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ETHICAL STANDARDS IN INTERNATIONAL SALES CONTRACTS: CAN THE CISG BE USED TO PREVENT CHILD LABOUR?

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Abstract

Despite international efforts in recent decades to eliminate it, child labour continues to affect millions of children worldwide. This paper considers whether the UN Convention on Contracts for the International Sale of Goods ('CISG') can be used to prevent child labour. It firstly addresses the conformity requirements in art 35 of the CISG, and asks whether these can be used to require a seller to deliver child labour-free goods, even where this is not explicitly required by the contract. It then considers whether a buyer can recover damages if the seller delivers goods that are tainted by child labour. It examines the difficulties associated with a claim for damages in this context – especially where the only harm suffered by the buyer is to its goodwill or its 'performance interest' – and suggests how such damages might be calculated.

I Introduction

For decades, the international community has struggled to eliminate child labour. The term 'child labour' refers to work done by children that "deprives [them] of their childhood, their potential and their dignity, and that is harmful to physical and mental development."[1] Although child labour is prohibited at international law,[2] as well as under domestic law in almost all states,[3] it affects an estimated 168 million children worldwide.[4] This includes over 85 million in hazardous work.[5] The difficulty with preventing child labour is that it often takes place in so-called 'failing states', where the governments are either unwilling or unable to adequately safeguard human rights.[6] Moreover, the companies that employ children are not (yet) directly subject to any human rights obligations under international law.[7] Thus, despite the efforts by the international community to prevent child labour, many companies throughout the world continue to use it without sanction.

The inability of international and municipal human rights law to adequately prevent corporate human rights abuses such as the use of child labour has led to the development of various alternative approaches. These include soft law instruments,[8] voluntary initiatives,[9] and the establishment of a UN

[1] International Labour Organisation "What is Child Labour" ILO Website <www.ilo.org>.
[2] Convention on the Rights of the Child 1577 UNTS 3 (opened for signature 20 November 1989, entered into force 2 September 1990), art 32; Convention (No. 138) Concerning Minimum Age for Admission to Employment 1015 UNTS 297 (opened for signature 26 June 1973, entered into force 19 June 1976); Convention (No. 182) Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour 2133 UNTS 161 (opened for signature 17 June 1999, entered into force 19 November 2000).
[3] Franziska Humbert *The Challenge of Child Labour in International Law* (Cambridge University Press, Cambridge, 2009) at 28.
[4] International Labour Organisation "Child Labour" ILO Website <www.ilo.org>.
[5] International Labour Organisation "Child Labour" ILO Website <www.ilo.org>.
[6] Ingeborg Schwenzer and Benjamin Leisinger "Ethical Values and International Sales Contracts" in Ross Cranston, Jan Ramberg and Jacob Ziegel (eds) *Commercial Law Challenges in the 21st Century: Jan Hellner in Memoriam* (Iustus Forlag, Stockholm, 2007) at 249 and 252; John Ruggie "Business and Human Rights: The evolving international agenda" (2007) 101 AJIL 819 at 834; Franziska Humbert, *The Challenge of Child Labour*, above n 3, at 28.
[7] Ruggie, "Business and Human Rights", above n 6, at 832.
[8] Such as the United Nations Guiding Principles on Business and Human Rights and the OECD Guidelines for Multinational Enterprises.
[9] Such as the United Nations Global Compact, the Electronics Industry Citizenship Coalition (EICC) Code of Conduct and the Kimberley Process.

Human Rights Council working group tasked with creating a binding instrument that imposes human rights obligations on corporations at international law.[10] Another approach, which will be the focus of this paper, involves using international sales contracts governed by the UN Convention on Contracts for the International Sale of Goods ('CISG') to require that goods adhere to certain ethical standards, such as being child labour-free.

This approach is an effective and efficient means of combatting child labour for two reasons. Firstly, it does not rely on the (often inadequate) laws and enforcement mechanisms in the state where the child labour is employed. This is because the prohibition on the use of child labour stems from the contract and the CISG, and is therefore enforced like any other contractual term. Secondly, if there is a risk that a seller will be liable for damages if it delivers goods produced using child labour, this will create a powerful disincentive against the use of child labour. Companies are profit-making enterprises, and those employing children only do so in order to maximise their profits. If it becomes unprofitable to use child labour, companies will stop using it.

Thus, assuming a buyer is able to require a seller to deliver child labour-free goods, and this requirement is bolstered by access to effective remedies, contracts will be an effective means of preventing child labour. However, without an explicit contractual requirement that the goods are produced without child labour (which a buyer may not have thought, or considered it necessary, to include) can the obligation to deliver child labour-free goods be imposed on the seller in any other way? Moreover, even if a seller is obliged to deliver child labour-free goods, can the buyer recover damages if this obligation is breached? This paper will consider these issues. It will argue that in many cases, the conformity requirements in art 35 of the CISG require sellers to deliver goods that were produced without using child labour, even where this is not explicitly required by the contract. Moreover, this requirement is given teeth by the fact that the buyer can recover

[10] Rashid Dumbuya "Corporate responsibility to respect human rights: Is the UN Guiding Principles on Business and Human Rights up to the task or is there a need for a Treaty on Business and Human Rights?" (LLM Paper, University of Dundee, 2014) at 5 and 7.

damages in the event of a breach. Thus, the CISG has the potential to be an effective tool for preventing child labour.

Part II of this paper will determine whether sellers can be required under the CISG to deliver child labour-free goods without an explicit requirement in the contract. It will determine that a seller's obligation to deliver child labour-free goods may arise from the circumstances, including negotiations and previous dealings between the parties, from a trade usage in some industries, and from the CISG's requirements that goods must be fit for both their ordinary and intended purposes.

Part III will outline how this issue is complicated by the often long and complex nature of international supply chains. It will conclude that sellers will generally be responsible for ensuring that child labour was not used in any stage of the supply chain, although their liability will often be limited in practice.

Finally, Part IV will determine whether a buyer can recover damages if a breach of art 35 is established. It will conclude that a buyer may recover damages where it was forced to sell the goods at a lower price as a result of the breach, and where the breach resulted in harm to the buyer's goodwill. Goodwill damages will be recoverable whether or not any financial loss flows from the loss of goodwill, because goodwill is an asset with financial value in itself. It will be further argued that even where a buyer has not suffered any pecuniary loss as a result of the breach, it should be compensated for the damage to its performance interest. A framework for measuring such damages will also be proposed.

II Can a seller be required to deliver child labour-free goods without an explicit agreement?

A Conformity of the goods

The seller's obligation to deliver conforming goods is dealt with under art 35 of the CISG. Article 35(1) requires the seller to deliver "goods which are of the quantity, quality and description required by the contract".[11]

Article 35(2) states that the goods must:[12]

> (a) [be] fit for the purposes for which goods of the same description would ordinarily be used;
>
> (b) [be] fit for any particular purpose expressly or impliedly made known to the seller at the time of the conclusion of the contract, except where the circumstances show that the buyer did not rely, or that it was unreasonable for him to rely, on the seller's skill and judgement.

Whilst art 35(1) deals with what the contract actually requires, art 35(2) sets out a series of objective criteria used to determine conformity.[13] It is a subsidiary definition which only applies to the extent that the contract does not contain any, or contains only insufficient, details of the requirements to be satisfied under art 35(1).[14] Thus, the primary consideration is whether the *contract* requires the goods to be produced without using child labour. If child labour-free goods are not required by the contract, the art 35(2) requirements can then be considered.

B Conformity under article 35(1): can a contract require child labour-free goods without an explicit requirement?

The fact that human rights are violated in the manufacture of goods alone does not affect their physical features. However under art 35(1), 'quality' includes not only the physical condition of the goods, but also "all factual and legal circumstances concerning the relationship of the goods to their surroundings."[15] Courts have held that non-physical requirements, such as

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[11] United Nations Convention on Contracts for the International Sale of Goods 1489 UNTS 3 (opened for signature 11 April 1980, entered into force 1 January 1988), art 35(1).
[12] Article 35(2)(a) and (b).
[13] Ingeborg Schwenzer (ed) *Commentary on the UN Convention on the International Sale of Goods (CISG)* (3rd ed, Oxford University Press, Oxford, 2010), at 575.
[14] At 575.
[15] At 572-573.

the age,[16] origin[17] or organic nature of the goods,[18] amount to quality requirements under art 35(1). It would therefore be no obstacle to a party alleging non-conformity under art 35(1) that the use of child labour did not affect the *physical* quality of the goods.

1 Can a term prohibiting child labour be established from the circumstances?

Article 8 of the CISG governs the interpretation of parties' statements and conduct.[19] It states that:[20]

> (1) For the purposes of this Convention statements made by and other conduct of a party are to be interpreted according to his intent where the other party knew or could not have been unaware what that intent was.
>
> (2) If the preceding paragraph is not applicable, 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.
>
> (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.

Thus, the primary consideration is the subjective intent of the parties. If the parties' actual intention cannot be established, their statements and conduct are interpreted objectively, according to the understanding that a reasonable person in the other party's position would have had in the circumstances. In determining the actual or objective intention of the parties, all relevant circumstances must be considered.

Article 9(1) states that "The parties are bound by any usage to which they have agreed and by any practices which they have established between themselves." Parties must expressly or impliedly agree to a usage in order to

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[16] *Landgericht* (District Court) Berlin, 13 September 2006, 94 O 50/06 (*Aston Martin case*) <www.cisg.law.pace.edu>.
[17] *Bundesgerichtshof* (German Supreme Court), 3 April 1996, VIII ZR 51/95 (*Cobolt Sulphate case*) <www.cisg.law.pace.edu>.
[18] *Oberlandesgericht* (Appellate Court) München, 13 November 2002, 27 U 346/02 (*Organic Barley case*) <www.cisg.law.pace.edu>.
[19] Ingeborg Schwenzer (ed) *Commentary on the UN Convention on the International Sale of Goods*, above n 13, at 146.
[20] CISG, above n 11, art 8.

be bound by it.[21] Unlike under art 9(2) (which will be discussed below), art 9(1) usages do not need to be internationally recognised.[22]

Practices are established through conduct that is repeated with sufficient frequency and duration to create a justified expectation that the parties will proceed correspondingly in the future.[23] Thus, the contract is supplemented to reflect the parties' previous conduct.[24]

(a) Contractual negotiations

In certain situations, a court may interpret parties' statements and conduct as requiring the seller to deliver child labour-free goods. For example, the buyer may inform the seller during negotiations that it requires the goods to be child labour-free, and the seller may accept this. Whether there is sufficient evidence of such a requirement will depend on the circumstances of each case.

(b) Prior transactions

A requirement that goods be child labour-free may also arise from the circumstances if the seller has sold child labour-free goods to the buyer on multiple occasions in the past, and has created a justified expectation that it will continue to do so.[25] This would establish a practice between the parties, which is binding on the seller under art 9(1).

(c) Mutual participation in a voluntary initiative

Schwenzer and Leisinger argue that if both parties participate in a private initiative prohibiting child labour such as the United Nations Global

[21] Ingeborg Schwenzer (ed) *Commentary on the UN Convention on the International Sale of Goods,* above n 13, at 185; C Pamboukis "The Concept and Function of Usages in the United Nations Convention on the International Sale of Goods" 25 J L Com 107 at 112-113; *Oberster Gerichtshof* (Austrian Supreme Court), 21 March 2000, 10 Ob 344/99g (*Wood case*) <www.cisg.law.pace.edu>.
[22] *Oberster Gerichtshof* (Austrian Supreme Court), 15 October 1998, 2 Ob 191/98x (*Timber case*) <www.cisg.law.pace.edu>.
[23] Ingeborg Schwenzer (ed) *Commentary on the UN Convention on the International Sale of Goods,* above n 13, at 186.
[24] Schwenzer and Leisinger "Ethical Values and International Sales Contracts", above n 6, at 264.
[25] Ingeborg Schwenzer (ed) *Commentary on the UN Convention on the International Sale of Goods,* above n 13, at 186.

Compact ('UNGC'),[26] it can be presumed that they have agreed to be bound by the standards set out in the initiative.[27] This is because "if both parties have agreed to certain standards on a broader scale, they must, consequently, be deemed to have, at least implicitly, agreed to such a usage in their individual contracts."[28]

Ramberg disagrees with this conclusion however, arguing that:[29]

> It is one thing to generally participate and sponsor a United Nation initiative. It is another thing to contractually agree that a contractual party is entitled to contractual remedies if an ethical standard is not met.

Thus, according to Ramberg one cannot assume that just because both parties have made a public commitment to uphold certain ethical standards in the conduct of their business generally, they must have also impliedly agreed that those standards apply to their contract. The fact that both parties may have publically communicated their commitment to the UNGC principles, for example, does not mean that either has communicated a willingness to undertake a *contractual* responsibility to adhere to those principles. [30] Initiatives like UNGC are by their nature voluntary. Participants do make certain commitments, however these are aspirational and are not intended to bind the participants in any way. It may therefore be drawing a long bow to argue that just because a seller has expressed a commitment to upholding the principles of a *voluntary* initiative, it has also impliedly agreed to be contractually bound by those principles in every international sales contract it enters into with other participants.

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[26] The Global Compact is a voluntary private initiative that sets out ten principles covering human rights, labour the environment and corruption. One of these principles requires that the participant businesses "uphold the effective abolition of child labour". See United Nations Global Compact "Overview of the UN Global Compact" Global Compact Website <www.unglobalcompact.org>; United Nations Global Compact "The Ten Principles" Global Compact Website <www.unglobalcompact.org>.

[27] Schwenzer and Leisinger "Ethical Values and International Sales Contracts", above n 6, at 264.

[28] At 264

[29] Christina Ramberg "Emotional Non-Conformity in the International Sale of Goods, Particularly in Relation to CSR Policies and Codes of Conduct" (Research paper, Stockholm University, 2014) at 13-14.

[30] At 16.

However, can a buyer not reasonably expect a seller, who has also made a public commitment against child labour by joining a voluntary initiative prohibiting it, to abide by the initiative's principles in its performance of the contract? While the parties may not have explicitly agreed that those principles will apply to their contract, they have both made an explicit commitment to uphold the principles in *all* of their dealings. A company participating in a voluntary initiative has expressed to the world – including potential trade partners – that it does business in a certain way and will continue to do so in future. A buyer who has researched into the background of a potential seller and discovered that it has (for example) made a public commitment to "uphold the effective abolition of child labour" within its sphere of influence[31] is likely to be led reasonably to believe that the seller will deliver child labour-free goods. Therefore, if both parties participate in a voluntary initiative which prohibits child labour, and the buyer is aware of the seller's participation, a court will infer an agreement that the ethical standards required by the initiative (including the prohibition of child labour) apply to their contract.

(d) Incorporation of standard terms without explicit reference: codes of conduct

A code of conduct ('Code') is a document which sets out the social and environmental standards that a firm expects its suppliers to abide by.[32] Where a buyer has a Code requiring suppliers to adhere to certain ethical standards (such as not using child labour), this Code can be incorporated into the contract as a set of standard terms. Standard terms are "provisions which are prepared in advance for general and repeated use by one party and which are actually used without negotiation with the other party".[33]

[31] United Nations Global Compact "The Ten Principles" Global Compact Website <www.unglobalcompact.org>.
[32] Mette Andersen and Tage Skjoett-Larsen "Corporate social responsibility in global supply chains" (2009) 14 Supply Chain Management: An International Journal 75 at 78.
[33] UNIDROIT Principles of International Commercial Contracts 2010, art 2.1.19(2); CISG Advisory Council "Inclusion of Standard Terms under the CISG" (CISG Advisory Council Opinion no. 13, Villanova, 2013) at [A1].

The CISG does not give any guidance as to when standard terms are included in a contract. However, the CISG Advisory Council has stated that standard terms are included in a contract "where the parties have either expressly or impliedly agreed to their inclusion…and the other party had a reasonable opportunity to take notice of the terms."[34] Thus, where a contract clearly refers to the incorporation of standard terms (such as a Code) and the terms are made reasonably available at the time, they will be incorporated in the contract.[35] Likewise, where a buyer otherwise clearly communicates to the seller during negotiations that the agreement is subject to its standard terms set out in its Code, the seller is deemed to have accepted the inclusion of the terms unless it clearly expresses otherwise (assuming the Code has been made reasonably available to the seller).[36]

Proving the inclusion of a Code becomes more difficult, however, where a buyer does not clearly refer to its inclusion, and/or where the Code is not physically attached to the contract. One may envisage a situation where a buyer prominently displays its Code on its website, and mentions it briefly during negotiations, but does not supply it to the seller or expressly stipulate that it is incorporated into the contract. Here, a buyer will need to prove that the parties impliedly agreed to the inclusion of the Code as a set of standard terms, and that the seller had a reasonable opportunity to take notice of the terms.

(i) Implied agreement

A seller's agreement to the inclusion of the buyer's standard terms will be inferred where the seller has, through its conduct, led the buyer reasonably to believe that it has accepted the inclusion of the terms.[37] Whether such an agreement can be inferred will depend on the particular circumstances. An issue may arise where a buyer attaches its Code to the contract, but does not include an incorporation clause in the contract. Here there will be no problem with making the terms reasonably available to the seller. However

[34] At [B2].
[35] At [B2.13].
[36] At [B1.6].
[37] Ramberg "Emotional Non-Conformity", above n 29, at 11; CISG, above n 11, art 8(2).

the seller may claim that by signing the contract, it did not agree to the inclusion of the Code.

There is diverging case law on whether there must be a clear incorporation clause where standard terms are attached to the contract.[38] The French *Cour d'appel* has held that printing standard terms on the back of an order form was not enough to incorporate those terms into the contract, as there was no incorporation clause.[39] A Spanish Appellate Court also reached the same result.[40] Conversely, a US Court has more recently held that the inclusion of both an offer and a set of standard terms together as attachments to an email was sufficient to incorporate the terms into the contract, despite no express reference to them in the offer.[41]

The CISG Advisory Council has favoured the US decision on the basis that it is a more commercially reasonable approach given prevalence of standard terms in modern trade.[42] Given the importance of the Advisory Council's guidance, Courts are likely to follow the US case in future, and infer that an offeree has agreed incorporate into the contract any standard terms that are attached to the contract.

Another issue is whether the buyer is required to explicitly make ethical requirements in its Code known to the seller in order for them to be binding. If a standard term is "so surprising or unusual that a reasonable person of the same kind as the relevant party could not reasonably have expected such a term in the agreement", it does not form part of the contract unless the party using the standard terms specifically informs the other party of its inclusion.[43] However, ethical requirements are now common in Codes, and

[38] CISG Advisory Council "Inclusion of Standard Terms", above n 33, at [B2.1]-[B2.12].
[39] *Cour d'appel* (Court of Appeal) Paris, 13 December 1995, 95-018179 (*ISEA Industrie v Lu)* <www.cisg.law.pace.edu>.
[40] *Audiencia Provincial* (Appellate Court) Navarra, 27 December 2007, (*Case involving machine for repair of bricks*) <www.cisg.law.pace.edu>.
[41] Federal District Court California, 21 January 2010, CV F 09-1424 LJO GSA (*Golden Valley Grape Juice and Wine LLC v Centrisys Corporation et al*) <www.cisg.law.pace.edu>.
[42] CISG Advisory Council "Inclusion of Standard Terms", above n 33, at [B2.12] and [B 3.2].
[43] At [B7] and [B7.2].

are not surprising or unusual. Thus, a buyer is not required to highlight them in order for them to be included.

(ii) Reasonable opportunity to take notice of the terms

According to the Advisory Council, an offeree will have reasonable opportunity to take notice of the standard terms where the terms are generally accessible online at the time of contracting (as long as the website was reasonably available to the other party at the time).[44] Thus, if a buyer makes the seller aware of its Code, which is available on its website, during negotiations, this will likely be enough to give the buyer a reasonable opportunity to take notice of its terms. Whether the Code is incorporated into the contract will then depend whether an agreement can be inferred from the parties' conduct.

In sum, a whether the ethical requirements contained in a buyer's Code are included in a contract as standard terms will depend on the circumstances of the case. A buyer cannot rely on standard terms that it has neither communicated to a seller (during negotiations or via an express clause), nor physically attached to the contract. However, it will often be sufficient that the buyer has done one of these two things. Of course, best practice would be to do both.

(e) Summary

This section has discussed the various ways in which a term requiring a seller to deliver child labour-free goods can be established from the circumstances in the absence of an express clause. It has determined that such an obligation can arise from the parties' negotiations, prior dealings, mutual involvement in certain voluntary initiatives and the inclusion of a Code as a set of standard terms. The preceding analysis has necessarily been open-ended, as much will depend on the circumstances of the individual case. The next section will consider whether an obligation to deliver child labour-free goods arises from customary international law.

[44] At [B3.4].

2 Does an obligation to deliver child labour-free goods arise from customary international law?

This section will consider the interplay between public international law and the CISG. It will determine whether the prohibition of child labour is customary international law, and if so, whether this requires a seller to deliver child labour-free goods.

(a) Is the prohibition of child labour a rule of customary international law?

Customary international law refers to a "general practice accepted as law".[45] In order for a practice to become customary international law, there must be duration, consistency and generality of practice, as well as *opinio juris.*[46] It is generally recognised that fundamental principles of human rights are part of customary international law.[47] This is especially true for the prohibition of child labour. Child labour is explicitly prohibited by the UN Convention on the Rights of the Child ('UNCRC'),[48] which has 194 state parties,[49] making it the most widely adopted of all international conventions.[50] The right of children to be free from child labour is also enshrined in the ILO Convention on the Minimum Age for Admission to Employment and Work[51] and the ILO Convention on the Worst Forms of Child Labour,[52]

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[45] Statute of the International Court of Justice (1946), art 38(1)(b).
[46] Ian Brownlie *Principles of Public International Law* (7th ed, Oxford University Press, Oxford, 2008) at 24-25.
[47] At 642.
[48] Convention on the Rights of the Child 1577 UNTS 3 (opened for signature 20 November 1989, entered into force 2 September 1990), art 32.
[49] Including the following non-member states: Holy See, Palestine, Cook Islands and Niue – the only member states that are not parties are the USA, Somalia and South Sudan: United Nations "Convention on the Rights of the Child" United Nations Treaty Collection Website <www. treaties.un.org>; Office of the High Commissioner for Human Rights "Status of Ratification Interactive Dashboard: Convention on the Rights of the Child" OHCHR Website <www.ohchr.org>.
[50] John Muncie and Barry Goldson "Youth justice: in a child's best interests?" in Jonathan Simon and Richard Sparks (eds) *The SAGE Handbook of Punishment and Society* (SAGE, London, 2013) at 345.
[51] Convention (No. 138) Concerning Minimum Age for Admission to Employment 1015 UNTS 297 (opened for signature 26 June 1973, entered into force 19 June 1976).
[52] Convention (No. 182) Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour 2133 UNTS 161 (opened for signature 17 June 1999, entered into force 19 November 2000); Recommendation (No. 190) Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour (adopted 17 Jun 1999).

which have been ratified by 167 and 179 states respectively.[53] Thus, the prohibition of child labour is not only generally, but *universally* practiced by states, and is also accepted as being binding at international law. It is therefore a rule of customary international law.

(b) The effect of this rule on CISG contracts

It must now be established whether the fact that the prohibition of child labour is a rule of customary international law means that goods delivered under a CISG contract must be child labour-free. To answer this question, one must first determine whether party autonomy under the CISG is limited by mandatory rules of international law. If so, the effect this mandatory rule has on a seller's obligations under the contract must then be determined.

(i) Is party autonomy under the CISG limited by mandatory rules of international law?

Article 6 of the CISG recognises the principle of party autonomy.[54] It states that "the parties may exclude the application of this Convention or, subject to article 12, derogate from or vary the effect of any of its provisions." Unlike the UNIDROIT Principles of International Commercial Contracts ('PICC') and the Principles of European Contract Law ('PECL'),[55] the CISG does not explicitly state that party autonomy is limited by mandatory rules. Some commentators have taken this to mean that party autonomy under art 6 is not limited by any mandatory rules that relate to matters within the CISG's scope.[56] In their view, only mandatory rules relating to

[53] International Labour Organisation "Ratifications of C138 - Minimum Age Convention" ILO Website <www.ilo.org>; International Labour Organisation "Ratifications of C182 - Worst Forms of Child Labour Convention" ILO Website <www.ilo.org>.
[54] Morten Fogt "Contract Formation under the CISG: The Need for a Reform" in Larry DiMatteo (ed) *International Sales Law: A Global Challenge* (Cambridge University Press, Cambridge, 2014) at 184.
[55] UNIDROIT Principles of International Commercial Contracts 2010, arts 1.1.3 and 1.4; The Principles of European Contract Law 2002, art 1:103.
[56] Ulrich Schroeter "Freedom of Contract: Comparison Between Provisions of the CISG (Article 6) and Counterpart Provisions of the PECL" (2002) 6 VJ 257 at 262; Fritz Enderlein and Dietrich Maskow *International Sales Law: United Nations Convention on Contracts for the International Sale of Goods - Convention on the Limitation Period in the International Sale of Goods: Commentary* (Oceana, New York, 1992) at 49.

matters *outside* the scope of the CISG apply to contracts governed by the convention.[57]

An example of such a matter is validity. Article 4 states that the CISG is not concerned with the validity of the contract, or its provisions.[58] Thus, international mandatory rules dealing with questions of validity are applicable. However, "the rights and obligations of the seller and the buyer arising from [the] contract" are within the CISG's scope.[59] Therefore, under the above view, party autonomy under art 6 is not limited by mandatory rules that determine these obligations. Thus, a term that explicitly requires or allows the use of child labour will be found to be invalid because it is contrary to the mandatory rule prohibiting child labour, while the same mandatory rule cannot be applied to determine the seller's obligations under the contract.

The above view is arguably supported by art 7(1), which states that:

> In the interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade.

Article 7(1) emphasises the need for the CISG to be interpreted autonomously, and applied in a uniform manner.[60] If mandatory rules that are within the CISG's scope of application are applied alongside the CISG's provisions, this risks undermining the uniformity of its application. However, art 7(1) is concerned with preventing recourse to *domestic* laws and concepts.[61] If the mandatory rules in question are rules of customary international law, they are universally applicable, and therefore no problems should arise with regards to uniformity.

Moreover, art 7(1) also emphasises the international character of the CISG. The Convention does not exist in a vacuum, and must be interpreted in light

[57] Ulrich Schroeter "Freedom of Contract", above n 56, at 262.
[58] CISG, above n 11, art 4.
[59] Article 4.
[60] Franco Ferrari "Gap-filling and Interpretation under the CISG: Overview of International Case Law" (2003) IBLJ 221 at 222.
[61] At 222.

of other international law. Article 31(3)(c) of the Vienna Convention on the Law of Treaties supports this, stating that when interpreting treaties, "any relevant rules of international law" should be taken into account.[62] Art 6 must therefore be interpreted in light of mandatory rules of customary international law, and the right to freedom of contract contained in art 6 must be limited by these rules, regardless of whether they relate to a matter within the CISG's scope. This view acknowledges the international character of the CISG, and is also consistent with the PICC and PECL, which both explicitly state that party autonomy is limited by mandatory rules.[63] As the prohibition of child labour is a rule of customary international law, it follows that this rule sets a limit to party autonomy under the CISG.

(ii) Does this rule require a seller to deliver child labour-free goods?

While the mandatory rule prohibiting child labour does set a limit to party autonomy under the CISG, it is submitted that it does not require the seller to deliver child labour-free goods. Instead, mandatory rules of international law only limit party autonomy in the sense that parties may not derogate from the rules in their contract. Parties are not required to adhere to those mandatory rules in the *performance* of their contracts. Such a requirement would limit party autonomy far more than the PECL and PICC (which merely require that parties do not derogate from mandatory rules) allow, and would place an unacceptable limit on the right to freedom of contract.

(c) Summary

Thus, the fact that the use of child labour is contrary to customary international law does not mean that a seller is obliged to deliver child labour-free goods. It will now be considered whether an obligation to deliver child labour-free goods arises from a trade usage under art 9(2).

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[62] Vienna Convention on the Law of Treaties 1155 UNTS 331 (opened for signature 23 May 1969, entered into force 27 January 1980), art 31(3)(c).
[63] UNIDROIT Principles of International Commercial Contracts 2010, arts 1.1.3 and 1.4; The Principles of European Contract Law 2002, art 1:103.

3 Is there an international trade usage prohibiting the use of child labour?

A buyer may also argue that the prohibition of child labour constitutes a trade usage, thus forming an implied term of the contract. Trade usages refer to "practices and rules, which are observed either by the parties in their relation or in the respective branch of activity."[64] Article 9(2) of the CISG states that:[65]

> The parties are considered, unless otherwise agreed, to have impliedly made applicable to their contract or its formation a usage of which the parties knew or ought to have known and which in international trade is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade concerned.

Thus, the usage becomes an implied term of the contract if it is widely known to, and regularly observed by, members of the relevant industry, and the parties either knew, or ought to have known about it. Trade usages do not need to be expressly agreed upon by the parties – they are so widely recognised and observed that the parties' reliance on them is presumed unless they express otherwise.[66] Article 9(2) also does not require *universal* knowledge or observance of the usage.[67] It is sufficient that it is recognised and observed by the *majority* of persons doing business in the particular industry in question.[68] Whether a trade usage exists, and what it requires of the parties, are questions of fact.[69]

The issue in this context is whether the prohibition of child labour amounts to a trade usage, either within a particular industry or globally. If so, this prohibition forms an implied term in any international sales contracts to

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[64] C Pamboukis "The Concept and Function of Usages", above n 21, at 111.
[65] CISG, above n 11, art 9(2).
[66] Sampsa Seppälä "The Responsibilities and Rights of Both Buyer and Seller in International Trade Concerning the Conformity of the Goods and Additional Contractual Requirements" (LLM Thesis, University of Lapland, 2013) at 23.
[67] Ingeborg Schwenzer (ed) *Commentary on the UN Convention on the International Sale of Goods,* above n 13, at 190.
[68] *Wood case,* above n 21; Ingeborg Schwenzer (ed) *Commentary on the UN Convention on the International Sale of Goods,* above n 13, at 190.
[69] *Wood case,* above n 21; Ingeborg Schwenzer (ed) *Commentary on the UN Convention on the International Sale of Goods,* above n 13, at 192.

which the usage applies. Accordingly, this section will consider firstly whether the prohibition of child labour is a *globally applicable* international trade usage which applies to all international sales contracts. It will then consider whether it constitutes an international trade usage within any *particular industries*. While a comprehensive industry-by-industry analysis is beyond the scope of this paper, the apparel and electronics industries will be considered as examples.

(a) Globally applicable trade usage?

Schwenzer and Leisinger assert that the observance of "minimum ethical standards" (such as the prohibition of child labour) is an international trade usage, forming an implied term in *every* international sales contract unless the parties agree otherwise.[70] However, Mitkidis argues that while the prohibition on child labour may be *theoretically* accepted worldwide, it is not observed by the majority of parties in practice.[71] This latter view is echoed by other commentators, who suggest that there are certain usages (such as the observance of ethical requirements) which may be widely acknowledged and adhered to in developed states, but cannot yet be adhered to in developing countries.[72] Whether such a usage exists will now be considered.

(i) Freedom of contract and party autonomy

Party autonomy and freedom of contract are fundamental principles underlying the CISG.[73] It would arguably be a substantial interference with these principles to imply a term prohibiting child labour into *every* international sales contract, regardless of the individual circumstances. However, the existence of a trade usage is a question of *fact*, and whether one exists depends on whether it is known to and observed by the majority

[70]Schwenzer and Leisinger "Ethical Values and International Sales Contracts", above n 6, at 264, 266 and 273.
[71] Katerina Mitkidis "Sustainability Clauses in International Supply Chain Contracts: Regulation, Enforceability and Effects of Ethical Requirements" (2014) 1 NJCL 1 at 14-15.
[72] Sampsa Seppälä "The Responsibilities and Rights of Both Buyer and Seller", above n 66, at 24-25; Enderlein and Maskow, *International Sales Law*, above n 56, at 69.
[73] Matthias Herdegen *Principles of International Economic Law* (Oxford University Press, Oxford, 2013) at 305.

of firms in the relevant industry or marketplace.[74] Article 9(2) leaves no room for normative considerations, so whether a trade usage would limit freedom of contract is irrelevant when determining whether there in fact *is* such a usage

(ii) International human rights law and the UN Guiding Principles

The worldwide condemnation of child labour is firstly demonstrated by the fact that it is prohibited at international law. As mentioned above, child labour is prohibited by, inter alia, the ILO Convention on the Minimum Age for Admission to Employment and Work, the ILO Convention on the Worst Forms of Child Labour and the UNCRC, all of which have been widely adopted. It is also prohibited by customary international law. This demonstrates that, at least at a state level, child labour is condemned globally.

More specifically, the UN Guiding Principles on Business and Human Rights ('UNGPs') represent a global condemnation of *corporate* human rights abuses, including the use of child labour. These principles recognise that corporations have a responsibility to respect human rights, regardless of compliance with (often inadequate) domestic laws.[75] This responsibility exists independently of states' human rights obligations at international law, and is a "*global standard* of expected conduct for *all* business enterprises wherever they operate [emphasis added]."[76] These principles were unanimously endorsed by the UN Human Rights Council, and have been implemented by hundreds of companies.[77] Furthermore, they are beginning to be implemented by states.[78] The widespread acknowledgement of the

[74] Ingeborg Schwenzer (ed) *Commentary on the UN Convention on the International Sale of Goods*, above n 13, at 187.
[75] Office of the United Nations High Commissioner for Human Rights *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework* (United Nations, 2011) at 13.
[76] At 13.
[77] Caroline Rees "Treaties & the UN Guiding Principles on Business & Human Rights: The Way Forward" (7 July 2014) CSRwire <http://www.csrwire.com>.
[78] Governments have begun developing 'National Action Plans' outlining how they intend to implement the UNGPs within their domestic legal frameworks: Michael Kourabas "US

UNGPs and the responsibilities they impose on corporations further represents global condemnation of corporate human rights abuses, including child labour.

However, while many may condemn child labour, this condemnation may not be extensive enough to form an international trade usage prohibiting it. Schlechtriem has suggested that condemnation of practices like child labour merely reflects the ethical values of an affluent, well-meaning minority rather those of the international trade community generally.[79] In other words, the fact that most of the western world finds child labour morally repugnant does not necessarily mean this attitude is shared by the majority of traders worldwide.

One must also remember that this issue concerns international trade usages between *businesses* and does not directly involve states. The UNGPs and international instruments prohibiting child labour certainly show (at least theoretical) condemnation of human rights abuses by the community of *states*. However, this does not necessarily reflect the actual attitudes of *corporations*. For example, out of the 10 countries where the child labour problem is most prevalent and severe,[80] nine are parties to the UNCRC,[81] nine have ratified the ILO Convention 182,[82] and eight have ratified ILO Convention 138.[83] Furthermore, despite the widespread adoption of these international instruments and the supposedly "global" standards imposed on

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Promises Action on UN Human Rights Principles" (1 October 2014) TriplePundit <http://www.triplepundit.com>. So far five states have produced National Action Plans, and 18 more, including the United States, are in the process of developing them: Office of the High Commissioner for Human Rights "State National Action Plans" <http://www.ohchr.org>. For an example of a National Action Plan, see: Rt Hon William Hague MP and Rt Hon Vince Cable MP *Good Business: Implementing the UN Guiding Principles on Business and Human Rights* (Secretary of State for Foreign and Commonwealth Affairs, National Action Plan, September 2013).

[79] Peter Schlechtriem "Non-Material Damages – Recovery under the CISG?" (2007) 19 Pace Int'l L Rev 89 at 98.

[80] Maplecroft "Child Labour Index 2014" Maplecroft Website <www.maplecroft.com>.

[81] All except Somalia: United Nations "Convention on the Rights of the Child" United Nations Treaty Collection Website <www. treaties.un.org>

[82] All except Eritrea: International Labour Organisation "Ratifications of C182 - Worst Forms of Child Labour Convention" ILO Website <www.ilo.org>.

[83] All except Somalia and Myanmar: International Labour Organisation "Ratifications of C138 - Minimum Age Convention" ILO Website <www.ilo.org>.

firms by the UNGPs, there are still 168 million children in child labour worldwide. The prevalence of child labour, even in countries that have made international commitments to prohibit it, shows a rift between the attitudes of states and the corporations within those states. It therefore cannot simply be assumed that just because child labour is condemned by the UN Human Rights Council and (theoretically) by states, it is also condemned by the majority of parties to international trade worldwide.

(iii) Private initiatives and Codes of Conduct

However, private initiatives such as the UNGC, the Principles for Responsible Investment ('PRI') Initiative and the Social Accountability 8000 International Standard ('SA8000') suggest that many firms themselves are committed to combatting child labour.

The UNGC is a voluntary initiative which sets out ten principles covering human rights, labour the environment and corruption.[84] One of these principles requires that the participants "uphold the effective abolition of child labour".[85] UNGC has more than 12,000 corporate participants across 145 countries.

The PRI Initiative is an international network of investors committed to investing responsibly by incorporating environmental, social and corporate governance issues (including human rights and labour standards) into their decision-making processes, policies and practices.[86] The PRI has more than 1325 signatories, and the total assets under management exceed US $45 trillion.[87]

[84] United Nations Global Compact "Overview of the UN Global Compact" Global Compact Website <www.unglobalcompact.org>.
[85] United Nations Global Compact "The Ten Principles" Global Compact Website <www.unglobalcompact.org>.
[86] PRI Association "About the PRI Initiative" Principles for Responsible Investment Website <www.unpri.org>; PRI Association "The Six Principles" Principles for Responsible Investment Website <www.unpri.org>; PRI Association "Introducing Responsible Investment" Principles for Responsible Investment Website <www.unpri.org>.
[87] PRI Association "About the PRI Initiative" Principles for Responsible Investment Website <www.unpri.org>.

The SA8000 is a voluntary standard requiring companies to adhere to certain requirements relating to workplace conditions and workers' rights, including the prohibition of child labour.[88] Facilities must be audited by independent certification bodies to become certified. There are currently 3388 certified facilities, employing 2,019,193 employees across 71 countries and 65 industries.[89]

As mentioned above, companies are also increasingly developing codes of conduct and policies which prohibit child labour.[90] Indeed, an ILO publication has asserted that:[91]

> the corporate responsibility to protect human rights, including a child's right to be free from child labour, is now widely recognised. Today, *companies that don't have a policy against child labour are outside the mainstream* [emphasis added].

This all suggests a widespread disapproval of, and commitment to combatting child labour among corporations themselves, rather than merely at a state level.

However, the PRI Initiative demonstrates the attitudes of investors, rather than actual traders. While these investors may be able to exercise some influence on parties to international trade in which they invest, their commitment to the PRI does not directly represent the attitudes of parties to international trade. The PRI Initiative is therefore only of limited use in determining the existence of a trade usage.

Moreover, although the UNGC and the SA8000 Standard show the attitudes of some well-meaning firms, they represent only a small percentage of the total firms involved in the international sale of goods. Many UNGC members are also not directly involved in the international trade of goods,

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[88] Social Accountability International *Social Accountability 8000 International Standard* (SAI, 2014) at 2.
[89] Social Accountability Accreditation Services "SA8000 Certified Facilities" SAAS Website <http://www.saasaccreditation.org>.
[90] See for example: Apple *Apple Supplier Code of Conduct* (2014), available at <http://www.apple.com>.
[91] Benjamin Smith "Children belong in school, not in supply chains" (28 November 2014) International Labour Organisation <http://www.ilo.org>.

meaning their participation is irrelevant in terms of determining the existence of a usage in the international goods trade. Furthermore, participants are not evenly distributed throughout the world. For example, while there are there are 951 business participants from France and 1231 from Spain, there are only 199 and 307 from China and the USA (the world's two biggest manufacturers) respectively, 18 from India, 55 from Pakistan, 33 from Russia and 26 from Bangladesh.[92] Thus, while UNGC shows the attitudes of many corporations in some countries, its utility in terms of demonstrating a truly *global* trade usage prohibiting child labour is limited.

Finally, while codes of conduct provide valuable evidence of companies' attitudes with regards to this type of ethical issue, there is insufficient evidence that these are adopted and applied by enough firms across every industry to show an international usage that is recognised and observed by the majority of parties to international sales contracts worldwide.

(iv) Summary

It is tempting to find a global trade usage implying a term into every international sale of goods contract prohibiting child labour. This would conform to the widely held view (especially among developed countries) that child labour is morally repugnant violation of human rights and must be prevented. It would also be a useful tool at combatting child labour. However, the existence of a trade usage is a question of fact. It does not matter whether there *should* be a usage prohibiting child labour, if in fact such a usage does not exist.

Corporations worldwide are increasingly moving away from the use of child labour, and will continue to do so in the coming years. Maybe one day such a broad trade usage may be established. However, for now there is simply insufficient evidence that the prohibition of child labour is a trade usage

[92] United Nations Global Compact "Participants and Stakeholders" Global Compact Website <http://www.unglobalcompact.org> (as of 18 December 2014).

which is known to and observed by the majority of corporations involved in international trade, across *all industries,* worldwide.

(b) Trade usage in particular industries?

It has been established above that there is no 'blanket' global trade usage prohibiting child labour. This section will narrow the focus, and consider whether such a usage can be found in the electronics and apparel industries.

(i) Electronics industry

The Electronic Industry Citizenship Coalition ('EICC') Code of Conduct sets out standards relating to social, environmental and ethical issues in the electronics industry supply chain.[93] EICC members are required to publically commit to the Code and ensure that this commitment is spread to their supply chains (at a minimum, members must require all tier one suppliers to adhere to the Code).[94] Members are held accountable for their conduct and that of their suppliers through audits, and are required to identify and self-audit high risk facilities.[95] The Code prohibits the use of child labour at any stage of manufacturing.[96]

The EICC comprises around 100 electronics companies with a total combined revenue of almost US $2.6 trillion.[97] These companies employ more than 5.5 million people and have thousands of tier one suppliers.[98] Moreover, over 3.5 million people from 120 countries are involved in the manufacture of members' products.[99] EICC members include most of the major multinational electronics companies, including Apple, Acer, Hewlett-

[93] Electronic Industry Citizenship Coalition "The EICC Code of Conduct" EICC Website <http://www.eiccoalition.org>.
[94] Electronic Industry Citizenship Coalition "Accountability" EICC Website <http://www.eiccoalition.org>.
[95] Electronic Industry Citizenship Coalition "Accountability" EICC Website <http://www.eiccoalition.org>.
[96] EICC *Electronic Industry Citizenship Coalition Code of Conduct* (2014), available at <http://www.eiccoalition.org>, at [A2].
[97] Electronic Industry Citizenship Coalition "Members" EICC Website <http://www.eiccoalition.org>.
[98] Electronic Industry Citizenship Coalition "Members" EICC Website <http://www.eiccoalition.org>.
[99] Electronic Industry Citizenship Coalition "Members" EICC Website <http://www.eiccoalition.org>.

Packard, IBM, Microsoft, LG, Philips, Samsung, Sony, Oracle and Xerox.[100] Thus, the powerhouse of the electronics industry is comprised of EICC members, who are all committed to eliminating child labour from both their own activities and *at least* those of the thousands of companies which make up their next-tier suppliers. Some companies also go further than merely taking responsibility for their tier one suppliers, and apply the Code throughout their supply chains.[101]

Furthermore, a 2014 survey of 39 major multinational electronics companies found that 85 per cent of the companies surveyed had codes of conduct prohibiting the use of child labour, and of those companies, 73 per cent included their codes of conduct in their supplier contracts.[102]

Child labour undoubtedly still exists in some electronics industry supply chains. For example, both Apple and Samsung have come under fire recently for the use of child labour in their suppliers' facilities.[103] Apple has also discovered 349 child labourers in its supply chain since 2006 through supplier audits.[104] However, the fact that child labour does still exist in companies' supply chains does not mean it is tolerated by those companies. In Apple's case, suppliers found to be using child labour are placed on probation, and in the most serious cases the business relationship is

[100] Other notable members include HTC, Eastman Kodak, Dell, Blackberry, Intel, Konica Minolta, Lenovo, Logitech, Motorola, Toshiba and Seagate Technology. See Electronic Industry Citizenship Coalition "Members" EICC Website <http://www.eiccoalition.org>.
[101] See for example Philips, which addresses conflict mineral issues eight or more tiers down its supply chain: Philips "Conflict Minerals" Philips Website <http://www.philips.com>.
[102] Gershon Nimbalker, Claire Cremen, Yolande Kyngdon and Haley Wrinkle "The Truth Behind the Barcode: Electronics Industry Trends" (2014) at 16.
[103] "Samsung's Supplier Factory Exploiting Child Labour" (8 August 2012) China Labour Watch <http://www.chinalaborwatch.org>; "Another Samsung Supplier Factory Exploiting Child Labour" (10 July 2014) China Labour Watch <http://www.chinalaborwatch.org>; Tim Fernholz "What happens when Apple finds a child making your iPhone" (6 March 2014) Quartz <http://www.qz.com>; Juliette Garside ""Child labour uncovered in Apple's supply chain" (25 January 2013) The Guardian <http://www.theguardian.com>; Reuters "Samsung halts business with supplier in China on child labor concern" (25 July 2014) Good Electronics <http://goodelectronics.org>; Arun Gupta "iEmpire: Apple's Sordid Business Practices Are Even Worse Than You Think" (10 February 2012) NY Times Examiner <https://www.nytexaminer.com>.
[104] Tim Fernholz "What happens when Apple finds a child making your iPhone" (6 March 2014) Quartz <http://www.qz.com>; Apple "Supplier Responsibility2014 Progress Report" (2014) at 14-15.

terminated.[105] Because of the complex nature of supply chains in the electronics industry (from extracting the base minerals to manufacturing the final product) it is difficult to completely eradicate child labour from a supply chain. Despite some incidences of child labour in their supply chains, the fact remains that the majority of major electronics companies strive to prevent child labour within their spheres of influence.

The widespread condemnation of child labour by the majority of major players in the electronics industry worldwide, as well as these corporations' commitment to expunging child labour from their supply chains, leads to the conclusion that the prohibition of child labour constitutes an international trade usage within the electronics industry.

(ii) Apparel industry

Unlike the electronics industry, the apparel industry does not currently have a central, quasi-regulatory initiative like the EICC. However, voluntary initiatives such as the Better Cotton Initiative, the Fair Labor Association, and the Fair Wear Foundation all indicate efforts in the industry to combat child labour at multiple levels of the supply chain.

The Fair Labor Association ('FLA') is a collaborative initiative of businesses, universities and NGOs committed to protecting workers' rights.[106] The FLA has a Workplace Code of Conduct, which affiliated companies are responsible for implementing throughout their entire supply chains.[107] The Code prohibits child labour. While the FLA covers several industries, most of its participants are garment and textile brands and manufacturers. Participating companies include Adidas, H&M, Hanes,

[105] At 14. An example of the relationship being terminated is when auditors discovered in 2012 that Guangdong Real Faith Pingzhou Electronics hired 74 child workers: Tim Fernholz "What happens when Apple finds a child making your iPhone" (6 March 2014) Quartz <http://www.qz.com>.
[106] Fair Labor Association "Affiliates" FLA Website <http://www.fairlabor.org>.
[107] Fair Labor Association "Protecting Workers' Rights Worldwide" FLA Website <http://www.fairlabor.org>; Fair Labor Association "Labor Standards" FLA Website <http://www.fairlabor.org>.

Hugo Boss, Kathmandu, New Balance, Nike and Puma, as well as a multitude of garment and textile manufacturers.[108]

The Fair Wear Foundation ('FWF') is another organisation working to uphold the rights of garment workers and improve their working conditions.[109] FWF has 80 member companies (representing more than 120 brands) from across Europe.[110] Members must abide by the FWF Code of Labour Practices, which prohibits child labour.[111]

The abolition of child labour further down the supply chain is also supported by a number of leaders in the apparel industry. The Better Cotton Initiative ('BCI') is an organisation committed to environmentally, economically and socially sustainable cotton production.[112] The BCI Production Principles and Criteria require that cotton farmers promote 'Decent Work', and prohibits the use of child labour in cotton production.[113] There are 294 members at the supplier manufacturer level, and 31 at the retail level.[114] Retail members include Adidas, Asos, H&M, Levi Strauss, Nike and Sainsbury's.[115]

Moreover, two surveys indicate that, like the electronics industry, many clothing companies are committed to eliminating child labour from their supply chains. According to a 2013 survey of 41 multinational apparel companies (selling under 128 brands), 83 per cent have a code of conduct prohibiting the use of child labour by suppliers, and of those companies, 82

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[108] Fair Labor Association "Participating Companies" FLA Website <http://www.fairlabor.org>.
[109] Fair Wear Foundation "About" FWF Website <http://www.fairwear.org>.
[110] Fair Wear Foundation "About" FWF Website <http://www.fairwear.org>.
[111] Fair Wear Foundation *FWF Code of Labour Practices*, available at <http://www.fairwear.org>; Fair Wear Foundation "Approach" FWF Website <http://www.fairwear.org>.
[112] Better Cotton Initiative "Better Cotton Standard System" BCI Website <http://bettercotton.org>.
[113] Better Cotton Initiative "Better Cotton Production Principles & Criteria Explained" (2013) at 26 and 36.
[114] Better Cotton Initiative "Find Members and Partners" BCI Website <http://bettercotton.org>.
[115] Better Cotton Initiative "Find Members and Partners" BCI Website <http://bettercotton.org>.

per cent include their code of conduct in their supplier contracts.[116] Moreover, 50 per cent apply their codes of conduct (either fully or partially) to multiple levels of their supply chains.[117] Another survey of 50 (mostly) large multinational apparel companies reveals a similar trend. 80 per cent of the companies surveyed have supplier codes of conduct which either fully or partially prohibit child labour.[118] Of those companies, 75 per cent include their codes of conduct in their supplier contracts, and 60 per cent either fully or partially apply their codes to multiple levels of their supply chains.[119]

The above evidence suggests that even though the apparel industry lacks a central and unifying entity like the EICC, the majority of major apparel companies strive to eradicate child labour from their supply chains. The prohibition of child labour therefore amounts to a trade usage in the apparel sector, requiring all goods to be child labour-free.

(c) Summary

It cannot yet be said that the prohibition of child labour amounts to a global trade usage which applies to *all* international sales contracts governed by the CISG. However, industry-specific usages can be found in both the electronics and apparel industries. Voluntary initiatives and public pressure by socially aware consumers has led these industries to take action against child labour. Thus, in these particular industries at least, every CISG contract will contain an implied term requiring that the goods are child labour-free.

4 Conclusion

This subpart has determined that a seller can be required under a contract (and thus under art 35(1) of the CISG) to deliver child labour-free goods, even without an explicit requirement in the contract. This obligation may arise from the circumstances, as well as generally through industry-wide

[116] Gershon Nimbalker, Claire Cremen and Haley Wrinkle "The Truth Behind the Barcode: The Australian Fashion Report" (2013) at 16.
[117] At 16.
[118] Haley Wrinkle, Elin Eriksson and Adrienne Lee "The Truth Behind the Barcode: Apparel Industry Trends from Farm to Factory" (2012) at 14.
[119] At 14.

trade usages. Moreover, while it cannot yet be said that there is a globally applicable trade usage across all industries, this may happen in the future, as more and more businesses come to recognise the economic benefits of being socially responsible. The next subpart will ask whether the objective conformity requirements in art 35(2) can also be used to require child labour-free goods.

C Conformity under article 35(2)

As mentioned above, art 35(2) requires that the goods are fit for any particular purpose which is expressly or impliedly made known to the seller, where the buyer has reasonably relied on the seller's skill and judgment.[120] If no such purpose is made known to the seller, the goods must be fit for their ordinary purpose.[121] It should be noted that art 35(2) only applies to the extent that the alleged requirements are not covered by the contract, and the following analysis is therefore based on the assumption that a seller is not required to deliver child labour-free goods under art 35(1). This subpart will consider paragraphs (a) and (b) in turn, and determine whether (and in what situations) a seller can be required under art 35(2) to deliver child labour-free goods.

1 Article 35(2)(a): fitness for ordinary purpose

Article 35(2)(a) requires that goods are fit for their ordinary purpose. Courts and tribunals have described the standard as being one of 'average quality',[122] and 'reasonable quality'.[123] First and foremost, goods must be able to be resold.[124] The fitness of goods for purposes other than resale is decided with reference to the objective view of a person in the relevant industry, and depends on the individual circumstances of each case.[125] Thus,

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[120] CISG, above n 11, art 35(2)(b).
[121] Article 35(2)(a); Ingeborg Schwenzer (ed) *Commentary on the UN Convention on the International Sale of Goods,* above n 13, at 575 and 578.
[122] *Landgericht* (District Court) Berlin, 15 September 1994, 52 S 247/94 (*Shoes case)* <www.cisg.law.pace.edu>.
[123] Netherlands Arbitration Institute, 15 October 2002, 2319 (*Rijn Blend* case) <www.cisg.law.pace.edu> at [117].
[124] Ingeborg Schwenzer (ed) *Commentary on the UN Convention on the International Sale of Goods,* above n 13, at 575.
[125] At 576 and 578.

if goods are free from physical defects and can be resold, it is likely that they will be fit for their ordinary use. This would be the case in a situation where a buyer unwittingly purchases goods that were produced using child labour, but are free from any material defects. As long as the buyer is still able to resell the goods (either on their intended market or an alternative market), they are fit for their ordinary purpose and the buyer will be unable to prove non-conformity under art 35(2)(a).

However, if the buyer is unable to resell the goods as a result of the use of child labour in their manufacture (for example because it became public knowledge and consumers refused to purchase the goods), they will be unfit for their ordinary use. A more problematic situation however, is if the goods can be resold despite the use of child labour, but only at a heavily discounted price. Here, the goods are technically resalable, so they are arguably fit for their ordinary use. Nevertheless, commentators have argued that because goods' ordinary purpose includes resale, they will be rendered unfit for this purpose by defects that *substantially reduce their market value*, regardless of whether they are still fit for their material use.[126] Thus, even though goods produced using child labour may be fit for all material uses, they may still be unfit for resale because their market value has been substantially lowered by the use of child labour.

Assuming the goal of resale is to make a profit, this argument is persuasive. If a buyer, originally intending to resell goods for a profit, is forced to sell them well below their market value due to a defect (thus losing profits and perhaps also selling at a loss), the goods are not fit for the purpose of resale in any real sense. They *can* be resold, but so can most defective goods, if the asking price is low enough.[127] Consider a situation where a defect renders the buyer unable to resell the goods at any price above 25 per cent of their regular market value. It cannot truly be said that the goods are fit for the

[126] Kristian 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 & Bus L Rev 82 at 113; Cesare Bianca and Michael Bonnell, *Commentary on the International Sales Law: The 1980 Vienna Sales Convention* (Giuffrè, Milan, 1987) at 144.

[127] Unless their defect means it would be illegal to sell them on the given market, for example due to contamination of edible goods: see *Bundesgerichtshof* (German Supreme Court), 2 March 2005, VIII ZR 67/04 (*Frozen pork case*) <www.cisg.law.pace.edu>.

purpose of resale. Thus, if the use of child labour in the production of goods leaves the buyer unable to resell the goods, or only able to sell them at far below their usual market value, the goods are unfit for their ordinary purpose and therefore non-conforming.

2 Article 35(2)(b): fitness for a particular purpose

A seller is only responsible for ensuring that goods are fit for a purpose other than their ordinary purpose, if that purpose has been (expressly or impliedly) made known to it.[128] The buyer must also have relied on the seller's skill and judgment as to the fitness of the goods for that purpose, and its reliance must have been reasonable.

For the purposes of this paper, art 35(2)(b) is most relevant in the context of goods which are intended for resale in socially conscious markets. Consider, for example, a situation where a buyer specialising in fair trade goods purchases goods that were produced using child labour. The buyer in this situation will argue that the particular purpose of the goods was for resale on an ethically conscious market,[129] and it therefore required that the goods be produced without violating human rights. In order to prove non-conformity under art 35(2)(b), the buyer would need to prove that 1) its particular purpose was either expressly or impliedly made known to the seller; and 2) it reasonably relied on the seller's skill and judgment as to the fitness of the goods for that purpose. This section will determine whether (and if so when) a buyer in the above scenario may be able to satisfy these two requirements and prove non-conformity under art 35(2)(b).

(a) When will the buyer's particular purpose (resale to ethically conscious consumers) be made known to the seller?

The obvious way a buyer could make its particular purpose known to the seller is by explicitly informing the seller of the purpose. If the buyer does not do this, it will need to argue that the purpose was nevertheless impliedly

[128] Ingeborg Schwenzer (ed) *Commentary on the UN Convention on the International Sale of Goods*, above n 13, at 580.
[129] Schwenzer and Leisinger "Ethical Values and International Sales Contracts", above n 6, at 266.

made known to the seller. Whether a particular purpose has been made known to a seller is determined objectively by asking whether a reasonable seller could have recognised the particular purpose in the circumstances.[130] The purpose does not need to be a term of the contract.[131] A buyer may make a seller aware of the purpose merely by communicating an intention to use the goods in a certain country.[132] Where a seller is made aware of the country of use, it is generally responsible for ensuring that the goods adhere to both public law standards and the "cultural, religious and ideological traditions and persuasions" of that country.[133] It has also been suggested that a particular purpose relating to ethical values may be impliedly made known where available information about the buyer's company (such as its company name) suggests this purpose, or the buyer is widely known for its ethical values in the trade sector concerned.[134]

This subsection will consider whether knowledge of the buyer's particular purpose can be imputed to the seller in the following situations:

1. The buyer participates in voluntary initiatives such as the UNGC or the EICC Code of Conduct.
2. The buyer is well-known for both its high ethical standards and its focus on fair trade goods.

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[130] Ingeborg Schwenzer (ed) *Commentary on the UN Convention on the International Sale of Goods*, above n 13, at 58.

[131] In fact it is likely that the purpose *cannot* be a contractual term because if it was, it would form a contractual description of the good under art 35(1), removing the need for any consideration of art 35(2): Ingeborg Schwenzer (ed) *Commentary on the UN Convention on the International Sale of Goods*, above n 13, at 580.

[132] Ingeborg Schwenzer "Conformity of the Goods – Physical Features on the Wane?" in *State of Play: The 3rd Annual MAA Schlechtriem CISG Conference* (Eleven International Publishing, The Hague, 2012) at 107.

[133] Ingeborg Schwenzer (ed) *Commentary on the UN Convention on the International Sale of Goods*, above n 13, at 581. Therefore, for example, "if one exports foodstuffs containing pork or beef to countries in which, due to religious reasons, the consumption or resale for consumption of pork or beef violates legal or religious ordinances, he cannot claim that in [its own country] other rules and customs prevail.": Peter Schlechtriem "Uniform Sales Law in the Decisions of the Bundesgerichtshof" in *50 Years of the Bundesgerichtshof: A Celebration Anthology from the Academic Community* (2001). Available at <http://www.cisg.law.pace.edu>.

[134] Schwenzer and Leisinger "Ethical Values and International Sales Contracts", above n 6, at 266; Ingeborg Schwenzer "Conformity of the Goods – Physical Features on the Wane?", above n 132, at 107.

The crucial issue in all of these situations is whether (and if so, to what extent) art 35(2)(b) obliges a seller to inquire into the buyer's affairs as part of its due diligence.

(i) Voluntary initiatives

CSR initiatives such as the EICC and UNGC require members to respect and uphold human rights, and specifically prohibit child labour. Members of these initiatives have publically denounced the use of child labour and are committed to eliminating it. A buyer may therefore argue that the mere fact that it is a member of voluntary initiatives like the EICC and UNGC is enough to make a reasonable person in the seller's position aware that the goods were intended for sale to socially conscious consumers, and therefore needed to be child labour-free.

However, this argument runs into two problems. Firstly, the fact that a company has made a commitment to combat child labour does not necessarily mean that its goods are intended to be sold on a socially conscious market, and therefore that its consumers require the goods to be produced ethically. An EICC member, such as Samsung, may not sell its products on any particularly ethically sensitive market, despite having taken a public stand against child labour. Equally, a company may exclusively deal in fair trade products without being a member of any voluntary initiatives. Whether a company is a member of a voluntary initiative is not a clear determinant of its target market and the requirements of its customers. Thus, the mere fact that a buyer is, for example, a member of UNGC would not lead a reasonable person in the position of the seller to believe that the goods were intended to be sold on a socially conscious market.

Further, it would be unduly burdensome to require a seller to research which voluntary initiatives the buyer participates in, as part of its due diligence. While the members of the various initiatives can easily be found online,[135] it is simply not the seller's responsibility dig up information about any ethical

[135] For example see United Nations Global Compact "Participants and Stakeholders" Global Compact Website <http://www.unglobalcompact.org>.

convictions that the buyer might hold, if the buyer has not given it any reason to do so. Requiring a seller to do this would be overly onerous, and inconsistent with the wording of art 35(2)(b), which places the onus on the *buyer* to inform the seller of its particular purpose. This conclusion is also consistent with the decision of the *Bundesgerichtshof* in the *New Zealand Mussels* case, which states that a seller is not expected to know about public law standards in the country of use that are "specialised" or "not easily determinable",[136] and therefore limits a seller's required due diligence under art 35(2)(b).

Thus, the fact that a buyer participates in a private initiative aimed at eliminating child labour is not enough on its own to make its purpose known to the seller. This is the case whether or not he seller has actual knowledge of the buyer's involvement with the initiative. The case may be different, however, if this is combined with other factors such as the buyer's reputation.

(ii) The buyer's reputation and character

If a buyer is well-known for specialising in ethically produced goods, this may be enough to impute knowledge of a particular purpose to the seller. While the buyer may not have taken any specific action to inform the seller of its particular purpose, in some cases its reputation may speak for it. Consider, for example, a retailer called 'The Ethical Goods Warehouse' which has an established reputation as a socially responsible retailer, selling a range of fair trade, free range, sustainable and organic products. Suppliers dealing with such a company could not be unaware of its need to provide ethically produced goods to its target market. Thus, while the buyer may not explicitly communicate its particular purpose to the seller, its reputation (and the way it holds itself out) makes the purpose impliedly known to the seller.

[136] *Bundesgerichtshof* (German Supreme Court), 8 March 1995, VIII ZR 159/94, (*New Zealand Mussels case)*, <www.cisg.law.pace.edu>.

In sum, while membership of voluntary initiatives alone is insufficient, a buyer may impliedly make its particular purpose known to the seller through its reputation and the way it holds itself out to the public and the industry.

(b) When will the buyer's reliance on the seller's skill and judgement be reasonable?

In order to prove non-conformity under art 35(2)(b) it must also be shown that the buyer has reasonably relied on the seller's skill and judgment as to the fitness of the goods for the particular purpose. Reliance will generally be reasonable where the seller is (or holds itself out as being) an expert in the manufacture of goods for the purpose required by the buyer.[137] If the seller is responsible for manufacturing or procuring goods, it will generally be in the best position to determine their fitness for their intended use.[138] The fact that the buyer is also knowledgeable in the particular area does not necessarily render its reliance unreasonable.[139] However, reliance is unlikely to be reasonable where the buyer is *more* knowledgeable or experienced than the seller.[140]

In the context of ethical standards and art 35(2)(b), Schwenzer and Leisinger do not foresee this requirement causing any problems for a buyer.[141] However, Ramberg disagrees, arguing that when a buyer has more knowledge and experience "regarding how to make profits from feelings and emotions" than its supplier, the buyer cannot reasonably rely on its supplier's skill and judgement.[142] Suppliers are usually solely focussed on producing *physically* conforming goods, and are not concerned with the goods' 'emotional characteristics'.[143] Ensuring that the goods are fit for the buyer's particular purpose (to profit from the goods' 'emotional

[137] Ingeborg Schwenzer (ed) *Commentary on the UN Convention on the International Sale of Goods*, above n 13, at 581-582.
[138] Kristian Maley "The limits to the conformity of goods", above n 126, at 119-120; Ingeborg Schwenzer (ed) *Commentary on the UN Convention on the International Sale of Goods*, above n 13, at 582.
[139] At 582.
[140] At 582.
[141] Schwenzer and Leisinger "Ethical Values and International Sales Contracts", above n 6, at 266.
[142] Ramberg "Emotional Non-Conformity", above n 29, at 21-22.
[143] At 21.

characteristics' by selling them to socially conscious consumers at a premium) is the expertise of the buyer, not the seller, and any reliance on the seller's skill of judgement as to fitness for this purpose is unreasonable.[144]

Ramberg's argument has a lot to commend it. Indeed, a buyer specialising in selling ethical goods to target market will know more about that market and what is required to satisfy its needs than its supplier will. The seller (especially given that it is based in a different country) may have insufficient knowledge of the buyer's target market to give an informed opinion as to the adherence of the goods to the consumers' ethical values. Also, the seller may not be an expert in the manufacture of *ethical* goods, or hold itself out as such. It would therefore seem that the fitness of the goods for this purpose is best determined by the buyer, and any reliance on the seller will be unreasonable.

However, at least in the context of child labour and other labour rights violations, Ramberg's reasoning is problematic. The point Ramberg seems to miss is that when the seller produces goods using child labour without the buyer's knowledge, it is the only one of the parties with sufficient knowledge to judge the fitness of the goods for the particular purpose. While many companies can conduct ethical audits, a buyer cannot be there to monitor the seller's manufacturing process all the time. It therefore relies on the seller to produce goods that are fit for the purpose that it has (expressly or impliedly) communicated to the seller. While the buyer undoubtedly has more knowledge and expertise regarding the sale of ethical goods on its target market, if it is established that the particular purpose has been made known to the seller, then the seller knows that the goods must be produced in compliance with human rights. Knowledge of this requirement, combined with the seller's *superior* knowledge of its manufacturing processes, make it the more suitable party to determine the fitness of the goods for their purpose. Schwenzer and Leisinger are therefore correct that

[144] At 20-21.

in this context, a buyer's reliance on a seller's skill and judgement will be reasonable.

(c) Summary

The above analysis demonstrates that, even if a buyer does not explicitly inform the seller of its intention to sell the goods on a socially conscious market (and thus that the goods must be child labour-free), in some situations the buyer's reputation and image will speak for it. Moreover, at least when the seller is aware of the use of child labour in the production of the goods and the buyer is not, the seller will be in a better position to determine whether the goods are suitable for the particular purpose.

3 Conclusion

This subpart has considered whether a seller may be required under art 35(2) to deliver child labour-free goods. It has established firstly that if the seller's use of child labour in the manufacture of the goods renders the buyer unable to resell the goods, or only able to do so at substantially below their market value, the goods will be unfit for their ordinary purpose. Furthermore, where the buyer has a reputation for specialising in the sale of ethical goods and holds itself out this way to the public, this may suffice to make its particular purpose known to the seller. Thus, article 35(2) provides us with two more ways in which a buyer may establish the non-conformity of goods produced using child labour.

III The supply chain problem

A The problem

Part II has established that, in theory, a buyer may successfully prove that goods produced using child labour are non-conforming, even without an express clause imposing ethical obligations on the seller. This is based on the assumption that the seller is also the manufacturer of the goods, and is responsible for the employment of child workers.

However, it is often not this simple. Many companies have very long and complex global supply chains, beginning with the extraction of raw materials and ending with the delivery of the finished product. For example, coltan, a metallic ore mined in the Democratic Republic of Congo ('DRC') from which tantalum is extracted and used in the manufacture of electronics, goes through at least ten intermediaries before reaching consumers.[145] The coltan is firstly mined, then passed through several intermediaries within the Congo.[146] The ore is then transported overseas for processing.[147] The processed tantalum is then sold to capacitor producers, who produce capacitors which are then assembled into circuit boards by other companies.[148] These circuit boards are then supplied to electronics manufacturers, who produce the final product.[149]

Human rights abuses can take place at any stage of these complex supply chains, and often occur at the bottom (extraction) levels. For example, many mines in the DRC producing 'conflict minerals' such as coltan, tungsten and tin are controlled by rebel groups who commonly use forced and child labour.[150] If a seller is contractually obliged to deliver goods that are produced ethically, the issue then becomes: how far does this responsibility extend?

Consider, for example, an electronics manufacturer (M Ltd) that produces smart phones for a leading electronics company (E Ltd). While M Ltd does not use child labour in its manufacturing facilities, the goods sold to E Ltd contain tantalum produced using coltan, which was extracted by child workers in the DRC. Thus, child labour has been involved in the production of the goods. Can M Ltd be held liable for delivery of non-conforming goods under art 35? Would it make any difference if the child labour took place in the facility of a capacitor producer (two tiers below M Ltd), and

[145] Tiffany Ma "China and Congo's Coltan Connection" (Research Paper, The Project 2049 Institute, 2009) at 3.
[146] At 3.
[147] At 4.
[148] At 4.
[149] At 4.
[150] World Vision "Tainted Technology: Forced and Child Labour in the Electronics Industry" (2012) at 1 and 3.

thus the capacitors are tainted by child labour? What about if the circuit boards that are supplied directly to M Ltd by its next tier sub-supplier are produced using child labour?

The answer to these questions depends on the scope of M Ltd's contractual obligation. If it is required not to use child labour in its *own* manufacturing process, it cannot be held responsible for the actions of other members of the supply chain. However, what if M Ltd has a more general obligation to deliver child labour-free goods?

B To what extent is a seller responsible?

Supply chains often run through several countries, and suppliers will usually have little knowledge and control over the lower levels of the chain. Holding M Ltd liable for the human rights violations perpetrated without its knowledge, by parties outside its control, would appear to place an unfair burden on it. If E Ltd wishes to ensure that no child labour is used *anywhere* in its supply chain, it can do this by rigorously auditing every level of the chain and demanding that ethical standards are observed.

However, if M Ltd is contractually obliged to deliver child labour-free goods, it must do this. Under the CISG, a seller is strictly liable for the conformity of the goods it delivers.[151] Thus, if child labour has been used at any stage of the goods' production, M Ltd will be in breach. Consider if the con-conformity was due to a *physical* fault in a circuit board that M Ltd bought from its supplier and installed in its product. If M Ltd's smart phone does not function because of the faulty circuit board, M Ltd cannot claim its goods conformed to the contract just because the fault was caused by another party. M Ltd will be liable for the non-conformity, and it will then be up to it to seek indemnity against its supplier. Similarly, in the case of a *non-physical* defect like this, M Ltd will be liable if the goods are non-conforming, and must seek indemnity for any losses suffered against the party who used child labour.

[151] Ingeborg Schwenzer (ed) *Commentary on the UN Convention on the International Sale of Goods*, above n 13, at 1066.

Unfortunately for a party in M Ltd's position, this will be difficult for two reasons. Firstly, it may not have a direct contractual relationship with the perpetrator. Secondly, even if the perpetrator is M Ltd's supplier, the same contractual obligation to deliver *child labour-free* goods may not exist between M Ltd and its supplier. It may therefore be difficult for an innocent supplier in M Ltd's position to hold the culpable party liable for the non-conformity. This creates all the more incentive for suppliers like M Ltd to impose ethical requirements on their own sub-suppliers.

However, while a seller will in theory be liable for the use of child labour anywhere in the supply chain, in practice its liability will be limited. This is because the further down the supply chain one goes, the harder it becomes to prove that the goods are tainted by child labour. For example, in the case of coltan mined using child labour in the Congo, once the coltan reaches the refinery, it is melted down and mixed with other coltan from different sources.[152] It therefore becomes impossible to trace its origin.[153] Likewise, cotton sourced from farms employing children will likely be mixed with (and become indistinguishable from) cotton from other farms. Thus, a buyer's ability to hold a seller liable for the use of child labour far down the supply chain will in many cases be limited.

C Conclusion

In sum, the long and complex nature of many supply chains further complicates this issue. Given the prevalence of child labour in many countries, it may be that despite the buyer's best efforts (and through no fault of the seller), goods end up being tainted with child labour at one of the lower levels of the supply chain. Where there is a general obligation to deliver child labour-free goods, sellers will theoretically be liable for the use of child labour further down the supply chain. However, whether a breach can be established in practice will depend on whether the buyer can prove that child labour was actually used in the production of the particular goods.

[152] World Vision "Tainted Technology: Forced and Child Labour in the Electronics Industry" (2012) at 2.
[153] At 2.

IV Damages

This final part will consider when an aggrieved buyer can recover damages where it purchases non-conforming goods produced using child labour. It will consider whether damages would be available to an aggrieved buyer in the following three situations:

1. The goods are delivered to the buyer, and the buyer becomes aware of the non-conformity *before* it has on-sold the goods.[154]
2. The buyer becomes aware of the non-conformity *after* it has on-sold the goods, and the non-conformity becomes public knowledge, damaging the buyer's reputation.
3. The buyer discovers the non-conformity *after* it has on-sold the goods, and the non-conformity does *not* become public knowledge.[155]

Damages are governed by art 74 of the CISG, which states that:[156]

> Damages for breach of contract by one party consist of a sum equal to the loss, including loss of profit, suffered by the other party as a consequence of the breach. Such damages may not exceed the loss which the party in breach foresaw or ought to have foreseen at the time of the conclusion of the contract, in the light of the facts and matters of which he then knew or ought to have known, as a possible consequence of the breach of contract.

Article 74 recognises the principle of 'full compensation', and must be "liberally construed to compensate an aggrieved party for all disadvantages suffered as a result of the breach."[157]

A Discovery of the non-conformity before the goods are on-sold

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[154] Schwenzer and Leisinger consider a similar scenario in "Ethical Values and International Sales Contracts", above n 6, at 268.
[155] Schwenzer and Leisinger consider a similar scenario in "Ethical Values and International Sales Contracts", above n 6, at 269.
[156] CISG, above n 11, art 74.
[157] CISG Advisory Council "Calculation of Damages under CISG Article 74" (CISG Advisory Council Opinion no. 6, Stockholm, 2006) at [1.1]; Schwenzer and Leisinger "Ethical Values and International Sales Contracts", above n 6, at 269; Ingeborg Schwenzer (ed) *Commentary on the UN Convention on the International Sale of Goods*, above n 13, at 1005.

If the buyer decides to resell the goods despite the non-conformity, it can claim damages for lost profits, as well as any loss suffered and additional expenditures involved with resale.[158] If it cannot resell the goods as a result of their tainted reputation, it will be able to claim damages for lost profits.[159] If the buyer *refuses* to resell the goods and claims damages for loss of profit, the seller may argue that it cannot recover because it has failed to mitigate its loss. Article 77 states that:[160]

> A party who relies on a breach of contract must take such measures as are reasonable in the circumstances to mitigate the loss, including loss of profit, resulting from the breach. If he fails to take such measures, the party in breach may claim a reduction in the damages in the amount by which the loss should have been mitigated.

However, it is submitted that a reasonable buyer would not resell the goods if to do so would be likely to harm its reputation. This is especially so in the case of buyers with highly ethical reputations and socially conscious target markets. However, it is also true for buyers selling on 'mainstream' markets. Thus, a buyer will have no problem recovering damages in this first situation.

B Discovery of the non-conformity after the goods have been on-sold – harm to goodwill

1 Financially quantifying loss of goodwill

Harm to goodwill is recoverable under art 74.[161] However, because art 74 does not allow recovery for non-pecuniary loss, an aggrieved party must quantify the harm to its goodwill in terms of financial loss, and establish with "reasonable certainty" that it suffered financial loss as a result of the breach.[162] The aggrieved party must also prove the extent of its loss,

[158] At 428 and 1014.
[159] Schwenzer and Leisinger "Ethical Values and International Sales Contracts", above n 6, at 268.
[160] CISG, above n 11, art 77.
[161] CISG Advisory Council "Calculation of Damages", above n 157, at [7.1]; Ingeborg Schwenzer (ed) *Commentary on the UN Convention on the International Sale of Goods,* above n 13, at 1013.
[162] CISG Advisory Council "Calculation of Damages", above n 157, at [7.1].

although this does not need to be done with "mathematical precision".[163] It must merely "provide a basis upon which a tribunal can reasonably estimate the extent of damages."[164]

Goodwill is "notoriously difficult to define", and financially quantifying harm to goodwill is therefore a difficult task.[165] Commentators have defined loss of goodwill in several ways, including loss of future profits, a deterioration of commercial image quantified by a loss of customers, and a decrease in the value of a business interest.[166] While these definitions are of some use, a claimant may have trouble proving that the financial loss was actually *caused* by the breach. For example it may be obvious that the breach has harmed the buyer's reputation, but actually proving a causal connection between the breach and the financial loss suffered will often involve guesswork and speculation.[167]

(a) Financial loss resulting from the harm to goodwill

A buyer who has suffered some discernible financial loss since the use of child labour became public knowledge may be able to claim damages for loss of goodwill. The loss could be a loss of sales, customers or investors, or a fall in share price (if the buyer is publically listed). Whether the buyer can prove with reasonable certainty that this loss was a result of the seller's breach will depend on the circumstances. If, for example, the buyer receives emails from customers terminating the business relationship on account of the buyer's 'unethical practices', causation will not be a problem. On the other hand, if the buyer experiences a fall in sales or a drop in its share price with only a temporal connection to the reputational harm, a court may find that there is no clear causal link, as the financial loss could have been due to a number of factors unrelated to the breach.

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[163] At [2.9].
[164] At [2.9].
[165] At [7.3]; Kristian Maley "The limits to the conformity of goods", above n 126, at 94; Schwenzer and Leisinger "Ethical Values and International Sales Contracts", above n 6, at 269.
[166] CISG Advisory Council "Calculation of Damages", above n 157, at [7.3].
[167] Peter Schlechtriem "Non-Material Damages", above n 79, at 95.

In establishing a causal connection, expert testimony, financial data and market surveys and analysis may be of use to a buyer.[168] For example, it may be sufficient that a buyer provides market surveys demonstrating a loss of trust in its brand since the use of child labour became public knowledge, coupled evidence of a loss of sales. Equally, a seller may be able to negate any causal connection by producing evidence of increased competition in the market, business mismanagement and increased costs.[169] Ultimately however, a buyer's ability to prove a causal connection will depend on the individual facts of the case

(b) 'Pure' loss of goodwill

A more difficult question is whether a buyer can recover damages where there is clear harm to the buyer's reputation, but it has not suffered any discernible financial loss (or any financial loss suffered cannot be causally linked to the harm to its goodwill). Can the buyer recover damages for loss of goodwill *alone,* or does there need to be financial loss flowing from the loss of goodwill?[170] Moreover, if damages for pure loss of goodwill are recoverable, how would they be measured?

(i) Are damages for pure loss of goodwill recoverable?

The *Landgericht Darmstadt* has held that pure loss of goodwill is not recoverable, stating that:[171]

> A damaged reputation is *completely insignificant as long as it does not lead to a loss of turnover and consequently lost profits*…As long as [the buyer] has the necessary turnover, it can be completely indifferent towards its image [emphasis added].

[168] CISG Advisory Council "Calculation of Damages", above n 157, at [2.9].
[169] Alain Dupont "Non-Pecuniary loss in commercial contracts: with special emphasis on the United Nations Convention on Contracts for the International Sale of Goods (CISG)" (Thesis, University of Cape Town, 2014) at 48.
[170] Kristian Maley "The limits to the conformity of goods", above n 126, at 94.
[171] *Landgericht* (District Court) Darmstadt, 9 May 2000, 10 O 72/00 (*Video Recorders case*) <www.cisg.law.pace.edu>.

The same view was taken by the French *Cour d'appel*, which held that the "deterioration of commercial image is not compensable damages in itself if it did not entail proved pecuniary damages [sic]".[172]

These approaches assume that harm to goodwill alone is a non-pecuniary loss, which is not recoverable under the CISG. However, commentators have argued that the value of goodwill is such that it is an asset *in itself*, and therefore any harm to goodwill *is* pecuniary in nature.[173] It is suggested that goodwill is an asset because, inter alia, it allows companies to charge premium prices for products, incur less marketing costs, attract the best employees, and receive better loyalty from customers and employees.[174] It is therefore viewed as a strategic resource which gives companies a competitive advantage.[175] If harm to goodwill can be characterised in this way, this would prima facie allow recovery of damages without separate financial loss.

It is clear that goodwill is an asset with economic value. Companies invest considerable time and money into building and preserving their reputations. Moreover, substantial amounts are paid for the right to trade under certain brand names (thus using the brand's goodwill). If a breach damages the reputation and identity that a company has carefully (and expensively) cultivated, the company's loss must be characterised as financial. Thus, when properly characterised, pure loss of goodwill is a pecuniary loss, and damages are therefore recoverable.

(ii) How could damages for pure loss of goodwill damages be calculated?

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[172] *Cour d'appel* (Court of Appeal) Grenoble, 21 October 1999, 97/03974 (*Calzados Maqnanni v Shoes General International*) <www.cisg.law.pace.edu>.

[173] Djakhongir Saidov "Damage to Business Reputation and Goodwill under the Vienna Sales Convention" in Djakhongir Saidov and Ralph Cunningham (eds) *Contract Damages: Domestic and International Perspectives* (Hart Publishing, Oxford, 2008) at 393; Ingeborg Schwenzer (ed) *Commentary on the UN Convention on the International Sale of Goods*, above n 13, at 1005, 1013-1015; Kristian Maley "The limits to the conformity of goods", above n 126, at 95.

[174] Djakhongir Saidov "Damage to Business Reputation", above n 173, at 393.

[175] At 393.

While it has been established that damages for pure loss of goodwill should be allowed, how to calculate these damages in practice is another issue entirely. Calculating damages for loss of goodwill without any discernible financial loss is by no means straightforward. However, the principle of full compensation, which governs art 74, must be kept in mind. Difficulties with calculation should not prevent a deserving claimant from recovering damages where it can establish an actual pecuniary loss.

The general measure of damages for loss of goodwill should be "the difference between the value of reputation/goodwill before and after the loss."[176] Saidov suggests several methods of measuring this loss of value. These include:

1. Determining the difference between the royalty payments a third party would be willing to pay to lease the claimant's company name before and after the loss ('the royalty method');[177]
2. Determining the difference between the company's actual profits and the profits it expected to earn but for the loss ('the expected profits method');[178]
3. Calculating the difference between the market value of the business and the value of its assets (the difference being the value of the goodwill), before and after the loss ('the market value method');[179] and
4. Estimating the cost or likely cost of repairing the damage to the goodwill ('the cost of cure method').[180]

The problem with using the 'expected profit' method to quantify pure loss of goodwill is that, unlike the other methods, it requires a claimant to establish actual financial loss *flowing* from the loss of goodwill. It is not concerned with the value of the lost goodwill itself. It is therefore unsuitable

[176] At 407.
[177] At 410.
[178] At 412.
[179] At 411.
[180] At 405-413.

for measuring *pure* loss of goodwill where there is no separate financial harm flowing from the loss.

The other three methods, on the other hand, are all capable of calculating the value of the lost goodwill itself, and are thus suitable in this context. The 'royalty' and 'market value' methods are both useful methods of measuring loss of goodwill where sufficient evidence is available. However, the required evidence may be difficult for a claimant to obtain. In particular, royalty rates may not be available.[181] Moreover, a claimant may have suffered serious damage to its goodwill, but be unable to show that it has lost potential royalties, or that the difference between its market value and its asset value has decreased. Consider for example a large company like Apple. Public revelations of the use of child labour in its supply chain[182] have undoubtedly affected the goodwill it has spent time and money cultivating. However, it is unlikely that this smear on Apple's reputation would have any noticeable effect on its market value or its ability to charge royalties. If these methods of calculation were relied on, Apple would be unable to recover damages, despite clear harm to its reputation. Thus, these methods will not always adequately compensate a claimant.

Where the 'market value' and 'royalty' methods are unsuitable, damages should be assessed based on the 'cost of cure' method. It is true that this method is less precise than the other two in terms of calculating the exact value of goodwill lost. However, it is submitted that this more discretionary method is required to deal with situations like the one outlined above, where there is clear harm to a company's reputation, but this does not have a discernible impact on the price others are willing to pay in order to buy or lease the company's name. This method has been endorsed by the *Tampereen Käräjäoikeus*, which granted damages in part based on the expense incurred by the aggrieved buyer in "regaining [its] reputation and credibility" and creating new customer networks.[183]

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[181] At 410.
[182] See above n 103 for examples.
[183] *Käräjäoikeus* (Court of First Instance) Tampere, 17 January 1997, 95/11193 (*Canned Food case*) <www.cisg.law.pace.edu>.

Under this method, damages would be calculated by reference to both what the claimant has already spent on repairing the harm to its goodwill, as well as any future costs.[184] These costs must be reasonable in the circumstances.[185] Thus, this measurement will involve an overall assessment of what it would be reasonable for a claimant to spend on repairing its goodwill, in light of all the circumstances. In this context, these circumstances should include the extent of the claimant's public ethical commitment, including participation in private CSR initiatives.[186] This gives an indication of how central ethical values are to the company's identity, and thus how much its identity is harmed (and its credibility undermined) as a result of being associated with child labour. Moreover, the level of public backlash against the buyer resulting from the breach should be considered.

The exact steps taken by a claimant to rebuild its reputation will differ between cases. However, they may include showing a commitment to combatting child labour by joining voluntary initiatives, introducing a new supplier code of conduct and conducting ethical audits of its suppliers. A claimant may also attempt to rebuild its image and denounce child labour through marketing campaigns or social media. It will be up to a judge or arbitrator to determine a reasonable sum of damages to reflect the cost of these curative measures in light of the circumstances.

To summarise, one of three methods may be used to calculate damages for pure loss of goodwill. Where a claimant cannot quantify the harm to its goodwill exactly using the 'royalty' and 'market value' methods, this should not necessarily be fatal to its claim. A more discretionary remedy based on the cost of curing the harm to its goodwill should also be available. There would inevitably be a deal of discretion and uncertainty involved in applying such a measure. However it is necessary if the buyer is to be

[184] Djakhongir Saidov "Damage to Business Reputation", above n 173, at 408.
[185] At 409. The reasonableness requirement for the 'cost of cure' measure of damages originates from the UK Court of Appeal decision in *Ruxley Electronics and Construction Ltd v Forsyth* [1996] AC 344.
[186] Schwenzer and Leisinger "Ethical Values and International Sales Contracts", above n 6, at 269; Ingeborg Schwenzer "Conformity of the Goods – Physical Features on the Wane?", above n 132, at 111.

properly compensated in accordance with the principle of full compensation.

2 Is the loss foreseeable?

Schwenzer and Leisinger contend that loss of goodwill will always be reasonably foreseeable as a possible consequence of a breach of ethical standards.[187] However, does the fact that a buyer's consumers are likely to strongly disapprove of child labour come within "the facts and matters of which [the seller] then knew or ought to have known" at the time the contract was concluded, [188] thus making it reasonably foreseeable that being associated with child labour would harm the buyer's reputation? It is submitted that it does. It has been established above that child labour is a serious human rights violation that is contrary to both international law and the domestic laws of most countries. A seller should therefore know that harm to a buyer's reputation as a result of being associated with child labour is *at least* a possible consequence of the breach.

3 Conclusion

In sum, if the use of child labour is discovered (and made public) after the buyer has on-sold the goods, it may be able to recover damages for loss of goodwill, even when there is no discernible financial loss flowing from the goodwill harm.

C Non-conformity is discovered after goods are on-sold but does not become public knowledge – no harm to goodwill

This final subsection will consider whether a buyer should be able to recover damages where it discovers the breach *after* on-selling the goods, but the use of child labour does not become public knowledge. Here, there is no financial loss flowing from the breach. Any loss is therefore non-pecuniary, which means no damages would be awarded under the CISG.[189]

[187] Schwenzer and Leisinger "Ethical Values and International Sales Contracts", above n 6, at 269.
[188] CISG, above n 11, art 74.
[189] CISG Advisory Council "Calculation of Damages", above n 157, at [7.1].

However, it is proposed that damages should be recoverable in this situation, despite the non-pecuniary nature of the loss. This subsection will firstly identify the loss suffered by a claimant in this situation, before arguing that this loss should be compensated with damages under art 74. Finally, it will recommend how such damages should be measured.

1 Non-pecuniary loss and the performance interest

In the situation mentioned above, the buyer is in no worse position financially than it would have been but for the breach. Thus, there is no actual financial loss flowing from the breach. However, the buyer has not received the benefit of the bargain that the contract was intended to deliver. If a buyer and seller agree that the goods will be produced according to certain requirements, the buyer has a right to receive goods that conform to these requirements. This right to performance of the contract is referred to as its 'performance interest'.[190] Here, the buyer and seller have agreed that the goods will be produced without child labour, and the goods do not conform to this requirement. The buyer has therefore suffered a loss in that it has not received the goods it bargained for. It has been deprived of its performance interest. The issue therefore becomes whether this is the kind of loss a buyer should be compensated for, or whether (as is currently the case) compensation under art 74 should be strictly limited to *financial* loss.

2 Should damages be awarded to protect the claimant's performance interest?

This question highlights two opposing views of contract damages: the 'economic benefits' principle and the 'performance principle'.[191] The economic benefits principle states that a claimant should only be compensated for economic loss resulting from the breach.[192] This is based

[190] Djakhongir Saidov and Ralph Cunningham "Introductory Remarks" in Djakhongir Saidov and Ralph Cunningham (eds) *Contract Damages: Domestic and International Perspectives* (Hart Publishing, Oxford, 2008) at 24; Brain Coote "Contract Damages, *Ruxley*, and the Performance Interest" (1997) 56 CLJ 537 at 542.
[191] Ingeborg Schwenzer and Pascal Hachem "The Scope of the CISG Provisions on Damages" in Djakhongir Saidov and Ralph Cunningham (eds) *Contract Damages: Domestic and International Perspectives* (Hart Publishing, Oxford, 2008) at 93.
[192] At 93-94; Brain Coote "Contract Damages", above n 190, at 545.

on the premise that the only function of contract damages is to protect the economic position of the aggrieved party.[193] Thus, non-pecuniary losses are not recoverable, and the claimant's performance interest is irrelevant if it has suffered no financial loss. According to the performance principle, on the other hand, the function of contract damages also includes the protection of the aggrieved party's performance interest.[194] This means an aggrieved party should be compensated for both its right to receive the *economic value* of performance, and also its right to receive performance *per se.*[195]

The obvious argument in favour of the economic benefits theory is that allowing damages without any actual financial loss provides a windfall profit for the aggrieved party, placing it in a better financial position than it would have occupied but for the breach.[196] However, this argument represents an overly simplistic view of the loss suffered by the aggrieved party. The buyer pays the price it does "precisely to obtain the correct performance of the contract."[197] Had the buyer known the goods were defective, it would not have paid the same price, and may not have bought them at all.[198] Thus, the buyer has been denied the goods that it has both bargained and paid for, as well as the opportunity to enter into the contract at a lower price. This is a real – and in the view of some commentators, pecuniary[199] – loss, which should be compensated.

The performance principle gains support from soft law initiatives. Both the PICC and the PECL allow recovery for non-pecuniary loss.[200] The preference for the performance principle demonstrated by these two newer

[193] Ingeborg Schwenzer, Pascal Hachem and Christopher Kee *Global Sales and Contract Law* (Oxford University Press, Oxford, 2012) at 583.
[194] At 584; Brain Coote "Contract Damages", above n 190, at 542.
[195] Schwenzer, Hachem and Kee *Global Sales and Contract Law,* above n 193, at 585.
[196] Schwenzer and Leisinger "Ethical Values and International Sales Contracts", above n 6, at 270.
[197] Schwenzer and Hachem "The Scope of the CISG Provisions on Damages" , above n 191, at 94.
[198] Schwenzer and Leisinger "Ethical Values and International Sales Contracts", above n 6, at 274.
[199] Schwenzer and Hachem "The Scope of the CISG Provisions on Damages" , above n 191, at 95.
[200] At 93; The Principles of European Contract Law 2002, art 9:501(2); UNIDROIT Principles of International Commercial Contracts 2010, art 7.4.2.

sets of rules suggests a shift form a strict economic benefits approach towards greater protection of the performance interest.

However, Schlechtriem has warned against allowing recovery for non-pecuniary loss in the case of ethical non-conformity.[201] He argues that while it is tempting to allow damages in this situation in order to 'punish' the producers of unethical goods,[202] allowing damages without any loss would essentially amount to imposing the buyer's moral convictions on the seller, and punishing it for offending the buyer's sensibilities.[203] Moreover, according to Schlechtriem, the recovery of these so-called 'punitive' damages would depend on the individual beliefs of the judge or arbitrator in question, leading to diverging results in different jurisdictions.[204] This would undermine the uniformity of the CISG's application.[205]

Although Schlechtriem's arguments are persuasive, they are based on the assumption that the buyer has not suffered any loss apart from "disappointment and hurt feelings", and therefore these damages are necessarily punitive.[206] It has, however, been established above that the buyer has suffered a real loss as a result of the breach and should be entitled to *compensatory* (not punitive) damages. If one takes this view, Schlechtriem's arguments lose their edge. It is true that if these damages were punitive, they would be awarded based on the individual views of the judge or arbitrator deciding the case, which would be undesirable. However, compensatory damages are aimed at compensating the *buyer's loss* rather than deterring or punishing the seller's 'immoral' conduct. If damages are awarded, this will be to compensate the buyer because it has been deprived of its performance interest. The seller is not being punished for offending the buyer, and there is no imposition of judges' and arbitrators' moral convictions on the seller. This is merely a case of giving effect to the buyer's performance interest under the contract.

[201] Peter Schlechtriem "Non-Material Damages", above n 79, at 98.
[202] At 98.
[203] At 99.
[204] At 99 and 102.
[205] At 99 and 102.
[206] At 99.

In sum, at least in this context, damages should be awarded to protect an aggrieved party's performance interest. Accordingly, a buyer who has suffered no economic loss as a result of the seller's delivery of goods produced using child labour should nevertheless be entitled to damages based on its right to performance. The issue then becomes how to calculate these damages.

3 How could these damages be calculated?

Schwenzer and others suggest three possible ways to measure damages in this type of case, depending on the circumstances. These will now be considered.

(a) Difference between price paid and ordinary market price

Where a buyer has paid more than the goods' ordinary market price to ensure that they are manufactured in compliance with human rights, Schwenzer and Hachem argue that it is entitled to damages equal to the difference between the market value of the goods and what it paid.[207] Thus, if a buyer pays $X higher than the goods' market price to ensure that they are manufactured without using child labour, it is entitled to recover $X if this requirement is breached.[208] This sum represents the buyer's interest in the correct performance of the contract.[209] This approach is appropriate as it directly compensates the buyer for the loss of its right to receive the goods it paid for. However, this method will only be useful where the buyer has paid extra for the promise that the goods will be produced ethically. Another method is therefore required for other situations.

(b) Difference between market prices of conforming and non-conforming goods

Schwenzer also suggests that more generally, the measure of damages will be the difference between the respective market prices of the goods

[207] Schwenzer and Hachem "The Scope of the CISG Provisions on Damages", above n 191, at 96.
[208] At 96.
[209] At 96.

contracted for and the non-conforming goods."[210] This difference in value is recoverable even if it has not been reflected in the resale price.[211] Thus, the buyer in this situation can recover the difference between the market values of goods manufactured under humane conditions, and goods produced in violation of human rights.[212]

Where the market value of the non-conforming goods can be assessed, this approach is also apposite, as it compensates the buyer for the difference between what it bargained and paid for, and what it received. However, as Schwenzer points out, the usefulness of this approach is limited to situations to where a market for non-conforming goods exists.[213] For example, it is unlikely that there is "a market for t-shirts fabricated by 10-year-olds under inhumane conditions".[214] Another measurement is therefore required where no such market exists.

(c) Gain-based damages

Where the diminished value of the goods cannot be determined using one of the above two methods, Schwenzer and others argue that damages should be measured according to the profits made by the seller as a result of the breach.[215] Thus, according to these commentators, a buyer can claim as minimum damages the amount by which the seller reduced its production costs (and increased its profits) by using child labour instead of employing adults.[216] Schwenzer and Hachem claim that while this measure is technically gain-based, it is "still in the realm of compensatory damages" because the breaching party's gains can be viewed as an indication of the

[210] Ingeborg Schwenzer (ed) *Commentary on the UN Convention on the International Sale of Goods*, above n 13, at 1006; Ingeborg Schwenzer "Conformity of the Goods – Physical Features on the Wane?", above n 132, at 111.
[211] Ingeborg Schwenzer (ed) *Commentary on the UN Convention on the International Sale of Goods*, above n 13, at 1006.
[212] At 1006-1007.
[213] Ingeborg Schwenzer "Conformity of the Goods – Physical Features on the Wane?", above n 132, at 111.
[214] At 111.
[215] Schwenzer and Hachem "The Scope of the CISG Provisions on Damages" , above n 191, at 102; Schwenzer and Leisinger "Ethical Values and International Sales Contracts", above n 6, at 269-270 and 274.
[216] Schwenzer and Hachem "The Scope of the CISG Provisions on Damages" , above n 191, at 102; Schwenzer and Leisinger "Ethical Values and International Sales Contracts", above n 6, at 269-270 and 274.

loss suffered by the aggrieved party.[217] Hence, "the question is not one of disgorgement of benefits, but of calculation of damages in accordance with the principle of full compensation."[218] It is also claimed that if these damages were not allowed, there would be a risk of courts resorting to domestic remedies to compensate the claimant, thus undermining the CISG.[219]

Although an aggrieved buyer should undoubtedly be compensated in this situation, it is submitted that this method is unsuitable. This is firstly because the production costs that the seller saves by using child labour is in no way reflective of the loss suffered by the buyer. The buyer's loss does not arise from the fact that the seller is paying its workers too little (and in doing so maximising its own profits). *It arises from the fact that the buyer has not received the goods it bargained for.* The seller's maximisation of profits has nothing to do with the harm to the buyer's performance interest. This leads to the conclusion that these damages would effectively be a punitive award designed to strip unscrupulous sellers of their ill-gotten profits. This is supported further by Schwenzer's emphasis on preventing the seller from "get[ting] off scot-free",[220] as well as preventing breaches of human rights,[221] when justifying this approach. While punishing and deterring unethical conduct may be a positive result of a damages claim from the perspective of a socially conscious buyer, the wording of art 74 makes it clear that damages under the CISG must be compensatory, rather than punitive.

Furthermore, measuring damages in this way would be unlikely to adequately compensate a claimant's loss. Child labour is likely to take place in developing countries where workers are paid comparatively very little. The difference between wages paid to children and adults in these

[217] Schwenzer and Hachem "The Scope of the CISG Provisions on Damages", above n 191, at 101.
[218] At 102.
[219] At 102.
[220] Ingeborg Schwenzer "Conformity of the Goods – Physical Features on the Wane?", above n 132, at 111; Schwenzer and Leisinger "Ethical Values and International Sales Contracts", above n 6, at 269.
[221] At 270 and 274.

countries is unlikely to amount to anything more than nominal damages, which may not reflect the claimant's loss. Moreover, this measure would be unsuitable where the use of child labour occurs further down the supply chain, and information about production costs cannot be adduced as evidence.

Given the flaws in the above approach, a new method of calculating damages is required if a buyer is to be adequately compensated.

(d) A proposed solution: hypothetical negotiation damages

It is proposed that in this situation, damages should be awarded based on a sum that the buyer could reasonably have demanded in return for relaxing the terms of the contract and allowing the seller to deliver goods produced using child labour.[222] The amount determined would depend on the circumstances, including the seriousness of the breach and the level of ethical commitment shown by the buyer. For example, if the buyer deals exclusively in fair trade goods and it is essential to it that its goods are produced ethically, it could reasonably demand more to allow the seller to deliver ethically tainted goods than a regular trader could.

The main advantage of this approach is that (unlike the disgorgement of profits measure mentioned above) it compensates the buyer for the *actual loss suffered*. Because it is based on the amount a reasonable person in the buyer's position would demand to allow the breach, it acknowledges the fact that the buyer would not have paid the same amount for the goods had it known about the breach. Thus, it directly compensates the buyer for the loss of both its performance interest and its ability to strike a better bargain. This approach also gives the judge or arbitrator discretion to award damages that

[222] The proposed damages are similar to the *Wrotham Park* measure of damages, which are available at common law. *Wrotham Park* damages were first awarded in *Wrotham Park Estate v Parkside Homes* [1974] 1 WLR 798. Under the *Wrotham Park* measure of damages, a plaintiff who has suffered no financial loss can claim damages equal to the amount of the defendant's likely profits that the plaintiff could reasonably have demanded in return for relaxing the terms of the covenant: *Wrotham Park Estate v Parkside Homes* [1974] 1 WLR 798 at 815; Peter Devonshire *Account of Profits* (Brookers, Wellington, 2013) at 155. This is based on hypothetical negotiations between the parties immediately prior to the breach: *WWF-World Wide Fund for Nature v World Wrestling Federation Entertainment Inc* [2006] EWHC184 (Ch) at [174].

are more than nominal, and thus enables a buyer to receive adequate compensation for its loss.

Moreover, unlike an account of profits, this measure focuses on compensating the buyer's loss, rather than stripping the seller of its ill-gotten gains.[223] Thus, it is consistent with the compensatory aim of art 74.

4 Conclusion

In sum, a buyer who has purchased non-conforming goods produced using child labour should be able to recover damages for the loss of its performance interest. If it cannot be determined how much the value of the goods has decreased due to the breach, damages should be calculated using a 'hypothetical negotiation' measurement rather than an account of profits. This approach properly compensates the buyer for its loss, and is also consistent with the compensatory nature of art 74.

V Conclusion

This paper has argued that the CISG can be used as a tool to prevent child labour. This is because not only can buyers explicitly require that goods are child labour-free, but in many situations, the conformity requirements in art 35 of the CISG can be used to require child labour-free goods, *even when this is not expressly required by the contract*.

This requirement may be inferred under arts 8 and 9(1) based on the parties' negotiations, prior dealings, mutual participation in a voluntary initiative prohibiting child labour, or their incorporation of standard terms prohibiting child labour. In certain industries, the requirement will form an implied term under art 9(2). Finally, the use of child labour may render the goods unfit for either their ordinary or particular purpose. Moreover, a buyer can recover damages if the seller breaches this obligation. Along with loss of

[223] It is accepted by common law courts that the *Wrotham Park* measure of damages, which is similar to this measure, is compensatory rather than restitutionary: Peter Devonshire *Account of Profits*, above n 224, at 164; *Jaggard v Sawyer* [1995] 1 WLR 269 at 281-282, 291; *WWF-World Wide Fund for Nature v World Wrestling Federation Entertainment Inc* [2007] EWCA Civ 286, [2008] 1 WLR 445 at [29] and [38]-[39].

profits, the buyer may be entitled to damages for loss of goodwill (whether or not there is any discernible financial harm flowing from the loss). Furthermore, a buyer who has not suffered any loss of profits or goodwill should still in principle be entitled to damages for the loss of its performance interest.

As companies continue to realise the value of an 'ethical' reputation, they will increasingly seek to enforce ethical standards through their contracts. It is therefore expected that the CISG will play an increasingly important role in the elimination of child labour in the future. While the focus of the paper has been on the prevention of child labour, it is also likely that the CISG will be used in a similar way to protect other fundamental human rights.

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The word count for this paper (excluding table of contents, abstract, footnotes and bibliography) is 15,800 words.

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