as furniture covering.<sup>148</sup> The market argument here was that the customers would use the sheepskin by dyeing it. It was left up to the seller to prove that its goods conformed to the sample. The parties called an expert to determine whether the leather could be used for the stated

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141. See *supra* note 78 and accompanying text.

142. Rechtbank van Koophandel of Veurne, Belgium, A/00/00665 (2001), *supra* note 140.

143. *Id.* at 6. “Since the ‘diesel tram’ actually appears to be a small tourist train, and as such is used by the [buyer] for promotional purposes (cf. [seller]’s brief, exhibit no. 24), a speed of 25 km per hour is not incompatible with the ‘ordinary use’ and/or the ‘particular purpose’ mentioned in Articles 35(2)(a) and (b) CISG.” *Id.*

144. *Id.* at 6.

145. *Id.*

146. *Id.*

147. *Id.*

148. RB Rotterdam, HA2A 98-1405 (1999), available at <http://www.cisg.law.pace.edu/cases/991014nl.html> (last visited Sept. 20, 2004).

purpose.<sup>149</sup> The seller provided an expert who testified about the products' suitability for a particular use.<sup>150</sup> Because the expert offered no testimony about the delivered products' conformity to the sample, however, the court held the expert's testimony was insufficient.<sup>151</sup> In the end, this case was not resolved in either party's favor.

Market information bolstered the decision of the Fourth Circuit in *Schmitz-Werke GmbH & Co. v. Rockland Industries, Inc.*, where the buyer communicated the need for goods suitable for a particular purpose.<sup>152</sup> The trial court had held that there was an express warranty of fitness for a particular purpose and that there were latent defects in the cloth delivered by the seller, making it inadequate for the particular purpose of transfer printing.<sup>153</sup> The Fourth Circuit did not rely on a hidden defect analysis and instead relied on information about the process of transfer printing. The cloth's suitability for the particular purpose was adequate and the court held that specific details about defects in the cloth, which might hinder the printing process, were irrelevant.<sup>154</sup> The court concluded that the buyer continued to use the product in the transfer printing process to mitigate its damages, not that the buyer admitted to the cloth's adequate quality.<sup>155</sup> Again, market information, here the ability of the buyer to mitigate damages by selling to customers, informed the court's decision in a case involving a product's disputed suitability for a particular purpose. This time, the buyer won.

The *Globe* case, which dealt with showroom display globes, shows again a reference to the market.<sup>156</sup> It was "made crystal clear and recognizable" that "these expensive and sophisticated exhibits" would be used for more than just "a few months."<sup>157</sup> "[T]he Court assumes an impliedly agreed operational lifetime of the globes of three years on average."<sup>158</sup> The court's

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149. *Id.* § 7.7. This is not a hidden defects case. Damage or faulty product were not alleged. *Id.*

150. *Id.*

151. *Id.* "The court encourage[d] the parties to arrange, by common agreement, an independent expertise to be made in order to facilitate the legal proceedings." *Id.*

152. *Schmitz-Werke GMBH v. Rockland Industries, Inc.*, 37 Fed. App. 687, 690 (4th Cir. 2002).

153. *Id.* at 690. "The court also found that the Trevira fabric sold by Rockland had latent defects . . ." *Id.*

154. *Id.* at 693. "[I]t just permits Schmitz to do so without proving the exact nature of the defect." *Id.*

155. *Id.* at 690. "Schmitz' continued printing of the fabric even after it began to discover problems was reasonable since it was at the express urging of Rockland and was in any event the best way to mitigate its damages." *Id.* (citations omitted).

156. LG Munchen, 5 HKO 3936/00 (2002), at <http://www.cisg.law.pace.edu/cases/020227g1.html> (last visited Sept. 20, 2004).

157. *Id.* at 6.

158. *Id.* at 6-7.

rhetoric describes exactly the opposite of an idealized market because it “assumes” three years. In this real world market, there is no perfect information, and as a result, the court is forced to make an assumption. Thus, the expense of the globes figured into their expected lifetime in the court’s eyes, raising a market argument, and the buyer won.

In a 1996 Russian arbitration, the market was *not* included to bolster the communication argument.<sup>159</sup> The arbitration involved unknown goods.<sup>160</sup> The Russian seller “could not have been unaware of the climatic conditions of use of the goods” when delivering to Ecuador.<sup>161</sup> Thus, the climate was regarded as general, widely available information. Depending on the type of goods, the exact temperature, rather than the general climate, might or might not have been relevant. Because we do not know the type of goods, it is impossible to say whether the general Ecuadoran climate is sufficient information on which to base specifications for the goods. Because the tribunal considered the climate to be sufficient, and because there is no evidence in the record of any contrary indication, the information about the climate must have been dispositive.

It is compelling to note that this Russian decision did not rely on market arguments, such as the feasibility of using the goods in Ecuador for economic gain. By neglecting market arguments, which were obvious, the tribunal limited the power of the market.

This sub-part is sub-titled “Communications and the Market, Redux” because the claim of a warranty of fitness for a particular purpose is parallel to that of a specification. The claim requires a buyer to communicate clearly to the seller exactly what the buyer wants. The claims are therefore susceptible to, and are decided under, article 8(2)’s rule of constructing ambiguities against the speaker.<sup>162</sup>

In three out of four cases that ended with a final decision, the buyer won because of the court or arbitral tribunal’s favorable decision with respect to warranty of fitness for a particular purpose. This win by the buyer is in sharp contrast with the specifications cases, particularly those cases without market arguments. Thus, it is advantageous for a buyer to make a claim of insuitability for a particular purpose. Claiming the suitability for use was part of the agreement will not always be possible, however, because the seller will

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159. Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, 166/1995 (1996), at <http://www.cisg.law.pace.edu/cases/960312r1.html> (last visited Sept. 20, 2004).

160. *Id.*

161. *See id.* § 1.4.

162. CISG, *supra* note 1, art. 8(2). *See also supra* Part II.C.1.



sometimes refuse the particular purpose. Where possible, the buyer will want to lay this groundwork.

The fact that the Russian tribunal omitted the market information,<sup>163</sup> however, shows that tribunals are making a choice as to whether to include information about the market. When it is included, the market is referenced subtly. The Russian arbitration delimited the power of the market by omitting any reference to it. These are not, however, arguments about efficiency and distribution of resources through market mechanisms.<sup>164</sup> Rather, these are arguments that reflect a world social-political-economic situation that only loosely embraces the market as a distributive mechanism.

These cases suggest that market references, or the conspicuous lack thereof, reflect the world “situation.”<sup>165</sup> The judge is not deciding in favor of any particular party, but rather the court is including rhetoric that is contemporary within that judge’s milieu. In this model, the trader is the “person-in-situation” and the judge and lawyers are analogous to “workers” who employ the prevalent text system within the institutional system to influence the “situational system,” of which the “person-in-situation” is a part. This is an application of the “situational” analysis of looking at the facts without preconceived theories.

The effect on the use of standards, however, is profound. These tribunals all decide the cases pursuant to what is required under article 35. The cases are autonomously decided pursuant to the CISG, not domestic law. The decisions work side by side without citing each other, but follow along using primarily the same rhetorical approach of analyzing the market’s shading of the decisions. The fact that the decisions use this rhetoric is shown by its absence in the Russian arbitration. The decisions are all based on standards, which lack the precision and apparent control over the judge that is characteristic of rules.<sup>166</sup> Contrary to what one would expect, however, it is in additional default rules that more conflict occurs.<sup>167</sup>

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163. See *supra* note 159.

164. Cf. Charny, *supra* note 78, at 1820 (setting forth a four-space matrix for determining whether particularized, generalized, idealized, or realized forms of market analysis should be used for various types of cases); Clayton P. Gillette, *The Law Merchant in the Modern Age: Institutional Design and International Usages under the CISG*, 5 CHI. J. INT’L L. 157 (2004) (putting a premium on efficient adjudication); Avery Wiener Katz, *The Relative Costs of Incorporating Trade Usage into Domestic Versus International Sales Contracts: Comments on Clayton Gillette, ‘Institutional Design and International Usages under the CISG’*, 5 CHI. J. INT’L L. 181 (2004).

165. Cf. Kennedy, *supra* note 12, at 1766 (regarding the judge “in-situation”).

166. See Kennedy, *supra* note 12, at 1765.

On the formal level, there is eclecticism about when we should use rules and when standards. Sometimes it will be true that we can trust the judge to apply the purposes of the legal order directly to the particular facts, without worrying either about arbitrariness or about the inefficiencies generated by uncertainty. Sometimes, on the other hand, we will want him to

*C. Markets and Merchantability: Triumph of the Market in Interpretation*

The warranty for ordinary use, also known as the warranty of “merchantability,” particularly brings forth market issues. This warranty does not depend on communication between the parties. It applies where no specification or warranty for a particular purpose governs. Thus, market issues, in these instances, are especially prevalent.

The most recent of these cases is the New Zealand *Housewares Case*.<sup>168</sup> The court rejected the defendant’s argument that the implied warranty of merchantability claim should be dismissed due to the presence of indemnity arrangements in the sale contract.<sup>169</sup> The court did not cite article 8(3) but based its decision on the economic circumstances of the case, the course of dealing between the parties, the warranty provisions of the CISG, and the general legal provisions of many statutes in favor of implied warranties.<sup>170</sup>

With regard to the economic circumstances of the case, the court held that under New Zealand law, this was “a good arguable case” and denied a motion to dismiss. The court had two reasons for its decision.<sup>171</sup> First, the court rejected the defendant’s argument that the presence of indemnity provisions meant that there were no implied warranties.<sup>172</sup> The court reasoned that, from both the buyer’s and seller’s point of view, an implied warranty of merchantability was objectively necessary because of the potential warranty claims by consumers or end-users.<sup>173</sup> These economic arguments were supported with statements about the parties’ understanding of these economic realities; these statements were provided by both the buyer<sup>174</sup> and the seller.<sup>175</sup>

distinguish clearly between his lawmaking and law-applying roles.

*Id.* (emphasis in original).

167. *See infra* Part IV.C (discussing whether the merchantability, average quality, or reasonable quality standard should be applied to the warranty for ordinary use). *See generally* DiMatteo et al., *supra* note 8 (arguing for more default rules under CISG articles and finding both consistent and inconsistent decisions).

168. NZ High Court, Auckland, CP 395 SD 01 (2003), at <http://www.cisg.law.pace.edu/cases/030331n6.html> (last visited Sept. 16, 2004).

169. *Id.* para. 52. The buyer had purchased light kitchen housewares appliances from seller, including toasters, deep fryers, food processors, kettles, irons, espresso machines and rice cookers, pursuant to distribution arrangements with the seller. *Id.*

170. *Id.* para. 59. This discussion invoked many national laws rather than New Zealand domestic law. *Id.*

171. *Id.* paras. 51, 78.

172. *Id.* para. 58.

173. *Id.*

174. *Id.* para. 58.

It is clear that the plaintiff accepted that it was responsible for dealing with warranty claims which were raised by its customers . . . Indeed, the plaintiff may only have been prepared to accept sole

The court also reasoned that the course of dealing between the parties supported the argument for an implied warranty.<sup>176</sup> The “situation” created by these “ad hoc arrangements” consisted of crediting an account and supplying new equipment.<sup>177</sup> Again, the court did not cite article 8. The court further referenced the merchantability provision of the CISG, without specifically citing article 35, and referenced the prevalence of warranty of merchantability provisions in other laws.<sup>178</sup>

Such market circumstances were also the foundation of the arbitral tribunal’s decision in the *Rijn Blend* arbitration.<sup>179</sup> In this case an English buyer brought suit against a Netherlands seller of condensate crude oil mix, known as “Rijn Blend.”<sup>180</sup> The Rijn Blend was a by-product from natural gas field exploration.<sup>181</sup> The chemical composition of the Rijn Blend was not specified, and the tribunal determined that the specifications of the Rijn Blend were not sufficiently set forth to resolve the case.<sup>182</sup> Moreover, an implied warranty of fitness for a particular purpose was not appropriate to this type of product because, if a particular purpose for this type of product was intended, then it should have been communicated and included in the contract’s specifications.<sup>183</sup>

That left the arbitrators with an issue of quality under the CISG article 35(2)(a) ordinary use provision. The tribunal discussed at length the legislative history of the CISG with regard to the “average quality” rule of civil law systems, the “merchantable quality” rule of English common law, and the “reasonable quality” rule of some commentators on the CISG.<sup>184</sup> The tribunal emphasized the importance of the mercury level of the Rijn Blend,

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responsibility for warranty issues on the basis that it could be assured that the products which it was to receive would be of merchantable quality.

*Id.*

175. *Id.* para. 60

The material which has been placed before the Court makes it clear that the issue of faulty appliances was a matter of real concern to the defendants. Had they been asked at the outset whether they would be responsible for supplying products of merchantable quality, I have no doubt that they would have categorically affirmed that they were.

*Id.*

176. *Id.* para. 58.

177. *Id.* para. 32.

178. *Id.* paras. 56–62.

179. Neth. Arb. Inst. 2319 (Oct. 15, 2002), <http://www.cisg.law.pace.edu/cases/021015n1.html> (last visited Sept. 16, 2004); also available at <http://www.unilex.info/case.cfm?pid=1&do=case&id=836&step=FullText> (last visited Sept. 20, 2004).

180. *Id.* para. 39.

181. *Id.*

182. *Id.* para. 62.

183. *Id.* para. 67.

184. *Id.* para. 68–72.

which would influence its market price.<sup>185</sup> The tribunal found that the Rijn Blend was a “single purpose” commodity with no alternate market.<sup>186</sup> Under the “merchantability” rule, the goods would be conforming if there were a substitute market.<sup>187</sup> There was none. Under the “average quality” rule, the buyer failed to prove that the goods were below the average standard.<sup>188</sup>

The tribunal chose to adopt the “reasonable quality” standard pursuant to article 7 of the CISG and found that market factors showed that the Rijn Blend failed the reasonable quality test.<sup>189</sup>

Two market factors were of importance: the price and the long-term nature of the sales contracts. “[T]here was no market for Rijn Blend with increased mercury levels at prices comparable to the sales contracts when the increased levels were disclosed to prospective alternate buyers,” with respect to the merchantability test.<sup>190</sup> This applied as well under the reasonable quality standard.<sup>191</sup>

The ordinary use standard could be decided under one of the other tests. The *Shoes Case* was brought by an Italian seller against a German buyer in the District Court of Berlin.<sup>192</sup> This was an early case under the CISG, decided in September, 1994. A sample was proffered by the seller, but the court held that the buyer had not agreed to it.<sup>193</sup> The court applied the “average quality” standard and, referencing the common law merchantability rule, stated that it was insufficient that the goods “can only just be traded.”<sup>194</sup> The goods thus failed the market test of average quality; the buyer won. Thus, the market arguments did not overcome the presence of disparate additional rules under article 35. When the CISG had spawned additional rules under the standards of article 35, these rules constrained the tribunals and resulted in inconsistencies in the decisions. The market analysis could not overcome the presence of these additional rules.

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185. *Id.* at para. 89.

186. *Id.*

187. *Id.*

188. *Id.* para. 99–102.

189. *Id.* para. 103–24.

190. *Id.* para. 89.

191. *Id.* In addition, the tribunal held that the long term nature of the contracts meant that the buyer was entitled to expect the initial, acceptable quality of the Rijn Blend. The tribunal found that a course of dealing had been established by the parties under article 8 and this course of dealing formed an important additional argument in this case. *Id.* para. 121.

192. LG Berlin, 52 S 247/94 (Sept. 15, 1994), <http://www.cisg.law.pace.edu/cases/940915g1.html> (last visited Sept. 16, 2004).

193. *Id.* at 6.

194. *Id.* at 5.

The *Cloth* case juxtaposed language about the “economical” nature, or lack thereof, and the “usual” use of cloth<sup>195</sup> with a conclusion that the fitness for ordinary use test had been met and that there was no agreement to a warranty of fitness for a particular purpose.<sup>196</sup> The court’s rhetoric is striking, almost mocking the market nature of the fitness for ordinary use test; the cloth had to be cut on a diagonal, which meant that “the cloth could not be cut economically [as] . . . [the diagonal cut] would have resulted in a waste of 122%, an amount that could not be considered economical.”<sup>197</sup> Although the cloth would usually be cut front to back, “[u]ndisputedly, the fabric delivered by the [seller] is fit to be used for the production of skirts and dresses.”<sup>198</sup> There was no warranty for a particular purpose either, as “[t]he [seller] was unable to infer from the circumstances that the [buyer] meant to cut the material in any particular way.”<sup>199</sup>

Thus, market arguments were rejected by the court. One CISG commentator suggested that traders should examine inadequate price.<sup>200</sup> This perspective could be regarded as the court acting as an equitable court that measured value as an integral part of its decision, rather than a market-driven court.<sup>201</sup>

There is another side to this argument, however. Although the court accepted a market in which the quality may be low if it is not specified, the standard of good faith in negotiations is upheld through the application of the “infer from the circumstances” reference to article 8.<sup>202</sup> If the buyer, who had not paid for the goods, intended to get a benefit from the delivery of below-warranty goods without paying for them, this effort was foiled. Thus, the market requires some responsibility toward others, some requirement of altruism. This is decided in the case through the application of standards,<sup>203</sup> whether through equity or regulation of the market.

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195. LG Regensburg, 6 O 107/98 (1998), at <http://www.cisg.law.pace.edu/cases/980924g1.html> (last visited Sept. 13, 2004). The case also included issues of conformity to samples and of a hidden defect for which notice was deficient. *Id.*

196. *Id.*

197. *Id.* at 5.

198. *Id.*

199. *Id.*

200. See BIANCA & BONELL, *supra* note 3, at 279 § 2.8.3. The buyer should conclude that goods do not conform to convention standards if “the price corresponds to the price generally paid for poor quality goods.” *Id.*

201. See Morton J. Horwitz, *The Historical Foundations of Modern Contract Law*, 87 HARV. L. REV. 917, 919 (1974). “Modern contract law was thus born staunchly proclaiming that all men are equal because all measures of inequality are illusory.” *Id.*

202. LG Regensburg, 6 O 107, para. 11 (1998), *supra* note 195.

203. See *supra* notes 64–71 and accompanying text (discussing Professor Kennedy’s four part dichotomy between individualism and altruism).

In these cases, the market is a central factor due to the parties' diverging opinions regarding the agreement. The three standards available to decide fitness for ordinary use—merchantability, average quality, and reasonable quality—are avenues for some non-uniformity in the quality of goods cases. The *Rijn Blend* arbitration, a more recent decision employing the “reasonable quality” standards, may represent the wave of the future.<sup>204</sup>

#### *D. Health and Conformity: Two Themes*

The health and conformity cases have two themes: whether other jurisdictions' cases are cited or tacitly acknowledged, and the power of the health concern for deciding cases. This will be seen in the contrast between the *Mussels*, *Cheese* and *Paprika* cases, and *Medical Marketing International, Inc. v. Internazionale Medico Scientifica, S.R.L.* on the one hand, and the *Machines* case on the other hand.

In the famous *Mussels* case,<sup>205</sup> the German Supreme Court set out a standard for deciding whether the regulations of the buyer's country, particularly health regulations, were binding on the seller.<sup>206</sup> The case was decided under articles 35(2)(a) and 35(2)(b) pertaining to warranties for ordinary use and for a particular purpose. The court used powerful rhetoric regarding the limitations on a duty:

The delivered mussels are not of inferior quality even if their cadmium content exceeds the examination results known so far. The reason for this is that the standard for cadmium content in fish, in contrast to the standard for meat, does not have a legally binding character but only an administratively guiding character. Even if the standard is exceeded by more than 100%, one cannot assume that the food is no longer suitable for consumption, because mussels, contrary to basic food, are usually not consumed in large quantities within a short period of time and, therefore, even “peaks of contamination” are not harmful to one's health.<sup>207</sup>

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204. See *supra* note 179 and accompanying text.

205. See Flechtner, 1998, *supra* note 17, at 209–10 (discussing the *Mussels* case); Teija Poikela, *Conformity of Goods in the 1980 United Nations Convention of [sic] Contracts for the International Sale of Goods*, 1 NORDIC J. COM. L. 1, 43, 54 n.129 (2003), at [http://www.njd.fi/1\\_\\_2003/article5.pdf](http://www.njd.fi/1__2003/article5.pdf) (last visited Nov. 2, 2004) (addressing the famous *Mussels* case).

206. BGH2 Germany, VIII ZR 159/94 (Mar. 8, 1995), at <http://www.cisg.law.pace.edu/cases/950308g3.html> (last visited Sept. 13, 2004) [hereinafter *Mussels* case].

207. *Id.* § I.

Thus, the court incorporated the consideration of supposed health effects as part of CISG jurisprudence, finding the regulations to be “administratively guiding.”<sup>208</sup> The court then, however, made its language almost completely powerless by providing for many exceptions to the holding.

The exceptions were far-reaching. The standards are not applicable: (1) if the seller has a branch in the buyer’s country; (2) if the seller has “already had a business connection with the buyer for some time;” or (3) if the seller often exports into the buyer’s country or has promoted products in that country.<sup>209</sup> The court cited authorities and stated that the buyer had alleged no facts to support a finding that any of these exceptions should be found.<sup>210</sup> The court put the burden on the buyer, however, to inform the seller of regulations. The buyer lost.

In the French *Cheese* case, the court made a decision that tightened a requirement imposed by the German Supreme Court without contradicting or citing the German court.<sup>211</sup> The French court maneuvered around the prior decision in a manner that suggests that it knew about the German decision. The court found that: the seller had an ongoing business relationship with the buyer; that the seller knew the cheese would be marketed in France; that this knowledge imposed a duty on the seller under article 8(1) to interpret the order as pertaining to goods that have to comply with the marketing regulations of the French market; and that the seller had therefore delivered non-conforming goods.<sup>212</sup>

This case goes a step beyond the *Mussels* case because the seller was charged with a duty to find out what the French regulations were, and because this duty was imported into the subjective agreement of the parties under article 8(1).<sup>213</sup> There is no mention in the case that the seller knew the regulations. Thus, the regulations, at least in this case, are implied in the contract. The case is not contrary to the *Mussels* case, however, because the case does not say that the regulations in question are guidelines only, as does the *Mussels* case,<sup>214</sup> and it states that there has been a business connection with the buyer for some time.<sup>215</sup> Thus, the French precedent is not contrary to the German decision. Interpretation of the case under article 8(1) rather than

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208. *Id.* § II(1)(bb).

209. *Id.* § II(1)(ccc).

210. *Id.*

211. CA Grenoble, *Jurisclasseur Périodique* (Paris) 1996, ed. 6, IV, 712, 927 93/4126(1995), at [www.cisg.law.pace.edu/cases/950913f1.html](http://www.cisg.law.pace.edu/cases/950913f1.html) (last visited Sept. 13, 2004) [hereinafter *Cheese* case].

212. *Id.* §§ 2–3.

213. *Id.* § 3.

214. *Mussels* case, § II(1)(bb), *supra* note 206.

215. *Cheese* case, § 3, *supra* note 211.

article 8(2) is perhaps another way of being consistent with the German decision, as article 8(2) would better fit the objective nature of the inquiry.<sup>216</sup> The buyer won.

For a French court to acknowledge a German decision as authority would, perhaps, put the French court in a position of providing undue acknowledgement of a foreign decision. Such acknowledgement of foreign decisions perhaps awaited further development of CISG law. This notion is expressed by a decision of the Italian *Tribunale di Vigevano* case described in the literature, which cited numerous foreign decisions.<sup>217</sup>

That a foreign court's decision is not cited does not undermine the decision's usefulness in the jurisprudence of the CISG. Foreign cases can be cited as authority, rather than precedent. Naturally, they may also simply not be cited.<sup>218</sup>

The *Paprika* case was decided by a lower German court a few months after the *Mussels* case.<sup>219</sup> It, too, worked around its Supreme Court's decision by finding a hidden defect and a need to require compliance with regulations.<sup>220</sup> The hidden defect was addressed under the provisions of article 38 dealing with inspection of non-conformity.<sup>221</sup> The buyer prevailed.

*Medical Marketing International, Inc. v. Internazionale Medico Scientifica, S.R.L.*, upheld an arbitral decision that, relying on the German court's reasoning in the *Mussels* case, held that the seller was aware of the regulations governing the buyer before they entered into an agreement to supply radiological devices.<sup>222</sup> The court used the German court's reasoning and even cited the German decision.<sup>223</sup> The U.S. court, unlike the earlier French court, was willing to cite a foreign case. It is important to note, however, that this was the Eastern District of Louisiana, a federal court sitting in a state with a long tradition of mixed legal traditions.

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216. See *supra* Part II.A.2.

217. See Franco Ferrari, *Tribunale di Vigevano: Specific Aspects of the CISG Uniformly Dealt With*, 20 J.L. & COM. 225 (2001) (describing ground-breaking case).

218. See Franco Ferrari, *CISG Case Law: A New Challenge for Interpreters?*, 17 J.L. & COM. 245, 260 (1998) (changing positions from that in Franco Ferrari, *Uniform Interpretation of the 1980 Uniform Sales Law*, 24 GA. J. INT'L & COMP. L. 183 (1994)).

219. See LG Ellwangen, 1 KfH O 32/95 (Aug. 21, 1995), <http://www.cisg.law.pace.edu/cases/950821g2.html> (last visited Sept. 13, 2004).

220. *Id.* § III(B).

221. *Id.*

222. *Medical Marketing Int'l, Inc. v. Internazionale Medico Scientifica, S.R.L.*, No. CIV.A.99-0380, 1999 WL 311945 (E.D. La. May 17, 1999).

223. *Id.* n.2.



From a litigation perspective, a case will not have the same appeal if food or health concerns are not identified. This appeared to be true in the 2000 Austrian Supreme Court *Machines* case.<sup>224</sup> The dispute was between an Austrian buyer and German seller.<sup>225</sup> The case was decided based on specifications. The regulations of the buyer's country pertained to European Community labeling of the generic "machines."<sup>226</sup> No food or health effect was reported, and the parties had a history of providing the machines without the labeling.<sup>227</sup> Thus, the course of dealing ran counter to the exception in the *Mussels* case for courses of dealing that show knowledge of the buyer's country's regulations. Thus, the legal argument about the course of dealing and the lack of food or health concerns makes this decision consistent with the *Mussels* case.

In none of the cases involving quality and articles 8(2) and 8(3), even those involving regulation, do analogies or outside gap-filling come into play in determining the legal provisions applicable to the case. As Professors Flechtner and Schlechtriem have concluded, article 8 provides a self-contained answer to many issues.<sup>228</sup> It is not necessary to turn to analogy or outside gap-filling in the case discussed in their hypothetical, or in the decisions discussed here.

Thus, this section makes evident two themes. These cases show, first, that health is a consideration that can mitigate against a lack of an agreement on a particular issue. Second, the *Cheese* case illustrates the principle that court decisions may converge consistently without actually citing each other.

## V. CONCLUSION

We see, in conclusion, that market arguments emerge as the primary article 8(3) circumstance. The markets that are relevant are the markets of the real world, not markets of ideal information. Their consideration may be omitted in favor of intent arguments alone, as in the sale from Russia to Ecuador. Arguments as to "efficiency" may even be dismissed, as in the *Cloth* case. Regulations may be imposed on agreements where food or health are at issue.

These markets fit the international trading system, which is formed around regulated markets such as those in the *Cheese* and other regulatory

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224. OGH, [2000] Österreichisches Recht der Wirtschaft (RdW) No. 506, 2 Ob 100/00w (Apr. 13, 2000), available at <http://www.cisg.law.pace.edu/cases/000413a3.html> (visited Sept. 13, 2004).

225. *Id.*

226. *Id.* at 9.

227. *Id.* at 10.

228. Flechtner, *supra* note 33, at 249. "We can do it within the Convention." *Id.*

cases. The regulation may also be that of putting forward the value of equity, as opposed to an “efficient” market, as in the *Cloth* case, or of simply dismissing an obvious market argument, as in the Russian arbitration regarding Ecuador. The globalization of Western trade has not, in these cases, resulted in a wildly enthusiastic embracing of “idealized” market-oriented thought, because these cases do not trumpet a “free” market or efficient market of perfect information.

These decisions are made primarily pursuant to “standards” in the CISG under the provisions governing quality in article 35 and provisions governing “objective intent” in articles 8(2) and 8(3). As such, discretion is afforded the judges. Yet, the decisions all detail facts that support the legal provisions that govern the cases. Patterns in the types of facts applied to the cases, which appear to influence the outcomes, can be discerned.

These patterns have striking significance for the litigator and international sales counsel attorney. For example, in the specifications and warranty cases, communications arguments can go either way, but in the cases analyzed here, communications arguments favored the sellers. Warranties of fitness for a specific purpose favor the buyer over straight specifications claims. Market arguments tend to favor the buyer across the cases. Health concerns strengthen regulatory claims for warranties.

Thus, the bottom line for practitioners is that sellers can always argue for more specificity in specifications, but buyers will want to show the market significance of claimed warranties.

These cases advance the goals of uniformity, good faith, international character, and even the promotion of international trade. The text system of the first three of these goals is suited by these decisions. Good faith is advanced by the article 8(2) rule of construing against the message sender. The decisions are fairly uniform and are decided based on CISG law, not by reference to domestic laws. The need for interpretive rules to advance the goal of good faith in negotiations is also advanced in furtherance of the goal of international character. These three textual goals are supported by the institutional system of a community of CISG interpreters that, with or without citation, acknowledges foreign decisions and has the resources to interpret the CISG. These objects of support combine in a way that is suited to the world in a “situational system” that allows the decisions to fit the world in which they are made.

This “situational system” is not at any pole or pathway point along most of the various dichotomies that are applied to the CISG. It is not the law of any one legal system or political block, and it is not the law of “altruism” or “individualism.” What can be seen is that the cases do not apply an “idealized” market; the cases are of the “real world,” the market of

institutions. The CISG is a compromise. As such, it is its own “system,” capable of guiding decisions to enforce the system for a long time.

The “situational system” recognizes the market in a “real world” form, compatible with the regulated market of the world economy.