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# STANDARDS AND CONFORMITY OF GOODS IN SALES LAW

Djakhongir Saidov\*

## Introduction

Standards are a pervasive feature of modern life. Most products today have some corresponding standard(s) concerning a product's composition, features, such as health and safety, or the process to be followed in making it. The standards are numerous, having different origins, ownership, character and functions. Some of them are adopted by states and often contained in public law regulations ('public' standards). Other standards are 'private' in the sense that they are produced by non-state bodies and organisations. These standards have proliferated greatly in the last two decades and play an important role in governing various aspects of goods and their production processes. This proliferation of standards has generated much discussion in legal and non-legal scholarship that addresses many aspects of standards, including their nature, content, functions, systematisation and classification, the relationship between private and public standards, their role in governing product quality and processes and their function of 'regulating' global supply chains.

Against this background, there has been surprisingly little discussion of the role and relevance of standards in the law of sale of goods. After all, the issue of 'conformity'<sup>1</sup> or 'quality'<sup>2</sup> of goods, being one of the most highly litigated,<sup>3</sup> occupies a central place in sales law; and it is with 'conformity of goods' that product standards are concerned. It is not the purpose of sales law to enforce standards because its task is to determine what the seller's obligations are in respect of goods. However, given that both the rules on conformity in sales law and standards largely target the same subject-matter, standards can be highly relevant to the determination of the seller's obligations and ultimately liability, arising from the contract of sale.

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\* Professor of Commercial Law, King's College London. The author is very grateful to Professor Michael Bridge for his comments on an earlier draft. Any errors are the author's own.

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<sup>1</sup> A convenient term often used in sales law to cover such aspects of the goods as quality, description, quantity or packaging. This is also how conformity is understood by the UN Sales Convention (Art 35(1)).

<sup>2</sup> An aspect of conformity.

<sup>3</sup> See CJ Murrow, 'Warranty of Quality: A Comparative Survey' (1940) 14 Tul L Rev 327; S Kröll, 'The Burden of Proof of the Non-Conformity of Goods under Article 35 CISG' (2011) 3 Belgrade L Rev 162; also n 232.

The specific question that this article examines is whether standards, public or private, should influence the interpretation of sales contracts and of the terms implied in sales law. This question, that has not been sufficiently addressed in the sales law scholarship, is important because the number and role of standards will only continue to increase, making the issue of their relationship with sales law more and more topical in the years to come. This article organises the thus far disparate discussions about standards within one framework and develops criteria and factors that will help understand and analyse a complex interaction between the interpretation of contracts and of terms implied in sales law, on the one hand, and public and private standards, on the other.

The question, posed in the previous paragraph, will be examined in the context of several common law systems, such as those of the United Kingdom (UK), Canada and, to a lesser degree, the United States and Hong Kong, and of the UN Convention on Contracts for the International Sale of Goods (CISG).<sup>4</sup> All these sales law regimes have many similarities and common features, making it appropriate to integrate their experiences into one discussion. The Canadian common law provinces<sup>5</sup> and the sales law of Hong Kong are modelled on the UK Sale of Goods Act 1893, which, in the UK, was replaced by the Sale of Goods Act 1979 (SGA), with subsequent amendments having been made to the SGA, such as the replacement<sup>6</sup> of the ‘merchantable quality’ test with that of ‘satisfactory quality’. The statutes in the common law provinces in Canada and Hong Kong continue to use the merchantable quality test.<sup>7</sup> Decisions in one common law jurisdiction are also often taken into account by courts in another, producing a degree of legal convergence, including in matters of quality or conformity of goods. The US Uniform Commercial Code (UCC) uses similar tests of ‘merchantable quality’<sup>8</sup> and of ‘fitness for purpose’, which is also provided for in statutes in other common law jurisdictions.<sup>9</sup> The CISG uses a similar ‘fitness for purpose’ test<sup>10</sup> and it is only its fall-back implied term that differs more substantially from its common law counterpart tests of ‘satisfactory’ or ‘merchantable’ quality. Instead, the CISG requires that goods be ‘fit for the purposes for which goods of the same description would ordinarily be used’.<sup>11</sup> More generally,

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<sup>4</sup> The CISG has been ratified by 84 countries. The UK has not ratified it.

<sup>5</sup> Only the provisions of the Sale of Goods Act of the province of British Columbia ([RSBC 1996]) will be referred to because all Canadian cases relevant to this discussion have been decided in that province.

<sup>6</sup> By means of the Sale and Supply of Goods Act 1994.

<sup>7</sup> See n 86.

<sup>8</sup> See n 86.

<sup>9</sup> See n 81.

<sup>10</sup> See Art 35(2)(b).

<sup>11</sup> Art 35(2)(a).

what all these sales laws have in common is that determining the seller's conformity or quality obligations is highly facts sensitive, with the terms implied in law providing a general framework for this purpose.

Much of this article will thus focus on examining and evaluating the experience of the said sales laws in so far as it concerns public and private standards. However, given that sales laws govern quality and other aspects of goods in a very direct way in order to allocate risks between the two contracting parties, it may be asked whether the discourse on standards outside sales law should engage with the experience of sales laws. It will be suggested that indeed both sales law and the discussion of standards outside it would benefit from greater engagement with each other. Several areas where such mutual benefits will arise will be highlighted.

The article will begin by providing an introduction to standards and to the discourse on them outside sales law, to the extent that is relevant to this article. The next substantial part will analyse the interaction between sales law and standards. The following part will identify the areas where sales law and the discourse on standards outside it may produce mutual benefits. The final conclusions will be drawn at the end.

## I. Standards in modern trade

There is no one universally accepted definition of a 'standard'. Generally, it can be understood as a benchmark or a level of quality or attainment, with reference to which something is evaluated or the compliance with which is desirable or expected.<sup>12</sup> Some leading standard setting organisations, such as the International Organisation for Standardization (ISO), define a standard as 'a document that provides requirements, specifications, guidelines or characteristics that can be used consistently to ensure that materials, products, processes and services are fit for their purpose'.<sup>13</sup> It is helpful to differentiate 'public' standards from 'private' ones. The former are adopted by state organisations and are often contained in public law regulations. They can also include those adopted by inter-governmental organisations, such the

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<sup>12</sup> See <<http://www.oxforddictionaries.com/definition/english/standard>>.

<sup>13</sup> See <<http://www.iso.org/iso/home/standards.htm>>.

United Nations, International Labour Organisation or Codex Alimentarius Commission.<sup>14</sup> Public standards can be mandatory or voluntary. Other standards are ‘private’ in the sense that they are produced by non-state bodies and organisations. These can be: companies, adopting their own standards or codes of conduct, such as Tesco (Nature’s Choice);<sup>15</sup> national industry bodies, such as the British Retail Consortium (BRC) and its BRC Global Standards;<sup>16</sup> international consortia of companies and their global standards, such as GlobalG.A.P. (‘Good Agricultural Practice’),<sup>17</sup> the Global Food Safety Initiative (GFSI)<sup>18</sup> or the Equator Principles (EP) Association;<sup>19</sup> international organisations that adopt standards across various industries and sectors, such as the ISO that adopts standards in a wide range of areas, including technology, food safety, agriculture, healthcare, environment;<sup>20</sup> civil society, represented by non-profit non-governmental organisations (NGOs), such as the Fairtrade Foundation<sup>21</sup> that promulgate what might called ‘ethical’ standards, concerning human rights, child labour and other labour standards, environmental protection, sustainability and corruption.

Being adopted by non-state actors, private standards are voluntary. However, they can become mandatory or quasi-mandatory. The former is the case where a private standard is incorporated into a national regulatory framework.<sup>22</sup> The example of the latter is where standards are applied by the majority of businesses in a particular sector and/or where compliance with such standards is required by a few large companies (usually, buyers) that dominate the sector.<sup>23</sup> Companies in that sector may have no real choice but to comply with these standards in order to enter, remain in the market or carry on business effectively.<sup>24</sup>

Standards and standardisation pursue a number of aims and objectives. Ethical standards, for example, aim to protect and promote social and human rights, combat such practices as child labour or bribery or protect environment. Standards of more technical nature define the composition and specifications of goods, ensure their compatibility and, essentially,

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<sup>14</sup> ‘The Codex Alimentarius was established by FAO and the World Health Organization in 1963 to develop harmonised international food standards, which protect consumer health and promote fair practices in food trade’ (<<http://www.codexalimentarius.org/>>).

<sup>15</sup> <<http://www.tesco.com/csr/g/g4.html>>.

<sup>16</sup> <<http://www.brcglobalstandards.com/>>.

<sup>17</sup> <[http://www.globalgap.org/uk\\_en/who-we-are/about-us/](http://www.globalgap.org/uk_en/who-we-are/about-us/)>.

<sup>18</sup> <<http://www.mygfsi.com/about-us/about-gfsi/what-is-gfsi.html>>.

<sup>19</sup> <<http://equator-principles.com/index.php/about-ep/governance-and-management>>.

<sup>20</sup> <<http://www.iso.org/iso/home/about.htm>>.

<sup>21</sup> <<http://www.fairtrade.org.uk/en/what-is-fairtrade/who-we-are>>.

<sup>22</sup> See, eg, G Smith, ‘Interaction of Public and Private Standards in Food Chain’ (2009) OECD Food, Agriculture and Fisheries Working Papers No. 15, OECD Publishing, 32-33.

<sup>23</sup> See, eg, *ibid*, 24.

<sup>24</sup> *Ibid*.

lead to the situation where ‘buyers and suppliers have a common language to recognise and discuss quality issues’,<sup>25</sup> with trade being thereby facilitated.<sup>26</sup> Most standards today will be concerned with ensuring and promoting human and animal health and safety and the importance of this role is difficult to overestimate. By adhering to high standards, companies enhance their reputations,<sup>27</sup> using standards as a competitive tool and a way of differentiating themselves from other companies. In the case of multinational companies (e.g., manufacturers or large retailers) that conduct their business through international supply chains,<sup>28</sup> the adoption of certain standards necessitates measures to ensure that these standards are complied with in all contracts within a supply chain. Standards become a way of regulating supply chains and, to that extent, constitute a regulatory framework governing international trade.<sup>29</sup>

There are many benefits associated with standards and standardisation.<sup>30</sup> They help manufacturers manage and rationalise the manufacturing process, reduce costs, including costs of negotiating contracts. They are valuable to traders and consumers in that they signal what can be expected of goods and provide certain assurances as regards quality and other aspects. By providing clear benchmarks of quality, standards can help settle disputes and avoid litigation. Since they necessarily provide some quality and other benchmarks, they are a useful platform for research and development into improving goods further.

It is in the last two decades that the world has seen proliferation of various standards, particularly private, and various standards setting organisations.<sup>31</sup> There are a number of factors that have contributed to this development. First, since the 1990s, safety of products, and food safety in particular, has been a concern in Western countries, following major food crises, such

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<sup>25</sup> S Henson and J Humphrey, ‘Understanding the Complexities of Private Standards in Global Agri-Food Chains’, <<https://www.ids.ac.uk/files/dmfile/HensonHumphreyLeuvenOct08.pdf>>, 9.

<sup>26</sup> See further N Brunsson, ‘Organizations, Markets and Standardization’ in N Brunsson and B Jacobsson, *A World of Standards* (OUP 2002) 21; N Brunsson and B Jacobsson, ‘The Contemporary Expansion of Standardization’ in Brunsson and Jacobsson, *A World of Standards* (n 26) 10.

<sup>27</sup> See, eg, L Fulponi, ‘Private Voluntary Standards in the Food System: The Perspectives of Major Food Retailers in OECD Countries’ (2006) 31 *Food Policy* 1, 5.

<sup>28</sup> Supply chain can be defined as the ‘series of companies, including suppliers, customers, and logistics providers which work together to deliver a value package of goods and services to the end consumer’ (see A Rümke, *Corporate Social Responsibility, Private Law and Global Supply Chains* (Edward Elgar 2015) 79)

<sup>29</sup> See, eg, P Liu, ‘Private Standards in International Trade: Issues and Opportunities’, <[http://www.fao.org/fileadmin/templates/est/AG\\_MARKET\\_ANALYSIS/Standards/Private\\_standards\\_\\_\\_Trade\\_Liu\\_WTO\\_wkshp.pdf](http://www.fao.org/fileadmin/templates/est/AG_MARKET_ANALYSIS/Standards/Private_standards___Trade_Liu_WTO_wkshp.pdf)>, 2.

<sup>30</sup> See, generally, United Nations Industrial Development Organization (UNIDO), *Role of Standards: A Guide for Small and Medium-Sized Enterprises*, Working Paper, 2006, <[https://www.unido.org/fileadmin/media/documents/pdf/tcb\\_role\\_standards.pdf](https://www.unido.org/fileadmin/media/documents/pdf/tcb_role_standards.pdf)>, 5.

<sup>31</sup> See International Trade Centre, *The Interplay of Public and Private Standards: Literature Review Series on the Impacts of Private Standards – Part III* (Geneva: ITC, 2011) 15, <[https://www.unido.org/fileadmin/media/documents/pdf/tcb\\_role\\_standards.pdf](https://www.unido.org/fileadmin/media/documents/pdf/tcb_role_standards.pdf)>.

as the mad cow disease.<sup>32</sup> As a result, many governments have strengthened regulatory frameworks to tackle real and/or perceived safety risks and placed responsibility on firms to ensure food safety for consumers.<sup>33</sup> The private sector has responded by adopting its own standards to ensure food safety and avoid or reduce potential liability under the applicable regulatory framework.<sup>34</sup> Secondly, there has been a large increase in a consumer's interest in and awareness of not only matters of product safety but also ethical aspects of the production process.<sup>35</sup> Thirdly, this consumer interest has been reinforced by companies who have developed their competitive strategies with reference to environmental, social and other ethical considerations.<sup>36</sup> Fourthly, the last decades have also witnessed the growth of civil society that contributed substantially to the emergence of ethical standards.<sup>37</sup> Fifthly, there has been globalisation of supply chains<sup>38</sup> with Western companies increasingly outsourcing parts of their production processes to developing and transition economies.<sup>39</sup> Business activities within these supply chains must be co-ordinated and standards and standardisation have become a major way through which multinational companies regulate their supply chains.

The latter factor, together with others such as a lack of resources and technical expertise to deal with increasing complexity of standards on a public level,<sup>40</sup> has resulted in what many perceive as the shift from public to private market governance.<sup>41</sup> In other words, it is private standards, incorporated into contracts within global supply chains, that largely govern quality of goods and their production processes. It is also widely reported that private standards often tend to be higher, more rigorous and flexible than their public counterparts.<sup>42</sup> The two sets of

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<sup>32</sup> E Giraud-Héraud et al, 'Joint Private Safety Standards and Vertical Relationships in Food Retailing' (2012) 21 *J Economics Management Strategy* 179.

<sup>33</sup> See, eg, the UK Food Safety Act 1990, in particular ss. 7, 8, 14-15. See further Henson and Humphrey (n 25) 5; Giraud-Héraud et al (n 32) 180.

<sup>34</sup> Under the UK Food Safety Act 1990, proving that a person charged with an offence 'took all reasonable precautions and exercise all due diligence to avoid the commission of the offence by himself or by a person under his control' is a defence to the charge of an offence (s 21(1)). The implementation of private standards is seen as 'one major tool to assure due diligence and signal that firms are taking all reasonable precautions to prevent incidents from occurring' (Giraud-Héraud et al (n 32) 180).

<sup>35</sup> See, eg, Henson and Humphrey (n 25) 5.

<sup>36</sup> See J Wouters and D Geraets, 'Private Food Standards and the World Trade Organization: Some Legal Considerations' [2012] *World Trade Rev* 479, 480.

<sup>37</sup> See, eg, Fulponi (n 27) 3.

<sup>38</sup> See, eg, Henson and Humphrey (n 25) 5; Wouters and Geraets (n 36) 480.

<sup>39</sup> See Rümke (n 28) 79.

<sup>40</sup> See, eg, International Trade Centre (n 31) 15.

<sup>41</sup> See, eg, Henson and Humphrey (n 25) 5; LC Backer, 'Multinational Corporations as Objects and Sources of Transnational Regulation' (2008) *ILSA J Int'l Comparative L* 499, 505.

<sup>42</sup> See, eg, International Trade Centre (n 31) 20; Giraud-Héraud et al (n 32) 182.

standards, however, are mutually reinforcing and complementary.<sup>43</sup> Public standards are necessary not just because it is the state that ultimately bears responsibility for public safety<sup>44</sup> but also because public standards are needed ‘to correct market failures associated with information asymmetries or consumption externalities and where standards have clearly public good characteristics’.<sup>45</sup> They sometimes trigger or provide the basis for the development of private standards.<sup>46</sup> The latter are useful, as far as public regulation is concerned, because private standards can perform the regulatory function where public standards are either weak or absent.<sup>47</sup>

The proliferation of various standards has had many ramifications, generating much discussion in non-legal and legal literature. This is not a place to summarise the entire multi-faceted discourse on standards. Only those areas that are relevant to the present discussion will be noted. For example, much discussion has focused on the nature, content, systematisation and classification of private standards and their relationship with public standards.<sup>48</sup> Private standards are not free from controversy and there is a debate about whether they are an obstacle to or catalyst of international trade, about their legitimacy,<sup>49</sup> impact on international trade and on developing countries. One concern regarding their legitimacy is that their development does not involve the required level of transparency, public and legal scrutiny.<sup>50</sup> Another is that private standards can be driven by self-interest of a body, setting the standard. Considering that they increasingly take on the role akin to public regulation, the approach based on the pursuit of self-interest cannot be the right way of regulating products and the production processes, which should reflect common goals and public interest.<sup>51</sup>

Developing countries, where most parts of supply chains are located, are also concerned by the fact that in reality their businesses become bound by standards that originate from the developed world. These can be standards based on laws and regulations in developed countries; this happens where multinational companies incorporate the requirement to comply with the

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<sup>43</sup> See Y Naiki, ‘The Dynamics of Private Food Safety Standards: A Case Study on The Regulatory Diffusion of GlobalG.A.P.’ (2014) 63 ICLQ 146.

<sup>44</sup> See International Trade Centre (n 31) 17.

<sup>45</sup> Smith (n 22) 6.

<sup>46</sup> See, eg, Liu (n 29) 14; Smith (n 22) 6.

<sup>47</sup> See Smith (n 22) 6, suggesting also that in certain circumstances private standards can ‘act to facilitate compliance with public standards to allow for better targeting of scarce compliance resources’.

<sup>48</sup> See sources referred to throughout this section.

<sup>49</sup> For a helpful overview of the debate and further references, see Naiki (n 43) 146-148.

<sup>50</sup> See, eg, Naiki (n 43) 146.

<sup>51</sup> See, eg, Naiki (n 43) 146-148.



laws of their home countries into all contracts within a supply chain.<sup>52</sup> Alternatively, these can be private standards, adopted by the dominant company in the chain or by a consortium of companies. Developing countries play a small role in developing these standards. Crucially, the costs and burdens of compliance are substantial, whilst non-compliance can lead to the exclusion from international markets, loss of earnings and access to expertise and technology.<sup>53</sup>

Another major theme, surrounding private standards, has been their extensive incorporation in contracts, often of standard form, within supply chains. As noted, multinational companies, usually acting as the end-buyers, often rely on supply chains, constructed as a series of contracts, in order to deliver a final product to the market. Using their dominant position, these companies require their suppliers to comply with specified standards.<sup>54</sup> To ensure such compliance, the suppliers incorporate these requirements in contracts with their own suppliers and these requirements are eventually contractually imposed on all parties upstream. The result is a supply chain, consisting of series of bilateral contracts, based on standards dictated by the dominant end-buyer. The ways these chains operate are well documented in many case studies that explain the operation of supply chains used by large multinational companies in retail, food and manufacturing sectors, such as GAP,<sup>55</sup> Wal-Mart<sup>56</sup> or IKEA.<sup>57</sup>

Many have argued that contracts, incorporating various standards, within global supply chains have turned into ‘transnational regulatory regimes’,<sup>58</sup> that in practice ‘operate as a substitute for public regulation’.<sup>59</sup> First, the incorporation of human rights, labour or environmental standards means that contracts seek to produce effects far beyond the parties to

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<sup>52</sup> This trend is only likely to increase. See, eg, the recent UK Modern Slavery Act 2015 requiring businesses with a commercial presence in the UK and a specified total turnover threshold (£36 million) to prepare a slavery and human trafficking statement for each financial year, setting out steps taken by an organisation to ‘ensure that slavery and human trafficking is not taking place – (i) in any of its supply chains, and (ii) in any part of its own business’ or providing that the organisation ‘has taken no such steps’ (s 54(4)).

<sup>53</sup> Liu (n 29) 17.

<sup>54</sup> See, eg, the statement by Philip Morris International: ‘We require each of our suppliers to follow our [Good Agricultural Practices] program which is designed to enable us to assess the farming processes of our suppliers and to identify opportunities for improvement’ (<[http://www.pmi.com/eng/about\\_us/how\\_we\\_operate/pages/good\\_agricultural\\_practices.aspx](http://www.pmi.com/eng/about_us/how_we_operate/pages/good_agricultural_practices.aspx)>).

<sup>55</sup> See Backer (n 41).

<sup>56</sup> See LC Backer, ‘Economic Globalization and the Rise of Efficient Systems of Global Private Law Making: Wal-Mart as Global Legislator’ (2007) 39 Connecticut L Rev 1741.

<sup>57</sup> ER Pedersen and M Andersen, ‘Safeguarding Corporate Social Responsibility (CSR) in Global Supply Chains: How Codes of Conduct are Managed in Buyer-Supplier Relationships’ (2006) 6 J Public Affairs 228.

<sup>58</sup> See, eg, F Cafaggi, ‘The Regulatory Functions of Transnational Commercial Contracts: New Architectures’ (2013) 36 Fordham Int’l L J 1557, 1566; Backer (n 56) 1783.

<sup>59</sup> See F Cafaggi, ‘New Foundations of Transnational Private Regulation’ (2011) 38 J L Society 20, 48.

a given contract.<sup>60</sup> Secondly, because the incorporation of standards in contracts does not guarantee compliance, dominant parties in a chain, together with their immediate suppliers, usually resort to the internal and external auditing and certification mechanisms.<sup>61</sup> Either the dominant party's own auditors or those employed externally, including NGOs, are entrusted to investigate the immediate supplier's compliance with the relevant standards as well as that of other parties in the chain. Where the immediate supplier's non-compliance with a standard is detected, the dominant party can resort to remedies for breach of contract against the supplier.<sup>62</sup> As a whole, though, the monitoring schemes are seen as 'intrusive as any created by governments'<sup>63</sup> and 'resemble more the form of legislative or administrative management under public law codes'.<sup>64</sup>

## II. Standards and sales law

### A. Legal framework

Before exploring the response of sales law to standards, it is necessary to set out the relevant legal framework in the common law systems and in the CISG. Freedom of contract is the underlying principle in all of them<sup>65</sup> and where the contract expressly provides that the seller must comply with a certain standard, that will normally constitute a seller's contractual obligation.<sup>66</sup> Not every statement in relation to the goods will, however, constitute a seller's contractual obligation.<sup>67</sup> A statement will only amount to a contractual obligation, if it was so intended by the parties. Such an intention is to be inferred from the surrounding

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<sup>60</sup> Cafaggi (n 58) 1565.

<sup>61</sup> See, eg, L Lin, 'Legal Transplants Through Private Contracting: Codes of Vendor Conduct in Global Supply Chains as an Example' (2009) 57 *American J Comparative L* 711, 723-724.

<sup>62</sup> Cafaggi (n 58) 1604.

<sup>63</sup> Backer (n 41) 518.

<sup>64</sup> *Ibid*; also Cafaggi (n 58) 1604. For the argument that the 'contractualisation of regulatory provisions' has widened legal avenues for claiming against various parties in a chain, see Cafaggi (n 58) 1604.

<sup>65</sup> See, eg, *Photo Production Ltd v Securicor Transport Ltd* [1980] AC 827, 848. See also CISG, Arts 6 and 35(1).

<sup>66</sup> See, eg, *Photo Production Ltd v Securicor Transport Ltd* (n 65) 848.

<sup>67</sup> The common law subsumes statements into: misrepresentations, inducing a party to enter into a contract; contractual promises that are terms of the main contract; contractual promises that are separate from the main contract (collateral contract); statements non-compliance with which will not trigger legal liability, such as mere puffs or statements of opinion or intention (see, generally, M Bridge (ed), *Benjamin's Sale of Goods* (9<sup>th</sup> edn, Sweet & Maxwell-Thomson Reuters 2014) paras 10-001-10-023).

circumstances,<sup>68</sup> with the relevant factors including the nature of a statement,<sup>69</sup> its importance to the parties, the time when it was made,<sup>70</sup> or the balance of the parties' expertise in and knowledge of the characteristic, to which the statement relates.<sup>71</sup> In the common law, the interpretation of the parties' intentions is to be done 'objectively', 'by asking whether the other party assumed, and a reasonable person in his position would have assumed, that the representor was to be regarded as undertaking legal liability for his assertions'.<sup>72</sup> Under the CISG, the representor's actual intention is relevant only if the other party 'knew or could not have been unaware what that intent was'.<sup>73</sup> Otherwise - and this is the most common situation - the test is also objective: '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>74</sup>

It may be that a seller has made no statements about the goods, but the question may still be whether the contracting parties have implicitly intended that the goods have certain characteristics or that a certain process be observed in their production. In such a case, a term can be implied into the contract from the circumstances (implication in fact). In the common law, a traditional approach is that a term will be implied if it is an obvious inference from the agreement,<sup>75</sup> or if it is necessary to make the contract work<sup>76</sup> - that is to say, to give it business efficacy or commercial or practical coherence.<sup>77</sup> Although the relevant tests under the CISG are formulated with less precision,<sup>78</sup> there is little doubt that the same essential character of a

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<sup>68</sup> See CISG, Art 8(3) ('In determining the intent of a party or the understanding a reasonable person would have had, due consideration is to be given to all relevant circumstances of the case including the negotiations, any practices which the parties have established between themselves, usages and any subsequent conduct of the parties').

<sup>69</sup> For example, whether the language is one of puffery or merely reflecting an opinion.

<sup>70</sup> The closer to the conclusion to the contract, the more likely it may be that the statement was intended to constitute a seller's obligation (warranty) and vice versa (see, generally, M Bridge, *The Sale of Goods* (3<sup>rd</sup> edn, OUP 2014) para 8.11).

<sup>71</sup> See, generally, *ibid* paras 8.09-8.15. For a detailed discussion in the context of the CISG, see D. Saidov, *Conformity of Goods and Documents - The Vienna Sales Convention* (Hart Publishing 2015) 29-43.

<sup>72</sup> *Benjamin* (n 67) 10-017.

<sup>73</sup> CISG, Art 8(1).

<sup>74</sup> CISG, Art 8(2).

<sup>75</sup> See eg, *Shirlaw v Southern Foundries* (1926) Ltd [1939] 2 KB 206.

<sup>76</sup> See, eg, *The Moorcock* (1889) 14 PD 64.

<sup>77</sup> *Marks and Spencer plc v BNP Paribas Securities Services Trust Company (Jersey) Ltd* [2015] UKSC 72, para [21]. But see *Attorney General of Belize v Belize Telecom Limited* [2009] UKPC 10, where these traditional tests were treated as guidelines in answering one central question: 'what the instrument, read as a whole against the relevant background, would reasonably be understood to mean?' (para [21]).

<sup>78</sup> Because any implication of a term is part of the contract interpretation process, with the same rules applying in both cases (see nn 73-74 and the accompanying main text). In English law, it has been debated whether implication of a term is a process separate from contract interpretation; compare *Marks and Spencer plc v BNP Paribas Securities Services Trust Company (Jersey) Ltd* (n 77) paras [25]-[28] (Lord Neuberger) with *Attorney General of Belize v Belize Telecom Limited* (n 77), para [18] (Lord Hoffmann).

term must, similarly, be demonstrated for it to be implied into a contract governed by the CISG.<sup>79</sup>

A term can also be implied in law from the relevant statute, Convention or code (hereinafter referred to as ‘statutory implied terms’ (SITs) or ‘terms implied in law’).<sup>80</sup> These terms are broadly similar in the common law and the CISG. According to s. 14(3) of the UK SGA, if the buyer makes known to the seller any ‘particular purpose for which the goods are being bought, there is an implied term that the goods supplied under the contract are reasonably fit for that purpose’. Other common law jurisdictions and the CISG contain a similar, although not an identical, ‘fitness for purpose’ test.<sup>81</sup> There is a close link between this test and the implication of terms in fact because the communication of a particular purpose to the seller can often be categorised as a term of the contract implied (in fact) from the circumstances.<sup>82</sup> Nevertheless, as far as the buyer is concerned, it is a strength of the fitness for purpose test that it does not require proving that the alleged particular purpose is a contractual term. Establishing that this purpose was duly made known to the seller suffices to impose an obligation.<sup>83</sup>

All sales laws have a fall-back test, such as the SGA’s test of ‘satisfactory quality’ that requires goods which ‘a reasonable person would regard as satisfactory, taking into account of any description of the goods, the price (if relevant) and all the other relevant circumstances’.<sup>84</sup> One important aspect of quality under SGA is, in appropriate cases, the goods’ ‘fitness for all the purposes for which goods of the kind in question are commonly supplied’.<sup>85</sup> Other common

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<sup>79</sup> See further Saidov (n 71) 29-43.

<sup>80</sup> If a contract specifies a standard with which the goods must comply, this may be deemed to be a sale of goods by description. In this case, the SGA and other common law statutes based on the SGA imply a term that goods must correspond with description, that is, with the specified standard. See SGA, section 13; Sale of Goods Act, RSBC 1996, section 17; the Sale of Goods Ordinance, Hong Kong, section 15. See also n 98 and the accompanying main text.

<sup>81</sup> See, eg, UCC, §2-315; Sale of Goods Act, RSBC 1996, section 18(a): ‘(a) if the buyer..., expressly or by implication, makes known to the seller...the particular purpose for which the goods are required, so as to show that the buyer...relies on the seller’s...skill or judgment, and the goods are of a description that it is in the course of the seller’s ...business to supply, whether the seller...is the manufacturer or not, there is an implied condition that the goods are reasonably fit for that purpose’; the Sale of Goods Ordinance, Hong Kong, section 16(3); CISG, Art 35(2)(b).

<sup>82</sup> In the context of the CISG, see Saidov (n 71) 72-74. In the common law, the linkage between contract interpretation and the fitness for purpose tests is also evidenced by the expansion of the latter’s scope reducing the impact of the law on express warranties (see Bridge (n 70) para 7.89).

<sup>83</sup> However, in the UK law and the CISG, the seller can prevent such an obligation from arising if the buyer did not rely or it was unreasonable for it to rely on the seller’s skill and judgment. In some other common law systems, the duty to comply with a particular purpose will be established if it was communicated *so as to show* that the buyer relies on the seller’s skill and judgment (see n 81). The latter approach seems to set a higher threshold for the buyer. On the whole, however, the skill and judgment provision makes the threshold for implying a term in fact and implying a term under the fitness for purpose test somewhat similar.

<sup>84</sup> SGA, section 14(2A).

<sup>85</sup> Section 14(2B)(a). See further section 14(2B)(b), (c), (d), (e).

law jurisdictions rely on the ‘merchantable quality’ test,<sup>86</sup> which was also used in the UK<sup>87</sup> but, as noted, replaced with that of ‘satisfactory quality’. The emphasis in the application of the merchantable quality test has traditionally been on the goods’ ability to be ‘commercially saleable’ under the contract description,<sup>88</sup> without abatement of the price if a buyer knew about the actual state and condition of the goods.<sup>89</sup> Another related element of this test is that it is sufficient that the goods are suitable for one or more, but not all, purposes for which the goods are normally bought under that description.<sup>90</sup> The CISG does not rely on a test of ‘quality’ and instead uses the fitness for the ordinary use test.<sup>91</sup> There is often considerable overlap between these fall-back tests and the fitness for purpose test, particularly if the latter concerns normal or ordinary purposes that are typically covered by the former. It is where fitness for purpose concerns an unusual, abnormal or idiosyncratic purpose, that the two tests become truly distinctive. Fitness for purpose would then lead to a higher standard being imposed on the seller.<sup>92</sup>

## B. Public standards

Whilst standards are set at different levels and by different bodies, the national level remains very important.<sup>93</sup> It is the prerogative of the state to define and protect the interests of the public. Governments are the ones primarily responsible for setting and enforcing standards, relating to health, safety, environment or other ethical considerations,<sup>94</sup> and more generally for advancing socially desirable goals. Therefore, the vast majority of countries have in place a myriad of public law regulations, concerning various human and business activities. As far as sales law

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<sup>86</sup> See UCC, §2-314; Sale of Goods Act, RSBC 1996, section 18(b) (‘if goods are bought by description from a seller...who deals in goods of that description, whether the seller...is the manufacturer or not, there is an implied condition that the goods are of merchantable quality’); the Sale of Goods Ordinance, Hong Kong, section 16(2).

<sup>87</sup> See the original Sale of Goods Act of 1893, section 14(2).

<sup>88</sup> See, eg, *Henry Kendall & Sons v William Lillico & Sons Ltd* [1969] 2 AC 31, 74-79 (Lord Reid).

<sup>89</sup> *Australian Knitting Mills v Grant* (1933) 50 CLR 387, 413.

<sup>90</sup> See, eg, *M/S Aswan Engineering Establishment Co v Lupdine Ltd* [1987] 1 WLR 1, 12.

<sup>91</sup> See n 11 and the accompanying main text.

<sup>92</sup> See *Benjamin* (n 67) para [11-071]. For the relationship between the two tests under the CISG, see Saidov (n 71) 110-111.

<sup>93</sup> ‘It is at the national level that the standardization requirements of individuals, companies and the industry are coordinated and integrated into purposeful national standards’ (UNIDO (n 30) 9).

<sup>94</sup> See, eg, n 44 and the accompanying main text. See also I Schwenzer and B Leisinger, ‘Ethical Values and International Sales Contracts’ in R Cranston, J Ramberg and J Ziegel (eds), *Commercial Law Challenges in the 21st Century, Jan Hellner in Memoriam* (Stockholm Centre for Commercial Law Juridiska Institutionen 2007) 252, making this point in relation to ethical standards.

is concerned, its primary function is to allocate risks and liabilities between the contracting parties. It is not its task to enforce public standards. Nevertheless, considering that public standards often concern the *goods* and their various features, which, in the eyes of sales law, constitute an issue of ‘conformity’ or ‘quality’, the question arises as to what the relationship between public standards and the rules of sales law is.

To what extent will the interpretation of a sales contract and of SITs be influenced by public standards? Where the contract expressly requires the seller to comply with the specified public standards, that will normally be sufficient to put the seller in breach of contract if such standards are not complied with. A contract may lack such an express provision, but may still contain formulations that reflect the parties’ intention to comply with public standards in a place where goods are intended to be used. In *Taurus Importgesellschaft J Seeböhm MBH v Wide Loyal Industries Ltd*,<sup>95</sup> a case decided in Hong Kong, a contract for the sales of ropelights by a Hong Kong seller to a German buyer provided that the ropelights were to be ‘CE Approved’. The German authorities discovered that the ropelights contained levels of cadmium, exceeding those allowed by German Law in accordance with the European Community (EC) Directives, and prohibited their sale. The court<sup>96</sup> held that although ‘CE Approved’ was only ‘a placed mercantile or trade term and not a legal term used either in the European Community Directives or even in German Law’,<sup>97</sup> the seller had committed a breach of contract.<sup>98</sup> Before the contract was made, the seller had presented itself as an international supplier of ropelights and displayed its various certifications, including CE certification. These factors caused the buyer to engage and make a contract with the seller. Knowing that the goods would be sold in Germany and that the CE mark had to be affixed to the goods, the seller had a contractual obligation, according to the decision, to comply with all the EC Directives<sup>99</sup> that prohibited products with the cadmium content exceeding the prescribed level. The court accepted evidence that the CE mark was a ‘passport into Europe’ and held that ‘[w]ithout full compliance with all the relevant directives, it is difficult to see how it can be “a passport into Europe” for the products involved’.<sup>100</sup>

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<sup>95</sup> [2009] HKEC 1236.

<sup>96</sup> The Court of First Instance of the High Court of the Hong Kong Special Administrative Region.

<sup>97</sup> Para [66].

<sup>98</sup> And a breach of SITs of correspondence with description (the CE marking was treated as part of description (para [79]); see the Sale of Goods Ordinance, Hong Kong, section 15) and merchantable quality (since the goods were not marketable in Germany (para [85])).

<sup>99</sup> And not just those concerning ropelights.

<sup>100</sup> Para [71].

The real difficulties of interpretation arise where there is no relevant contractual provision. This obligation can then only be inferred by implying a term in fact or in law. As an example of the former, take a CISG case<sup>101</sup> that concerned a sale of wheat flour by a Dutch seller to a Belgian buyer for further resale to Mozambique. The seller had added a substance containing potassium bromate, capable of causing cancer and damaging DNA structures, to the flour which upon delivery to Mozambique was confiscated by the authorities. There was evidence that the import of flour enriched with potassium bromate was *de facto* permitted in Mozambique and that a company appointed by the Mozambican government had tested the batches of wheat before shipment and had issued a Clean Report for the purpose of an import licence. The seller was held liable largely because of the ban on potassium bromate in the Netherlands and in the EU, of which the seller was aware, and under the Codex Alimentarius,<sup>102</sup> an international public standard, which both the Netherlands and Mozambique have agreed to use and which was regarded by the court as the ‘appropriate general standard’. The court also rejected the argument that the import of such goods to Mozambique was *de facto* permitted. Accepting this argument would mean that:

products unfit for human consumption could be delivered without contractual sanction by a seller from a highly developed country to a purchaser from a less developed country, who - due to the contract - may rightfully expect to have delivered to him a product that is reliable according to international standards and fit for human consumption.<sup>103</sup>

Non-compliance with public standards can lead to the conclusion that SITs have been breached. In a UK case, *Lowe v W Machell Joinery Ltd*,<sup>104</sup> the buyer ordered from the seller a bespoke wooden staircase to be installed in the buyer’s barn. The seller complied with the design, agreed between the parties, but the staircase did not comply with the applicable Building Regulations.<sup>105</sup> The majority of the Court of Appeal<sup>106</sup> held the seller liable<sup>107</sup> under both the satisfactory quality and fitness for purpose tests,<sup>108</sup> even though the buyer was

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<sup>101</sup> Appellate Court’s-Gravenhage, 99/474, 23 April 2003 (Netherlands) <<http://cisgw3.law.pace.edu/cases/030423n1.html>>.

<sup>102</sup> See n 14.

<sup>103</sup> Ibid, point 8.

<sup>104</sup> [2011] EWCA Civ 794.

<sup>105</sup> Issued under the Building Act 1984.

<sup>106</sup> Rix LJ dissenting.

<sup>107</sup> Para [38].

<sup>108</sup> The particular purpose being the goods being installed and used as the staircase in the barn, converted for residential use.

responsible for obtaining approval under the Building Regulations.<sup>109</sup> Similarly, in *Woodbury Chemical Company v Don Holgerson*,<sup>110</sup> a US case, a failure of weed killer to accomplish sagebrush kill, required by government specifications, was a factor in holding a chemical company liable to an aerial applicator of herbicides for breach of an implied term of fitness for purpose. It can be argued that by interpreting SITs with reference to public standards, SITs become conduit for implementing public regulation.<sup>111</sup>

The previous two cases show that where contracting parties operate in the same country or within the same regulatory framework, the seller is usually expected to comply with the applicable public standards, especially where it has the relevant experience and expertise. Where, however, contracting parties are from different countries, the extent of influence of public standards on the interpretation of contract and of SITs should arguably depend on whether the seller is in a position to know about such standards and the need to comply with them, in a place where the buyer intended to use or sell the goods. Where this knowledge cannot be implied to the seller, the common law and the CISG have placed the risk of non-compliance with public standards on the buyer, even where the seller knew the country in which the goods were intended to be used or sold.<sup>112</sup>

This risk allocation is fair and reasonable because, in general, the buyer is in a better position than the seller to know about any standards that the goods must or are expected to meet in a place where the *buyer* (or its sub-buyers) intends to use or sell the goods. If the position were otherwise, sellers would probably have to increase prices to pass to their buyers additional costs of taking measures to address the risk of their potential liability.<sup>113</sup> As a result, commerce and trade would become more expensive, contravening the basic purpose of commercial law of facilitating trade by reducing transaction costs. However, the seller should be liable where it is in a position to know about the public standards and the need to comply with them in a place of the intended use or sale. As held in a leading CISG case,<sup>114</sup> this

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<sup>109</sup> The point that troubled Rix LJ in his dissenting judgment (see para [108]).

<sup>110</sup> 439 F.2d 1052.

<sup>111</sup> See further D Saidov, 'Quality Control, Public Law Regulations and the Implied Terms of Quality' [2015] LMCLQ 491, 500-505.

<sup>112</sup> See *Sumner Permain & Co v Webb & Co* [1922] 1 KB 55 (merchantable quality); *Phoenix Distributors Ltd v L B Clarke (London) Ltd* [1967] 1 Lloyd's Rep 518 (no breach of contract and of merchantable quality and fitness for purpose tests); Supreme Court, 8 March 1995, VIII ZR 159/94 (Germany) <<http://cisgw3.law.pace.edu/cases/950308g3.html>> (no breach of the fitness for purpose and for ordinary use tests under the CISG).

<sup>113</sup> Such as costs of drafting the exclusion or limitation of liability clauses or investing in researching public standards in places where the goods will be used or sold.

<sup>114</sup> Supreme Court, 8 March 1995 (Germany) (n 112)



knowledge may be attributed to the seller where: the standards are the same in the seller's country; the buyer specifically drew the seller's attention to the regulations;<sup>115</sup> the seller had a good reason to know about the standards, such as where the seller had a branch in the buyer's country, had a long established business relationship with the buyer or often previously exported the goods to or promoted them in that country.<sup>116</sup>

There are other factors that will be relevant to determining whether the seller could be expected to know about and comply with public standards in a place of the intended use or sale of the goods, such as: the balance of the parties' expertise in relation to the goods;<sup>117</sup> the contract price;<sup>118</sup> the level of complexity of the relevant standards and whether the country in question is a federal state where the authorities in different administrative-territorial units use different standards;<sup>119</sup> the identity and characteristics of the seller<sup>120</sup> and the buyer<sup>121</sup>; the ease of access to the information, regarding the standards;<sup>122</sup> the consideration of how well-known the standards are;<sup>123</sup> the existence of a trade usage or a practice between the parties to follow a particular standard; the buyer being closely involved in designing the goods and advising the seller as to the manufacturing process;<sup>124</sup> the seller's pre- and post-contractual representations.

Factors, such as these, are to be balanced against one other in each case. The result will depend on the weight of which factors will prevail. For instance, whilst a long-standing relationship with the buyer was identified as a factor pointing to the seller's knowledge in one CISG case,<sup>125</sup> in another CISG case,<sup>126</sup> the seller was not held liable despite a long-standing relationship with the buyer. In the latter case, the Dutch seller had not only known that the mobile units would be used in Germany but had also been informed by the buyer that the German authorities had issued requirements in respect of such mobile units. Nevertheless, the

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<sup>115</sup> In which case the fitness for purpose standard would normally be triggered.

<sup>116</sup> For a more comprehensive discussion, see Saidov (n 71) 52-59, 80-86, 134-142.

<sup>117</sup> See n 126 and the accompanying main text.

<sup>118</sup> Which can be so high (or low) so as to signal a reasonable expectation that the goods will (or will not) comply with high quality standards, embodied in the relevant regulations.

<sup>119</sup> See n 126 and the accompanying main text.

<sup>120</sup> If the seller is a large multinational company, it may be reasonable to expect this seller to investigate the standards at a place of the intended use or sale of the goods.

<sup>121</sup> The buyer's well-known reputation for high quality products can communicate to the seller that the goods were expected to comply with high standards, such as those underlying the relevant regulations.

<sup>122</sup> Easy accessibility on the internet and/or availability in an accessible language may point to the conclusion that the seller could be reasonably expected to be aware of and comply with the standards.

<sup>123</sup> The more well-known they are, the more can the seller be expected to comply with them (see the above CISG case (n 101)).

<sup>124</sup> In which case, the seller may not be liable for non-compliance with those aspects, on which the buyer has advised the seller.

<sup>125</sup> See n 114 and the accompanying main text.

<sup>126</sup> Appellate Court Arnhem, 97/700 and 98/046, 27 April 1999 (Netherlands) <<http://cisgw3.law.pace.edu/cases/990427n1.html>>.

fact that both parties had equal expertise in the manufacture of mobile units and that German states imposed different construction requirements meant that, on balance, the buyer had superior access to the information and the seller did not have a duty to comply with the applicable standards in Germany.

Finally, to what extent should the fact that public standards can be voluntary or mandatory<sup>127</sup> influence the legal analysis? It is submitted that this difference in nature is neither irrelevant nor decisive. The nature of standards is part of the factual background against which the parties' reasonable expectations and SITs are interpreted. The mandatory character normally indicates to a reasonable person in the parties' position that the goods cannot be used or sold, unless they are standard compliant. Therefore, the starting point is that the mandatory character is a factor pointing to the seller having an obligation to comply with the standard.

However, it may be that a standard, whilst formally mandatory, is not enforced strictly in practice. In this case, the parties may not have reasonably expected that the seller would comply with it. In *Bramhill v Edwards*, a UK case,<sup>128</sup> non-compliance of a vehicle with the requirements as to width under the applicable Regulations was not held to be a breach of the satisfactory quality test in s.14(2) SGA, because in practice such vehicles were still able to be insured and the authorities did not enforce the regulations strictly, which meant that there was no real risk of prosecution.<sup>129</sup> Similarly, the fact that a standard is voluntary does not mean that the seller has committed no breach. Such a standard may be so well-known and established that compliance with it is generally expected in the relevant sector or market. Non-compliance may lead to reputational damage and/or loss of business. In this context, a voluntary standard is likely to carry the same weight as that normally attributed to a mandatory standard, influencing the interpretation of contract and SITs in the buyer's favour.<sup>130</sup>

### C. Private standards

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<sup>127</sup> See, eg, Smith (n 22) 14.

<sup>128</sup> [2004] EWCA Civ 403.

<sup>129</sup> See, similarly, *Activa DPS Europe SARL v Pressure Seal Solutions Limited T/A Welltec System (UK)* [2012] EWCA Civ 943.

<sup>130</sup> Another reason where a voluntary standard can be interpreted in this manner is where it is clear that its voluntary character is temporary, it being inevitable that it will become mandatory. See *Hazlewood Grocery Ltd v Lion Foods Ltd* [2007] EWHC 1887 (QB).

## 1. Technical standards

Compliance or non-compliance of goods with a technical standard will not necessarily make the seller immune from a claim that the goods are non-conforming or make the seller liable, respectively. Whether goods are non-conforming depends on the circumstances, surrounding the contract. It is always open to the parties to expressly specify in their contract a standard with which the seller must comply. Where this is the case and the goods do not comply with this standard, the seller is in breach of contract.<sup>131</sup> The reverse, however, is not always true. It may be that the seller has complied with the standard specified in the contract, but the issues, raised by the buyer in its lack of conformity claim, fall outside the scope of the standard. In this case, the seller may still fail to comply with SITs that will be applicable, if they are not deemed excluded by the parties.<sup>132</sup> For example, in *Messer UK Ltd v Britvic Soft Drinks Ltd*, a UK case,<sup>133</sup> the seller supplied carbon dioxide, contaminated with benzene, to the buyers who used it in the manufacture of sparkling drinks. The levels of contamination were low and insufficient to make the goods pose danger to health and safety, with which the contractually incorporated standard (British Standard (BS) 4105) was concerned. Nevertheless, the presence of benzene was enough to influence public perception, making the goods unsaleable and damaging the buyer's reputation. For these reasons, the Court of Appeal affirmed the judge's decision that the seller had breached the s. 14 implied terms of the SGA.<sup>134</sup>

More difficult cases are those where the contract does not expressly incorporate a standard. Is the seller in breach of contract or of SITs, if the goods do not comply with a standard? The interpretation of contract and of SITs, particularly in matters of conformity, is highly facts sensitive and there can be no hard and fast answer. The openness of sales laws to the facts means that a relevant standard will be taken into account. It is submitted that where it

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<sup>131</sup> The contract may formulate the seller's obligations with reference to general standards, such as 'good manufacturing or agricultural practices'. The relevant industry standards/codes, that are well-established and widely used (such GlobalG.A.P.), are likely to influence the meaning of such general clauses and to be able to inject precise meaning into them. Ultimately, however, the wording of the clause and its interpretation are decisive. The meaning of the clause may, for example, be interpreted as not being confined to a relevant industry standard/code, as demonstrated by *Scottish Power UK Plc v BP Exploration Operating Co Ltd & Others* [2015] EWHC 2658 (Comm). This recent UK case involved long-term gas sales agreements requiring the seller to act as the 'reasonable and prudent operator' (ROP). The court took the view that compliance with a voluntary industry code of practice was not enough to meet the ROP standard. There was nothing in the definition of ROP to indicate that factors other than those set out in the industry code were intended to be disregarded (para [118]).

<sup>132</sup> See SGA, s 55; CISG, Art 6.

<sup>133</sup> [2002] EWCA Civ 548.

<sup>134</sup> However, the judge was deemed to be wrong to treat BS 4105 as containing an express term that would lead to the seller's liability in damages (paras [16], [28]).

is the *buyer* who relies on the seller's *non-compliance with a standard*, the key broad question underlying this interpretative process should be whether the seller could reasonably be expected to be aware of the existence of the standard and of the need to comply with it in the light of the prevailing market expectations in a place where the goods are intended to be used or sold by the buyer. A number of factors, in addition to those noted in the context of public standards,<sup>135</sup> will be relevant.

It may be that the parties have had an established practice between themselves, with the seller complying with a particular standard in their past transactions. In sales laws, such as the CISG, that recognise the binding nature of a practice, if one is established,<sup>136</sup> such a finding will lead to the contract and SITs being interpreted as imposing an obligation on the seller to comply with the standard. In a CISG case,<sup>137</sup> where the buyer, who purchased vine wax to treat vines to reduce the risk of them becoming infected, alleged that the wax was 'defective'. The German Supreme Court held that the wax 'did not meet the industry standards...of which both parties were aware and which both parties applied' and, for this reason, the wax was not in conformity with seemingly both the contract and the terms implied under CISG.<sup>138</sup> Even if the parties' previous conduct and transactions do not amount to a 'practice' in the sense that binds the parties to it, any such past conduct will still be a factor pointing in favour of the parties' intention that the seller was to comply with a standard.<sup>139</sup>

The need to comply with a standard may have been communicated, expressly or implicitly, to the seller and, in this case, the seller is bound to comply with the standard by virtue of an implied term of fitness for purpose. One example of implicit communication is where the parties are both members of the same industry organisation or association that has adopted the standard. Where such an organisation or association requires its members to adopt its standard(s) in their business activities,<sup>140</sup> it is highly likely that the seller will have an obligation to comply with the standard(s) either by virtue of the fitness for purpose test, a term implied in fact or even under the fall-back implied terms. If both parties are aware of each

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<sup>135</sup> See nn 113-124 and the accompanying main text.

<sup>136</sup> See Art 9(1).

<sup>137</sup> Federal Supreme Court, VIII ZR 121/98, 24 March 1999 (Germany), <<http://www.cisg.law.pace.edu/cases/990324g1.html>>.

<sup>138</sup> *Ibid.*

<sup>139</sup> See, eg, CISG, Art 8(3).

<sup>140</sup> *Kingspan Environmental Ltd v Borealis A/S* [2012] EWHC 1147 (Comm), para [645].

other's membership that requires compliance with the standard(s), it is difficult to see how the contract or SITs may be interpreted otherwise.

Even if membership in an organisation that has adopted a standard does not require compliance, the fact that the parties operate under a common industry framework is likely to have a strong influence on the interpretation of contract or SITs. Where only the seller is a member of such an organisation, imposing an obligation on the seller to meet the relevant standard will not be easy. In *ARL Lighting (Manitoba) Ltd v Dixon ARL Lighting (Manitoba) Ltd*, a Canadian case,<sup>141</sup> the buyer argued that the dies supplied by the seller were not of merchantable quality because they did not conform to the standards of North American Die Casters Association (NADCA). The buyer relied on the fact that the seller, a manufacturer, was a member of NADCA and advertised itself as such and that the NADCA 'logo' was present in several communications before and after the conclusion of the contract. The British Columbia Supreme Court held that there was no breach of the merchantable quality test for three reasons. First, the buyer did not 'cite any authority for the propositions that a manufacturer who advertises that it is a member of a group that sets standards is obliged to follow those standards and recommendations'.<sup>142</sup> Secondly, it could not be said that the buyer was aware of the seller's membership or, in any case, relied on that membership to assume that NADCA standards would be followed.<sup>143</sup> Finally, the presence of the NADCA logo could not lead to an assumption or be seen as a seller's representation that the NADCA standards would be complied with.<sup>144</sup>

This reasoning seems harsh on the buyer. Even if there was no evidence demonstrating the buyer's reliance on the seller being a member of NADCA, the seller itself placed strong emphasis on its membership, through its advertisement, usage of logo and even in its communications with the buyer. The seller's statement – that '[o]ur quality program will assure you a product which will be acceptable to the industry'<sup>145</sup> - also appears to acknowledge the need to comply with industry (NADCA) standards. Arguably, the totality of these circumstances should have been sufficient to generate the buyer's reasonable expectation that the seller would comply with industry standards. Be that as it may, the case demonstrates that the mere fact of the seller's membership in a standard setting body may not be sufficient to imply an obligation to comply with the relevant standard.

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<sup>141</sup> [1998] BCJ No 2442.

<sup>142</sup> Para [52].

<sup>143</sup> Para [54].

<sup>144</sup> Para [54].

<sup>145</sup> Ibid, para [13].

Despite standards being merely a factor in interpreting contracts and SITs, it is a strong factor. Interpreting contracts and SITs is a balancing exercise, drawing on all relevant circumstances. SITs may also not offer sufficiently precise benchmarks of conformity, whereas technical standards often contain detailed specifications and parameters that help resolve disputes on the basis of criteria that the industry regards as desirable or acceptable. That is why it is not surprising to find cases where standards have been strongly relied upon.

In *Lafarge Concrete Ltd. v. Rempel Bros. Concrete Ltd.*,<sup>146</sup> a Canadian case, non-compliance with industry standards (the Canadian Standards Association (CSA)) was held to create an inference that the sand, bought by the buyer from the seller for making concrete, was contaminated, resulting in the concrete being ‘defective’. The burden then shifted to the seller to prove that the buyer’s mix design was a significant contributing factor to the defect. The seller was unable to do so and was found to be in breach of contract.<sup>147</sup> Another Canadian case, *Universal Printed Circuit Co Canada v Omni Graphics Ltd*,<sup>148</sup> went a step further and relied solely on an industry standard to define the meaning of SITs. The buyer purchased circuit board for resale and it was established that there was a relevant industry standard, providing for a permissible failure rate of two percent. The British Columbia Supreme Court held that this standard ‘would be the standard of reasonable fitness for the purpose for which the circuit boards were provided’ and it would ‘serve, as well, as the implied condition as to merchantable quality’.<sup>149</sup> Since the goods fell well below the industry standards, the seller was in breach of both the fitness for purpose and merchantable quality tests.

The ability of standards to exert strong influence on the interpretation of SITs can also be seen where it is the *seller* who relies on *its compliance with a standard* to demonstrate that no breach of SITs has been committed. In *Medivance Instruments Ltd v Gaslane Pipework Services Ltd, Vulcana Gas Appliances Ltd*,<sup>150</sup> a UK case, the buyer, a manufacturer of x-ray and other equipment, argued that the seller was in breach, amongst other things, of the merchantable quality and fitness for purpose tests. A heater, supplied by the seller, was located

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<sup>146</sup> [1985] B.C.W.L.D. 3022.

<sup>147</sup> The decision is open to criticism that the basis of liability was not set out clearly. The seller was liable for delivering ‘contaminated sand’, which was presumed to cause the concrete being ‘defective’. However, ‘contamination’ and ‘defects’ are not bases of liability in themselves. The seller’s liability ought to have been based on a relevant contract term or SIT, with ‘contamination’ and ‘defect’ being factors pointing to non-compliance with SITs. The decision appears to be based on the contract interpretation analysis, although the buyer also relied on the merchantable quality test.

<sup>148</sup> 85 A.C.W.S. (3d) 1193.

<sup>149</sup> Para [43].

<sup>150</sup> [2002] EWCA Civ 500.

close to the cardboard boxes, which resulted in a fire that caused substantial damage to the buyer's factory. The seller relied on the fact that the heater complied with the standards of the British Standards Institution.<sup>151</sup> The Court of Appeal held that for the purpose of the two statutory tests, compliance with such standards was 'certainly an important factor which should be taken into account, but it was not 'necessarily a conclusive factor'.<sup>152</sup> It further held that this factor was particularly important for the application of the merchantability test because neither the standard nor the merchantability test was concerned with a particular purpose for which the goods were intended to be used. However, it was not irrelevant to the fitness for purpose test, 'albeit the more unusual and exceptional circumstances of the particular use, the less may be the force of the argument that the article complies with the British Standard'.<sup>153</sup> Compliance with the standard strongly influenced the decision that the seller was not in breach of the merchantability test.<sup>154</sup> For the same reason, the seller was also not in breach of the fitness for purpose test because the specific purpose in this case was no different from the 'general run of purposes' covered by the merchantability test.<sup>155</sup>

The decision also helpfully explains the relationship between standards and the merchantability test by identifying cases and factors that may point to the goods being unmerchantable, despite complying with a standard. These cases are where: the standard was prepared at a time when a defect or a problem in question was not known; a standard is not concerned with a defect or problem at hand; or a standard is 'too low or deficient in a certain aspect'.<sup>156</sup> The latter point appears to reflect the fact that courts have some benchmark of conformity in mind when defining the seller's obligations. There must be some reference point against which a standard will be deemed 'too low or deficient'; and it is normally the fall-back statutory terms, such as 'satisfactory' or 'merchantable' quality, that will provide the basis for setting that benchmark. Thus, in *John Handrigan v Apex Warwick, Inc.*,<sup>157</sup> a US case, involving

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<sup>151</sup> 'an independent non-profit making body, incorporated...to undertake the preparation and promulgation of standards for the production of goods and the provision of certification and testing (para [27]).

<sup>152</sup> Para [34].

<sup>153</sup> Para [34].

<sup>154</sup> 'The fact that the Heater complied with the British Standard is...of strong assistance to the respondents so far as merchantability is concerned' (para [38]).

<sup>155</sup> 'the Judge accepted expert evidence...to the effect that the use of the Heater "in a well-run storeroom poses no significantly greater degree of risk compared to its use in other well-run commercial environments". He went on to say that, while the packing area contained combustible materials, it was not large, there was no mechanical handling, and "the quality of management of the store was generally high". He expressed himself "satisfied the degree of risk does not require the installation of a different sort of heater than that provided"' (para [39]).

<sup>156</sup> Para [37].

<sup>157</sup> 275 A.2d 262 (1971).

a claim brought by a man who fell off a ladder bought from a buyer, the Supreme Court of Rhode Island held that:

The fact that the ladder met all the specifications of the American Standard Safety Code does not establish as a matter of law that the ladder was fit for the ordinary purposes for which ladders are used. The expert's testimony that the ladder was 'too weak' and 'unsafe' raised a question of fact, and we hold that the trial justice correctly submitted the case to the jury so that they could determine, on all the evidence, the question of fitness under the Uniform Commercial Code.<sup>158</sup>

Whilst the fall-back statutory tests closely inter-relate with industry standards, they are ultimately standalone tests, imbued with independent meaning which can be influenced by industry standards only in appropriate cases. The fall-back tests thus inevitably set and promote a minimum threshold of quality in a society, arguably acquiring a regulatory feature.<sup>159</sup> Whilst lacking in precision, they are not without content and are based on the body of case law that injects layers of meaning into them.

## 2. Ethical standards

Ethical standards, such as those concerned with human rights, labour standards and working conditions, environmental protection, transparency and corruption, have become much more prominent in the world today than they have ever been. The question for sales law is whether a seller is required by a contract and/or terms implied in law to ensure compliance with such standards. In contrast with standards that concern physical characteristics of the goods, ethical standards mainly concern the process surrounding the making of the goods. The goods may be perfect in terms of their physical properties, but may have been produced in poor working conditions, with the use of child labour or bad environmental practices. Are these goods non-conforming?

It is increasingly recognised that conformity concerns not only the goods' physical properties, but also their relationship with an environment in which they are used or sold.<sup>160</sup>

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<sup>158</sup> Ibid, 265.

<sup>159</sup> See, further, Saidov (n 111) 492, 496.

<sup>160</sup> I Schwenzer in I Schwenzer (ed), *Schlechtriem and Schwenzer, Commentary on the UN Convention on the International Sale of Goods (CISG)* (3<sup>rd</sup> edn, OUP 2010) Art 35, para 9.



Ethical standards can be an important part of such an environment. However, the mere existence of ethical standards does not mean that they become a source of defining the seller's obligations. As with other standards, this issue depends on the how contracts and SITs are interpreted in the particular circumstances and in the light of the relevant factors, many of which have already been mentioned.<sup>161</sup> In addition, other considerations, specific to the context of ethical standards, need to be borne in mind.

Many companies today adopt their own codes of conduct,<sup>162</sup> containing ethical standards, as developed by them and/or as defined in: international instruments (e.g., International Labour Organisation (ILO) Conventions,<sup>163</sup> UN Convention on the Rights of the Child<sup>164</sup> or the Universal Declaration of Human Rights<sup>165</sup>); international initiatives (e.g., the UN Global Compact (UNGC),<sup>166</sup> the 'Kimberly Process' (KP)<sup>167</sup>); non-governmental organisations' documentation (e.g., ISO 14001<sup>168</sup> or SA8000<sup>169</sup>); or industry coalitions' documents (e.g., Electronic Industry Citizenship Coalition (EICC)<sup>170</sup>). These standards are often expressly incorporated into contracts and where this is the case, compliance with them is

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<sup>161</sup> See nn 113-124 and the accompanying main text.

<sup>162</sup> The majority of top 500 companies in the US and the UK have adopted some kind of code of conduct (<<http://www.ilo.org/global/standards/introduction-to-international-labour-standards/international-labour-standards-use/lang--en/index.htm>>).

<sup>163</sup> See, eg, Apple Supplier Code of Conduct: 'Supplier shall employ only workers who are at least 15 years of age or the applicable minimum legal age, whichever is higher. Supplier may provide legitimate workplace apprenticeship programs for educational benefit that are consistent with Article 6 of ILO Minimum Age Convention No. 138 or light work consistent with Article 7 of ILO Minimum Age Convention No. 138' (<[https://www.apple.com/supplier-responsibility/pdfs/supplier\\_code\\_of\\_conduct.pdf](https://www.apple.com/supplier-responsibility/pdfs/supplier_code_of_conduct.pdf)>).

<sup>164</sup> See, eg, Ericsson Code of Conduct, <<http://www.ericsson.com/res/thecompany/docs/corporate-responsibility/codeofconduct.pdf>>.

<sup>165</sup> See, eg, Sony Group Code of Conduct, <[http://www.sony.net/SonyInfo/csr\\_report/compliance/index3.html](http://www.sony.net/SonyInfo/csr_report/compliance/index3.html)>.

<sup>166</sup> UNGC is the largest voluntary international corporate sustainability initiative, comprising 8,000 companies and 4,000 non-business organisations. The UNGC's Ten Principles concern human rights, labour, environment and anti-corruption. See: <<https://www.unglobalcompact.org/>>.

<sup>167</sup> KP is a 'joint governments, industry and civil society initiative to stem the flow of conflict diamonds – rough diamonds used by rebel movements to finance wars against legitimate governments' (<<http://www.kimberleyprocess.com/>>).

<sup>168</sup> 'The ISO 14000 family of standards provides practical tools for companies and organizations of all kinds looking to manage their environmental responsibilities' (<<http://www.iso.org/iso/home/standards/management-standards/iso14000.htm>>).

<sup>169</sup> This standard has been produced by Social Accountability International, a non-governmental organisation aimed at implementing socially responsible standards. SA8000 is 'one of the world's first auditable social certification standards for decent workplaces, across all industrial sectors. It is based on the UN Declaration of Human Rights, conventions of the ILO, UN and national law, and spans industry and corporate codes to create a common language to measure social performance' (<<http://www.sai-intl.org/index.cfm?fuseaction=Page.ViewPage&pageId=1689>>).

<sup>170</sup> 'The EICC Code of Conduct is a set of standards on social, environmental and ethical issues in the electronics industry supply chain. The standards set out in the Code of Conduct reference international norms and standards including the Universal Declaration of Human Rights, ILO International Labor Standards, OECD Guidelines for Multinational Enterprises, ISO and SA standards, and many more' (<<http://www.eiccoalition.org/standards/code-of-conduct/>>).

the seller's contractual obligation. Standards are usually incorporated either by reference,<sup>171</sup> where the contract refers to the relevant document, or are themselves expressly set out in the contract.<sup>172</sup>

It is more difficult to determine whether the seller has an obligation to comply with any such standards where there is no express contractual provision to that effect. The first case to be addressed is where both parties are members of a voluntary initiative, such as the UNGC. If the contract is silent on the need to comply with any ethical standards, can a term be implied in it that the seller ought to comply with the UNGC because both parties are members of this initiative? Before addressing this question, it is worth mentioning that membership in the UNGC requires participating companies to produce an annual Communication on Progress (COP) that sets out the details of the work that a company has done to implement the UNGC Principles in its strategies and operations and to support 'societal priorities'.<sup>173</sup>

'The COP is a visible expression of [a company's] commitment to sustainability and [its] stakeholders can view it on [the company's] profile page. Companies that fail to report or to meet the criteria over time may be removed from the initiative'.<sup>174</sup>

As explained, it seems that to imply a term that compliance with the UNGC was expected both the common law and the CISG require that such compliance be essential to the parties and their contract.<sup>175</sup>

Whether that is the case may, to some extent, depend on whether a contract is seen as a regulatory vehicle for implementing and promoting ethical values in a society.<sup>176</sup> If so, courts may be inclined to give an affirmative answer. Even if the issue is viewed outside any possible regulatory function of a contract, it can still be argued that there are good reasons for inferring the parties' intention that the seller will comply with the UNGC.<sup>177</sup> Membership in the UNGC represents a public declaration of commitment to implement the values enshrined in this document, as is evidenced by the requirement to produce an annual COP. Business is

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<sup>171</sup> In English law, one party's terms can be incorporated by reference provided that reasonable notice of them has been given to the other (see, eg, H Beale (ed), *Chitty on Contracts* (32<sup>nd</sup> edn, Sweet & Maxwell-Thomson Reuters 2015) vol I, paras 13-013-13-014).

<sup>172</sup> See, further, Rümke (n 28) 87-88, giving examples.

<sup>173</sup> See <<https://www.unglobalcompact.org/participation/report>>.

<sup>174</sup> *Ibid.*

<sup>175</sup> See nn 75-79 and the accompanying main text.

<sup>176</sup> 'necessity for business efficacy involves a value judgment' (*Marks and Spencer plc v BNP Paribas Securities Services Trust Company (Jersey) Ltd* (n 77) para [21] (Lord Neuberger)).

<sup>177</sup> See Schwenzer and Leisinger (n 94) 263-264, treating the UNGC as a trade usage to which the parties can be presumed to have agreed under CISG, Art 9(1).

conducted through contracts and a company can hardly be regarded as committed to implementing the UNGC if it is not ensuring that these standards are incorporated into its contracts.<sup>178</sup> This argument is stronger if both parties are aware of each other's membership in the UNGC, making it likely that compliance with the UNGC was reasonably expected by both parties.

So far as SITs are concerned, it can be contended that membership of both parties in the same initiative should be sufficient to communicate to the seller a particular purpose that the UNGC standards are to be complied with,<sup>179</sup> triggering the fitness for purpose test. It may be more difficult to infer such an obligation through the fall-back tests. Compliance with ethical values may not be an obstacle to the goods' being resaleable or used in some other ordinary way (e.g., in the manufacturing process). That said, much will depend on an environment in which the goods are sold or used. If it is a market or an environment where compliance with standards, such as the UNGC, is expected, it can be argued that, in that environment, the goods are not of merchantable or satisfactory quality or are not fit for their ordinary or common purposes.

Another case is where only one party has expressed its commitment to ethical standards, usually in its code of conduct. Whether such standards become terms of the contract depends on the applicable rules of incorporation of terms. Briefly, in English law, such (written) terms can become part of the contract if they are contained in a document which the receiving party or a reasonable person would expect to contain contractual terms<sup>180</sup> and notice of them was given at or before the conclusion of the contract;<sup>181</sup> or there is a course of dealing between the parties 'where each party has led the other reasonably to believe that he intended that their rights and liabilities should be ascertained by reference to the terms of a document which had been consistently used by them in previous transactions'.<sup>182</sup> In the context of the CISG, a reasonable opportunity to take notice of a party's terms must similarly be given to the other

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<sup>178</sup> For a contrary view, see C Ramberg, 'Emotional Non-Conformity in the International Sale of Goods, Particularly in Relation to CSR-Policies and Codes of Conduct' in I Schwenzer and L Spagnolo (eds), *Boundaries and Intersections: 5<sup>th</sup> Annual Schlechtriem CISG Conference* (Eleven International Publishing 2014) 80 ('It is one thing to generally participate and sponsor a United Nations Initiative. It is another thing to contractually agree that a contractual party is entitled to contractual remedies if an ethical standard is not met').

<sup>179</sup> See n 140 and the accompanying main text.

<sup>180</sup> See, eg, *Parker c South Eastern Railway* (1877) 2 CPD 416; *Thompson v London, Midland and Scottish Railway Co Ltd* [1930] 1 KB 41.

<sup>181</sup> See, eg, *Olley v Marlborough Council* [1949] 1 KB 532.

<sup>182</sup> *Chitty* (n 171) para 13-011.

party in order for any intention to incorporate terms to be inferred.<sup>183</sup> If there has been a practice between the parties to comply with certain terms in the past, it will also give rise to the seller's duty to comply with them.<sup>184</sup>

All this means that the question of whether a party's code of conduct has become part of the contract depends on the circumstances and no general conclusions can be reached. What can be highlighted are a number of factors relevant in ascertaining the parties' intentions, such as the price of the goods or whether a party can be taken to have relied on the other party's terms.<sup>185</sup> The very fact that the contract is silent on the need to comply with a buyer's code of conduct is likely to work against the buyer, who claims that the seller's non-compliance with the buyer's code is a breach of contract. If the buyer felt strongly about its standards and intended the seller to comply with them, why did it not incorporate its code into the contract or refrain from entering into one if the seller resisted such incorporation?<sup>186</sup> This point is particularly strong in the context of global supply chains where the end-buyers are often the ones setting the standards throughout the chain. A failure of a powerful and sophisticated commercial party to expressly incorporate its code of conduct into the contract points to the intention not to require the seller to comply with its code. A contract providing for the auditing and inspection processes may be indicative of the parties' implicit intention to incorporate a party's (usually, the end-buyer in the chain) code of conduct because it is through the inspection, certification and auditing schemes that buyers seek to ensure compliance across the chain.<sup>187</sup>

On balance, proving that a buyer's code of conduct has been incorporated into a contract does not appear to be easy. Ethical standards reflect moral convictions, which means that the contractual silence poses difficulties for a buyer seeking to rely on the seller's non-compliance with ethical standards. This also means that establishing a breach of SITs, particularly fitness

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<sup>183</sup> See Rules 2 and 3 of the CISG-Advisory Council (CISG-AC) Opinion No 13, *Inclusion of Standard Terms under the CISG*, <<http://www.cisg.law.pace.edu/cisg/CISG-AC-op13.html>>.

<sup>184</sup> See CISG, Arts 8(3) and 9(1). Even if prior course of dealing does not amount to a 'practice', it must still be taken into account in interpreting the parties' intentions (see Art 8(3)).

<sup>185</sup> See, generally, Saidov (n 71) 35-37.

<sup>186</sup> See P Schlechtriem, 'Non-Material Damages – Recovery under the CISG?' (2007) 19 Pace Int'l L Rev 89, 100-101.

<sup>187</sup> See Ramberg (n 178) 81. But, as Ramberg notes, this will not necessarily be the case: 'In some situations... the supplier could successfully argue that he perceived the auditing procedures only as a means for the purchaser to determine whether he wishes to continue to purchase goods from the supplier – and that he did not perceive the auditing procedures to imply that he was liable for production methods contrary to the purchaser's [Corporate Social Responsibility] policy' (ibid).

for purpose which borders closely with contract interpretation,<sup>188</sup> should not be allowed to become a different and easier<sup>189</sup> route for the buyer to establish the seller's liability.<sup>190</sup> It is advisable therefore that the interpretation of contract and of the fitness for purpose test be applied with the same level of rigour,<sup>191</sup> unless there are additional factors pointing to the communication of a particular purpose. One such factor can be the buyer's business identity and well-established reputation, based on its adherence to ethical standards. This can be the case, for example, where the seller knows that the buyer always sells goods at markets, specialising in organic or fair trade products, or where the focus on ethical standards is evident from the name of the buyer's business.<sup>192</sup> However, these factors can be equally important to contract interpretation and therefore their presence can lead to the same result being achieved by both the contractual implication of a term and the fitness for purpose test. Similarly, fall-back tests are unlikely to lead to the seller's liability merely because the buyer has declared its commitment to certain ethical standards in its code of conduct. It is only where the overall environment, within which parties operate, is well-known for adherence to similar standards that the goods may become unmerchantable, of unsatisfactory quality or unfit for their ordinary<sup>193</sup> use.

This discussion is, generally, applicable to the case where the buyer relies on the *seller's* code of conduct being part of the contract. Nevertheless, somewhat different considerations also arise. There will be tension between a seller's declaration of commitment to ethical standards and its argument that it did not have a contractual obligation to comply with them. There may also be policy reasons for implying a contractual obligation, considering that by making declarations of commitment to certain standards, companies will often want to induce the public as a whole to do business with them. It can be argued that such sellers should be held liable to protect the public and encourage sellers to stay true to their public representations.<sup>194</sup> A buyer's reasonable reliance on the seller's standards, whilst not decisive, acquires particular significance and can point in favour of the seller's code being part of the contract. The seller's

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<sup>188</sup> See the main text accompanying nn 81-83.

<sup>189</sup> The communication of a particular purpose is a lower threshold than implying a term into a contract (see nn 82-83).

<sup>190</sup> Bridge (n 70) para 7.85.

<sup>191</sup> In any case, the requirement of communicating a particular purpose is surely not met merely because a buyer has publicly proclaimed its adherence to a code of conduct and the seller is aware of that.

<sup>192</sup> See Schwenzer and Leisinger (n 94) 266.

<sup>193</sup> As understood in that particular environment.

<sup>194</sup> See Draft Common Frame of Reference (DCFR), Comment A on Art 2:303, in C von Bar and E Clive (eds), *Principles, Definitions and Model Rules of European Private Law: Draft Common Frame of Reference (DCFR)* (Munich, Sellier European Law Publishers, 2009) vol II, 1296.

identity and reputation are also important. If it has a well-established reputation and identity as ‘ethical business’, reflected in its corporate name and/or brands of its products, this factor adds strength to the argument that ethical standards in its code of conduct are part of the contract. Ultimately, the parties’ intentions are crucial and there need to be circumstances from which the seller’s reasonable intention to assume a contractual obligation to comply with its code can be inferred.

SITs are less useful to the buyer than in the case of the buyer’s reliance on its own code of conduct. In contrast with the case where the buyer’s code of conduct and/or its business identity/reputation can themselves be a way of communicating a particular purpose, the seller’s code of conduct or business identity/reputation<sup>195</sup> are hardly relevant for communicating a particular purpose to the seller.<sup>196</sup> In other respects, the above discussion of factors relevant to the fitness for purpose and the fall-back tests is equally applicable in this context.<sup>197</sup>

### 3. Minimum ethical standards in sales contracts?

It has been argued that the notions of conformity or quality should comprise non-physical characteristics of the goods, such as whether ethical standards were complied with in their manufacture or production processes.<sup>198</sup> Indeed, there is increasing recognition that conformity comprises the relationship of the goods with their surrounding environment and that, at its core, conformity is about what the buyer can reasonably expect from the goods.<sup>199</sup> Bearing in mind the consumers’ awareness of ethical issues, it can be argued that many buyers today expect goods to comply with various ethical standards. This line of reasoning does not necessarily mean that every sales contract and/or SITs must always be interpreted as imposing an

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<sup>195</sup> However, this factor will be highly relevant to establishing the buyer’s reasonable reliance on the seller’s skill and judgment for the purpose of the fitness for purpose test (see n 83).

<sup>196</sup> Although it is conceivable that the buyer may argue that the very fact that it has entered into a contract with a seller, known for its ethical standards, is a way of communicating a particular purpose that the goods were to comply with such standards.

<sup>197</sup> See the main text accompanying nn 192-193 above.

<sup>198</sup> See, generally, H Collins, ‘Conformity of Goods, the Network Society, and the Ethical Consumer’ (2014) 5 *European Rev Private L* 619; I Schwenzer, ‘Conformity of the Goods – Physical Features on Wane?’ in I Schwenzer and L Spagnolo (eds), *State of Play: The 3<sup>rd</sup> Annual MAA Schlechtriem CISG Conference* (Eleven International Publishing 2012) 103-106; K Maley, ‘The Limits to the Conformity of Goods in the United Nations Convention on Contracts for the International Sale of Goods (CISG)’ (2009) 12 *Int’l Trade Business L Rev* 82.

<sup>199</sup> See, eg, Collins (n 198) 633 (‘In UK law, the replacement of the standard of merchantable quality with that of ‘satisfactory quality’ shifted the focus away from the seller’s promise and the inherent qualities of the goods to the expectations of the consumer to acquire a product that satisfied her’).

obligation to comply with ethical standards. Rather, it seems to encourage the legal community to be ready and willing to interpret contracts and SITs with reference to such standards, where appropriate, in the light of the buyer's reasonable expectations. These expectations are to be inferred from a given factual scenario, commercial context and a broader environment, surrounding the contract.<sup>200</sup> Even so, sales contracts and SITs acquire regulatory features because they become instruments of promoting values and protecting interests going well beyond the interests of the two contracting parties.<sup>201</sup>

There have, however, been more radical proposals, which, if adopted, would turn sales contracts and SITs into a truly regulatory tool. It has been argued that some minimum ethical standards, such as the 'prohibition of child labor', 'forced and compulsory labor' and 'minimum labor conditions', should be implied in every sales contract.<sup>202</sup> With the argument having made in the context of the CISG, the suggested legal mechanism for achieving this result is to treat such minimum standards as a trade usage, which the parties will be considered to 'have impliedly made applicable to their contract or its formation'<sup>203</sup> and which is further defined in the CISG as one 'of which the parties knew or ought to have known and which in international trade is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade concerned'.<sup>204</sup> Underlying this proposal is a strong sense that certain ethical standards are so important that they must be applied universally and that sales contracts and sales law should be a vehicle for promoting and implementing these standards as well as a tool for empowering buyers, and ultimately consumers, to enforce minimum ethical standards.<sup>205</sup>

Whilst several instances of where arguably sales law manifests regulatory features have already been noted, the question is whether expanding this function to incorporate ethical standards is justifiable. There are arguments, challenging the proposition that an international sales law should be a channel for promoting ethical standards. One is that doing so would stretch the functions of sales law too far, considering that its main role is to allocate risks

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<sup>200</sup> 'carbon dioxide might be unsuitable for industrial food application, simply because it included an ingredient which the media or public perceived as the product of sweated labour in a producer country' (*Messer UK Ltd v Britvic Soft Drinks Ltd* (n 133) para [14]).

<sup>201</sup> See Collins (n 198) 623, 639, taking a similar view and challenging 'the traditional division of labour between contract law and public regulation with respect to labour rights' (ibid, 623).

<sup>202</sup> Schwenzer and Leisinger (n 94) 264. These commentators, however, qualify this proposition by stating that minimum ethical standards should not be implied where a contract price is 'so low that ethical production standards are impossible to be applied'.

<sup>203</sup> CISG, Art 9(2).

<sup>204</sup> Ibid.

<sup>205</sup> See, similarly, Collins (n 198) 639.

between the contracting parties primarily on the basis of commercial, rather than moral, considerations. Another is that not all ethical standards are necessarily universal:

it should be considered whether and to what extent the public at large, in the setting of global trade, shares certain ethical values clearly and overwhelmingly, or whether the condemnation of certain production methods only reflect social standards of affluent minorities wanting to do good, and whose members can easily do without the goods in question. It is also uncertain to what extent all members of this group share the same convictions...<sup>206</sup>

An obvious danger, highlighted by this quotation, is that moral convictions, shared by some, may be imposed, through sales law and contracts, on those who might not share them. Care must be taken to ensure that if an international sales law is to promote and protect ethical standards worldwide, these standards are accepted globally.

Yet another point is this: even where some ethical standards have achieved wide international recognition, does it follow that they amount to an international trade usage? For example, there has been wide acceptance of and global commitment<sup>207</sup> to such standards as prohibition of child labour, as evidenced by a high number of ratifications of international conventions, protecting the rights of children.<sup>208</sup> However, nearly global acceptance of this standard by *states* does not mean that it is ‘regularly observed’ by *companies* around the world, as is the CISG’s requirement in respect of a usage. More so, the recent data – according to which 168 million children worldwide are in child labour (almost eleven per cent of the entire child population)<sup>209</sup> - suggests that businesses, particularly in the poorest parts of the world,<sup>210</sup> are far from regularly observing these standards. Whilst the CISG has been interpreted by courts as not requiring the *universal* observance of a usage, but only that it should be observed

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<sup>206</sup> Schlechtriem (n 186) 97.

<sup>207</sup> See <<http://www.unicef.org/crc/>>.

<sup>208</sup> 194 countries are parties to the Convention on the Rights of the Child, which is the highest number of ratifications received by a human rights treaty (see <[http://www.unicef.org/crc/index\\_30225.html](http://www.unicef.org/crc/index_30225.html)>). The ILO Convention No. 138 on the Minimum Age for Admission to Employment (1973) has been ratified by 156 countries and the Convention No. 182 on the Worst Forms of Child Labour (1999) has been ratified by 173 countries (see <<http://www.un.org/en/globalissues/briefingpapers/childlabour/intlconv.shtml>>).

<sup>209</sup> International Labour Office, *Making Progress against Child Labour: Global Estimates and Trends 2000-2012* (Geneva, International Labour Organization 2013) vii (<[http://www.ilo.org/wcmsp5/groups/public/---ed\\_norm/--ipec/documents/publication/wcms\\_221513.pdf](http://www.ilo.org/wcmsp5/groups/public/---ed_norm/--ipec/documents/publication/wcms_221513.pdf)>).

<sup>210</sup> See, eg, J Moulds, ‘Child Labour in the Fashion Supply Chain: Where, Why and What Can Be Done’, <<http://labs.theguardian.com/unicef-child-labour/>>.



by a *majority* of companies,<sup>211</sup> the conditions, sadly, have not yet ripened for it to be justifiable to suggest that the prohibition of child labour is an international trade usage.

Such trade usages may, however, exist in the particular trade or commercial sectors. Take the already mentioned EICC, which comprises more than one hundred electronics companies, probably including all major companies.<sup>212</sup> Not only do the EICC members subscribe and are held accountable to a common Code of Conduct<sup>213</sup> but many of them have also adopted their own Codes of Conduct.<sup>214</sup> In addition to the EICC members, thousands of suppliers of those companies are required to implement the EICC Code.<sup>215</sup> Against this background, it is arguable<sup>216</sup> that the ethical standards, including the prohibition of child labour,<sup>217</sup> in the EICC Code and the Codes of Conduct of individual companies, based on the EICC Code, constitute trade usages that are ‘widely known to and regularly observed by’ companies in the electronics sector. Where the CISG governs an electronic product supply contract,<sup>218</sup> an argument can be made that a seller, even if it has not subscribed to the EICC Code,<sup>219</sup> has an implied obligation to comply with the standards in the EICC Code,<sup>220</sup> unless it is excluded by the contract.<sup>221</sup>

The debate about whether sales law should be a vehicle for promoting ethical standards and whether minimum standards are to be implied in every sales contract is likely to continue in the years to come.<sup>222</sup> Reaching an agreement is easier in the context of domestic law than in the context of the CISG, which must reflect global ‘common ground’. The interpretation of

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<sup>211</sup> See Supreme Court, 2 Ob 191/98x, 15 October 1998 (Austria), <<http://cisgw3.law.pace.edu/cases/981015a3.html>>; Supreme Court, 10 Ob 344/99g, 21 March 2000 (Austria), <<http://cisgw3.law.pace.edu/cases/000321a3.html>>.

<sup>212</sup> Such as Apple, Dell Inc, Hewlett-Packard, HTC Corp, IBM Corporation, Intel Corporation, LG Electronics, Microsoft, Philips, Samsung Electronics, Texas Instruments, Toshiba Corp. and others. See <<http://www.eiccoalition.org/about/members/>>.

<sup>213</sup> See <<http://www.eiccoalition.org/about/>>.

<sup>214</sup> See G Nimbalker et al, ‘The Truth Behind the Barcode: Electronic Industry Trend’, <<http://www.baptistworldaid.org.au/assets/BehindtheBarcode/Electronics-Industry-Trends-Report-Australia.pdf>>, 15, for the results of a survey of 39 members of the EICC, according to which 82 per cent out of those companies have a code of conduct that covers core ILO principles.

<sup>215</sup> See <<http://www.eiccoalition.org/about/members/>>.

<sup>216</sup> See S Wilson, ‘Ethical Standards in International Sales Contracts: Can the CISG be Used to Prevent Child Labour?’, <<http://researcharchive.vuw.ac.nz/xmlui/bitstream/handle/10063/4622/thesis.pdf?sequence=2>>.

<sup>217</sup> See EICC Code, 2, prohibiting the use of child labour ‘in any stage of manufacturing’ (<[http://www.eiccoalition.org/media/docs/EICCCodeofConduct5\\_English.pdf](http://www.eiccoalition.org/media/docs/EICCCodeofConduct5_English.pdf)>).

<sup>218</sup> The same reasoning can be used if a contract is governed by domestic law.

<sup>219</sup> Liability will arise in this case by virtue of CISG, Art 9(2).

<sup>220</sup> For those parties who have subscribed to the EICC Code, liability may arise either under CISG, Art 9(1) or 9(2).

<sup>221</sup> See CISG, Art 6.

<sup>222</sup> See, similarly, Bridge (n 70) para 7.112.

domestic law is likely to be shaped by public expectations in the respective country and these expectations are easier to gauge and identify than in the worldwide context. If the future policy direction becomes such that the minimum ethical standards will be expected to be complied with in every sales contract, SITs will be the main vehicle for imposing such an obligation; not least because being implied in law, they are conceptually best suited to performing regulatory functions. Such fall-back tests as merchantable or satisfactory quality are, by definition, based on some benchmark of quality,<sup>223</sup> which is flexible enough to cover and expand into an ethical dimension. A similar result can be achieved through the fitness for purpose test. An environment, where there is an overwhelming public expectation as regards some minimum ethical standards, can itself become a source of communicating that expectation to the seller and translating it into an obligation in every contract.<sup>224</sup> This approach, however, will inevitably introduce automaticity into the application of SITs, whereas they have been largely designed to respond to the particularities of each case.

### III. Sales law and discourse on standards outside it

Now that the response of sales laws to standards has been examined, it is time to ask whether and how this experience can contribute to the discourse on standards outside sales law and vice versa. Some broad directions emerge. First, several instances have been noted where sales law appears to have acquired regulatory features, such as where the rules on conformity: inevitably promote minimum benchmarks of quality<sup>225</sup> and even some moral considerations, such as equality between developed and developing countries,<sup>226</sup> become a conduit through which public law requirements influence the definition of the seller's obligations,<sup>227</sup> being capable of

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<sup>223</sup> See nn 156-159 and the accompanying main text.

<sup>224</sup> 'If concern about [labour] standards on the part of consumers were ever to become more widespread than they are now, a more convincing case could be made that goods manufactured in breach of such standards were *generally* unfit for purpose' (see Bridge (n 70) para 7.112 (emphasis added)). Bridge argues that in the environment, where such a concern is not yet widespread, the seller's liability under the fitness for purpose tests in SGA, s. 14(3), is easier to establish if the buyer is an intermediate buyer than if it is the end buyer in the chain. In the former case, the seller should be liable under s. 14(3) 'given the buyer's purpose of resale and the, by now, well-known reaction against [bad] labour practices on the part of a large section of the consuming public'. In the latter case, the end buyer will have to make a more difficult case that 'a failure to comply with public standards meant that the goods supplied could not be used with ease and peace of mind and therefore were in a general sense unfit for purpose, so that the seller would be liable even if the buyer did not disclose his concerns at the time the goods were supplied' (ibid).

<sup>225</sup> See the main text accompanying n 159.

<sup>226</sup> See the main text accompanying n 103.

<sup>227</sup> See the main text accompanying n 111.

incorporating ethical standards, thereby promoting and protecting interests going far beyond the contract at hand.<sup>228</sup> It will be recalled that the discourse outside sales law suggests that, in global supply chains, contracts, incorporating standards, have become ‘transnational regulatory regimes’. This is a valuable insight for sales law. It highlights yet another instance where sales and contract law, that underpin and provide a framework for the interpretation and enforcement of contracts, perform a regulatory function. At the same time, showing that sales law is no stranger to regulation can only reinforce the argument that it performs this function in global supply chains. These lines of argument in sales law and in the broader discourse on standards thus reinforce each other.

Secondly, it has been argued that the phenomenon of standardisation, of which the proliferation of standards is one main form,<sup>229</sup> is in itself a source of regulation, a form of ‘organised governance’.<sup>230</sup> Standardisation has been seen to affect ‘individual rights in a way equivalent to legislation’ as well as to ‘open up new avenues for enforcement of contracts by private actors themselves’.<sup>231</sup> The experience of sales law shows the need to temper this argument to some extent. Commercial dealings are based on contracts. If sellers do not comply with standards, it is remedies available in contract and sales law that are the main mechanism of enforcing the buyers’ rights. The experience of jurisdictions examined here shows that the number of cases involving standards, particularly private, is relatively low, considering a substantial amount of case law on conformity of goods.<sup>232</sup> If standards were truly a form of organised governance and a major source of transnational regulation, why have standards generated such a modest number of cases? If standards are so widely incorporated, as they are claimed to be, why are there virtually no cases on breach of ‘express warranties’ concerning standards? This applies with a particular force to ethical standards, on which not a single case

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<sup>228</sup> See the main text accompanying nn 60, 201

<sup>229</sup> The proliferation of standard form contracts being another.

<sup>230</sup> Brunsson and Jacobsson (n 26).

<sup>231</sup> D Wielsch, ‘Global Law’s Toolbox: How Standards Form Contracts’ in H. Eidenmüller (ed), *Regulatory Competition in Contract Law and Dispute Resolution* (CH Beck-Hart-Nomos 2013) 73 (in the context of standard form contracts).

<sup>232</sup> As of the time of writing, there were more than 500 reported cases on conformity of goods decided under the CISG (see [http://www.cisg.law.pace.edu/cgi-bin/isearch?DATABASE=cases2&SEARCH\\_TYPE=ADVANCED&ISEARCH\\_TERM=articles/35&ELEMENT\\_SET=TITLE&MAXHITS=500](http://www.cisg.law.pace.edu/cgi-bin/isearch?DATABASE=cases2&SEARCH_TYPE=ADVANCED&ISEARCH_TERM=articles/35&ELEMENT_SET=TITLE&MAXHITS=500)). In the context of the UCC, it is estimated that there are ‘thousands, perhaps tens of thousands, of cases’ on the merchantable quality and fitness for purpose tests only (JJ White and RS Summers, *Uniform Commercial Code* (6<sup>th</sup> edn, West – Thomson Reuters 2010) 483). Against this data, it is striking how few cases, involving standards, have arisen.

has been found. Surely, if compliance with standards, including ethical standards, were so important to commercial buyers,<sup>233</sup> they would enforce them more frequently and vigorously.

One response is that parties may prefer resorting to the enforcement mechanisms outside the realm of the traditional contract and sales law remedies. In global supply chains, in particular, contracts often contain their own remedial schemes that seek to *prevent* non-compliance from occurring or to make parties within a chain to *co-operate* before or after any non-compliance.<sup>234</sup> The already mentioned certification and inspection processes are an important part of such remedial schemes:

‘Certification schemes reflect a different logic from that deployed in current contract law: they induce cooperation and require corrective measures to a much higher degree. They focus on compliance rather than breach and on cure rather than compensation’.<sup>235</sup>

It may also be that, being concerned with reputational damage, companies prefer to keep problems (particularly those concerned with ethical standards), relating to their production processes, confidential and seek to avoid litigation.<sup>236</sup> Nevertheless, the experience of sales laws in several jurisdictions and of a major international instrument, applied worldwide, cannot be completely brushed aside by these arguments. The message from sales law is that the extent to which standardisation and standards represent a source of *actual* governance of commercial affairs may not be as significant as is often presented in scholarship outside sales law. In relation to ethical standards in particular, the experience of sales law raises doubts about whether, despite numerous codes of conduct, companies take them sufficiently seriously. One mere statistic regarding the use of child labour<sup>237</sup> suffices to show that the world is far from meeting such standards.

Finally, there are other areas where sales law and discourse about standards outside it can be useful to each other. The research about the nature and functions of standards, the extent to which they are used in practice and the realities of their application, is useful to sales law. It explains the commercial context against which contracts and SITs are to be interpreted. Conversely, the sales law cases involving standards can contribute to the body of knowledge

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<sup>233</sup> In contrast, class actions have been brought in the US under consumer protection laws. See, eg, D Wallace, ‘Seller Beware: A Look at Liability Risk for the Labour Practices of Business Partners in the Global Supply Chain’, <<http://www.lexology.com/library/detail.aspx?g=895b1249-54d1-4710-9437-5c639609ad3f>>.

<sup>234</sup> See, generally, F Cafaggi and P Iamiceli, ‘Contracting in Global Supply Chains and Cooperative Remedies’ (2015) *Uniform L Rev* 135.

<sup>235</sup> *Ibid*, 149.

<sup>236</sup> *Lin* (n 61) 725-726.

<sup>237</sup> See n 209 and the accompanying main text.

on standards more generally.<sup>238</sup> To determine whether a standard should be a source of defining the seller's obligations, standards will often have to be scrutinised. This scrutiny may reveal various aspects of standards, including their legitimacy, standing in a relevant commercial sector and the extent to which they take account of different interests involved. This means that positions that courts take in respect of a standard – that is, if a standard is or is not relied upon – can contribute to the debates surrounding standards. In the context of the CISG in particular, which incorporates<sup>239</sup> the ideals of the New International Economic Order,<sup>240</sup> the needs of developing countries can be, as seen above,<sup>241</sup> a relevant consideration in a dispute on conformity of goods. It is not inconceivable therefore that future cases can reveal whether a particular standard takes into account the interests of the developing world, contributing to the debate about the legitimacy of standards from this perspective.<sup>242</sup> There are thus a number of areas where sales law and the discourse on standards outside it would benefit from engaging with each other.

## Conclusion

The last few decades have seen the proliferation of product standards created by various bodies. Whilst standards emanating from states continue to be important, it is 'private' standards that are gaining particular prominence, often replacing 'public' standards or being more rigorous than the latter. The accumulation and ever expanding nature of all these standards and the phenomenon of standardisation more generally have generated much discussion in legal and non-legal scholarship. However, the experience of the law of sale of goods with its body of case law on 'conformity' or 'quality' of the goods, has featured very little in this discussion. More so, there has not been enough research done in sales law itself to examine the impact of

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<sup>238</sup> For good examples of cases where standards are examined in some detail, see, eg, *Medivance Instruments Ltd v Gaslane Pipework Services Ltd*, *Vulcana Gas Appliances Ltd* (n 150); *Kingspan Environmental Ltd v Borealis A/S* (n 140).

<sup>239</sup> See the Preamble to the CISG.

<sup>240</sup> Such as equality, fairness, economic advancement and social growth of all people and eliminating the gap between the developed and developing world. See the UN General Assembly Resolution 3201 (S-VI): 'Declaration on the Establishment of a New International Economic Order', 1 May 1974, <<http://www.un-documents.net/s6r3201.htm>>.

<sup>241</sup> See n 101.

<sup>242</sup> See nn 49-53 and the accompanying main text.

standards on contract interpretation and SITs. This article addressed both these issues by drawing on the experience of the common law and the CISG.

The conclusion, flowing from this experience, is that whilst standards *can* influence the interpretation of contracts and SITs, their precise legal significance depends on the balance of various factors, identified in this article, in the particular circumstances. It has been argued that this balancing exercise should be driven and informed by the broad question of whether the seller was in the position to know about the relevant standard and the need to comply with it and, where relevant, by the logic and rationale of the applicable SIT(s). It has also been suggested that there is much to be gained from greater engagement between the discussions of standards in sales law and outside it. There are a number of areas where the body of knowledge and experience in each of the discourses on standards can be mutually relevant and useful.