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## THE KNOWLEDGE TEST UNDER THE CISG—A GLOBAL THREEFOLD DISTINCTION OF NEGLIGENCE, GROSS NEGLIGENCE AND *DE FACTO* KNOWLEDGE

*Morten M. Fogt*



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*Morten M. Fogt\**

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## I. INTRODUCTION

*A. Requirements for a Well-Balanced Sales Law Regime*

In a well-balanced sales law regime such as the United Nations Convention on Contracts for the International Sale of Goods (“CISG”) and every modern national sales law, a contracting party’s knowledge has decisive importance as it shapes the rights and obligations of the contracting parties. A contracting party will in some situations only gain rights if there is certain knowledge and can likewise lose rights by awareness of certain facts. In cases where a right is acquired or lost, the counter party will be imposed or released of the obligation corresponding to the right in question. A sales law can consequently only achieve a reasonable balance of the rights and obligation of the parties to a sales contract if the parties’ actual (*de facto*) knowledge and the knowledge that a prudent or reasonable seller or buyer “*should have had*” or “*could not have been unaware of*” (constructive knowledge) are taken into account. These two emphasized examples of terms and formulations are indicators of a certain degree of diligence (negligence) and reasonable expected conduct of care by the contracting parties. The reason for this diligence requirement seems evident. *De facto* or constructive knowledge attributable to one or both of the contracting parties will influence and often determine various rights and obligations under the sales contract, *inter alia*, whether a right under the contract is acquired, whether a breach, including a fundamental breach, exists, whether one of the parties has reasonable expectations regarding the contract formation and performance, and whether the strict notice requirements apply and ultimately whether a remedy is available. In one important respect the CISG avoids relying on the concept of intent or negligence (*culpa*) as the no-fault principle rules under the Convention for the liability to pay damage for breach of contract. If you are in breach of contract you are liable under the CISG according to the causation based expectation principle.<sup>1</sup> Nevertheless, whereas the CISG evades the fault-

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<sup>1</sup> The no-fault principle is not expressly stated in the CISG, but can be derived from CISG Article 45(1)(b) and 61(1)(b) according to which if a party “fails to perform any of his obligations under the contract or this Convention” the other contracting party may “claim damages as provided in Articles 74–77.” United Nations Convention on Contracts for the International Sale of Goods, Apr. 11, 1980, S.

principle as a requirement for a claim of damage, it does not *in toto* avert the concept of negligence as part of its no-fault expectation principle. The CISG foreseeability limitation of damages provides that “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. . . .”<sup>2</sup> This is but yet another CISG expression which indicates a certain degree of diligence (negligence).

### *B. The Inquiry into the “Knowledge Test”*

The core two questions are, on the one hand, how *de facto* knowledge is established and, on the other hand, how constructive knowledge of a party is determined. The first issue is predominantly a quest for the national applicable law of evidence of the *lex fori* having in mind that the allocation of the burden of proof can be settled by the substantive applicable law—the *lex contractus*.<sup>3</sup> The second issue concerns the constructive knowledge and focuses on what kind of care (diligence) a party in the circumstances must exercise in order to become aware of relevant facts. This is a quest of the substantive law exclusively and, thus, for the CISG to answer. If the question is phrased in the negative it concerns which test is applied to put a contracting party on a constructive (fictive) knowledge in the sense that the party is intentionally or negligently unaware of certain facts. The knowledge test will therefore make use of one or more degrees of intent and negligence, which decides whether such unacceptable ignorance is present.

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Treaty Doc. No. 98-9, 1489 U.N.T.S. 3 (entered into force on Jan. 1, 1988) [hereinafter CISG or Convention].

<sup>2</sup> CISG, *supra* note 1, at art. 74 (emphasis added). Article 74 expresses a principle familiar to most legal systems including the English common law. *See* Hadley v. Baxendale, (1854) 156 Eng. Rep. 145 (Exch.) 151 (“Now we think the proper rule in such a case as the present is this: Where two parties have made a contract which one of them has broken, *the damages* which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally, i.e., according to the usual course of things, from such breach of contract itself, or *such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it.*”) (emphasis added).

<sup>3</sup> See the decision kantonsgericht Nidwalden May 28, 2005, No. ZK 04 26 (Switz.), available at <http://www.globalsaleslaw.org/content/api/cisg/display.cfm?test=1086>, where the court found that questions about the measurement of proof and the necessary degree of judicial conviction are governed by the law of the forum; *see id.* at 12, para. 3.1: Fragen des Beweismasses, der notwendige Grad der richterlichen Überzeugung, sind dagegen der *lex fori*, in casu dem Schweizerischen Privatrecht, zu entnehmen.

The content of many sales law provisions such as, *inter alia*, the *caveat emptor* rule and other CISG provisions depends on the *de facto* (actual) knowledge or presumed (constructive) knowledge of one of the parties and, thus, boils down to one inquiry: the content of the mental element or “subjective test” or, as it is better termed, the “knowledge test.” To which degree must a CISG-contracting party be aware in order to have sufficient “knowledge” of relevant facts, and do different degrees of negligence legally exist for the determination of a constructive knowledge under the CISG so that a party cannot just be negligent but more or less negligent? The CISG provides no definition or specific guidance in this regard, and the convention employs varying nomenclature to express the content of the applicable “knowledge test” and the notion of negligence.

### C. Degrees of Negligence

The question of whether one or more degrees of negligence exist and of its borderline to intent *on the one hand* and mere accident *on the other hand* has been the subject of intense scholarly debate and dispute since Roman times. It has occupied doctrine and frequently surfaced in case law both in criminal law and civil law but is comparatively still controversial.<sup>4</sup> In civil law, some national legislators use various expressions in statutory provisions to indicate a degree of negligence and/or a lower degree of intent.<sup>5</sup> Other national lawmakers are more cautious and, thus, disciplined and refer to a limited category of terms and concepts in the sense of a

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<sup>4</sup> See Sheldon D. Elliott, *Degrees of Negligence*, 6 S. CAL. L. REV. 91, 91–98 (1933) (discussing an account of the development of the concept of negligence from Roman law in a common law perspective); for the continental European viewpoint see Theo Mayer-Maly, *Die Wiederkehr der culpa levissima: Diagnosen und Reflexionen zur Lehre von den Fahrlässigkeitsstufen*, 163 ARCHIV FÜR DIE CIVILLISTISCHE PRAXIS 114 (1964) (discussing the continental European viewpoint of negligence and arguing for a return to the threefold distinction of the degrees of negligence originating from Roman law and the *usus modernus*). See Dan W. Morkel, *On the Distinction Between Recklessness and Conscious Negligence*, 30 AM. J. COMP. L. 325 (1982), for a comparative criminal law overview of the different concepts used to indicate intent and negligence and where these two forms meet.

<sup>5</sup> A striking example are the statutes on tort immunity, solidary liability and exemplary damage enacted by the Louisiana Legislature that use different terms and combinations thereof to indicate a degree of intention and gross negligence. Edwin D. Byrd, *Reflections on Willful, Wanton, Reckless, and Gross Negligence*, 48 LA. L. REV. 1383, 1386–87 (1988). See Justin Ward, *Filling the Gaps: The Value of the Common Law Approach to Gross Negligence and Punitive Damages*, 6 J. CIV. L. STUD. 215 (2013), for the subsequent development of gross negligence under Louisiana law.

twofold distinction of negligence, which has a general uniform concept of ordinary (simple) negligence and only by exception employs a concept of a higher degree of negligence in the sense of gross negligence.<sup>6</sup> In the development of Roman law, the origin of the threefold distinction of degrees negligence is found: *culpa lata* (gross negligence), *culpa levis* (ordinary or simple negligence) and *culpa levissima* (slight negligence).<sup>7</sup> The *usus modernus* in Germany (*das gemeine Recht*) followed this tripartite distinction.<sup>8</sup> In English common law the Roman threefold distinction of negligence was introduced by Chief Justice Holt in *Coggs v. Bernard*, where Holt referred to “some gross neglect,” “any ordinary neglect” and “the least neglect.”<sup>9</sup> With this decision the concept of “gross negligence” entered into the English common law, and subsequently, the threefold

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<sup>6</sup> See Mayer-Maley, *supra* note 4, at 124 (discussing the historical development in continental European law-German, Austrian, French, Italian and Spanish law). A similar development has taken place in Nordic law, where in general the ordinary negligence standard (simple *culpa*) applies based on the *pater familias* notion, but the gross negligence standard is foreseen for various specific issues. See *købelov [Kbl]* [Sale of Goods Act], nr. 140 (2014) (Den.) § 53 (stating the seller’s knowledge required in order to make the strict notice requirements inoperative); *Patienterstatningen* [Liability for Damages Act], nr. 266 (2014) (Den.) § 19 (regarding an exception from immunity for liability for damages covered by an insurance); *Tinglysning vedrørende fast ejendom* [Registration of Property], nr. 1075 (2014) (Den.) § 5 (regarding the requirement for acquisition in good faith); *Bekendtgørelse af lov om fragtaftaler ved international vejtransport [CMR]* [Act on Contract for international road transport], nr. 602 (1986) (Den.) § 37 (implementing the concept of “willful misconduct” from Article 29 of the Convention on the Contract for the International Carriage of Goods by Road by using “intentionally” and “gross negligence”).

<sup>7</sup> Elliott, *supra* note 4, at 95. It is debated whether in the text of Justinian a three- or twofold distinction is reflected. *Id.*

<sup>8</sup> Mayer-Maley, *supra* note 4, at 124.

<sup>9</sup> *Coggs v. Bernard*, (1703) 92 Eng. Rep. 107 (K.B.) 110-11 (Lord Holt, C.J.). Lord Holt states the following regarding keeping goods in the custody of another: “As to the . . . first sort, where a man takes goods in his custody to keep for the use of the bailor, I shall consider, for what things such a bailee is answerable. He is not answerable, if they are stole without any fault in him, neither will a common neglect make him chargeable, but he must *be guilty of some gross neglect*. There is I confess a great authority against me . . .” *Id.* at 110 (emphasis added). “This Bracton I have cited is, I confess, an old author, but in this his doctrine is agreeable to reason, and to what the law is in other countries. The civil law is so, as you have it in Justinian’s *Inst. lib. 3, tit. 15*. There the law goes farther . . . So that a bailee is not chargeable without an apparent gross neglect.” *Id.* at 111. “[I]f the bailee be guilty of gross negligence, he will be chargeable, but *not for any ordinary neglect*.” *Id.* (emphasis added). Chief Justice Holt further explains lending of goods for use where slight negligence applies: “As to the second sort of bailment, viz. *commodatum* or lending gratis, the borrower is bound to the strictest care and diligence, to keep the goods, so as to restore them back again to the lender, because the bailee has a benefit by the use of them, so as if the bailee *be guilty of the least neglect*, he will be answerable . . .” *Id.* (emphasis added).



degrees of negligence and the term “gross negligence” was adopted in U.S. American jurisprudence by Circuit Justice Joseph Story in *Tracy v. Wood*.<sup>10</sup> Whereas Chief Justice Holt in *Coggs v. Bernard* left the definition of the three degrees of negligence open for the future development, Story elaborated in detail on the definition of gross negligence compared with ordinary and slight negligence.<sup>11</sup> The tripartite distinction of the degrees of negligence has been challenged and criticized and the concept of gross negligence has been under attack as well.<sup>12</sup> Today, often a twofold distinction is used with a uniform concept of ordinary negligence (*culpa*) and the possibility to set a higher gross negligence standard if deemed appropriate for certain specific questions in either tort law, property law or contract (sales) law. This short sketch shows that the national legal systems partly founded on the Roman law heritage are not alien to a distinction between different degrees of negligence but illuminates at the same time the inevitable challenges of adopting ill- or undefined legal terms. This will need consideration when the eyes are turned from national law to the global sales law regime of the CISG.

#### *D. The Practical Importance*

The practical importance of the different content of the knowledge test for a sales law regime is immense. When first the level for the relevant knowledge is set this will make a provision beneficial and advantageous to one of the contracting parties and disadvantageous to the other contracting

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<sup>10</sup> *Tracy v. Wood*, 24 F. Cas. 117 (C.C.D. R.I. 1822) (No. 14,130) (Story, Cir. J.).

<sup>11</sup> *Id.* “After summing up the facts, said, I agree to the law as laid down at the bar, that in cases of bailees without reward, they are liable only for gross negligence. *Id.* at 118. Story continues his statement with the following definition of the three degrees of negligence: “The question is not whether he has omitted that care, which very prudent persons usually take of their own property, for the omission of that would be but *slight negligence*: nor whether he has omitted that care which prudent persons ordinarily take of their own property, for that would be but *ordinary negligence*. But whether there be a want of that care, which men of common sense, however inattentive, usually take, or ought to be presumed to take of their property, for that is *gross negligence*.” *Id.* (emphasis added).

<sup>12</sup> See Grant H. Morris, *Gross Negligence in Michigan—How Gross Is It?*, 16 WAYNE L. REV. 457, 468 (1969) (arguing that the term “gross negligence” should be eliminated from the legal lexicon as courts are unable to properly define and apply the term); see also Jacqueline Monte, “*Gross Negligence*” and “*Wilful and Wanton Conduct*”—Thanks to *Jennings v. Southwood*, *Michigan Now Knows What They Mean*, U. DET. MERCY L. REV. 1379 (1995) (discussing the development of the concept of “gross negligence”).

party. A clear illustration is *de facto* knowledge or presumed (constructive) knowledge required to make the *caveat venditor* principle and the *caveat emptor* rule operate.<sup>13</sup> Based on this knowledge both the seller and the buyer will need to make *caveats* and to take precautions regarding known facts about the goods being traded, their intended use and the expected market. The content of the knowledge test tells what kind of care the seller and the buyer must take and what kind of inspection they must make in order for a seller not to be held liable for an alleged lack of conformity under the *caveat venditor* principle and in order for a buyer to retain the remedies available in case of an alleged non-conformity under the *caveat emptor* rule. Furthermore, the knowledge test indicates which exchange of information between the parties can be expected in good faith regarding the quality and expected use of the goods and is, therefore, the basis for a reasonable good faith requirement on both parties not to withhold important information from the other. A convincing and functional sales law regime must provide for a clear concept of the knowledge test and entail an operational design that, in a balanced way, decides when the different levels of a party's actual or constructive knowledge apply. Such a balanced design ensures, in particular, that equilibrium between the *caveat venditor* principle and the *caveat emptor* rule is created.

The text of the CISG consists of such a functional and balanced contract and sales law system apt for uniform interpretation, however, this is not reflected in the divergent views expressed in doctrine or by the non-uniform interpretation of the knowledge test in practice under the current CISG case law. The result is that those courts which rightly do not shy away from the demand of a uniform interpretation and do reject a *lex fori* construction have difficulties and do not feel comfortable when interpreting the knowledge test under the CISG. As the Israeli Supreme Court

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<sup>13</sup> A CISG seller must according to the *caveat venditor* principle deliver goods fit for ordinary use or any particular purpose made known to him (CISG, *supra* note 1, at art. 35(2)) but can rely on the strict notice requirements in case of an alleged lack of conformity by the buyer (CISG, *supra* note 1, at arts. 38–39). However, the seller's reliance on the notice requirement comes with an important exception in case the seller already knows or has constructive knowledge about the lack of conformity, then it would be unreasonable and pure formalism to demand the buyer to notify. See Bundesgericht [BGer] Apr. 2, 2015, No. 4A 614/2014 (Switz.), available at <http://www.globalsaleslaw.org/content/api/cisg/display.cfm?test=2592> [hereinafter *Wire Rod* case], para. 7.2.2.3: "Es wäre unbillig und überflüssiger Formalismus, vom Käufer zu verlangen, den Verkäufer über Solche Mängel zu unterrichten, die diesem schon bekannt sind oder seinmüssen."

emphasized in its decision in 2009 in *Pamesa Ceramica v. Yisrael Mendelson Ltd.* on the interpretation of ULIS Article 40 (identical to that in CISG Article 40), a review of the ULIS and CISG literature does not leave the courts with a clear picture:

It would appear that the main question is whether the expression “of which he could not have been unaware” should be interpreted as a requirement of *de facto awareness* (or the equivalent), or whether it should be interpreted as a *normative* requirement, which includes awareness of the facts of which a *reasonable seller should have* been aware. *Prima facie*, the wording of the article does not support “normative” awareness (negligence) but requires *de facto* awareness . . . .

. . . .

Despite the textual restrictions, scholars and various courts have adopted an interpretation that art. 40 also applies in cases where the seller is not *de facto* aware of the non-conformity in the goods . . . . *In other words, the spectrum of views ranges from “almost fraud” to negligence that constitutes a violation of “customary care in trade.”*<sup>14</sup>

#### *E. Aim and Structure of the Analysis*

There is as far as known to the author no in-depth analysis of the content and effect of the knowledge test under the global CISG regime nor is there a profound investigation of the knowledge test together with the connected issues of a possible duty to make a pre-contractual inspection and the placement of the burden of proof. This is the aim of this article. It will be based on the assumption that the CISG knowledge test and its underlying standards are issues governed and settled by the CISG and, thus, to be developed inside the CISG in a uniform manner. Following this view, the CISG knowledge test has neither external gaps outside the CISG nor internal gaps in accordance with Article 7(2) within the CISG for which a recourse to private international law and the applicable domestic law is necessary or permitted.<sup>15</sup> Emphasis in the analysis will be put on the CISG

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<sup>14</sup> CA 7833/06 *Pamesa Ceramica v. Yisrael Mendelson Eng'g Technical Supply Ltd.*, IsrLR 27, ¶ 38 [2009] (Isr.), available at <http://cisgw3.law.pace.edu/cases/090317i5.html> (emphasis added).

<sup>15</sup> See Morten M. Fogt, *Private International Law in the Process of Harmonization of International Commercial Law: The 'Ugly Duckling'?*, in UNIFICATION AND HARMONIZATION OF INTERNATIONAL COMMERCIAL LAW INTERACTION OR DEHARMONIZATION? 57, 91–98 (Morten M. Fogt ed., 2012) for a discussion of the possible choice of State law within and outside an instrument of harmonization, in particular for the so called internal and external gaps regarding the CISG. Different

case law, which on several occasions has inconsistently dealt with the question of the knowledge test under the CISG. In 2012 the English High Court did express doubts about the interpretation of the CISG knowledge test and in 2014–15 European Supreme Courts have interpreted the knowledge test in Article 40 CISG differently using a variety of terms.<sup>16</sup> The divergent views in doctrine which will also be included in this survey are to a large extent based on this non-uniform body of CISG court decisions and arbitral awards, which is often not considered comprehensively.

The article proceeds as follows. **Part II** explains the general CISG-setting and the demand for uniform interpretation and development and, moreover, identifies the relevant textual basis for the knowledge test and its

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from the CISG, the CMR-Convention in Article 29 determines carrier liability by determining whether damage was caused by “willful misconduct” or by such default on his part as, in accordance with the law of the court or tribunal seized of the case, is considered as equivalent to “wilful misconduct.” Convention on the Contract for International Carriage of Goods by Road (CMR), May 19, 1956, 399 U.N.T.S. 189 [hereinafter CMR Convention]. The Danish legislature, in instituting the CMR Convention has defined “willful misconduct” as intent (“*forsæt*”) or a “default . . . equivalent to wilful misconduct” as gross negligence (“*grov uagtsomhed*”). Bekendtgørelse af lov om fragtaftaler ved international vejtransport [CMR] [Act on Contract for international road transport], nr. 602 (1986) (Den.) § 37. See Morten M. Fogt, *Transportret*, in FORMUERETLIGE EMNER 129, 183–86 (6th ed. 2013) for reference to the latest rulings of the Danish Supreme Court: Højesteret [Danish Supreme Court] UGESKRIFT FOR RETSVÆSEN [UfR] 2004.366 (Den.) (denying gross negligence); Højesteret [Danish Supreme Court] UGESKRIFT FOR RETSVÆSEN [UfR] 2012.115 (Den.) (denying gross negligence); Højesteret [Danish Supreme Court] UGESKRIFT FOR RETSVÆSEN [UfR] 2014.1183 (Den.) (holding that there was gross negligence due to “such a serious breach of the standards which must be applied to a carrier”—“*en så graverende tilsidesættelse af de normer, som må gælde for en fragtfører*”).

<sup>16</sup> See *Kingspan Env'tl. Ltd. v. Borealis A/S* [2012] EWHC (Comm) 1147 [1022] (Eng.), available at <http://cisgw3.law.pace.edu/cases/120501uk.html> (favouring a *de facto* knowledge test expressed as “willful blindness to the obvious”); *S.T.S.*, July 9, 2014 (R.J. No. 4523) (Spain), available at <http://www.globalsaleslaw.org/content/api/cisg/urteile/2578.pdf> (applying a standard of (ordinary) negligence conduct and behaviour indicated as “*un comportamiento negligente*”) [hereinafter *Red pepper powder case*]; Bundesgerichtshof [BGH] [Federal Court of Justice] Sept. 24, 2014, 202 ENTSCHEIDUNGEN DES BUNDESGERICHTSHOFES IN ZIVILSACHEN [BGHZ] 258 (Ger.), available at <http://www.globalsaleslaw.org/content/api/cisg/urteile/2545.pdf> (using a gross negligence standard expressed as “*ins Auge springen müssen*” (must jump into the eyes)); Cour de cassation (Cass.) (supreme court for judicial matters), com, Nov. 4, 2014, Bull. Civ. IV, No. 947 (Fr.), available at <http://www.globalsaleslaw.org/content/api/cisg/urteile/2563.pdf> [hereinafter *Christmas tree case*] (demanding bad faith “*mauvaise foi*” in terms that a party “*connaissait les défauts de conformité et qu’il s’est abstenu de les lui révéler*”); *Wire Rod case*, *supra* note 13 (requiring only superficial (less) diligence: “Die Formulierung ‘nicht in Unkenntnis sein konnte’ meint Fälle, in denen der Verkäufer erhebliche und offensichtliche Mängel nicht entdeckt hat, die auch bei oberflächlicher Sorgfalt auffallen mussten”); see *infra* Parts V.C and V.E. for comments on the foregoing cases.

disputed interpretation. It is argued that the CISG consists of an integrated and coherent sales law regime, which as a strong presumption builds on underlying principles and standards. In the first stage of the analysis, **Part III** deduces from the legislative history a seemingly clear interpretation. For the purpose of comparison, the article focuses in **Parts IV–V** on the provisions about the buyer’s knowledge (making the *caveat emptor* rule operative) and seller’s knowledge (making the notice requirements inoperative) and analyzes the content of the knowledge test in doctrine and case law. **Part VI** presents the overall conclusion for the knowledge test according to which the CISG embodies a threefold knowledge test with a *culpa levis*, *culpa lata* and *de facto* knowledge standard. Hereafter, **Part VI** continues with an analysis of the apparently difficult gross negligence standard and guidance on a definition of gross negligence is presented. In **Parts VII–VIII** the interconnected issues of a pre-contractual examination and the burden of proof question are addressed before **Part IX** discusses the relationship between the knowledge test and a *de minimis bona fide* requirement. A conclusion and an outlook for the knowledge test under the CISG in **Part X** finalizes the analysis.

## II. THE KNOWLEDGE TEST UNDER THE CISG IN GENERAL—GENERAL UNDERLYING PRINCIPLES AND STANDARDS

The content of the knowledge test is not defined under the uniform CISG regime.<sup>17</sup> Thus the content of the test must be established taking into account the demand for a uniform interpretation of the Convention text under CISG Article 7(1) and established principles of treaty interpretation. The starting point is (and must be) the CISG text itself and the literal understanding of the wording and textual context of the provision in question with regard to the object and purpose and possible recourse to

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<sup>17</sup> On the contrary, such a definition of the term “know or ought to have known” is provided for by Article 13 of the 1964 Hague Convention on the Uniform Law on the International Sale of Goods. Convention Relating to a Uniform Law on the International Sale of Goods, July 1, 1964, 834 U.N.T.S. 107 art. 13 [hereinafter ULIS]. See also 29 RABELS ZEITSCHRIFT FÜR AUSLÄNDISCHES UND INTERNATIONALES PRIVATRECHT 170 (1965) [hereinafter 29 RABELSZ] (containing the French and English text of the ULIS). However, there is no definition in ULIS of the later adopted term “*connaissait ou ne pouvait ignorer*” or “could not have been unaware of” in the *caveat emptor* rule in ULIS Article 36. ULIS, *supra* note 17.

supplementary means of interpretation, including the preparatory work (the *travaux préparatoires*) in line with the Vienna Convention on the Law of Treaties (“VCLT”).<sup>18</sup>

When estimating the “knowledge” of one of the contracting parties, it is crucial to distinguish, on the one hand, a party and a third party engaged by that party for the purpose of negotiating, concluding, and performing the sales contract from, on the other hand, an independent third party whose knowledge is without significance and cannot be attributed to one of the parties to the contract. It is clear, and has been confirmed in case law, that a contracting party answers for the *de facto* knowledge or presumed knowledge (constructive knowledge) of any third party it has engaged,<sup>19</sup> or of a person who is just *de facto* acting on behalf of one of the parties in the negotiations.<sup>20</sup> It may be assumed that this is a common situation in international sales transactions, which typically involve multiple parties acting on behalf of one or both of the contracting parties. In case a third party is engaged by the contracting parties jointly or by one of them acting on behalf of both parties, the knowledge or constructive knowledge of that

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<sup>18</sup> Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331 arts. 31–32 (entered into force Jan. 27, 1980) [hereinafter VCLT]. It should be emphasized that both the VCLT and general principles of treaty interpretation are open for use of *travaux préparatoires* in the process of treaty interpretation in confirming and determining the meaning of a text. The *travaux préparatoires* are not *a priori* excluded or *a priori* reduced to a secondary (often insignificant) means of interpretation. Jan Klabbers, *International Legal Histories: The Declining Importance of Travaux Préparatoires in Treaty Interpretation?*, 50 NETH. INT’L L. REV. 267, 288 (2003); see also Julian Davis Mortenson, *The Travaux of Travaux: Is the Vienna Convention Hostile to Drafting History?*, 107 AM. J. INT’L L. 780, 820–22 (2013).

<sup>19</sup> See, e.g., Case No. 9187 of 1999 (ICC Int’l Ct. Arb.) [hereinafter *Coke case*], available at <http://www.unilex.info/case.cfm?pid=1&do=case&id=466&step=FullText> (“If the seller uses auxiliary people for the performance of its contractual obligations, the consequences of their knowledge or grossly negligent lack of knowledge of the non-conformity have to be borne by the seller as if it had acted itself. . .”).

<sup>20</sup> See Oberlandesgericht Dresden [OLG] [Provincial Court of Appeal] May 27, 2010, Case No. 10 U 450/09, 10 (Ger.), available at <http://www.globalsaleslaw.org/content/api/cisg/urteile/2182.pdf> [hereinafter *Used Chevrolet Corvette case*] (“Hinsichtlich der als Mangel gerügten ‘fehlerhaft verlegten Bremsleistung’ sind Sachmängelrechte der Klägerin [the buyer] jedenfalls nach Art. 35 Abs. 3 CISG ausgeschlossen . . . des die Verkaufsverhandlungen führenden Ehemannes der Klägerin bereits vorgetragen gehabt, dass der ‘Beklagte [the seller] bei der Besichtigung des Fahrzeugs durch die Klägerin erklärt habe, die Bremsleitung müsse nur etwas zur Seite geborgen werden, damit sie nicht mehr an Karosserieteilen scheuere.’ Damit räumt sie aber ein, dass sie bzw. Ihr Ehemann—dessen Wissen als Verhandlungsvertreter sie sich zurechnen lassen muss—Kenntnis von der nicht vorschriftsmässigen Verlegung der Bremsleitung im Motorraum hatte bzw. nicht im Unklaren darüber sein konnte”) (emphasis added).

third party in principle is attributed to both contracting parties, whether or not they actually share it with the third party or each other. Consequently, the knowledge of that third party builds a common understanding of the parties to the sales contract.<sup>21</sup> Even when the parties henceforth in principle share the knowledge of a third party, the consequences may differ depending on the applicable knowledge test for the seller and the buyer and, thus, the context of the legal question being considered. The third-party knowledge thus attributed to a buyer will preclude a determination that a seller acted fraudulently or in bad faith by not personally disclosing this knowledge to the buyer. This third-party knowledge is also relevant in determining the conformity of the goods under the *caveat emptor* rule.

There should be a strong presumption that the CISG reflects an integrated and coherent regime employing legal terms and formulations on important issues, for example, regarding the required test of a contracting party's actual or constructive knowledge. The same or similar terms and formulations in the CISG should not be interpreted differently for each and every provision or parts of the convention, unless this is supported by the intention of the drafters and/or by convincing reasons. The terms and formulations should therefore, as a clear starting point for the interpretation, be seen as amounting to underlying principles on which the convention is based according to CISG Article 7(2).

Similarly, there should be a strong presumption that when the text of the Convention employs decisively different wording on a particular issue, it is intended to have a legislative purpose. In particular, where the wording of a CISG provision is ambiguous or unclear, the legislative history (the *travaux préparatoires* of the Diplomatic Conference on the Unification of Law Governing the International Sale of Goods and the United Nations Conference on Contracts for the International Sale of Goods) may provide support for the proper interpretation of the provision and guidance on the *ratio legis*.

VLCT Articles 31–32 allow reference to the *travaux préparatoires* without setting a clear, rigid hierarchy of the means of treaty interpretation

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<sup>21</sup> See *Coke case*, *supra* note 19 (holding that where both parties had engaged an agent to analyze weight and quality of the cokes at the loading port and the agent should have discovered the non-conformity, CISG Article 40 was inapplicable because the agent was not an ancillary third party used by the seller alone).



privileging the textual approach.<sup>22</sup> When the wording of a text is clear and virtually undisputed, the *travaux préparatoires* are less important in confirming the interpretation.<sup>23</sup> However, in the many contestable situations where the meaning of the text of a treaty, such as the CISG, is unclear and disputed, the *travaux préparatoires* can play an important role in confirming, supporting, or disapproving an interpretation, and should be consulted to shed light on the meaning, context, and *ratio legis* of the text.<sup>24</sup> As some authors stress, the drafting history is important in any case of interpretation though the wording in VCLT Article 32 partly suggests otherwise, and though the *travaux* may not always give clear answers.<sup>25</sup>

### A. The Threefold Distinction of the Legal Terms

The CISG employs a general threefold distinction of the legal terms which describe the knowledge or constructive knowledge of the contracting parties used throughout the Convention.<sup>26</sup> In the official English version of

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<sup>22</sup> VCLT arts. 31–32, *supra* note 18.

<sup>23</sup> *Id.*

<sup>24</sup> *Id.* See Case No. 2319 of 2002, para. 110-11 (Neth. Arb. Inst.) (*Condensate crude oil mix case*), available at <http://www.cisg.law.pace.edu/cisg/wais/db/cases2/021015n1.html#cx> (“In solving this interpretation issue, attention is also to be paid to Articles 31 and 32 of the Vienna Convention on the Law of Treaties dated May 23, 1969. Article 32 of the 1969 Vienna Treaty permits to resort to the *travaux préparatoires* of treaties to explain ambiguous or unclear treaty provisions. Article 35(2)(a) CISG may thus be interpreted on the basis of the preparatory work during the negotiations leading to CISG . . .”).

<sup>25</sup> See Mortenson, *supra* note 18, at 821 (“Far from being disfavoured, *travaux* were expected to be an integral component of interpretation.”).

<sup>26</sup> Perhaps differently (and if differently, then incorrectly) the French Cour de Cassation stated: “Alors, d’autre part, qu’en tout état de cause en vertu de l’article 40 de la Convention de Vienne le vendeur ne peut pas se prévaloir de l’article 39 lorsque le défaut de conformité porte sur des faits qu’il *connaissait ou ne pouvait ignorer* et qu’il n’a pas révélé à l’acheteur; que la [French buyer] avait fait valoir que la [Dutch seller] ne pouvait ignorer que les capuchons qu’elle avait livrés ne correspondaient pas aux obligations qu’elle avait contractées envers la [French buyer] et qu’elle ne pouvait dès lors en vertu de l’article 40 de la Convention de Vienne se prévaloir de son article 39; qu’en l’état de ces conclusions d’appel, la Cour d’appel qui n’a pas recherché si [Dutch seller] *connaissait ou aurait dû connaître* le défaut de conformité litigieux, a privé sa décision de base légale au regard des articles 39 et 40 de la Convention de Vienne.” Cour de cassation (Cass.) (supreme court for judicial matters), com, Feb. 3, 2009, Case No. 07-21827 (Fr.), available at <http://www.globalsaleslaw.org/content/api/cisg/urteile/1843.pdf>. The French expression “*connaissait ou aurait dû connaître*” (knew or ought to have known) is not found in CISG Article 40 and does, according to the clearly prevailing view, indicate a different standard in the sense of simple negligence.



the Convention,<sup>27</sup> they are the following:

- 1) “knew”<sup>28</sup> or “made known”<sup>29</sup> or “become aware”<sup>30</sup> or “to make known”<sup>31</sup> or “is aware”<sup>32</sup>
- 2) “could not have been unaware”<sup>33</sup>
- 3) “ought to have known,”<sup>34</sup> “ought to have discovered”<sup>35</sup> or “would have had”<sup>36</sup> or “would not have,”<sup>37</sup> “ought to have become aware of”<sup>38</sup> or “ought to have foreseen.”<sup>39</sup>

Whereas there is agreement that the terms in the first group concern the actual knowledge or awareness of a person (a contracting party or a third party acting on behalf of one or both parties), and that those in the third group reflect the constructive knowledge a reasonable business person in the same circumstances (*bonus pater familias*) would have had or ought to have known (ordinary or simple negligence),<sup>40</sup> the meaning of the second

<sup>27</sup> Note that of the six official versions of the CISG in Article 101, *in fine* (Arabic, Chinese, English, French, Russian, and Spanish), courts and scholars are often only fully acquainted with some of the language versions. For the present author, these are English, French, and Spanish.

<sup>28</sup> CISG, *supra* note 1, at arts. 2(a), 8(1), 9(2), 31(b), 35(3), 38(3), 40, 42(1), 42(2)(a), 43(2), 49(2)(b)(i), 64(2)(b)(i), 68.

<sup>29</sup> *Id.* at art. 35(2)(b).

<sup>30</sup> *Id.* at arts. 43(1), 49(2)(a), 64(2)(a).

<sup>31</sup> *Id.* at art. 48(2)–(3).

<sup>32</sup> *Id.* at art. 69(2).

<sup>33</sup> *Id.* at arts. 8(1), 35(3), 40, 42(1), 42(2)(a). This formulation of the knowledge test regarding the subjective interpretation in CISG Article 8(1) is used in the International Institute for the Unification of Private Law (“Unidroit”) Principles of International Commercial Contracts (2010) (“U PICC”) Article 4.2.1 and The Principles of European Contract Law (2002) (“PECL”) Article 5:101(2). In the Commission Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law, COM (2011) 635 final (Oct. 11, 2011) [hereinafter CESL] Article 58(2), however, the formulation has been changed to “aware or could be expected to be aware” and, clearly thus, to a simple negligence standard.

<sup>34</sup> CISG, *supra* note 1, at arts. 2(a), 9(2), 38(3), 49(2)(a)(i), 64(2)(b)(i), 68.

<sup>35</sup> *Id.* at art. 39(1).

<sup>36</sup> *Id.* at art. 8(2).

<sup>37</sup> *Id.* at art. 25.

<sup>38</sup> *Id.* at art. 43(1).

<sup>39</sup> *Id.* at art. 74.

<sup>40</sup> See UN CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS (CISG): COMMENTARY 529–30 (Stefan Kröll et al. eds., 2011), for a different understanding of the views expressed, which, however, does not seem to find support in doctrine, refers to a distinction in literature between gross negligence test and a stricter standard and, regarding the latter, states the following:

They rely on the fact that the CISG distinguishes between the concept of “ought to have known,” which covers gross negligence, and the concept of “could not have been unaware.” The latter does not lead to any examination duties and only covers those cases

term *could not have been unaware of* is highly disputed. It can in principle be deemed to be identical or similar to actual knowledge (one view), an independent middle category between the first and third groups based on a degree of gross negligence (*culpa lata*) (second view), or identical or similar to constructive knowledge based only on simple negligence (*culpa levis*) (third view). These positions in the CISG doctrine reflect either a twofold degree of negligence (*culpa lata* and *culpa levis*) or just one overall degree of negligence (*culpa levis*). The wording of the CISG does not support a threefold distinction of the degrees of negligence, a degree of slight or the least negligence (*culpa levissima*) is not made part of the textual CISG regime.

In some regional and domestic codifications the term “could not have been unaware” in CISG Article 35(3) has been changed to a wording thought to correspond to CISG Article 35(3) in the sense of “must be deemed to have known” and “aware or must have been aware.”<sup>41</sup> Other domestic codifications, which to a large extent are based on the CISG and similar international principles, have only the twofold distinction of “knowledge” and “should have had” constructive knowledge based on simple *culpa* and do, thus, avoid the third category of the knowledge test “could not have been unaware.”<sup>42</sup>

In addition to the general threefold distinction of legal terms in the CISG regarding the knowledge or constructive knowledge of the

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where all facts were apparent and the buyer had to draw the necessary conclusions. The purpose of the reference in this context is to lighten the burden of proving that the facts which were before the buyer's eyes also reached his mind . . . .

This understanding of the view expressed in doctrine seems doubtful, and moreover, confuses the threefold distinction of expressions on the knowledge test in the CISG.

<sup>41</sup> See the texts adopted in § 20(1) of the Sale of Goods Acts in Finland (1987), Sweden (1990), and Norway (1988): “*måste antas ha känt till*,” “*kjenne eller atte kjenne til*,” terms which in the Nordic *travaux préparatoires* of the new Nordic sales law are interpreted as “being aware of” and “have knowledge about” (“*varit medveten om*” and “*har känt till*”) indicating a *de facto* knowledge test. In sum, the deviation from the wording of Article 35(3) and the remarks in the Nordic *travaux préparatoires* have been a source for doubts of interpretation in Nordic law. See Fogt, *supra* note 13.

<sup>42</sup> See Tsiviilseadustiku Üldosa Seadus [TsÜS] [General Principles of the Civil Law Code] § 75(1) (Est.), available at <https://www.riigiteataja.ee/tutvustus.html?m=3> (“A declaration of intention made to a certain person shall be interpreted according to the intention of the person making the declaration of intention if the recipient of the declaration *knew or should have known* such intention. If the recipient of the declaration *did not know nor should have known* the actual intention of the person making the declaration, the declaration of intention shall be interpreted according to the understanding of a reasonable person similar to the recipient under the same circumstances.”) (emphasis added).

contracting parties, the Convention uses related but different terms and formulations to express the likelihood or foreseeability of an anticipatory breach of contract under CISG Articles 71–73. For a contracting party to establish a high likelihood that a breach (or a fundamental breach) will occur in the future, the CISG standard for a suspension of performance is that “it becomes apparent” that a breach will occur;<sup>43</sup> and for an avoidance of a contract, that “it is clear” or that any failure to perform subsequent instalments gives a party “good grounds to conclude” that a fundamental breach will occur.<sup>44</sup> These are requirements for the particular situation of a possible anticipatory breach of contract, which relate to a different point in time and focus on the apparent (clear) indications of the likelihood of a breach of contract in the future.<sup>45</sup>

*B. The Disputed Term: “Could Not be Unaware of”*

Despite the fact that *de facto* knowledge required by, *inter alia*, the terms “knew” or “aware” may often be difficult to prove, the natural meaning is clear. The terms “ought to have” or “would have had” expressing ordinary negligence (*culpa levis*) are linguistic indicators of the usual formulation of the *bonus pater familias*, with which lawyers are familiar. Only five provisions in the CISG depart from these terms and make use of the disputed language *could not have been unaware of*—CISG Articles 8(1), 35(3), 40, 42(1), and 42(2)(a). These can be divided into three groups, of which the last two are closely interconnected: (1) the general provision on *contract interpretation*—CISG Article 8(1) on subjective “shared” intent; (2) the two specific provisions on the buyer’s knowledge, CISG Articles 35(3) and 42(2)(a), the *caveat emptor* rules; and (3) the provisions on the seller’s knowledge—CISG Articles 40 and 42(1)—reflecting the *caveat venditor* principle.<sup>46</sup>

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<sup>43</sup> CISG, *supra* note 1, at art. 71.

<sup>44</sup> *Id.* at arts. 72–73.

<sup>45</sup> *See id.* at art. 71 (“after the conclusion of the contract . . .”); *id.* at art. 72 (“If prior to the date of performance . . .”).

<sup>46</sup> Note that the knowledge test in Article 42(1) is further narrowed down in the sense that it (only) concerns a right or claim based on two State laws: the law of the State where the goods as contemplated by the parties will be resold or otherwise used *or* the law of the State where the buyer has his place of business. *Id.* at art. 42(1).

The slightly different wording in the official French and Spanish versions of the CISG—“*connaissait ou ne pouvait ignorer*” and “*conociera o no hubiera podido ignorer*”—which in English literally mean *knew or could not ignore*, does not seem to imply any difference in meaning in these authentic texts.<sup>47</sup> As far as the present author is aware, the official Arabic, Chinese, and Russian versions of the formulation likewise do not differ in the meaning.

If, for the purpose of comparison, we leave out the provision on subjective contract interpretation of the parties’ shared intent in CISG Article 8(1), then the term *could not have been unaware of* is exclusively concerned with the relatively few situations where the knowledge or constructive knowledge of either party would deprive the other party of the right to claim remedies (e.g., the buyer from claiming remedies for lack of conformity) or of the right to escape liability (e.g., a seller from relying on the notice requirement for lack of conformity). The language *could not have been unaware of* is thereby used to balance the parties’ rights and obligations because it makes a provision, *on the one hand*, “buyer-friendly” or, *on the other hand*, “seller-friendly” by demanding a higher level of knowledge than is required under the ordinary negligence standard (*culpa levis*). Consequently, there are convincing reasons to suggest that the language *could not have been unaware* must be given the same meaning whether it is to the benefit of the buyer or the seller, so as not to shift the established balance and the *ratio legis* to the disadvantage of one of the parties to an international sales contract.

### III. LEGISLATIVE HISTORY OF THE CISG KNOWLEDGE TEST

A knowledge test will start with a certain high-degree of subjective awareness (*de facto* knowledge) and end with a certain low-degree of objective (fictive), should have had, knowledge (negligent unawareness). Common to all legal systems since Roman law is that they operate with *de facto* knowledge and a certain degree of objective (fictive) negligent

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<sup>47</sup> See Joseph Lookofsky, *Cator Can’t Compete: Caveat Emptor under CISG Article 35(3)?*, in *THE CISG CONVENTION AND DOMESTIC CONTRACT LAW, HARMONY, CROSS-INSPIRATION OR DISCORD?* 131, 136 (Joseph Lookofsky & Mads Bryde Andersen eds., 2014) for the same conclusion regarding the official French text.

unawareness, where the latter commonly is expressed with the concept of the *bonus pater familia* (a reasonable person's understanding in the same situation). However, as illustrated in the historical sketch above in Part I.C, the *bonus pater familia* (a hypothetical reasonable business man) test can be based on different degrees of negligence (*culpa*).

In the legislative history of the knowledge test under the CISG, the consideration of whether different degrees of negligence (*culpa*) should be used begins with the comparative research on the sales laws that preceded the ULIS and the CISG, where the different views on the important practical issue of the effect of the buyer's knowledge, *caveat emptor* rules, and domestic doctrines on hidden or apparent defects (*vices cachés et vices apparentes*) were investigated.<sup>48</sup> The formulations of the *caveat emptor* rule in all the earlier drafts and in ULIS Article 36 were based on Rabel's comparative studies,<sup>49</sup> which concluded that in all continental laws, including Nordic laws, the buyer was precluded from claiming remedies for defects which he knew about or which, owing to gross negligence, he did not know about but should have known about. Moreover, the studies concluded that the (strict) *caveat emptor* developed in English law had lost much of its power owing to the recognition of implied warranties in the contract of sale.<sup>50</sup> Rabel's conclusions are important for the issue discussed here and are, furthermore, fine illustrations of comparative research and deserve to be cited directly:

Darin nun, daß dem Käufer *bekante* Mängel kein Gegenstand der Gewährleistung sind, stimmen alle *kontinentalen* Systeme überein. Aber während die *romanischen* Rechte darüber hinaus alle Mängel ausscheiden, die "offen" liegen, schützen die *deutschen*, *schweizerischen* und dem Grundsatz nach auch die *skandinavischen* Bestimmungen den Käufer stärker: Der Käufer muss nicht nur die schädliche Tatsache, sondern geradezu die Untauglichkeit als Wirkung der Tatsache gekannt haben; und nur grobfahrlässige Unkenntnis wird dieser Kenntnis gleichgestellt. Hier braucht der Käufer nicht vor Kaufabschluss zu untersuchen.<sup>51</sup>

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<sup>48</sup> See 2 ERNST RABEL, DAS RECHT DES WARENKAUFS 173 (1958).

<sup>49</sup> *Id.*

<sup>50</sup> *Id.* at 173–77.

<sup>51</sup> RABEL, *supra* note 48, at 173 (emphasis original).

Es ist hier ein besonders interessanter Fall von abweichenden Gedankengängen gegeben, mit denen die Gerichte der verschiedenen Länder trotzdem fast immer dieselben praktischen Ergebnisse erzielen. Die einzig grundlegende Besonderheit des *Common Law* ist, daß der Grundsatz *caveat emptor* noch immer gilt; aber obwohl sich dieses Prinzip noch in Entscheidungen des 20. Jahrhunderts bemerkbar machte, hat es doch dauernd an Bedeutung verloren.<sup>52</sup>

Following these comparative results—which are similar to one of the views in doctrine on the CISG—Article 46 of the first 1935 Draft and the second 1939/1951 Draft of a uniform sales law did provide a buyer-friendly *caveat emptor* rule as follows: “Le vendeur n’est pas tenu à la garantie des defaults s’il prouve que ces derniers *étaient connus* de l’acheteur lors de la conclusion du contrat. Il en est de même si l’acheteur s’est rendu *coupable, en les ignorant, d’une négligence grossière.*”<sup>53</sup>

From this, it is clear that the draft texts were faithful to the findings of the preceding comparative studies in that they provided for a *caveat emptor* knowledge test requiring that the buyer knew (“*étaient connus*”) about defects or would be culpable if he ignored the defects in a grossly negligent manner.<sup>54</sup> In summing up his conclusions in 1958, Rabel did, however, find a *caveat emptor* rule based on simple negligence to be more convincing because the concept of gross negligence was not universal and problems of translation of the formulation in French could be encountered.<sup>55</sup> Apparently, Article 45 of the 1956 Draft followed this recommendation: “Le vendeur n’est pas tenu des effets des defaults de conformité . . . , s’il prouve que, lors de la conclusion du contrat, l’acheteur *connaissait* ces defaults *ou aurait dû les connaître*; quand le vendeur a prouvé que l’acheteur, *ignorant le défaut, aurait dû le connaître* . . . .”<sup>56</sup>

Against this background, it is possible to comprehend the achievement of the 1964 Hague Diplomatic Conference, which led to the adoption of the ULIS and the two distinct wordings on the knowledge test—in the general ULIS Article 13 (deleted in the CISG), *on the one hand*, and the specific

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<sup>52</sup> *Id.* at 175 (emphasis in original).

<sup>53</sup> *Id.* at 382, 402.

<sup>54</sup> Compare the translation of the French wording with the concerns of Rabel. *See id.* at 177 n.103 (“Grobe Fahrlässigkeit ist kein universeller Begriff. Auch wäre die Wendung im Entwurf, daß der Käufer ‘s’est rendu coupable,’ unübersetzbar.”).

<sup>55</sup> *Id.* at 177 (“Das Projekt formuliert den Rechtssatz im Anschluß an das deutsche Gesetzbuch; wird aber besser lauten: Artikel 42: . . . kannte oder kennen mußte . . .”).

<sup>56</sup> *Id.* at 425 (emphasis added).

provisions in ULIS Article 36 (CISG Article 35(3)) and ULIS Article 40 (CISG Article 40), *on the other hand*.<sup>57</sup> In his commentary on ULIS Article 36, Stumpf—with reference to the *travaux préparatoires*<sup>58</sup> and German, English, and French doctrine—leaves no doubt about the purpose and intent of the formulation *could not have been unaware of* or *ne pouvait pas ignorer* chosen for ULIS Articles 36 and 40 *in sensu* that the clear *ratio legis* was to distinguish this from the simple culpa (*culpa levis*—ordinary negligence) in the general definition in ULIS Article 13.<sup>59</sup> This purpose and intent of the formulation *could not have been unaware of* or *ne pouvait pas ignorer* is confirmed when one scrutinizes the results of the diplomatic negotiations in the Hague Conference of 1964 regarding ULIS Article 13 and 36.

At its Paris Conference in 1963, the Sales Law Committee, which had been tasked with considering the preconference proposals from the States regarding the 1956 Draft for a Uniform Sales Law, proposed including in the draft a definition of the meanings of the various expressions used to indicate what a contracting party knew or ought to have known.<sup>60</sup> This proposal was made more objective with a reference to a “reasonable man” test and was subsequently adopted by a clear majority of the delegations. As the German delegate Otto Riese notes, the definition in ULIS Article 13 was successively superseded by two later changes in the ULIS knowledge test concerning, firstly, the buyer and, secondly, the seller. Riese’s representation and explanation seem both reliable and, regarding the result, perfectly clear:

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<sup>57</sup> ULIS, *supra* note 17, at arts. 13, 36, 40.

<sup>58</sup> See Conférence diplomatique sur l’unification du droit en matière de la vente internationale, ACTES ET DOCUMENTS DE LA CONFERENCE 287 (1964).

<sup>59</sup> Herbert Stumpf, in KOMMENTAR ZUM EINHEITLICHEN KAUFRECHT 279–80 (Hans Döle ed., 1976) (“Diese Formulierung stehen im Gegensatz zu den Ausdrücken “wissen müssen” oder “kennen müssen” in Art. 13, mit denen das EKG [ULIS] die gewöhnliche Fahrlässigkeit umschreibt. Sie wurden gewählt, um zum Ausdruck zu bringen, daß der Käufer, wie im deutschen Recht (§ 460 BGB) [*now* § 442 BGB], seine Recht außer im Falle positiver Kenntnis nur dann verlieren soll, wenn er die von ihm zu erwartende Sorgfalt in besonders großem Maße außer acht gelassen hat . . . ergibt sich aus ihrer Entstehung mit hinreichender Deutlichkeit, daß nur ein solcher Grad an schuldhafter Unkenntnis der Vertragswidrigkeit seitens des Käufers die Verkäuferhaftung ausschließt, der als grobe Fahrlässigkeit einzustufen ist.”). See *id.* for further reference to doctrine.

<sup>60</sup> See Otto Riese, *Verlauf der Konferenz und Ergebnisse hinsichtlich der materiellen Vereinheitlichung des Kaufrechts*, in 29 RABELSZ 25 (1964) (referring to the expression in German as “wußte oder wissen mußte”).



Nach der Prüfung verschiedenen Vorschläge durch eine Arbeitsgruppe wurde zunächst vorgesehen, daß der Käufer schon dann seiner Ansprüche verlustig gehen sollte, wenn er die Mängel hätte erkennen können. Erst in der 5. Plenarsitzung konnte die deutsche Delegation erreichen—nachdem die Konferenz mit der dafür erforderlichen Zweidrittelmehrheit auf deutschen Antrag die Wiedereröffnung der Debatte beschlossen hatte—, daß *nur solche Mängel, die der Käufer nicht verkennen konnte (ne devait ignorer), den Rechtsverlust zur Folge haben*. Das dürfte bedeuten, daß der Käufer seine Ansprüche nur verliert, wenn er den Mangel *infolge bewußter grober Fahrlässigkeit nicht erkannt hat*.<sup>61</sup>

Die britische Delegation beantragte, statt dessen auf den Fall abzustellen, daß sich die Vertragswidrigkeit der Sache auf Tatsachen bezieht, die der Verkäufer kannte oder infolge grober Fahrlässigkeit nicht kannte.—Da der Begriff der “mauvaise foi” unklar erschienen . . . , wird nunmehr bestimmt, daß der Verkäufer sich auf Artt. 38 und 39 nicht berufen kann, wenn der Sachmangel auf Tatsachen beruht . . . , die der Verkäufer *kannte oder nicht verkennen konnte (ne pouvait pas ignorer)* und die er verschwiegen hat. Daß *mit dem Ausdruck “ne pouvait pas ignorer” ein strengerer Maßstab angelegt wird, als er sich aus der in Art. 13 enthaltenen Formel “aurait dû connaître” ergibt*, wurde bereits oben zu Art. 36 bemerkt.<sup>62</sup>

*First*, regarding the buyer’s knowledge in the *caveat emptor* rule of ULIS Article 36, the German delegation in the last minutes finally succeeded in changing the knowledge test from ordinary negligence (*culpa levis* “hätte kennen müssen”) to gross negligence (*culpa lata* “nicht verkennen konnte” (*ne devait ignorer*)). *Second*, the British delegation changed Article 49 of the 1956 Draft (ULIS/CISG Article 40) on fraudulent conduct by the seller by replacing the wording *mauvaise foi* with the (allegedly clearer) wording *ne pouvait pas ignorer* and *could not have been unaware of*, which was meant to express gross negligence.

Unfortunately, the definition in ULIS Article 13 was, as a consequence, not brought in line with the new threefold distinction of the expressions in the ULIS: *knew* and *ought to have known* in ULIS Article 13 and, then, *could not have been unaware of* in ULIS Articles 36 and 40. However, according to the Commentary there is a difference between the general definition in ULIS Article 13 and “the more restrictive formulae

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<sup>61</sup> *See id.* at 49 (emphasis added).

<sup>62</sup> *Id.* at 52–53 (emphasis added).



used in Articles 36 and 40.”<sup>63</sup> Similarly, the ULIS doctrine supported this distinction between *ought to have known* in the sense of simple negligence (*culpa levis*) in ULIS Article 13 and *could not have been unaware of* as meaning gross negligence (*culpa lata*) in ULIS Articles 36 and 40.<sup>64</sup> This language, which reflects a stricter knowledge-test requirement in the sense of gross negligence and was chosen during the negotiations in the Hague Convention for the ULIS, then went into the 1977 Sales Draft and the UNCITRAL Draft of 1978. It was thus the starting point for the discussions during the preparations for and at the Vienna Diplomatic Conference 1980.

The inconsistency between the general definition in ULIS Article 13 and the narrower knowledge test found in a few other ULIS provisions proved fatal at the Vienna Diplomatic Conference on the CISG. This lack of consistency was one of the reasons the drafters deleted the general ULIS Article 13 definition from the final CISG text rather than try to come up with an improved version.<sup>65</sup> When deleting ULIS Article 13, the UNCITRAL Working Group on the CISG, based on its review and revision of ULIS Articles 1–17 in 1970, nevertheless decided that:

[C]oncerning the knowledge of a party, attention should be given to the question whether the language appropriately expressed the standard of investigation required of the party in the particular circumstances of that case. In this review, attention should also be given to the possibility of obtaining greater uniformity of expression.<sup>66</sup>

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<sup>63</sup> ANDRÉ TUNC, COMMENTAIRE DES CONVENTIONS DE LA HAYE DU 1ER JUILLET 1964: SUR LA VENTE INTERNATIONALE DES OBJETS MOBILIERS CORPORELS ET SUR LA FORMATION DES CONTRATS DE VENTE 42 (1964).

<sup>64</sup> RONALD H. GRAVESON ET AL., THE UNIFORM LAWS ON INTERNATIONAL SALES ACT 1967, at 74–75 (1968) (discussing ULIS Article 36 about the expression knew or could not have been unaware: “This is constructive notice. It covers the case of gross negligence (*culpa lata*) or professional incompetence. It is narrower than ‘ought to have known’ and appears not to include ignorance based on ordinary negligence (*culpa levis*).”) See also *id.* at 77 (discussing ULIS Article 40).

<sup>65</sup> See 1971 U.N. Comm’n on Int’l Trade L. Y.B. II, 60, A/CN.9/SER.A/1971. The Working Group recommended the deletion of ULIS Article 13 for three reasons. Firstly, the abstract concept of a “reasonable person” was unknown to some legal systems and the reference to a “reasonable person in the same situation” only indicated what a party to a sales contract in any case ought to have known and seemed thus rather unhelpful. *Id.* Secondly, the reference to “any similar expression” in the single definition in ULIS Article 13 seemed inappropriate to the Working Group as there was a variety of expressions in the ULIS on the knowledge test and, thirdly, the formulations in ULIS Articles 36 and 40 did not seem “similar.” *Id.*; JOHN O. HONNOLD, DOCUMENTARY HISTORY OF THE UNIFORM LAW FOR INTERNATIONAL SALES 66–67 (1989).

<sup>66</sup> Comm’n on Int’l Trade L. Y.B. II, *supra* note 65, at 60.

*The first consideration* to strike a reasonable balance between the interests of the buyer and of the seller in an international sales transaction seems, on the one hand, to be well-achieved by the expressions used in the CISG for the standard of the knowledge test, which limits the *caveat emptor* rule in international distance sales (buyer-friendly test) and narrows the range of potential situations in which the seller can be precluded from relying on the certainty of requirements that the buyer give notice of lack of conformity (seller-friendly test). *The second consideration* to achieve uniformity in expression and thus avoid doubt about the content of the CISG knowledge test is, on the other hand, given the current dispute in the CISG doctrine and inconsistency in case law, achieved to a lesser degree.

The formulation in ULIS Article 36 *knew or could not have been unaware of* was adopted by the UNCITRAL Working Groups without any consideration or discussion of the content of the knowledge test, except for some *en passant* remarks found in the report by the UNCITRAL Secretary on the seller's obligations in the ULIS from December 1972. The UNCITRAL secretary did not elaborate on the content of the knowledge test, referring, rather imprecisely, only to the knowledge of the buyer.<sup>67</sup>

Late in the preconference stage before the Diplomatic Vienna Conference two proposals concerning Article 33(2) of the UNCITRAL 1978 Draft (CISG Article 35(3)) were submitted and presented as follows: "The United Kingdom suggests deleting the words 'or could not have been unaware of,' Israel suggests replacing them by 'or ought to have known of.'"<sup>68</sup> In the end, neither proposal was maintained by the UK or Israel. As a result, neither the UK proposal for a general, purely *de facto* knowledge test in the CISG<sup>69</sup> nor the Israeli proposal, which essentially reintroduced the

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<sup>67</sup> 1973 U.N. Comm'n on Int'l Trade L. Y.B. IV, 46, A/CN.9/SER.A/1973 (referring to "the buyer's *knowledge* of defects in the goods" and noting that "[Article 36] probably intends to provide that characteristics of the goods of which the buyer *was aware of* would not constitute a lack of conformity.") (emphasis added); HONNOLD, *supra* note 65, at 123.

<sup>68</sup> United Nations Conference on Contracts for the International Sale of Goods, *Official Records*, Vienna, Mar. 10—Apr. 11, 1980, 72, U.N. Doc. A/CONF.97/9, available at <https://www.uncitral.org/pdf/english/texts/sales/cisg/a-conf-97-19-ocred-e.pdf> [hereinafter *Official Records*]; HONNOLD, *supra* note 65, at 398.

<sup>69</sup> The UK did consistently at the pre-conference stage suggest a general change and deletion of the term "could not have been unaware of" in the UNCITRAL 1978 Draft Articles 7(1); 38, 40 (CISG Article 8(1) 40, 42). *Official Records*, *supra* note 68, at 73, 77, 78; HONNOLD, *supra* note 65, at 394, 398–99.

Rabel recommendation from 1958 for ordinary/simple negligence (*culpa levis*) into the *caveat emptor* rule, went into the final text of CISG Article 35(3).<sup>70</sup>

During the 1980 Vienna Diplomatic Conference on the CISG and the deliberations of the First Committee, the UNCITRAL 1978 Draft Article 33 (CISG Article 35) was considered as the Canadian delegation proposed to reword UNCITRAL 1978 Draft Article 33 taking the experience of the common law jurisdictions into account.<sup>71</sup> Part of the Canadian proposal concerned the *caveat emptor* rule in UNCITRAL 1978 Draft Article 33(2), which, according to the Canadian delegation: “[W]as much too favourable to the buyer. In particular, if the buyer had examined the goods or been given a sample, he should be deemed to have accepted the goods subject to such defects as a reasonable examination by him *would have* revealed.”<sup>72</sup> The Canadians’ proposed new text did not address or imply a duty to examine, but it did provide for a knowledge test based on simple negligence (“ought to have revealed”) in the case of a *de facto* examination conducted by the buyer.<sup>73</sup> The proposal did not have enough support and was ultimately not maintained by the Canadian delegation.<sup>74</sup>

Briefly stated, the cautious conclusion which can be drawn from the legislative history is *that* the knowledge test in the Rabel comparative study pointed to a gross negligence standard, *that* the early drafts of a uniform sales law (except for the 1958 Draft) expressly required gross negligence, *that* the *travaux préparatoires* to the Hague ULIS clearly support the purpose and intention *in sensu* of gross negligence in the wording *could not have been unaware of*, and *that* this language then went into the UNCITRAL 1978 Draft. Only a few suggestions at the preconference stage and during the Diplomatic Vienna Conference sought to change this approach in both a more buyer-friendly and a more seller-friendly

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<sup>70</sup> See RABEL, *supra* note 48, at 73–74.

<sup>71</sup> *Official Records*, *supra* note 68, at 308; HONNOLD, *supra* note 65, at 529.

<sup>72</sup> *Official Records*, *supra* note 68, at 308 (emphasis added); HONNOLD, *supra* note 65, at 529.

<sup>73</sup> *Official Records*, *supra* note 68, at 103; HONNOLD, *supra* note 65, at 675 (“Paragraph (2) does not apply, (a) as regards defects specifically drawn to the buyer’s attention before the contract was made; (b) if the buyer examined the goods before the contract was made, with respect to any defect *that a reasonable examination ought to have revealed*; or (c) in the case of a sale by sample or model . . .”) (emphasis added).

<sup>74</sup> *Official Records*, *supra* note 68, at 315; HONNOLD, *supra* note 65, at 529.

formulation, but the proposals were not maintained and in the end were not adopted. What came out was an unchanged knowledge test based on the CISG drafters understanding and intention to establish a gross negligence standard in CISG Articles 35(3), 40, and 42, although this is not apparent in the final adopted wording.

Another important development for the discussion of the knowledge test under the CISG came late in the drafting process: the description of the test for the interpretation of the subjective intent of the contracting parties according to CISG Article 8(1). This essential provision has no predecessor in the Hague Conventions. A draft provision was proposed in Article 3(2) of the UNIDROIT 1972 Draft of a Law for the Unification of Certain Rules Relating to the Validity of Contracts of International Sale of Goods (“LUV”), but first considered by the UNCITRAL after completion of the 1976 Sales draft. The provision in LUV Article 3(2), which wording on the knowledge test was adopted and, thus, is identical to Article 14(2) of the UNCITRAL Working group Draft 1977 and Article 4(2) UNCITRAL Secretary Formation Draft 1978, reads as follows:

If the actual common intent of the parties cannot be established, statements by and acts of the parties shall be interpreted according to the intent of one of the parties, where such an intent can be established and the other party *knew or ought to have known* what that intent was.<sup>75</sup>

The change from an “*ought to have known*” negligence test to a different and presumably higher degree of negligence was first proposed during the UNCITRAL Commission’s deliberations on the 1978 “Formation” Draft, where the following two contrary proposals in favour of, on the one hand, a purely knowledge test and, on the other hand, a more objective (higher) negligence test were suggested:

*It was also noted that although a party’s subjective intent should in principle govern the interpretation to be given to his communication and conduct, that party’s intention should either appear clearly from his communication and*

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<sup>75</sup> Compare Draft of a Law for the Unification of Certain Rules Relating to Validity of Contracts of International Sale of Goods, UNIDROIT, Study XVI/B, Doc. 22, U.D.P. 1972, available at <http://www.unidroit.org/english/documents/1972/study16b/s-16b-22-e&f.pdf> [hereinafter LUV], and HONNOLD, *supra* note 65, at 268–69, 287, with 1978 U.N. Comm’n on Int’l Trade L. Y.B. IX, 62, A/CN.9/SER.A/1978, available at [http://www.uncitral.org/pdf/english/yearbooks/yb-1978-e/yb\\_1978\\_e.pdf](http://www.uncitral.org/pdf/english/yearbooks/yb-1978-e/yb_1978_e.pdf) [hereinafter UNCITRAL YB IX], and HONNOLD, *supra* note 65, at 294–95, 367–68.

conduct, or he should have the burden of proving that the other party know or ought to have known of his intent. *It was suggested* that the present structure of article 4 could be altered by limiting the primary rule in paragraph (1) to cases where the other party *knew of the intent* . . . .

. . . .

*It was suggested that the subjective nature of the rule on interpretation could be lessened* if paragraph (1) was reformulated to state that communications, statements and declarations by and 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 rather than referring to what the other party know or ought to have known . . . .<sup>76</sup>

The 1978 UNCITRAL Draft Convention, which combined the Formation and the Sales Drafts in Article 7(1) suggests an interpretation of the party's subjective intention based on a knowledge test "*knew or could not have been unaware*," which without any change became the final adopted version of CISG Article 8(1). Again, late in the preconference stage before the Diplomatic Vienna Conference, the UK reiterated its view and suggestion that: "the two conditions in paragraph (1) are tautologous since, if a party [']could not have been unaware['] of the other party's intent, then he must have known what that intent was. Therefore, it is suggested that the second condition be deleted."<sup>77</sup> This proposal and other proposals for a simple (ordinary) negligence test in Article 8(1) CISG were, after discussion at the Vienna Diplomatic Conference, not adopted.<sup>78</sup> As an argument against the UK proposal, the Norwegian delegate Rognlien stated that the wording *could not have been unaware of* "contained a stricter criterion than [']ought to have known['] but one that was hardly less objective."<sup>79</sup>

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<sup>76</sup> UNCITRAL YB IX, *supra* note 75, at 34 (emphasis added); HONNOLD, *supra* note 65, at 368.

<sup>77</sup> *Official Records*, *supra* note 68, at 73; HONNOLD, *supra* note 65, at 394.

<sup>78</sup> *Official Records*, *supra* note 68, at 259–60; HONNOLD, *supra* note 65, at 480–81.

<sup>79</sup> *Official Records*, *supra* note 68, at 260; HONNOLD, *supra* note 65, at 481.

IV. DOCTRINE AND CASE LAW ON THE CISG *CAVEAT EMPTOR*  
KNOWLEDGE TEST

*A. The Two Main Views in Doctrine: Knowledge with a Relaxed Burden of Proof or Gross Negligence (Culpa Lata)*

For the vast majority, views in the doctrine on the CISG are divided into two major categories, *on the one hand*, based on the view that the knowledge test *could not have been unaware of* is identical or similar to knowledge with a relaxed burden of proof and, *on the other hand*, the independent middle category in which the knowledge test is based on a degree of gross negligence (*culpa lata*)—either gross negligence or even-more-than-gross negligence. The latter expression of even-more-than-gross negligence seems difficult to distinguish from gross negligence but must be understood to lack the inherent subjective intent which is part of the lowest degrees of intention in the sense of *dolus eventualis* or the similar recklessness standard of U.S. American law. Both of these major views distinguish this phrase in CISG Article 35(3) from constructive knowledge based on simple (ordinary) negligence (*culpa levis*).<sup>80</sup> This is convincing since the CISG does have particular and different formulations reflecting the simple *culpa levis* standard.<sup>81</sup> Only a few voices in the doctrine advocate for equating the expression *could not have been unaware of* with *ought to have known* and similar formulations meaning simple negligence.<sup>82</sup>

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<sup>80</sup> There are a few exceptions to this division of views in the doctrine presented here. See C. Massimo Bianca, in COMMENTARY ON THE INTERNATIONAL SALES LAW 279–80 (C. Massimo Bianca & Michael Joachim eds., 1987) (discussing CISG Article 35(3) as “knew or ought to have known”); VINCENT HEUZÉ, LA VENTE INTERNATIONALE DE MARCHANDISES 257 n.296 (2000) (“De façon générale, l’article 35.3 interdit à l’acheteur de se plaindre d’un défaut qu’il connaissait, ou devait connaître . . . les vices que l’acheteur aurait dû connaître.”); see also UN CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS (CISG): COMMENTARY, *supra* note 40, at 529.

<sup>81</sup> See *supra* Part II.A.

<sup>82</sup> See FRITZ ENDERLEIN & DIETRICH MASKOW, INTERNATIONAL SALES LAW: UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS 163 (1992) for this view regarding CISG Article 40. “The wording [‘]could not have been unaware[’] is defined by Huber . . . as being a little bit less than cunning and a little bit more than gross negligence; others treat it as being equivalent to gross negligence . . . . In this context it is felt that efforts are made to protect the seller following domestic law. The wording of the CISG itself would, in our view, include simple negligence, which could also be described as a violation of customary care in trade.” *Id.* (emphasis added). This does not, however, concern CISG Article 35(3) where reference is made to other views in doctrine requiring gross negligence or more than that or “objective and clearly recognizable deficiency.” *Id.* at

The strong view in the doctrine, which in the expression “*could not have been unaware*” finds a *de facto* knowledge test with a lightened burden of proof, was presented by the influential CISG scholar—the late Professor Honnold—in his textbook on the CISG, which may be regarded as one of the sources of the dispute about the *caveat emptor* knowledge test under the CISG. Honnold’s explanation therefore deserves citation before one analyzes the case law and takes a stand on the issue:

The fact one “*ought to have known*” includes those facts that would be disclosed by an investigation or inquiry that the party should make. But an obligation based on facts of which one “*could not have been unaware*” does not impose a duty to investigate—these are the facts that are before the eyes of one who can see. This expression is used at various places in the Conventions to slightly lighten the burden of proving that facts that were before the eyes reached the mind.<sup>83</sup>

For the purpose of this analysis, the citation from Honnold can be divided into two parts. The first part seems clear and convincing—a normal simple negligence standard would rather easily (but not necessarily) lead to the conclusion that an examination must be made or, at least, that an invitation by the seller to inspect the goods must be acted on (a pre-contractual duty to examine). On the contrary, this is not the case with a higher degree of negligence standard, which *prima facie* is indicated by the wording “*could not have been unaware*.” The second explanatory part, on the intention of the expression “*could not have been unaware*,” seems less clear, *firstly*, because the CISG is not concerned with procedural law or therefore with the evidence required to satisfy the burden of proof, and, *secondly*, because during the UNCITRAL review of the 1977 Sales Draft, *inter alia*, a proposal for a regulation of issues of evidence and the burden of proof regarding conformity of the goods was (rightly) not retained: “There was little support for this proposal as it was considered inappropriate for the Convention, which relates to the international sale of goods, to deal with

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147–48. See also Bianca, *supra* note 80, at 279–80. See *Pamesa Ceramica v. Yisrael Mendelson Engineering Technical Supply Ltd.*, *supra* note 14, ¶ 36–41, for a discussion in case law *obiter dictum* of the wording and mental element in CISG Article 40.

<sup>83</sup> JOHN O. HONNOLD, UNIFORM LAW FOR INTERNATIONAL SALES 260 (3d ed. 1999) (emphasis in original); JOHN O. HONNOLD & HARRY M. FLECHTNER, UNIFORM LAW FOR INTERNATIONAL SALES 339 (4th ed. 2009). See also CAMILLA BAASCH ANDERSEN ET AL., A PRACTITIONER’S GUIDE TO THE CISG 346 (2010).



matters of evidence or procedure. The Committee, accordingly did not retain the proposal.”<sup>84</sup>

### *B. Leading Case Law on the Content of the Caveat Emptor Knowledge Test*

Case law addressing the exact content of the *caveat emptor* knowledge test under the CISG is rare. There are, however, decisions which point to the practical importance of CISG Article 35(3), though not all of these decisions specifically address the meaning of the term *could not have been unaware of*. Among those that do not address it are cases decided by the Swiss Cantonal du Valais in 1998 and by the Federal Court of Australia from 2011 in *Castel Electronics Pty. Ltd. v. Toshiba Singapore Pte. Ltd.*<sup>85</sup> The Australian *Castel* case is, however, interesting as it illuminates the role of the *caveat emptor* rule in CISG Article 35(3) by addressing the relevant point in time of estimating the buyers’ knowledge, the facts concerning the defects in the goods which this knowledge must relate to, and, thus, the proof which the seller must establish. Therefore, there are good reasons to begin the analysis of case law on Article 35(3) CISG with *Castel*.

The decisions which *de facto* as their *ratio decidendi*, or at least in the reasoning, take a stand on or refer to the content of the knowledge test in CISG Article 35(3) to which one can refer, for the reasons explained below, include those of the German Oberlandesgericht Cologne 1996 (*Used Mercedes Benz case*);<sup>86</sup> the Swiss Tribunal Cantonal de Vaud 1997 (*Second hand bulldozer case*);<sup>87</sup> the Court of Appeal of New Zealand in *RJ & AM Smallmon v. Transport Sales Ltd.*;<sup>88</sup> the English High Court of Justice in

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<sup>84</sup> See 1977 U.N. Comm’n on Int’l Trade L. Y.B. VIII, 37, A/CN.9/SER.A/1977; HONNOLD, *supra* note 65, at 330.

<sup>85</sup> Tribunal Cantonal du Valais [Canton Appellate Court] June 29, 1998, No. CI 97 288 (Switz.), available at <http://www.unilex.info/case.cfm?pid=1&do=case&id=366&step=FullText> [hereinafter *Sports clothing case*]; Castel Elecs. Pty. Ltd. v. Toshiba Singapore Pte. Ltd., (2011) FCAFC 55 (Austl.), available at <http://www.global-saleslaw.org/content/api/cisg/urteile/2219.pdf>.

<sup>86</sup> Oberlandesgericht Köln [OLG] [Higher Regional Court of Cologne] May 21, 1996, No. 22 U 4/96 (Ger.), available at <http://www.cisg-online.ch/content/api/cisg/display.cfm?test=254> [hereinafter *Used Mercedes Benz case*].

<sup>87</sup> Tribunal Cantonal de Vaud [Canton Appellate Court] Oct. 28, 1997, No. CI 97 167 (Switz.), available at <http://www.cisg-online.ch/content/api/cisg/display.cfm?test=254> [hereinafter *Second hand bulldozer case*].

<sup>88</sup> *RJ & AM Smallmon v. Transp. Sales Ltd.* [2011] NZCA 340 (N.Z.), available at <http://cisgw3.law.pace.edu/cases/110722n6.html>.



*Kingspan Environmental Ltd. v. Borealis A/S*;<sup>89</sup> the Danish District Court Horsens in *Julie George v. Kristian Skovridder*;<sup>90</sup> and, finally, the German Oberlandesgericht Koblenz (“*Electricity generator case*”).<sup>91</sup> All of these decisions are addressed in detail.

### *I. No Ratio Decidendi on the Knowledge Test*

#### *a) 2011 Federal Court of Australia in Castel Electronics Pty. Ltd. v. Toshiba Singapore Pte. Ltd.*

The precedence of the decision by the Federal Court of Australia from 2011, in the case *Castel Electronics Pty. Ltd. v. Toshiba Singapore Pte. Ltd.*, remains in doubt because the court refers to and only interprets the term “knew” from CISG Article 35(3) and, thus, leaves it unclear whether its interpretation extends to the language “could not have been unaware of.”<sup>92</sup> This is surprising since the seller grounded its appeal on the court’s failure to apply CISG Article 35(3) in its entirety.<sup>93</sup> The precedence of this Australian case should therefore be dealt with separately and in more detail

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<sup>89</sup> *Kingspan Envtl. Ltd. v. Borealis A/S*, *supra* note 16.

<sup>90</sup> *Julie George v. Kristian Skovridder*, Retten i Horsens [District Court] Dec. 7, 2012, BS 150-1320/2010 (Den.), abstract of case, available at <http://cisgw3.law.pace.edu/cases/121207d1.html>.

<sup>91</sup> Oberlandesgericht Koblenz [OLG] [Higher Regional Court of Koblenz] Dec. 19, 2010, No. 2 U 1464/11 (Ger.), available at <http://cisgw3.law.pace.edu/cases/121219g2.html> [hereinafter *Electricity generator case*].

<sup>92</sup> *Castel Elecs. Pty. Ltd. v. Toshiba Singapore Pte. Ltd.*, *supra* note 85, at 140. See also Lookofsky, *supra* note 47, ¶ 140 (discussing *Castel*).

<sup>93</sup> *Castel*, *supra* note 85, ¶ 140 (“[Seller’s] Notice of Cross Appeal contains 29 separate grounds of appeal. The grounds may be summarized within six broad grounds: (a) the primary judge failed to apply Article 35(3) of CISG”) (emphasis added). See also *id.* ¶ 286 (“[Seller] filed a cross appeal in which it argues that: 1. The primary judge erred in failing to address [Seller’s] submission that, by reason of art 35(3) of the CISG, [Seller] was not liable to [Buyer] for any lack of conformity of the set-top boxes because at the time of the conclusion of each relevant contract, [Buyer] knew, or could not have been unaware of a lack of conformity in each and every relevant set-top box within the meaning of art 35(3) of the CISG.”) (emphasis added); *id.* ¶ 288 (“In response to [Seller’s] cross appeal, [Buyer] argues that: 1. When each contract was entered into for the purchase of the J35s, the C26s or the DLPs, [Buyer] did not know, and could not have been aware, of a lack of conformity in each and every set-top box within the meaning of art 35(3) of the CISG. Castel submits that the trial judge found Mr. Hew to be a ‘careful and impressive witness’ whose evidence established that [Buyer] did no more in regard to the testing than merely facilitate the work of [Seller] and its contractor, Zinwell. Once [Buyer] became aware of the defects, it halted supply until it was informed by [Seller] that the defects had been rectified.”) (emphasis added).

first because it must be distinguished from cases that in their *ratio decidendi* do take a stand on the knowledge test in CISG Article 35(3).

The *Castel* case concerned a lack of conformity in a new and improved high-capacity version of the seller's set-top box, which the seller (TSP) had described as being capable of receiving high-definition television digital signals in all Australian display formats.<sup>94</sup> The CISG Article 35(3) question was, did the Australian buyer (Castel) at the time it ordered each consignment know or could it not have been unaware of particular defects in the concrete lot of improved (type J35) and in later new versions (type C26) of set-top boxes?<sup>95</sup> There had been series of deliveries of consignments under separate contracts, and the buyer had already received several consumer claims of lack of conformity in the set-top boxes from the first batch.<sup>96</sup> The seller attempted to correct the problem and believed that it had mitigated it each time, expressly informing and reassuring the buyer to that effect on several occasions.<sup>97</sup> The *ratio decidendi* of the decision regarding CISG Article 35(3) is therefore not focused on the content of the knowledge test but instead, *firstly*, on the relevant point in time for the estimation of the buyer's knowledge and, *secondly*, the importance of the seller's reassurance before each consignment that the problem had been solved.<sup>98</sup> There was, consequently, no reason for the court to elaborate on the exact content of the knowledge test; moreover, the court did, *de facto*, make reference both to what the buyer "knew, or must have been aware of":

The cross-examination of Mr. Hew elicited admissions by Mr. Hew that after J35 units were received by Castel from TSP, Castel on-sold some of them, even though they were affected by defects. *Mr. Hew did not admit that there were serious defects in all such units; and the questions were focussed upon his knowledge of defects after receipt, and before on-sale, not upon the material time, which was when Castel and TSP contracted for the supply of any particular batch. It did not seek to elicit admissions that Mr. Hew knew, or must have been aware of, defects in all the J35 units, the subject of each order, at the time the orders were placed by Castel. The cross-examination was not targeted with sufficient precision to engage the operation of Article 35(3).* TSP failed to establish that the particular defects which gave rise to the lack of conformity in

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<sup>94</sup> *Id.* ¶ 9.

<sup>95</sup> *Id.* ¶ 286.

<sup>96</sup> *Id.* ¶¶ 12–18.

<sup>97</sup> *Id.*

<sup>98</sup> *But see* Lookofsky, *supra* note 47, at 140 (taking a different view on the case).

respect of which Castel sued TSP were known to Castel at the time each batch of goods was ordered by it.<sup>99</sup>

From the court's reasoning it follows, *firstly*, that a buyer's general knowledge of defects is insufficient for the *caveat emptor* preclusion of remedies and, consequently, that the burden of proof on the seller must be established "with sufficient precision to engage the operation of Article 35(3)."<sup>100</sup> The knowledge or constructive knowledge of the CISG buyer must concern particular defects in the goods sold under a particular contract or consignment.

Under the *caveat emptor* rule in Article 35(3), this knowledge must, *secondly*, be given and proven "upon the material time," that is, at the time of the conclusion of the contract.<sup>101</sup> This means that the contract-formation regime in CISG Part II is of paramount importance in order to determine the relevant point in time. This regime is, however, challenged by the modern means of contract formation and, in addition, the modern means of instant electronic communication.<sup>102</sup> In the following sections, the focus is on decisions which either directly or indirectly address the meaning of the language "could not have been unaware."

## 2. A Gross Negligence Test

### a) 1996 German OLG Cologne (Used Mercedes Benz Case): A Gross Negligence Test

In the first decision, rendered by the 1996 German OLG Cologne in *Used Mercedes Benz case*, the court equated the term "*nicht in Unkenntnis sein konnte*" in CISG Article 35(3) with gross negligence as follows:

Bei Arglist des Verkäufers ist aus dem Grundgedanken des Artikel 40 CISG, wonach der Verkäufer sich nicht auf ein Verhalten des Käufers berufen kann, wenn ihn selber ein größerer Vorwurf trifft, in Verbindung mit Artikel 7 Abs. 1 CISG zu folgern, daß der Verkäufer selbst dann einzustehen hat, wenn der Käufer über den Mangel *nicht in Unkenntnis sein konnte* . . . Selbst der *grob*

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<sup>99</sup> *Castel*, *supra* note 85, ¶ 313 (emphasis added).

<sup>100</sup> *Id.*

<sup>101</sup> *Id.*

<sup>102</sup> See Morten M. Fogt, *Contract Formation under the CISG: The Need for a Reform*, in *INTERNATIONAL SALES LAW: A GLOBAL CHALLENGE* 179 (Larry A. DiMatteo ed., 2014).

*fahrlässig unwissende* Käufer erscheint schutzwürdiger als der arglistig handelnde Verkäufer.<sup>103</sup>

The court first cites the unofficial German version of “could not have been unaware” (“*nicht in Unkenntnis sein konnte*”) and, thereafter, refers to this language and the stage of knowledge it expresses as “being gross negligently unaware” (“*grob fahrlässig unwissende*”).<sup>104</sup> It is certain that the court understood the constructive knowledge in CISG Article 35(3) as such.

*b) 1997 Swiss Tribunal Cantonal de Vaud (Second Hand Bulldozer Case): Presumably a Gross Negligence Test*

The next case involving an interpretation of “could not have been unaware” in CISG Article 35(3) is the decision of Swiss Tribunal Cantonal de Vaud in *Second hand bulldozer case*.<sup>105</sup> The buyer, in his capacity as a professional contractor (*entrepreneur*) had, prior to the conclusion of the contract, inspected and tested the bulldozer, and the parties had agreed that the seller had an obligation to cure three specific, expressly mentioned defects.<sup>106</sup> The court’s reasoning was therefore based on the principle of the *caveat emptor* doctrine. The court held:

Au demeurant, en tant qu’entrepreneur, le demandeur *avait conscience de la qualité* de l’objet vendu. Or, à l’occasion de l’essai du “bulldozer,” *ce dernier n’a fait valoir aucun défaut et a accepté l’offre de la défenderesse*. Dès lors, cette dernière est, de toute façon, exonérée de sa responsabilité (art. 35 al. 3 CVIM).<sup>107</sup>

From this excerpt of the court’s reasoning it is clear that the court concluded that the buyer—in his capacity as a professional contractor—*knew of the quality* of the purchased bulldozer. *Nevertheless, he did not at the time of the inspection claim any defects but instead accepted the seller’s offer*. Consequently, the court did not state that at the time of the inspection the buyer had *de facto* knowledge of the specific defects in the bulldozer he

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<sup>103</sup> *Used Mercedes Benz case*, *supra* note 86, ¶ 2 (emphasis added).

<sup>104</sup> *Id.*

<sup>105</sup> *Second hand bulldozer case*, *supra* note 87.

<sup>106</sup> *Id.*

<sup>107</sup> *Id.* ¶ 4 (emphasis added).

later alleged but, instead, that he had only a general knowledge of the quality of the bulldozer.<sup>108</sup> Thus, other defects should, after his professional inspection, have been obvious (apparent) to him.<sup>109</sup> With good reason, it could therefore be argued that the buyer lacked knowledge of the defects due to gross negligence (“could not have been unaware”) and therefore, at the time of inspection and before the contract conclusion, should have raised the quality issue with the seller. In other words, the court’s decision should not be interpreted as being based on the buyer’s knowledge of the concrete defects.<sup>110</sup> In the end, the professional buyer bought, after prior examination, a second-hand bulldozer repaired as the parties had agreed, and this was what he received.

*c) 2011 Court of Appeal of New Zealand in RJ & AM Smallmon v. Transport Sales Ltd.: An Obiter Dictum Indicating a Gross Negligence Test*

In the 2011 decision of the Court of Appeal of New Zealand in *RJ & AM Smallmon v. Transport Sales Ltd.*, the court based its reasoning on the *caveat emptor* principle but did not expressly refer to Article 35(3) or address the test for the Australian buyer’s constructive knowledge.<sup>111</sup> Instead, the case was decided on the basis of the default conformity provision in CISG Article 35(2) applying the principles laid down by the German Bundesgerichtshof (“BGH”) in the leading *New Zealand mussels case*.<sup>112</sup> Although the *caveat emptor* issue was not put to the court in the parties’ pleadings in *Smallmon*, in deciding the case, the court did consider the implications of the buyer’s constructive knowledge of the fact that the compliance plates on the trucks were missing, which “*was not kept from them*” and “*was there for them (and anyone else) to see*”:

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<sup>108</sup> *Id.*

<sup>109</sup> *Id.*

<sup>110</sup> See differently Lookofsky, *supra* note 47, at 139, who interprets the decision to support the view that the term “could not be unaware of” equals awareness (de facto knowledge).

<sup>111</sup> *RJ & AM Smallmon v. Transp. Sales Ltd.*, *supra* note 88. See also Petra Butler, *New Zealand*, in *INTERNATIONAL SALES LAW: A GLOBAL CHALLENGE* 539, 544–46 (Larry A. DiMatteo ed., 2014) (commenting on *Smallmon* regarding application of the conformity rule in Article 35(2)).

<sup>112</sup> Bundesgerichtshof [BGH] [Federal Court of Justice] Mar. 8, 1995, 129 *ENTSCHEIDUNGEN DES BUNDESGERICHTSHOFES IN ZIVILSACHEN* [BGHZ] 75 (Ger.), available at <http://cisgw3.law.pace.edu/cases/950308g3.html> [hereinafter *New Zealand mussels case*].

Another circumstance that we consider to be material is the knowledge and experience of [the buyers]. As the Judge found, they were experienced transport operators. Hence they were in a much better position than Mr. Miller [the seller] to know the registration requirements of their own country. Moreover, having received preliminary expert advice from Mr. Walsh about matters to watch out for, they had the opportunity to (and did) inspect the four trucks in New Zealand. *The fact that the trucks did not have compliance plates on them was not kept from them. It was there for them (and anyone else) to see. The Judge was satisfied that, given their experience, they could be expected to be able to identify the presence or absence of a compliance plate. We agree.*<sup>113</sup>

From the court's statement and language it may be assumed that the *caveat emptor* rule could have been successfully invoked as there were evident facts relating to the impossibility of importing the trucks to Australia, which were before the eyes of the experienced buyer inspecting the trucks. Although placed in an *obiter dictum* and not directly related to a discussion of the *caveat emptor* rule in CISG Article 35(3), the facts of the case and the reasoning of the court are not much different from a gross negligence *caveat emptor* test "could not be unaware." The decision still remains a weak precedent for the *caveat emptor* rule in the CISG, as it was only an additional circumstance considered by the court.

*d) 2011 German OLG Koblenz (Clay case OLG) and 2012 BGH (Clay case BGH): A Gross Negligence Test*

The question on the knowledge test in CISG Article 35(3) was considered by the German Oberlandesgericht ("OLG") Koblenz in its decision from 2011 ("*Clay case OLG*").<sup>114</sup> The *Clay case* appeal to the Bundesgerichtshof ("BGH") ("*Clay case BGH*") was based on other non-*caveat emptor* issues and therefore did not necessitate that the BGH take a stand on the CISG Article 35(3) issue.<sup>115</sup> A German seller's delivery of dioxin-contaminated clay to a Dutch buyer for use in a potato separation

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<sup>113</sup> *RJ & AM Smallmon v. Transp. Sales Ltd.*, *supra* note 88, ¶ 66 (emphasis added).

<sup>114</sup> Oberlandesgericht Koblenz [OLG] [Higher Regional Court of Koblenz] Feb. 24, 2011, No. 6 U555/07 (Ger.), available at <http://www.cisg-online.ch/content/api/cisg/urteile/2301.pdf> [hereinafter *Clay case OLG*].

<sup>115</sup> Bundesgerichtshof [BGH] [Federal Court of Justice] Sept. 26, 2012, No. VIII ZR 100/11 (Ger.), available at <http://www.cisg-online.ch/content/api/cisg/urteile/2348.pdf> [hereinafter *Clay case BGH*].

process could, depending on the expected subsequent use of the potatoes for human consumption or in animal feed and on whether the separation process included or did not include a cleaning procedure, constitute a lack of conformity.<sup>116</sup> There was no express agreement on conformity between the parties, only a European Commission Safety Data Sheet marked “non-toxic,” a required public safety document not indicating any specific requirement concerning the conformity of the clay.<sup>117</sup> Therefore, the decision of the OLG Koblenz and the BGH to a large extent depended on the information exchanged by the parties and the *de facto* and constructive knowledge of the parties regarding the elevated dioxin levels and the expected use by the buyer. The OLG Koblenz left the question of the conformity of the dioxin-contaminated clay open but held that if the dioxin could not be easily removed, the delivered clay would be non-conforming.<sup>118</sup> In the reasoning on this possible outcome of the conformity dispute, the OLG Koblenz discussed the *caveat emptor* rule and referred to the knowledge test in CISG Article 35(3), as follows:

Der Ton entsprach also, wenn Dioxinrückstände sich nicht ohne Schwierigkeiten entfernen ließen, nach Art. 35 Abs. 2 Buchst. a CISG nicht dem Vertrag. Dass die Klägerin bei Vertragsschluss von diesem Mangel *gewusst hätte oder hierüber nicht in Unkenntnis hätte sein können* (Art. 35 Abs. 3 CISG), d. h., dass ihre Unkenntnis auf grober Fahrlässigkeit beruhte . . . , ist auszuschließen.<sup>119</sup>

The OLG Koblenz referred to the disputed wording “could not have been unaware” of CISG Article 35(3) in the correct unofficial German translation and *expressis verbis* defined the unawareness as based on gross negligence. Even though the dioxin contamination of clay was well-known to the public and multiple public law measures addressing the issue had been enacted at the time of conclusion of the contract, the Dutch buyer was not held to be grossly negligent.<sup>120</sup> A general awareness of market conditions and the current contamination problems from reports in the public media rightly does not lead to any knowledge or grossly negligent ignorance of a

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<sup>116</sup> *Id.*

<sup>117</sup> *Id.* ¶ 29.

<sup>118</sup> *Clay case OLG*, *supra* note 114. This rather narrow construction of the default conformity rule in CISG Article 35(2)(a) was changed by the BGH on appeal. *Clay case BGH*, *supra* note 115, ¶¶ 19–21.

<sup>119</sup> *Clay case OLG*, *supra* note 114, at 11 (emphasis added).

<sup>120</sup> *Id.*

contamination of a particular delivery of clay. The knowledge test of the *caveat emptor* rule must relate to the concrete consignment and to the specific nature of the non-conformity.

*e) 2012 Danish District Court in Julie George v. Kristian Skovridder: A Test of a Higher Degree of Negligence*

The interesting unpublished Danish District Court decision from 2012 in *Julie George v. Kristian Skovridder* is in line with previous CISG case law regarding the knowledge test in CISG Article 35(3) and the meaning of the phrase “could not have been unaware,” as the court specifically refers to “a degree of negligence” in the *caveat emptor* rule of CISG Article 35(3).<sup>121</sup> Unlike in *Castel*, discussed above, the *ratio decidendi* of the decision in the *Julie George* was specifically about the knowledge test in CISG Article 35(3). The Danish court—again, unlike the Federal Court of Australia in *Castel*—started by citing the relevant wording (*in casu* the unofficial Danish translation) of this part of CISG Article 35(3): “*kendte eller kunne ikke være uvidende om*” (the correct translation of “could not have been unaware of”).<sup>122</sup>

In *Julie George*, a Canadian buyer, on November 30, 2009, bought two horses (named Cator and Ferrari) from a professional Danish horse dealer for 1,150,000 euros, of which the price for Cator was 550,000 euros.<sup>123</sup> The father of the buyer employed a professional Canadian horse trading agent, who specialized in jumping horses, to find a suitable jumping horse for his daughter, a full-time equestrian who competed at the highest levels in international jumping competitions and whose goal was to qualify for the 2012 Olympic Games in London.<sup>124</sup> Before concluding the sale, both the father and the buyer (the daughter) and the Canadian professional agent had inspected the horse, and the daughter had also taken several test rides on Cator.<sup>125</sup> In addition, the buyer engaged a Canadian veterinarian to examine

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<sup>121</sup> *Julie George v. Kristian Skovridder*, *supra* note 90. See also Lookofsky, *supra* note 47, at 140 (commenting on *Julie George v. Kristian Skovridder*).

<sup>122</sup> *Julie George v. Kristian Skovridder*, *supra* note 90.

<sup>123</sup> *Id.*

<sup>124</sup> *Id.*

<sup>125</sup> *Id.*



Cator.<sup>126</sup> This examination had taken place on November 24, 2009 at a Danish animal hospital.<sup>127</sup> The veterinarian issued a report to the buyer based in part on 30 x-rays of Cator's forefeet.<sup>128</sup> Cator was delivered to the buyer in Denmark on December 9, 2009 and then transported to Canada.<sup>129</sup> Shortly thereafter, on January 2, 2010, Cator proved to have a serious problem in his right forefoot.<sup>130</sup> The buyer had Cator examined by a different Canadian veterinarian on January 5, 2010, and on January 7, 2010, gave the seller the specified notice of lack of conformity.<sup>131</sup> On January 16, 2010, the buyer, in an e-mail to the seller, declared the avoidance of the contract for Cator.<sup>132</sup> A dispute arose between the parties concerning *inter alia* the buyer's knowledge or constructive knowledge of Cator's lack of conformity as a jumping horse.<sup>133</sup>

Unfortunately, the pleadings of the parties were not helpful in guiding the court because both parties treated the transaction for Cator as both a consumer sale and as a commercial sale under the CISG; nor did either party relate its arguments to the dispute over the interpretation of the phrase "could not have been unaware" in CISG Article 35(3). Instead, the pleadings of both parties referred several times to the simple negligence standard without addressing the interpretation of the CISG language "could not have been unaware" and the exact degree of negligence required.<sup>134</sup> Admittedly, the reasoning of the Danish court could have been more precise and would have been improved if the court had clearly distinguished the interpretation of the terms "knew" and "could not have been unaware" instead of referring to an (undefined) degree of negligence. However, the court did not base its decision on the parties' arguments about simple negligence (in Danish, *burde vide*; in English, "ought to have known"), but made reference to "*such a degree of negligence*" and found that the buyer

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<sup>126</sup> *Id.*

<sup>127</sup> *Id.*

<sup>128</sup> *Id.*

<sup>129</sup> *Id.*

<sup>130</sup> *Id.*

<sup>131</sup> *Id.*

<sup>132</sup> *Id.*

<sup>133</sup> *Id.*

<sup>134</sup> *Id.* at 25–26, 30–32.

by virtue of CISG Article 35(3) had not acted with such a degree of negligence as to preclude her from remedial relief for nonconformity:

Under the described circumstances the court cannot conclude that [the buyer] *knew or could not have been unaware* of Cator's disorders or predisposition for those disorders, *nor* that [the buyer], moreover, had exhibited *such a degree of negligence* that she by virtue of CISG Article 35(3) is precluded from asserting remedies for lack of conformity.<sup>135</sup>

This reasoning by the District Court—though it is somewhat unclearly divided into two reasons regarding, *first*, the wording “*knew or could not have been unaware*” and *second* a gross negligence standard in CISG Article 35(3)—can only be interpreted to mean that the court found the knowledge test in the CISG to be based on the buyer's knowledge or grossly negligent ignorance of the competition horse's (Cator's) disorder or predisposition for such disorders.

*Firstly*, the District Court did expressly refer to and cite the unofficial Danish translation of CISG Article 35(3), which does not use the Danish term for simple negligence *burde vide* (ought to know) and *burde have vidst* (ought to have known), but instead correctly makes use of the different expression *ikke kunne have været uvidende om* (could not have been unaware of). *Secondly*, in its reasoning, the District Court not only addressed “knowledge” but also went into a detailed discussion of the concepts of both negligence and the concrete degree of negligence. This can only be explained, and only makes sense, if the court was of the opinion that such an investigation *de lege lata* was necessary, and that the facts of the case *in concreto* demonstrated a form of negligence on the part of the buyer that needed to be evaluated. Moreover, the District Court did not engage in a discussion of proof or of a relaxed proof of the buyer's knowledge.

*Thirdly*, the judge went on to evaluate the possible negligence by the Canadian veterinarian engaged by the Canadian buyer who had examined Cator at the animal hospital in Denmark. It is not only the buyer's personal negligence or that of her father but also that of a third party engaged by the

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<sup>135</sup> *Id.* at 40 (“Under de beskrevne omstændigheder kan retten ikke fastslå, at Julie George *kendte eller ikke kunne være uvidende om* Cators lidelser eller prædisponeringen herfor, eller at hun i øvrigt har *udvist en sådan grad af uagtsomhed*, at hun i medfør af CISG artikel 35, stk. 3, er afskåret fra at gøre mangelsindsigelser gældende.”) (translation by author) (emphasis added).

buyer which is decisive.<sup>136</sup> In fact, the District Court based its conclusion on the evidence provided by a court-appointed Danish veterinarian, who testified that there was negligence by the Canadian veterinarian and, consequently, *in concreto* by the buyer. It was the opinion of the court-appointed Danish veterinarian that the Canadian veterinarian should have conducted or initiated additional examinations and observations of Cator in order to have sufficient grounds for concluding that the horse was fit for high-level jumping competitions. According to the report and testimony of the Danish veterinarian, his findings could support both an insignificant and a quite important observation of lack of conformity.<sup>137</sup> Even though the court did not find any negligence by the buyer herself during the test rides, it did find evidence of negligence by the buyer's professional Canadian veterinarian in conducting the physical examination and observation of the horse; such negligence, however, did not, in the author's interpretation of the court's reasoning, amount to *such a degree of negligence* as required in CISG Article 35(3). As a result, there was merely simple (ordinary) but no gross negligence on the part of the buyer.

3. *The "Must Not Obtrude or Impose" Test—2013 OLG Koblenz (Electricity Generator Case)*

In the reasoning of the OLG Koblenz in *Electricity generator case*, there is implicit support for the view that the knowledge test in CISG Article 35(3) in fact depends not only on knowledge but also on what should have appeared before the eyes of the buyer but did not due to a degree of gross negligence.<sup>138</sup> *Electricity generator case* concerned a German seller's sale of an electricity generator to a Czech buyer.<sup>139</sup> According to the seller's internet advertisement, the generator had a "300

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<sup>136</sup> See *supra* Part II (referencing further case law).

<sup>137</sup> *Julie George v. Kristian Skovridder*, *supra* note 90, at 40 ("Endelig har skønsmanden, både i sine erklæringer og under sin forklaring i retten, anført, at dr. Michael Scott burde have foretaget eller foranlediget yderligere undersøgelser samt observation af Cator over tid, førend han kunne have tilstrækkeligt grundlag for at vurdere, om Cator var egnet som springhest på højt niveau. Skønsmanden har videre anført, at de konstateringer, dr. Michael Scott gjorde, både kunne forenes med en antagelse om, at det var ubetydelige fund, og med en antagelse om, at det var ret alvorlige fund.") (emphasis added).

<sup>138</sup> *Electricity generator case*, *supra* note 91, at 4.

<sup>139</sup> *Id.*

KVA, 361 Ampere” output.<sup>140</sup> However, this output could be achieved only with the electricity supply on the American market and not in Europe.<sup>141</sup> The court therefore found a lack of conformity under CISG Article 35(1) because when used in Europe, the generator’s output was 20% lower than advertised (with Europe’s 400/230 V electricity supply, the output was only 250 KVA).<sup>142</sup> After the court found there was a lack of conformity under CISG Article 35(1), the decisive question was whether the Czech buyer under the *caveat emptor* rule could hold the German seller liable for the non-conformity.<sup>143</sup> The literal reasoning of the court on Article 35(3) CISG should be consulted:

Die Klägerin [the buyer] muss sich auch nicht vorhalten lassen, dass sie über die Vertragswidrigkeit des Generators *nicht in Unkenntnis sein konnte* (vgl. Art. 35 Abs. 3 CISG). *So musste sich ihr*—entgegen der Auffassung der Beklagten [the seller]—aus der Angabe von 361 Ampere in der Internet-Anzeige *nicht aufdrängen*, dass der Generator über eine Leistung von 300 KVA gar nicht verfügen konnte. So gibt die Beklagte [the seller] selbst in ihrer Berufungsbegründung an, dass in der Maschinenbeschreibung “richtigerweise die Leistung mit 300 KVA bei 361 Ampere angegeben” worden sei (vgl. Bl. 107 d.A.).

*Ebenso wenig* bestand angesichts der eindeutigen technischen Vorgaben in der Internet-Anzeige eine Verpflichtung der Klägerin [the buyer], bei der vorherigen Besichtigung des Generators *nach eventuell daran befindlichen Typenschildern zu suchen und die Angaben der Beklagten [the seller] insoweit zu verifizieren*.<sup>144</sup>

The court’s statements go directly to the interpretation of the wording “could not have been unaware” (in the German unofficial translation—*nicht in Unkenntnis sein konnte*). The interesting parts of the courts’ reasoning (here emphasized) are twofold.

*First*, the OLG Koblenz does not discuss or even consider that the meaning of “could not have been unaware of” could be identical or similar (close) to knowledge in the sense that *knowledge of the defect reasonably can be inferred, if not proven*. The judges, apparently, presume that the meaning is different from *de facto* knowledge and turn to a discussion about

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<sup>140</sup> *Id.* at 2.

<sup>141</sup> *Id.*

<sup>142</sup> *Id.* at 4.

<sup>143</sup> *Id.*

<sup>144</sup> *Id.* (emphasis added).

whether the information about capacity provided by the seller in the internet advertisement was so obviously unclear or incorrect that the buyer (i.e., a prudent buyer) must to some degree have noticed (“*sich aufdrängen*”).

*Second*, concerning the knowledge test in CISG Article 35(3), the use of the German verb *musste . . . nicht aufdrängen* (must not obtrude or impose) with respect to what the internet information did not obtrude upon the buyer concerning the generators’ capability, indicates that the court demanded a clear and easily recognizable indication or facts in order to find that the buyer “could not be unaware.”<sup>145</sup> This language is close to a gross negligence standard, which in fact the OLG Koblenz in its earlier decision from 2011 found expressed in CISG Article 35(3).<sup>146</sup> The court rejected any duty of the buyer to inspect or to seek verification of the unclear information provided online.<sup>147</sup>

#### V. DOCTRINE AND CASE LAW ON THE KNOWLEDGE TEST FOR SELLER IN ARTICLE 40 CISG

##### A. *The Prevailing View in Doctrine Supporting a Gross Negligence Test*

The knowledge test for the seller in CISG Article 40 is literally identical to that of the buyer in the *caveat emptor* rule in CISG Article 35(3). CISG Article 40 states: “The seller is not entitled to rely on the provisions of articles 38 and 39 if the lack of conformity relates to facts of which he *knew or could not have been unaware* and which he did not disclose to the buyer.”<sup>148</sup>

There are good reasons for the identical wording of the knowledge tests in CISG Articles 35(3) and 40. This knowledge or constructive knowledge of the parties to a sales contract will determine their right to

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<sup>145</sup> Cf. M. Schmidt-Kessel, in KOMMENTAR ZUM EINHEITLICHEN UN-KAUFRECHT (CISG) 203 (Peter Schlechtriem et al. eds., 6th ed. 2013) (suggesting the expression “*sich geradezu aufdrängte*” as the interpretation of the knowledge test, “could not have been unaware of,” in CISG Article 8(1)). See also Oberlandesgericht Koblenz [OLG] [Higher Regional Court of Koblenz] Sept. 11, 1998, No. 2 U 580/96 (Ger.), available at <http://www.cisg-online.ch/content/api/cisg/urteile/505.htm> (employing the same formulation in its decision on CISG Article 40).

<sup>146</sup> *Clay case* OLG, *supra* note 114.

<sup>147</sup> *Electricity generator case*, *supra* note 91.

<sup>148</sup> CISG, *supra* note 1, at art. 40.

remedies or to relief of liability. It is therefore justified to demand either actual knowledge or a certain high degree of negligence (*culpa*) which, then, in exceptional cases, overrides the otherwise available default rights of a party—by precluding the buyer from claiming lack of conformity and by precluding the seller from relying on the provisions for timely notice of lack of conformity. To balance the rights and obligations of the parties the standard should be the same for both.<sup>149</sup>

The doctrine under the ULIS<sup>150</sup> and CISG has convincingly made a consistent interpretation of the knowledge test in CISG Article 35(3) and 40 (as well as Article 8(1) and 42).<sup>151</sup> The difference is that under the ULIS, the doctrine was almost in agreement about a gross negligence (*culpa lata*) standard in ULIS Articles 36 and 40, whereas under the CISG, the doctrine on CISG Article 40 is split into the same two divergent approaches for interpretations of the knowledge test of the *caveat emptor* under CISG Article 35(3).<sup>152</sup> The presumptively prevailing view in the CISG doctrine supports a gross negligence knowledge test in CISG Article 40,<sup>153</sup> but as the Israeli Supreme Court emphasized in its decision in 2009 in *Pamesa Ceramica*, the CISG doctrine does not give courts or tribunals clear guidance.<sup>154</sup> In *Pamesa Ceramica*, the Israeli buyer (Mendelson) actually

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<sup>149</sup> See *supra* Part I.A (discussing the balancing requirement of a sales law regime).

<sup>150</sup> See TUNC, *supra* note 63, at 42; GRAVERSON ET AL., *supra* note 64, at 74–75, 77; Stumpf, *supra* note 59, at 279–80, 291.

<sup>151</sup> See, e.g., Ulrich Magnus, in KOMMENTAR ZUM BÜRGERLICHEN GESETZBUCH MIT EINFÜHRUNGSGESETZ UND NEBENGESETZE, WIENER UN-KAUFRECHT (CISG) 503–04 (Julius von Staudinger ed., 2013) (referencing further doctrine and case law). Even though some of the larger CISG commentaries with independent contributions from authors have different views of the interpretation of the wording “could not have been unaware” in CISG Articles 8, 35, 40 and 42, this does in principle not imply that each author would employ the different meaning of the same expression throughout the convention. Compare Schmidt-Kessel, *supra* note 145, at 203 (“ein gesteigertes Maß an Sorgfaltswidrigkeit verstanden, welches in der deutschsprachigen Literatur regelmäßig mit grober Fahrlässigkeit gleichgesetzt wird.”), with Ingeborg Schwenzer, in KOMMENTAR ZUM EINHEITLICHEN UN-KAUFRECHT (CISG) 594–95, 649 (Peter Schlechtriem et al. eds., 6th ed. 2013) (“mehr als grobe Fahrlässigkeit . . . Insofern stellt die Formulierung eine Beweiserleichterung . . . dar.”).

<sup>152</sup> See Magnus, *supra* note 151, at 530 for a knowledge test based on gross negligence. See also Schwenzer, *supra* note 151, at 649 (discussing a gross negligence standard). Other commentary is in favor of a *de facto* knowledge test with a relaxed burden of proof for the buyer. See HONNOLD, *supra* note 83, at 260; HONNOLD & FLECHTNER, *supra* note 83, at 33; JAN RAMBERG & JOHNNY HERRE, INTERNATIONALE KÖPLAGEN (CISG) 264 (2001).

<sup>153</sup> See Magnus, *supra* note 151, at 503–04.

<sup>154</sup> *Pamesa Ceramica v. Yisrael Mendelson Engineering Technical Supply Ltd.*, *supra* note 14, ¶¶ 36–38.

knew about the non-conformity for almost three years before it gave notice (far too late) to the Spanish seller (Pamesa), and neither knowledge nor negligent ignorance of the concrete lack of conformity of the specific consignment on the part of the seller could be demonstrated.<sup>155</sup> Therefore, the Spanish seller—as the Israeli Supreme Court rightly held—was not precluded from relying on CISG Article 39 because “a *general awareness* of ‘problems’ that were discovered in the past, without any specific notice being given by a buyer with regard to the specific goods, does not satisfy the requirements of art[icle] 40.”<sup>156</sup>

### *B. Ratio Legis of CISG Article 40—The Principle of Good Faith*

Under both the ULIS and the CISG there is agreement about the underlying *ratio* of Article 40 in the ULIS and CISG that it is an expression of the principle of good faith and, thus, of the contracting parties’ obligation to cooperate and to exchange important information.<sup>157</sup> If a seller failed to disclose lack of conformity that it *de facto* knew or could not have been unaware (ignorant) of at the time of the contract conclusion and at the same time, attempts to rely on the buyer’s failure to give timely notice of the lack of conformity, the seller would indeed be acting in bad faith or constructive bad faith. No sales law could reasonably protect a seller, who with full knowledge or a high degree of negligence, performs a sales contract with unsuitable (unfit) goods and then alleges a too-late notice thereof to avoid liability.<sup>158</sup> The ICC International Court of Arbitration in 1999—while deciding the case under “the general standards and rules of international

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<sup>155</sup> *Id.* ¶ 35.

<sup>156</sup> *Id.* ¶ 45.

<sup>157</sup> See TUNC, *supra* note 63, at 63 (“[ULIS] Article 40 does no more than sanction a rule of good faith.”) (emphasis added); GRAVERSON ET AL., *supra* note 64, at 77 (taking a similar view on ULIS Article 40). BERNARD AUDIT, LA VENTE INTERNATIONALE DE MARCHANDISES 108 n.112 (2000) (discussing CISG Article 40); Magnus, *supra* note 151, at 502 (“Grundsätzen redlichen Geschäftsverkehrs”).

<sup>158</sup> See, e.g., Landgericht Trier [LG] [District Court] Oct. 12, 1995, NEUE JURISTISCHE WOCHENSCHRIFT-RECHTSPRECHUNG REPORT [NJW-RR] 564 (Ger.), available at <http://www.cisg-online.ch/content/api/cisg/urteile/160.htm> [hereinafter *Wine case*] (“Im übrigen kann die Klägerin sich gemäß Art. 40 CISG vorliegend nicht auf die Art. 38 und 39 CISG berufen, weil die Vertragswidrigkeit auf Tatsachen beruht, die sie kannte oder über die sie nicht in Unkenntnis sein konnte und die sie der Käuferin nicht offenbart hat; die Lieferung eines mit Wasser versetzten Weins, der nicht verkehrsfähig ist, stellt nämlich ein arglistiges Verhalten dar.”).

contracts”—made an award in which it held with reference to CISG Article 40 that:

It is a general recognized principle of commercial law that a vendor cannot rely on a buyer's failure to inspect the goods and to give timely notice of defects, if the vendor has adopted a conduct which is not in conformity with his own duties. Especially, it is generally admitted that the vendor is precluded from asserting the non-conformity of the notice if it has concealed the existence of the defect.<sup>159</sup>

When there is evidence of undisclosed knowledge of a defect on the part of the seller and, thus, of bad faith on the part of the seller, the principle of good faith will override the knowledge or constructive knowledge of a buyer that would in principle activate the *caveat emptor* rule in CISG Article 35(3).<sup>160</sup> Still, however, CISG Article 40 must be applied only in exceptional cases in order to maintain certainty in international trade and to protect the seller's reasonable expectations that past sales transactions are closed if he or she has not received notice of non-conformity issues.<sup>161</sup> Hence, it is also required that the CISG buyer act in good faith and give the seller immediate notice or notice “within reasonable time” of any lack of conformity. This, then, enables the seller to take precautions, consider a possible cure, and secure remedies against his counterparts by giving third parties timely notice. The principle of good faith and fair dealing does not go only one way; it is two-sided.

*C. Cautious Favouring of a De Facto Knowledge Test—2012 English High Court of Justice in Kingspan Environmental Ltd. v. Borealis A/S*

In 2012, the English High Court of Justice in *Kingspan v. Borealis* introduced the two possible interpretations of the CISG Article 40

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<sup>159</sup> Case No. 9474 of 1999, 12 ICC Int'l. Ct. Arb. Bull. 64, ¶ 16 (ICC Int'l. Ct. Arb.), available at <http://www.unilex.info/case.cfm?pid=1&do=case&id=716&step=FullText>.

<sup>160</sup> *Used Mercedes Benz case*, *supra* note 86, ¶ 2.

<sup>161</sup> See *Beijing Light Automobile Co. Ltd. v. Connell Ltd. P'ship*, Arbitration Institute of the Stockholm Chamber of Commerce, June 5, 1998, ¶ 6.3(b), available at <http://www.cisg.law.pace.edu/cases/980605s5.html> (“Article 40 of CISG should only be applied in special circumstances.”); *Pamesa Ceramica v. Yisrael Mendelson Engineering Technical Supply Ltd.*, *supra* note 14, ¶¶ 34–35. See also Yehuda Adar, *Israel*, in *INTERNATIONAL SALES LAW: A GLOBAL CHALLENGE* 518, 536–38 (Larry A. DiMatteo ed., 2014) (commenting on the judgment of the Stockholm Chamber of Commerce).



knowledge test disputed in the doctrine.<sup>162</sup> In *Kingspan v. Borealis*, a Danish seller and UK buyers disputed the lack of conformity of a polymer, Borecene, that the seller had delivered to the English buyers for use as a raw material to rotomould static tanks to hold bulk liquids.<sup>163</sup> One of the issues was whether the buyers could avoid the effect of a lack of timely notice under CISG Article 39 because the Danish seller, according to CISG Article 40, “knew or could not have been unaware” of facts related to the lack of conformity which he did not disclose to the buyers.<sup>164</sup> Justice Christopher Clarke elaborated on this knowledge test and concluded the following:

It also applies where the lack of conformity relates to facts of which the seller could not have been unaware. That is, as it seems to me, an expression of a basis for deciding that the seller was in fact aware. If the facts are such that the seller could not have been unaware of them, then of them he must have been aware. That conclusion is consistent with the agreement between the experts contained in the joint memorandum that the seller will only have the relevant knowledge if “he knew or where his knowledge of the defect reasonably can be inferred, if not proven, from the circumstances in the particular case.”

If I am wrong about that . . . then the test may be regarded as embracing wilful blindness to the obvious (insofar as that is different from actual knowledge) and knowledge of facts which would cause any reasonable person to be aware such that it would be grossly negligent not to realise what they signified.<sup>165</sup>

The English court suggests that the expression *could not have been unaware* must be said to mean that a person was in fact aware and therefore knew, or, that his knowledge can reasonably be inferred, but not necessarily proven. The court’s reasoning thus supports the view in doctrine that the expressions “knew” and “could not be unaware” have basically the same meaning but differ with respect to the proof (evidence) of such “knowledge.” The court, however, did not state a firm opinion and made reference to what a reasonable person “would be grossly negligent not to realise”; and it did—to some extent—admit that there is room for doubt regarding this literal understanding of the language *could not have been unaware*. Because the court left room for interpretation, the precedence of

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<sup>162</sup> *Kingspan Envtl. Ltd. v. Borealis A/S*, *supra* note 16, ¶ 1.

<sup>163</sup> *Id.*

<sup>164</sup> *Id.* ¶ 1021.

<sup>165</sup> *Id.* ¶¶ 1021–22 (emphasis in original).

the decision regarding the knowledge test is limited, since the court might have been convinced to follow the gross negligence interpretation if more support for this opinion in case law had been presented. The further available case law will be presented and discussed in detail in the following sections.

#### *D. Case Law on the CISG Article 40 Knowledge Test*

There is a long list of published cases on the interpretation of CISG Article 40 that proves the practical importance of the *caveat venditor* principle and of the seller's disclosure of knowledge of the quality (or lack of quality) of the goods.<sup>166</sup> A large part of this case law takes a stand on the CISG knowledge test. The focus below will be on selected decisions that address the knowledge test for the seller under CISG Article 40 and either expressly or indirectly touch upon the disputed interpretation of the wording "*could not have been unaware.*"

##### *1. Gross Negligence or Lightening the Burden of Proof of Knowledge—Initial German, Swiss, and Austrian Case Law*

In 1997 and 1998, four German courts and a Swiss court took the initial stand on the content of the knowledge test for the seller in CISG Article 40. However, the Austrian Supreme Court ("OGH") in an early decision, also from 1998, referred only (but not without significance) to the negligence standard in CISG Article 40.<sup>167</sup> The dispute over the knowledge standard was fortified in 1997 by the OLG Karlsruhe ("*Protective foil case*")<sup>168</sup> and OLG Munich ("*Cashmere clothing case*"),<sup>169</sup> where two

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<sup>166</sup> For purposes of this analysis, I investigated, *inter alia*, the approximately 60 available cases addressing CISG Article 40 that are published on <http://www.cisg-online.ch>.

<sup>167</sup> Oberster Gerichtshof [OGH] [Supreme Court] Feb. 12, 1998, No. 2 Ob 328/97t (Austria), available at <http://www.cisg-online.ch/content/api/cisg/urteile/349.pdf> [hereinafter *Umbrella case*] ("*im Sinn des Art. 40 UNK schuldhaft gehandelt. . .*") (emphasis added).

<sup>168</sup> Oberlandesgericht Karlsruhe [OLG] [Higher Regional Court of Karlsruhe] June 25, 1997, No. 1 U 280/96 (Ger.), available at <http://www.cisg-online.ch/content/api/cisg/urteile/263.htm> [hereinafter *Protective foil case*].

<sup>169</sup> Oberlandesgericht München [Higher Regional Court of Munich] Mar. 11, 1998, No. 7 U 4427/97 (Ger.), available at <http://www.cisg-online.ch/content/api/cisg/display.cfm?test=310> [hereinafter *Cashmere clothing case*].

distinct interpretations of the wording “could not have been unaware” were presented and still today divide the CISG doctrine into two different views. The OLG Karlsruhe saw the formulation as a lightening of the burden of proof of the difficult evidence of awareness, whereas the OLG Munich interpreted the wording as bad faith or the gross negligence unawareness of the seller. The OLG Karlsruhe stated: “Die Formulierung in Art. 40 CISG: ‘über die er nicht in Unkenntnis sein konnte’ *stellt eine Beweiserleichterung für anders nur schwer zu beweisende Kenntnis dar.*”<sup>170</sup> To the contrary, the OLG Munich stated:

Die Klägerin kann sich auf Art. 39 CISG berufen, da ihr kein Vorwurf der *Bösgläubigkeit im Sinne von Art. 40 CISG zu machen ist. Eine grob fahrlässige Unkenntnis der Klägerin hat die Beklagte nicht dargetan.* Diese läge nur vor, wenn die Klägerin, die die Ware ihrerseits herstellen läßt, augenfällige und gravierende Mängel ihrer Ware übersehen hat, die schon bei Anwendung einfachster Sorgfalt zu erkennen waren.<sup>171</sup>

In 1998, the Swiss Commercial Court of Zürich reached the same solution as the OLG München in *Cashmere clothing case* and likewise expressly referred to a gross negligence test in CISG Article 40 that according to the court followed from the text of the CISG itself:

Nach Art. 40 WKR [CISG] kann sich der Verkäufer nicht auf Art. 38 und 39 WKR berufen, wenn die Vertragswidrigkeit auf Tatsachen beruht, die er kannte oder über die er nicht in Unkenntnis sein konnte und die er dem Käufer nicht offenbart hat. *Dabei genügt nach dem Gesetzestext bereits schon grobfahrlässige Unkenntnis.*<sup>172</sup>

In the same year, the OLG Koblenz, in its decision from September 11, 1998 (*Chemical substance case*) did not continue the express reference to the gross negligence knowledge test in CISG Article 40 CISG but instead used the formulation that a certain understanding must not obtrude or impose (*musste . . . nicht aufdrängen*) itself upon the seller.<sup>173</sup> The use of

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<sup>170</sup> *Protective foil case*, *supra* note 168 (emphasis added).

<sup>171</sup> *Cashmere clothing case*, *supra* note 169 (emphasis added).

<sup>172</sup> Handelsgericht Zürich [HG] [Commercial Court of Zurich] Nov. 30, 1998, No. HG 93064/O, 23 (Switz.), available at <http://www.cisg-online.ch/content/api/cisg/urteile/415.pdf> [hereinafter *Lambskin coat case*].

<sup>173</sup> Oberlandesgericht Koblenz [OLG] [Higher Regional Court of Koblenz] Sept. 11, 1998, No. 2 U 580/96, ¶1.2.c (Ger.), available at <http://www.cisg-online.ch/content/api/cisg/urteile/505.htm>

this formulation signals the need for clear and easily recognizable indication or facts of which the seller “could not be unaware” and, thus, seems to be identical to, or at least comes close to, the gross negligence standard.<sup>174</sup>

## 2. *Gross Negligence or More?—Stockholm, ICC and Russian Arbitral Awards*

Three arbitration awards have either dealt in detail with or taken an indirect stance on the knowledge test in CISG Article 40. *Firstly*, the arbitral award on CISG Article 40 rendered in 1998 by the Arbitration Institute of the Stockholm Chamber of Commerce in *Beijing Light Automobile Co. Ltd. v. Conell Ltd. Partnership* deserves special attention as the decision elaborated in detail on the object and purpose of Article 40 and specifically addressed the knowledge test “could not have been unaware.”<sup>175</sup> Moreover, the Stockholm award has in the doctrine been suggested to indicate a knowledge standard of more-than-gross negligence.

The case involved a U.S. seller that had contracted to design, construct, and deliver to a Chinese buyer a large 4000-ton rail press designed to make frame rails that would be used by the buyer in the manufacture of light trucks in a factory outside Beijing that produced approximately 50,000 trucks per year.<sup>176</sup> The parties communicated extensively for about one year before entering into the contract, which stipulated that the expensive rail press must be made “of the best materials with first class workmanship.”<sup>177</sup> During the construction of the rail press at the seller’s Chicago plant, the Chinese buyer sent engineers to the plant, but the buyer’s workforce did not take part in the assembly and installation of the parts of the rail press, which malfunctioned after nearly three years of use.<sup>178</sup> The seller built the rail press according to its own design, but during

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[hereinafter *Chemical substance case*] (“Diese Vorstellung mußte sich der Beklagten auch nicht aufdrängen.”).

<sup>174</sup> See *supra* Part IV.B.3 (discussing the interpretation of this language in CISG Article 35(3) by the OLG Koblenz in *Electricity generator case*).

<sup>175</sup> *Beijing Light Automobile Co. Ltd. v. Connell Ltd. P’ship*, *supra* note 161.

<sup>176</sup> *Id.* ¶ 4.

<sup>177</sup> *Id.*

<sup>178</sup> *Id.*

the construction process, the seller decided to replace an essential part (an A-5750 lock plate) with a different part (a P-52 lock plate) without notifying the buyer of the change or providing the buyer with any records or information regarding its installation.<sup>179</sup> The only indication of the changed part was that the new locking device was stamped “P-52.”<sup>180</sup> In the meantime, the buyer decided that after shipment and delivery of the rail press, the assembly and installation should be done by a third party under the agreed partial supervision of the U.S. seller.<sup>181</sup>

The Arbitral Tribunal found that there was a lack of conformity, noting that the seller, in constructing the new, custom-made, large-size rail press had replaced “a planned design intended for an important security function with a new device without ascertaining its performance or installation.”<sup>182</sup> The decisive question then became whether the buyer, whose notification of lack of conformity did not take place until the press broke down, a time lapse of over three years from the time of delivery, could claim remedies—that is, whether under CISG Article 40, the seller was precluded from claiming lack of timely notice under CISG Article 39 because it “knew or could not have been unaware of” the lack of conformity.<sup>183</sup> The Tribunal first reasoned on the general requirement of “awareness” in Article 40 CISG and, then, in the *ratio decidendi* went into a detailed discussion of its decision, as follows:

The doctrine on the issue of the seller’s awareness according to Article 40 also reflects the difficulty in reaching a common denominator for the qualification of the necessary “awareness” . . . . As a clear case of the requisite awareness has been mentioned a situation where the non-conformity has already resulted in accidents in similar or identical goods sold by the seller and been made known to him or to the relevant branch of the industry. But also in the absence of such relatively clear cases *awareness may be considered to be at hand if the facts relating to the non-conformity are easily apparent or detected.*

. . . .

These are the circumstances that in the Tribunal’s opinion distinguishes this case from the situation where a seller is generally “aware” that the goods

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<sup>179</sup> *Id.*

<sup>180</sup> *Id.*

<sup>181</sup> *Id.*

<sup>182</sup> *Id.* ¶ 6.3(b).

<sup>183</sup> *Id.*

manufactured in his ordinary course of business are not of the best quality or leave something to be desired. But that is not in itself enough to meet the test under Article 40. The requisite state of awareness that is *the threshold criterion for the application of Article 40 must in the Tribunal's opinion amount to at least a conscious disregard of facts that meet the eye and are of evident relevance to the non-conformity*.<sup>184</sup>

This reasoning in terms of “*disregard of facts that meet the eye*” does not seem to be any different from other descriptions of gross negligence in the sense of obvious facts relating to a non-conformity, which can be ignored only by gross negligence. The similarity of the Arbitral Tribunal’s reasoning with the formulation often-used by German courts in their decisions on the CISG “could not have been unaware” knowledge test in the sense of must obtrude or impose itself upon a party (*musste sich aufdrängen*) is striking. The difference is, that the Tribunal referred to the subjective element of “*conscious*,” which involves a lower degree of a subjective intent to disregard, similar to the statement of “*willful blindness to the obvious*” by the English High Court in the case *Kingspan v. Borealis*.<sup>185</sup> In the end, the language of the majority of the Arbitral Tribunal—“conscious disregard of facts that meet the eye and are of evident relevance”—is not clear in this regard. It could, less convincingly, be interpreted as meaning either *de facto* knowledge with a lightened burden of proof, or more-than-grossly negligent.<sup>186</sup> The Tribunal’s next statements can be understood as such,<sup>187</sup> but this interpretation can be countered by the fact *that* a knowledge test based on gross negligence to some extent also lightens the burden of proof, *that* the CISG is not at all concerned with the procedural law and the law of evidence, and that the reasoning of the minority on the application *in casu* of the knowledge test formula adopted by the Tribunal “awareness or conscious disregard” referred to “*a higher degree of subjective blameworthiness*” but not *de facto* awareness or intent:

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<sup>184</sup> *Id.* (emphasis added).

<sup>185</sup> *Kingspan Envtl. Ltd. v. Borealis A/S*, *supra* note 16.

<sup>186</sup> For this understanding see, *inter alia*, Schwenger, *supra* note 151, at 649; perhaps more cautiously in the sense of “similar” (“ähnlich”) see Magnus, *supra* note 151, at 503.

<sup>187</sup> *Beijing Light Automobile Co. Ltd. v. Connell Ltd. P'ship*, *supra* note 161, ¶ 6.3(b) (stating that CISG Article 40 “as phrased is intended to alleviate the burden of proof on the buyer in respect of the seller’s awareness, a burden that otherwise often would be impossible”).

My reading of the requirement for the seller's awareness is therefore more restrictive. *The test of awareness or "conscious disregard" on the part of the seller requires in my opinion a higher degree of subjective blameworthiness than the one demonstrated by [seller] in this instance by their not supplying installation instructions for the P-52 lockplate.*<sup>188</sup>

When one considers the Tribunal's introductory statements together with the final conclusive reasoning on the knowledge test in CISG Article 40 by the majority of the arbitrators, it appears, *firstly*, that the Tribunal did not assume a *de facto* knowledge test with a relaxed burden of proof; *secondly*, that the arbitrators instead discussed the seller's higher degree of negligence stemming from its awareness that proper installation of the substituted part was critical and that the buyer would be installing the part, and, therefore, of the possibility that the part would be installed incorrectly, with the inherent risk that incorrect installation would cause the failure of the rail press over time; and, *thirdly*, that the Tribunal stressed the fact that the U.S. seller "did not do anything."<sup>189</sup> In the view of the majority of arbitrators, the U.S. seller had acted negligently—in fact, grossly negligent—and had, moreover, not disclosed crucial information of which it could not have been unaware to the buyer. The minority view was also that the U.S. seller had acted highly negligent, but that the seller's actions were not grossly negligent to the extent required by CISG Article 40—that is, in the sense of "a higher degree of subjective blameworthiness than the one demonstrated by [seller] in this instance by their not supplying installation instructions . . . ."<sup>190</sup> From this, it should follow that both the majority and minority of the Tribunal were in agreement about a twofold knowledge test in CISG Article 40—a test of either awareness or "conscious disregard," the latter in the sense of a high degree of negligence (gross negligence).

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<sup>188</sup> *Id.* ¶ 8 (Romlöv, dissenting) (emphasis added).

<sup>189</sup> *Id.* ¶ 6.3(b) (regarding CISG Article 40: "What is relevant is that [seller] cannot have been unaware of the fact that proper installation was critical, the fact that the possibility of improper installation by [buyer] could not be ruled out, the fact that there was a clear risk that this could lead to serious failure of the Press within a period of time that certainly differed from what [buyer] was entitled to expect under the Contract, and that [seller] did not do anything to eliminate this risk. The Tribunal therefore concludes that [seller] must be assumed to have consciously disregarded apparent facts which were of evident relevance to the non-conformity and which, in fact, caused the failure of the Press.")

<sup>190</sup> *Id.* ¶ 8 (Romlöv, dissenting).

*Secondly*, the ICC Arbitration Court, in its 1999 award in *Coke case*, expressly addressed the knowledge standard in Article 40 CISG.<sup>191</sup> In this case, the Arbitral Tribunal, by virtue of having a choice between the two opposite opinions in the German doctrine (one favouring a gross negligence standard for the knowledge test and the other favouring a “more than grossly negligent” standard), found for a knowledge test based on gross negligence.<sup>192</sup> Even though the Tribunal makes several incorrect references to the Convention text, including references to CISG Article 8(1) and Article 40 as “knew or ought to have known,” the Tribunal’s stand on the issue is clear:

As a consequence it has to be examined whether any of the above mentioned exceptions to Art. 39 CISG are applicable; i.e. if Defendant knew or ought to have known the non conformity of the coke when it was handed over to Claimant, after inspection and loading and failed to disclose this fact to Claimant (Art. 40 CISG) or whether Claimant had a reasonable excuse for not duly notifying Defendant (Art. 44 CISG). *Art 40 CISG applies in case the seller was acting with intent or gross negligence.*<sup>193</sup>

*Thirdly*, the Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, in its 2006 decision, discussed not just knowledge but also negligence (presumably gross negligence) because the lack of conformity of the seller’s product could be clearly seen in certificates issued by the manufacturer.<sup>194</sup> The seller, therefore, either knew or could not have been unaware of the fact that a breach of the quality requirements under the contract followed directly from the certificate issued by the manufacturer.<sup>195</sup>

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<sup>191</sup> *Coke case*, *supra* note 19.

<sup>192</sup> *Id.* ¶ 3.

<sup>193</sup> *Id.* (emphasis added).

<sup>194</sup> The Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, Oct. 19, 2006, No. 53/2006, ¶ 3.5 (Russ. Fed’n), *available at* <http://cisgw3.law.pace.edu/cases/061019r1.html>.

<sup>195</sup> *Id.*



3. *Breach of Obligation and a Higher Degree of Negligence—The U.S. BP Oil International v. Empresa Estatal Petroleos de Ecuador and In re Siskiyou Evergreen, Inc. Cases*

There are only few decisions from the United States on the interpretation of the knowledge test under the CISG that give guidance on the U.S. approach. The two available decisions concern firstly the ordinary negligent standard (*culpa levis*) and secondly the interpretation of the disputed formulation “knew or could not have been unaware,” where the latter is compared and distinguished from the knowledge test adopted in the UCC in terms of “has reason to know.”

In the first, a decision by the Fifth Circuit Court of Appeals, on June 11, 2003, in *BP Oil International v. Empresa Estatal Petroleos de Ecuador*, the court rightly attributed to the buyer “ought to have known” knowledge of a third party to certify that the gum content in gasoline purchased from the seller was under the limit.<sup>196</sup> In its reasoning, the Fifth Circuit cited CISG Article 40 as providing an obligation for the U.S. seller to not deliver goods that the seller knew or had constructive knowledge were non-conforming goods at the time that the risk passed to the buyer (*in concreto* “passed over the ship’s rail”).<sup>197</sup>

Having appointed Saybolt to test the gasoline, [buyer] “ought to have discovered” the defect before the cargo left Texas. CISG art. 39(1). Permitting [buyer] now to distance itself from Saybolt’s test would negate the parties’ selection of CFR delivery and would undermine the key role that reliance plays in international sales agreements. *Nevertheless, [seller] could have breached the agreement if it provided goods that it “knew or could not have been unaware” were defective* when they “passed over the ship’s rail” and risk shifted to [buyer]. CISG art. 40.<sup>198</sup>

On the contrary, the effect of CISG Article 40 is not an agreed or default obligation on the seller, which can be breached and lead to the seller’s liability for the buyer’s remedies, *inter alia*, the liability to pay the buyer damages. The legal effect consists of a seller’s duty, in his or her own

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<sup>196</sup> *BP Oil Int’l Ltd. v. Empresa Estatal Petroleos de Ecuador*, 332 F.3d 333 (5th Cir. 2003), available at <http://cisgw3.law.pace.edu/cases/030611u1.html>.

<sup>197</sup> *Id.* at 338.

<sup>198</sup> *Id.* at 338 (emphasis added).

interest, to provide the buyer with information in good faith, and the direct legal consequence to the seller of not fulfilling this duty is the loss of its rights under the CISG—namely, the loss of the right to rely on the notice provisions to defend against the buyer’s claim of lack of conformity.

The United States Bankruptcy Court for the District of Oregon, in its 2004 decision *In re Siskiyou Evergreen, Inc.*, held that the CISG, according to CISG Article 1(1)(a), applied to a sale between a U.S. Christmas tree seller and a Mexican buyer and that conformity according to a contract specification had to be estimated based on a Christmas-tree grading system established by the United States Department of Agriculture (“USDA”), i.e., “delivery of plantation cut, USDA #1 or better trees.”<sup>199</sup> Because the U.S. seller was fully aware of the USDA’s uniform-quality standards for Christmas trees, the court found that the seller “could not have been unaware of” the fact that a significant number of the trees it had delivered did not meet those standards and that the constructive knowledge test of CISG Article 40 had therefore been satisfied:

The Convention relieves the buyer of the duty to give notice if the seller “could not have been unaware” of the non-conformity. CISG Art. 40. *Arguably, this language sets a lower standard of awareness than the phrase “his [has] reason to know” usually found in American law . . . .* However, the Debtor is chargeable with an understanding of the uniform standards for Christmas trees established by the USDA, and could not have been unaware that the quality of nearly half the trees its own employees harvested and shipped failed to meet those standards.<sup>200</sup>

By this reasoning, the court compared the standard of awareness according to the U.S. Uniform Commercial Code (“UCC”) and found that CISG Article 40 sets a lower standard (i.e., in the sense of a higher degree of negligence).<sup>201</sup> Hence, the court did not regard the CISG knowledge test “*could not have been unaware*” as *de facto* knowledge but as a normative standard of what a party with some higher degree of negligence has reason

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<sup>199</sup> *In re Siskiyou Evergreens, Inc.*, No. 02-66975-fra11, 2004 Bankr. LEXIS 1044, \*6 (D. Or. Mar. 29, 2004), available at <http://cisgw3.law.pace.edu/cases/040329u2.html>.

<sup>200</sup> *Id.* at \*17 (emphasis added). The phrase should be “has reason to know.” See U.C.C. § 1-202 (“(a) Subject to subsection (f), a person has ‘notice’ of a fact if the person: (1) Has actual knowledge of it; (2) Has received a notice or notification of it; or (3) From all the facts and circumstances known to the person at the time in question, *has reason to know* that it exists. (b) ‘Knowledge’ means actual knowledge. ‘Knows’ has a corresponding meaning.”) (emphasis added).

<sup>201</sup> *Id.*

to know (constructive knowledge). This reasoning is similar to *Julie George*, where the Danish court engaged in considerations of whether “such a degree of negligence” was present to make CISG Article 35(3) applicable.<sup>202</sup>

4. *An Obiter Dictum of at Least Negligence Constituting a Breach of Customary Care in Trade—2009 Israeli Supreme Court in Pamesa Ceramica v. Yisrael Mendelson Ltd.*

On March 17, 2009, the Israeli Supreme Court in *Pamesa Ceramica v. Yisrael Mendelson Ltd.* issued an extensive *obiter dictum* in which it discussed the interpretation of the language *aware or could not have been unaware of* in ULIS Article 40 (identical to that in CISG Article 40) and the provision’s mental element of the seller.<sup>203</sup> The Israeli Supreme Court went into an inquiry of what it saw as the main question: whether the formulation “could not have been unaware” means *de facto awareness* (or the equivalent) or a normative standard of negligence.<sup>204</sup>

In its interpretation of the text of ULIS Article 40, the Israeli Supreme Court found support for its *prima facie* understanding of a *de facto* knowledge test in the views of the Israeli legislator and the language used in the Israeli domestic Sales Law Section 16 that is based on ULIS Article 40—“*knew or should have known*”—which is more favourable to the seller.<sup>205</sup> From the adoption of the different wording it, according to the Israeli Supreme Court, “appear[ed] that the Israeli legislature also thought that the language of the Hague Convention [ULIS] does not require negligence, and therefore it adopted a different language.”<sup>206</sup>

As a result, in the opinion of the Israeli Supreme Court, the wording of ULIS Article 40 (CISG Article 40) *prima facie* points to *de facto* awareness.<sup>207</sup> This understanding, however, does not seem convincing from either the wording itself or the legislative history of the ULIS and the CISG. The Israeli Supreme Court therefore consulted doctrine and case law and

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<sup>202</sup> *Julie George v. Kristian Skovridder*, *supra* note 90.

<sup>203</sup> *Pamesa Ceramica v. Yisrael Mendelson Eng'g Technical Supply Ltd.*, *supra* note 14, ¶ 36.

<sup>204</sup> *Id.*

<sup>205</sup> *Id.* ¶ 35.

<sup>206</sup> *Id.* ¶ 37.

<sup>207</sup> *Id.*

found that this narrow construction of the text (“the textual restrictions”) points to a *prima facie de facto* awareness test had not been followed by scholars and case law.<sup>208</sup> After reviewing the entire range of views, in particular the reference to the verdict by the Arbitration Institute of the Stockholm Chamber of Commerce in *Beijing Light Automobile Co. Ltd. v. Connell Ltd. Partnership*,<sup>209</sup> the Israeli Supreme Court concluded in an *obiter dictum* that, for the purpose of deciding the case, a precise determination on the question of the mental element in the absence of actual awareness could be left open, and that “it is therefore sufficient to hold that even according to the opinions that give the broadest interpretation, art. 40 requires at least negligence that constitutes a breach of the customary care in trade.”<sup>210</sup>

#### *E. Follow-up European Case Law—Almost Consensus about a Gross Negligence Test*

A decision by the Austrian OLG Graz in 2001<sup>211</sup> and a Swiss decision from 2004<sup>212</sup> expressly refer to the gross negligence test in CISG Article 40 without discussing the dispute in doctrine or decisions in case law which might point to another interpretation. In 2004, the German Federal Supreme Court (BGH) and the German State Appeal Courts, OLG Celle and Hamm, likewise followed up on the earlier German OLG Munich 1998 decision<sup>213</sup>

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<sup>208</sup> *Id.* ¶ 38.

<sup>209</sup> *Beijing Light Automobile Co. Ltd. v. Connell Ltd. P’ship*, *supra* note 161.

<sup>210</sup> *Pamesa Ceramica v. Yisrael Mendelson Eng’g Technical Supply Ltd.*, *supra* note 14, ¶ 41 (emphasis added).

<sup>211</sup> Oberlandesgericht Graz [OLG] [Higher Regional Court of Graz] Jan. 24, 2001, No. 4 R 125/00k, 13 (Austria), available at <http://www.globalsaleslaw.org/content/api/cisg/urteile/800.pdf> (“Die Bestimmungen sind für die Beurteilung dieser Rechtssache maßgeblich, zumal die Voraussetzungen des Artikel 40 UNKR [CISG]—Schlechtgläubigkeit oder grobe Fahrlässigkeit des Verkäufers—nicht behauptet wurden.”) (emphasis added).

<sup>212</sup> Kantonsgericht Schaffhausen [Cantonal Court of Schaffhausen] Jan. 27, 2004, No. 11/1999/99, 13 (Switz.), available at <http://www.globalsaleslaw.org/content/api/cisg/urteile/960.pdf> [hereinafter *Model locomotives case*] (“Gemäss WKR [CISG] verliert der Käufer . . . sein Recht, sich auf die Vertragswidrigkeit der Ware zu berufen, wenn er seinen Untersuchungs- und Rügeobliegenheiten nicht nachkommt—es sei den, der Verkäufer habe den Mangel, aus dem der Käufer seine Rechte herleiten will, gekannt oder grobfahrlässig nicht gekannt (“über die er nicht in Unkenntnis sein konnte”); Art. 38 und 39, sowie 40 WKR.”) (emphasis added).

<sup>213</sup> *Cashmere clothing case*, *supra* note 169.

and decided in favour of a knowledge test based on gross negligence.<sup>214</sup> The Belgian Court of Appeal of Ghent, in its 2007 decision, also confirmed a gross negligence test in CISG Article 40 and, moreover, specified that the mere fact that goods are non-conforming is not in itself sufficient grounds to attribute to a seller *de facto* knowledge or grossly negligent unawareness of lack of conformity.<sup>215</sup> Furthermore, the Austrian Supreme Court (OGH) in 2012 referred to a content of a degree of negligence in CISG Article 40,<sup>216</sup> and subsequently in 2012 in *Austrian Paprika case*, directly referred to a gross negligence standard in its discussion of the burden of proof in CISG Article 40.<sup>217</sup> Finally, the BGH in 2014, in an *obiter dictum* regarding the knowledge test in Article 40, referred to the expression “*ins Auge springen müssen*” (must jump into the eyes) without qualifying the expression and without any reference to doctrine.<sup>218</sup> This formulation is

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<sup>214</sup> Bundesgerichtshof [BGH] June 30, 2004, NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 3181, 2004 (Ger.), available at <http://www.cisg-online.ch/content/api/cisg/urteile/847.pdf> [hereinafter *German paprika case*] (“*nicht in Unkenntnis sein konnte . . . damit erfaßt Art. 40 CISG auch Fälle grob fahrlässiger Unkenntnis*”); Oberlandesgericht Celle [OLG] [Higher Regional Court of Celle] Mar. 10, 2004, No. 7 U 147/03 (Ger.), available at <http://www.cisg-online.ch/content/api/cisg/urteile/824.pdf> (“*zumindest grob fahrlässig*”); Oberlandesgericht Hamm [OLG] [Higher Regional Court of Hamm] Apr. 2, 2009, No. 28 U 107/08 (Ger.), available at <http://www.cisg-online.ch/content/api/cisg/urteile/1978.pdf>.

<sup>215</sup> Dat-Schaub International a/s v. Kipeo Damaco N.V., Hof van Beroep, Gent [HvB] [Appeals Court of Gent Apr. 16, 2007, No. 2006/AR/477 (Belg.), available at <http://www.cisg-online.ch/content/api/cisg/urteile/1584.pdf> (“*Alhier wordt ofwel de kwade trouw in atte van de verkoper bedoeld, ofwel een grove nalatigheid in diens atte. Noch het een noch het ander wordt vermoed. De bewijslast is bij de koper. Uit de feitelijke elementen van de zaak volgt niet dat er sprake is van kwade trouw dan wel grove nalatigheid in hoofde van de geïntimeerde. De gebeurlijke aanwezigheid van veren in het vlees, is 'op zich' onvoldoende om te besluiten dat de verkoper ervan hiervan kennis had of grovelijk nalatig zou zijn geweest.*”) (emphasis added).

<sup>216</sup> *Umbrella case*, *supra* note 167.

<sup>217</sup> Oberster Gerichtshof [OGH] [Supreme Court] Feb. 14, 2012, No. 10 Ob 4/12d (Austria), available at <http://www.cisg-online.ch/content/api/cisg/urteile/2308.pdf> [hereinafter *Austrian paprika case*].

<sup>218</sup> Bundesgerichtshof [BGH] [Federal Court of Justice] Sept. 24, 2014, 202 ENTSCHIEDUNGEN DES BUNDESGERICHTSHOFES IN ZIVILSACHEN [BGHZ] 258 (Ger.), available at <http://www.globalsaleslaw.org/content/api/cisg/urteile/2545.pdf> (“*Hinsichtlich der Lieferung 40117 liege eine ordnungsgemäße Mängelrüge im Sinne des Art. 39 CISG vor. Im Übrigen könne dahinstehen, ob eine ordnungsgemäße Rüge erfolgt sei. Denn gemäß Art. 40 CISG sei auch eine nicht rechtzeitige oder nicht gehörige Mängelanzeige unschädlich, wenn der Verkäufer die Tatsachen, auf denen die Vertragswidrigkeit beruhe, gekannt habe oder darüber nicht in Unkenntnis habe sein können und diese dem Käufer nicht offenbart habe. So verhalte es sich im Streitfall. Der Klägerin hätten die vorhandenen Mängel “ins Auge springen” müssen, so dass sie hierüber nicht in Unkenntnis gewesen sein könne.*”) (emphasis added).

used in part of the CISG doctrine to indicate more-than-gross negligence.<sup>219</sup> Whether the BGH thereby wished to depart from its earlier case law, which consolidated the German view on the knowledge test in terms of a gross negligence standard, is doubtful. The Swiss Supreme Court held in 2015 that the formulation “could not be unaware of” (“*nicht in Unkenntnis sein konnte*”) in CISG Article 40 means situations, where the seller is unaware of an important and obvious lack of conformity which the seller by the exercise of superficial diligence would have known (“*oberflächlicher Sorgfalt auffallen mussten*”).<sup>220</sup>

In European case law, a clear majority consensus has been reached about a gross negligence knowledge test in CISG Article 40. Nevertheless, a few cases have raised doubts about the interpretation of the knowledge test under the CISG and some seem to depart from this interpretation of a gross negligence standard. In *Kingspan v. Borealis*, the English High Court of Justice cautiously advocated for a *de facto* knowledge test in CISG Article 40, admitting, however, that there is room for doubt about whether it actually is a gross negligence standard.<sup>221</sup> The German decision from OLG Zweibrücken in 2004,<sup>222</sup> the French potato seedling cases from Cour d’appel de Rouen in 2006<sup>223</sup> and Cour de Cassation in 2009,<sup>224</sup> and, moreover, in the most recent cases decided in 2014 by the Spanish Tribunal Supremo in *Red pepper powder case*,<sup>225</sup> and the French Cour de Cassation in *Christmas tree case*<sup>226</sup> all depart from the standard gross negligence test. These five cases will be discussed in turn.

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<sup>219</sup> See Schwenzler, *supra* note 151, at 594–95.

<sup>220</sup> Bundesgericht [Bger.] Apr. 2, 2015, No. 4A 614/2014 (Switz.), available at <http://www.globalsaleslaw.org/content/api/cisg/display.cfm?test=2592> (emphasis added).

<sup>221</sup> *Kingspan Envtl. Ltd. v. Borealis A/S*, *supra* note 16.

<sup>222</sup> Oberlandesgericht Zweibrücken [OLG] [Higher Regional Court of Zweibrücken] Feb. 2, 2004, No. 7 U 4/03 (Ger.), available at <http://www.cisg-online.ch/content/api/cisg/urteile/877.pdf> [hereinafter *Milling equipment case*].

<sup>223</sup> Cour d’appel de Rouen [CA] [Court of Appeal of Rouen] Dec. 19, 2006, No. 05/03275 (Fr.), available at <http://www.cisg-online.ch/content/api/cisg/urteile/1933.pdf> [hereinafter *Potato seedling case*].

<sup>224</sup> Cour de cassation [Cass.] [Supreme Court] Sept. 16, 2008, No. 07-11803; 07-12160 (Fr.), available at <http://www.cisg-online.ch/content/api/cisg/urteile/1851.pdf> [hereinafter *Potato seedling case appeal*].

<sup>225</sup> *Red pepper powder case*, *supra* note 16.

<sup>226</sup> *Christmas tree case*, *supra* note 16.

The first group of cases employs expressions indicating a high degree of negligence and raise the question whether a more-than-gross negligence standard is used. The 2004 decision by OLG Zweibrücken in *Milling equipment case* is important for the current dispute in the doctrine because the reasoning by the OLG Zweibrücken has been interpreted in German CISG doctrine as requiring an Article 40 knowledge test based on “more than gross negligence.”<sup>227</sup> Similarly, the BGH in its 2014 *obiter dictum* used the same expression as the OLG Zweibrücken.<sup>228</sup> *Milling equipment case* concerned a German seller’s delivery to an Iranian buyer of inferior goods of which the seller *de facto* knew regarding the main part of the delivery.<sup>229</sup> Regarding the delivery of twelve mills that were of Russian origin instead of German, however, the court could not reason that the seller had knowledge that a substitution was not in accordance with the contract and, thus, non-conforming.<sup>230</sup> Instead, the court, regarding the situation from the viewpoint of the seller, found that it was evident that there had not been a mistake in the delivery, that the seller had a right to resort to and deliver goods of another origin, and that there had not been any modification of the contract.<sup>231</sup> Therefore, the court held that the conditions in CISG Article 40 were only fulfilled “*wenn sich der Verkäufer sich über eine ins Auge springende Vertragswidrigkeit hinwegsetzt . . .*”<sup>232</sup> This reasoning has—as indicated—in the German doctrine not convincingly been interpreted as requiring a knowledge test in CISG Article 40 based on more-than-gross negligence.<sup>233</sup> This understanding of the reasoning is, however, not *expressis verbis* stated by the court, nor is there any

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<sup>227</sup> See Schwenzer, *supra* note 151, at 594–95; Magnus, *supra* note 151, at 503 (interpreting the decision as similar to such a test).

<sup>228</sup> Bundesgerichtshof [BGH] [Federal Court of Justice] Sept. 24, 2014, 202 ENTSCHEIDUNGEN DES BUNDESGERICHTSHOFES IN ZIVILSACHEN [BGHZ] 258 (Ger.), available at <http://www.globalsaleslaw.org/content/api/cisg/urteile/2545.pdf>.

<sup>229</sup> *Milling equipment case*, *supra* note 222. The German seller could not deliver the agreed quality products from a German manufacturer and, therefore, resorted to parts made by a Russian company and other “components” made by a Turkish company but did not disclose this to the buyer. *Id.* Moreover, some of these parts proved to have a lack of conformity. *Id.*

<sup>230</sup> *Id.*

<sup>231</sup> *Id.*

<sup>232</sup> *Id.* at 16 (“when the seller ignores a lack of conformity which jumps into the eyes”) (translation by author).

<sup>233</sup> See Schwenzer, *supra* note 151, at 649; Magnus, *supra* note 151, at 503 (stating the decision as similar (“ähnlich”) to more than gross negligence).



comparison to a different lower gross negligence standard or a reference to a lighter burden of proof as advocated by one part of the doctrine.

If one compares this wording of the reasoning by the OLG Zweibrücken with the previous verdict by the OLG Munich in *Cashmere clothing case* (“*augenfällige und gravierende Mängel ihrer Ware übersehen hat, die schon bei Anwendung einfachster Sorgfalt zu erkennen waren . . .*”)<sup>234</sup> and the OLG Koblenz in *Electricity generator case* (“*musste sich . . . nicht aufdrängen*”)<sup>235</sup> and, moreover, with the reasoning of the Stockholm Chamber of Commerce Arbitration Award in *Beijing Light Automobile Co. Ltd. v. Connell Ltd. Partnership* (“*disregard of facts that meet the eye and are of evident relevance to the non-conformity*”)<sup>236</sup> and of the English High Court in *Kingspan v. Borealis* (“*blindness to the obvious*”)<sup>237</sup> then the similarity is compelling. There does not seem to be any degree of difference between “*ins Auge springende*” (jumps into the eyes), “*augenfällig*” (obvious to the eye) and “*musste sich . . . nicht aufdrängen*” (must not obtrude or impose), German expressions which have been equated with gross negligence. These formulations all seem identical, or at least close, to a gross negligence standard. To conclude, it seems doubtful that there are convincing arguments or other elements of the OLG Zweibrücken decision that support an interpretation of the wording *ins Auge springende* (jumps into the eyes) as meaning “more-than-gross-negligence.”<sup>238</sup> The 2014 decision by the Spanish Tribunal Supremo in *Red pepper powder case* does not seem to fit into the existing body of case law as the court only referred to “negligence” without any indication of a higher degree thereof.<sup>239</sup> However, the court reasoned that red chilli powder was sold in a market that should have generated distrust of the purity thereof, that the appearance of colourants was not unusual, and the case arose at a time when the presence of illegal colourants in chilli powder had produced a “food crisis” in Europe,<sup>240</sup> a crisis which led to an intervention by the

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<sup>234</sup> *Cashmere clothing case*, *supra* note 169 (emphasis added).

<sup>235</sup> *Electricity generator case*, *supra* note 91 (emphasis added).

<sup>236</sup> *Beijing Light Automobile Co. Ltd. v. Connell Ltd. Partnership*, *supra* note 162 (emphasis added).

<sup>237</sup> *Kingspan Envtl. Ltd. v. Borealis A/S*, *supra* note 16.

<sup>238</sup> For a different view, see Schwenzer, *supra* note 151, at 649. See also Magnus, *supra* note 151, at 503.

<sup>239</sup> *Red pepper powder case*, *supra* note 16.

<sup>240</sup> *Id.*



European Union to warn and prohibit the use of illegal colourants for human consumption in different countries and in the European Union.<sup>241</sup> Thus, these facts seem to bring the decision in line with the gross negligence standard in order to eliminate the possibility that the seller could invoke the consequences of default by the buyer to give timely notice according to CISG Article 39.<sup>242</sup>

The next group of cases consists of decisions in which the courts' reasoning mentioned only the elements of bad faith in Article 40, in the sense of referencing the seller's knowledge of and non-disclosure of a lack of conformity without taking an express stance on the meaning of "could not have been unaware."<sup>243</sup> Although there are references in these cases to what the seller knew and whether there was a lack of conformity on the part of the seller, this does not imply that the decisions can be interpreted as requiring *de facto* knowledge coupled with non-disclosure in bad faith. Nevertheless, the wording and a literal understanding of the reasoning in the French decisions in the potato seedling cases of 2006<sup>244</sup> and 2008<sup>245</sup> and, moreover, the Cour de Cassation in the French *Christmas tree case*<sup>246</sup> do quite strongly suggest that CISG Article 40 in these decisions was interpreted as requiring *de facto* knowledge *and* non-disclosure of this knowledge in the sense of *mauvaise foi*.

In the French potato seedling cases a French buyer purchased from a Dutch seller (an agricultural cooperative) a large quantity of potato plants (twenty-five tons) grown from seed produced by a Dutch farmer.<sup>247</sup> The French buyer planted some of these plants and subsequently harvested the potatoes.<sup>248</sup> The Dutch farmer (the producer) had under public law an obligation to test its seeds as specified in Directive 77/93/EEC and these

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<sup>241</sup> *Id.*

<sup>242</sup> *Id.*

<sup>243</sup> See, e.g., Oberlandesgericht Koblenz [OLG] [Higher Regional Court of Koblenz] June 3, 2013, No. 2 U 50/12 (Ger.), available at <http://www.globalsaleslaw.org/content/api/cisg/urteile/2469.pdf> ("Dies könnte gemäß Art. 40 CISG zunächst bei Bösgläubigkeit des Verkäufers der Fall sein, wenn nämlich die Vertragswidrigkeit auf Tatsachen beruht, die der Verkäufer kannte oder über die er nicht in Unkenntnis sein konnte und die er dem Käufer nicht offenbart hat.").

<sup>244</sup> *Potato seedling case*, *supra* note 223.

<sup>245</sup> *Potato seedling case appeal*, *supra* note 224.

<sup>246</sup> *Christmas tree case*, *supra* note 16.

<sup>247</sup> *Potato seedling case*, *supra* note 223.

<sup>248</sup> *Id.*

tests, *de facto*, had been conducted with a negative result.<sup>249</sup> Nevertheless, it turned out that part of the crop of potatoes harvested and resold by the French buyer developed the bacterial disease *ralstonia solanacearum* (known as “brown rot”), that the area of the Dutch farmer’s land where the potato seeds and plants were produced was in fact contaminated with brown rot bacteria, and that, according to an expert, the only possible source of the contamination of the potatoes grown by the French buyer was the potato plants delivered by the Dutch seller.<sup>250</sup> The French buyer and its sub-buyers filed a number of claims against the Dutch seller with the court of first instance in Rouen, two of which went on appeal to the Cour d’appel de Rouen in 2006 in *Potato seedling case* and Cour de Cassation in 2009 in *Potato seedling case appeal*.

The Cour d’appel de Rouen in 2006 and Cour de Cassation in 2009 both took a restrictive approach to CISG Article 40 and seem to have interpreted a bad faith requirement into the provision of Article 40, *stricto sensu*, and held that the seller must have had knowledge of the non-conformity and concealed the non-conformity from the buyer.<sup>251</sup> This becomes particularly clear in the reasoning of the courts:

Attendu que l’article 40 de la Convention de VIENNE prévoit que le vendeur ne peut se prévaloir des dispositions des articles 38 et 39 . . . lorsque le défaut de conformité (ou le vice caché) porte sur des faits *qu’il connaissait* et qu’il n’a pas révélés à l’acheteur; Attendu qu’en l’espèce, dès lors que les plants litigieux bénéficiaient d’un certificat attestant de la négativité des tests, il ne peut être soutenu par [the buyer] que [the seller] *lui aurait dissimulé un défaut de conformité* qu’elle ignorait, . . . que le fait que les plants aient été élevés dans une zone atteinte par la pourriture brune *ne peut par lui-même constituer la dissimulation visée par l’article 40 précité* . . .<sup>252</sup>

[Q]ue l’article 40 de la Convention de Vienne sur la vente internationale de marchandises exclut que le vendeur puisse se prévaloir du défaut de dénonciation par l’acheteur du défaut de conformité, dans les deux ans, si le vendeur *connaissait le risque de défaut et ne le lui a pas signalé*; que dès lors en

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<sup>249</sup> *Id.*

<sup>250</sup> *Id.*

<sup>251</sup> *Id.*; *Potato seedling case appeal*, *supra* note 224. See also Sylvaine Poillot-Peruzzetto, *French Perspective of the CISG*, in *INTERNATIONAL SALES LAW: A GLOBAL CHALLENGE* 338, 348 (Larry A. DiMatteo ed., 2014) (interpreting the Cour de Cassation decision as containing “no indication of bad faith on the part of the seller.”).

<sup>252</sup> *Potato seedling case*, *supra* note 223, at 22 (emphasis added).

l'espèce en ne recherchant pas si la société Agrico *connaissait* le risque de contamination de la production de M. S. . . . malgré un test négatif, la cour d'appel a privé sa décision de base légale au regard de l'article 40 de la Convention de Vienne.<sup>253</sup>

These interpretations of CISG Article 40 requiring bad faith *stricto sensu* would indeed be directly contrary to the wording of the provision, the legislative history, the doctrine, and the vast majority of CISG case law. At best, the French decisions in the *potato seedling cases* and in other similar decisions should be understood, or narrowed down to an understanding, that the only CISG Article 40 issue discussed by the courts (i.e., the only issue pleaded by the parties) was the term “knew” and subsequent non-disclosure, and that the courts did not mention the language “could not have been unaware of” and thus tacitly left its interpretation open. However, the Cour de Cassation has unfortunately in *Christmas tree case* between a Danish seller (Monsieur Y) and a French buyer (Monsieur X) maintained a bad faith requirement *stricto sensu* regarding CISG Article 40 with the following wording:

[Q]ue l'article 40 de la convention de Vienne fait cependant échec aux deux dispositions précédentes lorsque le défaut de conformité porte sur des faits *que le vendeur connaissait ou ne pouvait ignorer et qu'il n'a pas révélé à l'acheteur*; que Monsieur X n'apporte aucun élément probant permettant d'affirmer que Monsieur Y connaissait les défauts de conformité et qu'il s'est abstenu de les lui révéler avant le 12 décembre 2005 . . . *que dans ces conditions, aucune mauvaise foi du vendeur n'est démontrée*, que l'article 40 de la convention ne permet donc pas de faire échec à l'exigence de délai raisonnable posée par l'article 39.<sup>254</sup>

#### VI. CONCLUSION ON THE CISG KNOWLEDGE TEST—A THREE TEST STANDARD OF *CULPA LEVIS*, *CULPA LATA* AND *DE FACTO* KNOWLEDGE

The foregoing thorough analysis of the content of the knowledge test under the CISG, including the wording, purpose, and intent (to the extent it is possible to deduce the purpose and intent from the long legislative history and statements in CISG doctrine) and a detailed interpretation of the CISG case law on the seller's knowledge in CISG Article 35(3), compared with

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<sup>253</sup> *Potato seedling case appeal*, *supra* note 224, at 2 (emphasis added).

<sup>254</sup> *Christmas tree case*, *supra* note 16, at 4–5 (emphasis added).

the case law on the equivalent provision in CISG Article 40, leads to an understanding that the formulation “knew or could not have been unaware” means the *de facto* knowledge or grossly negligent unawareness of evident facts relating to a specific lack of conformity. Based on an analysis of the legislative history, comparative research, doctrine and case law, it can be concluded that there is prevailing support for a constructive knowledge test under the CISG based on two degrees of negligence: a degree of simple or ordinary negligence (*culpa levis*) and one of gross negligence (*culpa lata*). The dispute about the CISG knowledge test centres on the formulation “could not have been unaware.” There is no agreement in doctrine and case law.<sup>255</sup> A minor part of the doctrine argues for an overall simple negligence test (*culpa levis*). A stronger view in the doctrine supports a “more than gross negligence” test (more than *culpa lata*) or *de facto* knowledge with a relaxed burden of proof concerning the formula “knew or could not have been unaware” (a form of willful blindness or conscious disregard in the sense of a lower degree of subjective intent comparable with *dolus eventualis*).<sup>256</sup> Finally, some cases regarding this formula seem to require an act of bad faith in the sense of knowledge and non-disclosure (a form comparable with *dolus directus or indirectus*) under both CISG Articles 35(3) and 40. These interpretations are nonetheless difficult to maintain in light of (1) the wording of the threefold knowledge test in the CISG, (2) the quite clear support in the legislative history for a gross negligent standard—from Rabel’s drafts of the negotiations on the ULIS at the 1964 Diplomatic Conference in the Hague to the 1980 Vienna Conference on the CISG, (3) the prevailing view in doctrine supporting a higher degree of negligence than simple (ordinary) *culpa*—and (4) the view in the vast majority of case law for a gross negligence knowledge test under these CISG provisions.

The analysis does also bring another important factor to light as it demonstrates the danger of using an undefined concept for the purpose of

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<sup>255</sup> See *Austrian paprika case*, *supra* note 217, at 12 (“Es besteht weitgehende Einigkeit darüber, dass die Formulierung “nicht in Unkenntnis sein konnte” mit grob fahrlässiger Unkenntnis gleichzusetzen ist . . .”).

<sup>256</sup> See Von Ulrich Huber, *Der UNCITRAL-Entwurf Eines Übereinkommens Über Internationale Warenkaufverträge*, in 43 RABELS ZEITSCHRIFT FÜR AUSLÄNDISCHES UND INTERNATIONALES PRIVATRECHT 413, 479, 482 (1979) for a more-than-gross-negligence test (“[D]as ist mehr als ‘grob Fahrlässigkeit’ im Sinn unseres . . .”). See also Schwenzler, *supra* note 151, at 594–95. For a *de facto* knowledge test with a relaxed burden of proof see Lookofsky, *supra* note 47.

the harmonization and unification of commercial law. Despite the fact that the doctrine on the CISG is divided into three major positions: (1) a gross negligence test, (2) a more-than-gross-negligence test, and (3) a *de facto* knowledge test with a relaxed burden of proof, the convincing interpretation of the knowledge test under the CISG is that the term *could not have been unaware* refers to a higher degree of negligence—a gross negligence standard.

From an analytical point of view, it is possible to put forward several arguments to support the view that this knowledge test is based on simple and grossly negligent unawareness standards. But, it is also possible to make a few counter-arguments against the gross negligent standard, which must be mitigated as much as possible. The most important pros and cons are the following.

#### *A. Pros of a Gross Negligence Standard*

*Firstly and foremost*, this threefold distinction does express the well-balanced CISG sales law regime by supporting the underlying *caveat venditor* principle of the CISG, which confers on the seller a default obligation to deliver conforming goods fit for ordinary use, and expresses a buyer-friendly limited *caveat emptor* rule based on the absence of a buyer's duty to make a pre-contractual inspection of the goods but still strictly requiring the buyer's inspection after delivery and notice of lack of conformity. The buyer-friendly *caveat emptor* provision in CISG Article 35(3) underlining the *caveat venditor* principle of the CISG conformity rules must, under the design of the CISG regime, be counterbalanced with the seller-friendly provision of CISG Article 40, under which the seller only in exceptional cases is excluded from relying on the legal certainty established by the strict notice requirements for lack of conformity. Moreover, the gross negligence standard supports the important CISG contract formation principle of "meeting of the minds," which requires that the subjective intention of one party must be clearly shared by the other contracting party in terms that the other party is aware of what the intention is or by minimal (less) diligence would have been aware. Only if the other party was grossly negligent (ignorant) of what the intention of the other party was, he or she will be bound thereby. This ensures clarity and certainty regarding contract formation.

*Secondly*, a gross negligence standard does not involve any deviation from the wording of the CISG. On the contrary, there is a construction, which is supported by an intended distinction between “knowledge” and “constructive knowledge,” based on three different knowledge tests as underlying principles on which the Convention is based. In the CISG provisions, these three tests are most often expressed as “knew,” “could not have been unaware of,” and “ought to have known.” There is no support in the wording for the interpretation that the formulation “knew or could not have been unaware” refers only to *de facto* knowledge. Moreover, nothing in the wording indicates that the question of the level of the burden of proof, or any other question of the law of evidence, is regulated by the Convention. On the contrary, the procedural law of evidence, including an estimation of whether a burden of proof placed on a particular party by substantive rules in the CISG has been demonstrated sufficiently, is not governed by the CISG and is thus left to the procedural law of the *lex fori*.

*Thirdly*, on this single CISG issue, the legislative history and the *travaux préparatoires* of both the 1964 Diplomatic Conference on the ULIS and of the CISG are, with rare exception, quite consistent and unambiguous. The *travaux préparatoires* provide evidence that the object and purpose was to describe a standard for the knowledge test that is more than simple negligence (*culpa levis*) but less than *de facto* knowledge—a concept of gross negligence well-known since Roman times in many national legal systems and unknown in few jurisdictions. The gross negligence standard (*culpa lata*) was confirmed by the choice of the wording *could not have been unaware* or *ne pouvait ignorer* (could not ignore), which was thought to be different from the normal phrases of simple (ordinary) negligence (*culpa levis*). The *travaux préparatoires* of CISG Article 35(3) and 8(1) are particularly significant in that proposals (made both before and during the 1980 Vienna Diplomatic Conference) to require either *de facto* knowledge or simple negligence were not adopted.<sup>257</sup> The formulation *could not have been unaware of* was maintained as a middle approach between the two—a certain higher degree of negligence.

*Fourthly*, the meaning of “more than gross negligence” seems difficult to grasp and to define. Making a clear distinction between simple and gross

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<sup>257</sup> See *supra* Part III.

negligence and “more than gross negligence” is difficult to do in practice and is, equally, a theoretical challenge. Such a new fourfold distinction would not make global sales law any simpler and would be a novelty, as it was not addressed in the making of the ULIS or the CISG.

*Finally*, an interpretation in favour of a *de facto* knowledge test with a relaxed burden of proof would force the CISG to enter into alien territory of the law of evidence in the *lex fori* and in domestic procedural law, which could lead to a non-uniform interpretation and application, and, in addition, overstep the borderline between issues governed and harmonized by the CISG and issues not governed by the CISG and left to domestic law.

### *B. Cons of a Gross Negligence Standard and Their Mitigation*

There are only few cons concerning the use of the concept of gross negligence, but they are important, two of which are mentioned below, together with remarks on how these drawbacks can be mitigated. *First*, the CISG text does not include a definition of the knowledge test, nor did the CISG adopt a revised ULIS Article 13 that addressed the issue. This makes interpreting the CISG knowledge test difficult, and the uncertainties must be resolved through uniform interpretation and the development of the underlying CISG principles.

*Second*, it may be difficult to formulate and translate a gross negligence concept, a standard which—although known since Roman law—may be unknown to a number of domestic legal systems, where the civil law is based on the concepts of *de facto* knowledge, i.e., “knew,” or of simple negligence in the sense of “ought to have known” and similar formulations or where in civil law different concepts and expressions are used to indicate a higher degree of negligence.

Regarding the harmonization the CISG has achieved, these two counterarguments may mean that it will be difficult to develop a uniform global understanding and definition of gross negligence (*culpa lata*). That this is a challenge can be seen in the various formulations and terms that have been used in the case law for CISG Articles 35(3) and 40 to describe the mental requirement of the concept. From this, it follows that guidelines on the meaning and a definition of the gross negligence standard are needed.



### C. Guidance on and Definition of a Gross Negligence Standard

On the assumption that the term *could not have been unaware* in CISG Articles 8(1), 35(3), 40, and 42(2) expresses a grossly negligent unawareness standard (*culpa lata*), the content of this standard must be defined, or at least described, using guidelines that are as clear as possible. Both the preamble of the CISG and Article 7(1) stipulate that in interpreting the text “regard is to be had to its international character and to the need to promote uniformity.” From this, the doctrine and case law have convincingly deduced a demand for a uniform and autonomous interpretation which is, in principle, independent from domestic law.

The demand for an autonomous interpretation does, however, have a limitation. If it can be established that a legal concept in the CISG was intentionally adopted by the CISG drafters and that it, thus, derives from one or more domestic legal systems, then, in the understanding and interpretation of specific provisions of the CISG, it is permissible to take such concepts, as understood in those particular domestic laws, into account.<sup>258</sup> With the evident and clear legislative history, as outlined in Rabel’s comparative work (referring to German and Swiss law and partly to Scandinavian law regarding the gross negligence test in the *caveat emptor* rule),<sup>259</sup> and with the earlier drafts of the negotiations in the Hague, which, after the intervention of the German delegation, led to the adoption of the gross negligence standard in ULIS Article 36 (a result that remains unchanged in the CISG), there is sufficient justification—if justification is needed—to seek some guidance in German domestic sales law and Nordic domestic sales law.<sup>260</sup> Here, the gross negligence standard is used in civil law in, *inter alia*, German law sales law (§ 442 BGB), property law (§ 932 BGB), and insurance law,<sup>261</sup> and Danish law (*inter alia* SGA, *købeloven*, which, however, provides for a qualified gross negligence standard in § 53

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<sup>258</sup> See Magnus, *supra* note 151, at 191.

<sup>259</sup> RABEL, *supra* note 48, at 173.

<sup>260</sup> See Magnus, *supra* note 151, at 191. See also Stumpf, *supra* note 59, at 280 (discussing the interpretation of ULIS Article 36).

<sup>261</sup> See Bürgerliches Gesetzbuch [Civil Code] Nov. 23, 2007, Versicherungsvertragsgesetz [VVG], as amended, § 28(2) (Ger.) (“[G]rob fahrlässigen Verletzung der Obliegenheit . . .”) (emphasis added).



SGA).<sup>262</sup> First and foremost, case law on the CISG should be consulted in order to develop the necessary guidelines on the meaning and definition of the gross negligence standard as an underlying principle of the CISG.

### *1. Object and Purpose of a Higher Degree of Negligence*

It follows from the object and purpose of the use of the language *could not have been unaware* in CISG Articles 8(1), 35(3), 40, and 42(2) (in the sense of a gross negligence standard) that the aim is to set a higher bar for the constructive knowledge of a party in order to (1) ascertain that the parties actually share a common intent (under CISG Article 8(1), one party's subjective intent which with a high likelihood is shared by the other party), (2) provide for a buyer-friendly provision (under the *caveat emptor* rules of CISG Articles 35(3) and 42) that does not impose on the buyer a duty to make a pre-contractual inspection of the goods,<sup>263</sup> or (3) establish a seller-friendly provision by limiting the situations in which a seller may be precluded from relying on the important certainty of the requirements for timely notice of lack of conformity.

### *2. The Lower and Upper Threshold for Gross Negligence*

The spectrum of a constructive knowledge test based on gross negligence can be defined as follows: on one end of the spectrum is the lower threshold in which a party (a *bonus pater familia* reasonable person) not only has or ought to have had knowledge of, *inter alia*, the specific lack of conformity but also, because of evident, obvious, and striking facts, simply must have seen, could not ignore, or could not be unaware thereof by the conduct of less diligence.<sup>264</sup> It is not a degree of diligence, which a

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<sup>262</sup> See Danish legislation, *supra* note 6.

<sup>263</sup> See RABEL, *supra* note 48, at 173 (“[N]ur grobfahrlässige Unkenntnis wird dieser Kenntnis gleichgestellt. Hier braucht der Käufer nicht vor Kaufabschluß zu untersuchen.”).

<sup>264</sup> *In re Siskiyou Evergreens, Inc.*, No. 02-66975-fra11, 2004 Bankr. LEXIS 1044, \*17 (D. Or. Mar. 29, 2004) (“[S]ets a lower standard of awareness than the phrase ‘[has] reason to know’ . . .”). See also Tracy v. Wood, 24 F. Cas. 117, 118 (C.C.D. R.I. 1822) (No. 14,130) (distinguishing between simple and gross negligence); Bundesgerichtshof [BGH] [Federal Court of Justice] May 11, 1953, No. IV ZR 170/52 (Ger.), available at [https://www.jurion.de/Urteile/BGH/1953-05-11/IV-ZR-170\\_52](https://www.jurion.de/Urteile/BGH/1953-05-11/IV-ZR-170_52) (regarding § 932 BGB and emphasizing that the assessment of gross negligence depends on the concrete circumstances and whether the violation of normal care seems particularly coarse and gross: “ob nach

very prudent or prudent business man usually takes but a lack of the care, which business men of common sense, however inattentive, usually take, or ought to be presumed to take, for that is—in the words of Justice Story—gross negligence.<sup>265</sup>

On the other end of the spectrum is in practice the upper threshold, the point at which *de facto* knowledge of the specific lack of conformity has not been proven as required by the applicable domestic procedural law on evidence or admitted, but where the absence of knowledge is so unlikely that this is due to an intentional conduct not to show diligence at all. Such presumed intentional ignorance can in practice be seen as an upper threshold of a gross negligent standard, which in case law has been described as “conscious disregard”<sup>266</sup> or “willful blindness to the obvious”<sup>267</sup> and referred to as more-than-gross negligence in doctrine. This presumed intentional ignorance or even *de facto* knowledge and non-disclosure (bad faith) is, however, not a requirement for gross negligence.

### 3. Content and Expressions of Gross Negligence

A grossly negligent unawareness of a specific lack of conformity of goods can arguably be said to be present when a party, even in the presence of evident, obvious, and striking facts relating to the lack of conformity, has not seen or become aware of the non-conformity.<sup>268</sup> Multiple suitable

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der Gesamtlage der Umstände die Sorgfaltverletzung *als besondere schwer* erscheint . . .”) (emphasis added).

<sup>265</sup> Tracy v. Wood, 24 F. Cas. 117 (C.C.D. R.I. 1822) (No. 14,130) (Story, C.J.).

<sup>266</sup> See *Beijing Light Automobile Co. Ltd. v. Connell Ltd. P'ship*, *supra* note 161.

<sup>267</sup> See *Kingspan Envtl. Ltd. v. Borealis A/S*, *supra* note 16.

<sup>268</sup> See the definition of the domestic concept of gross negligence developed in German case law and the leading decision of the BGH from May 11, 1953, *supra* note 264, in a case concerning an acquisition in good faith (gutgläubiger Erwerb in § 932 BGB): “Der Begriff der groben Fahrlässigkeit als solcher ist . . . ein Rechtsbegriff . . . Was grobe Fahrlässigkeit ist, sagt das Gesetz nicht. Die Rechtsprechung versteht darunter im allgemeinen ein Handeln, bei dem *die erforderliche Sorgfalt nach den gesamten Umständen in ungewöhnlichen großen Maße verletzt* worden ist und bei dem *dasjenige unbeachtet geblieben ist, was im gegebenen Falle jedem hätte einleuchten müssen . . .*” (emphasis added). See Bundesgerichtshof [BGH] [Federal Court of Justice] Jan. 29, 2003, No. IV ZR 173/01 (Ger.), available at <http://openjur.de/u/66087.html> (following the rationale from the BGH 1952 decision); Bundesgerichtshof [BGH] [Federal Court of Justice] July 11, 2007, No. XII ZR 197/05 (Ger.), available at <http://openjur.de/u/77120.html> (same). The BGH has in its case law since 1966, moreover, found that the concept of gross negligence in German civil law in order to achieve legal certainty is in principle a uniform concept. See [BGH], No. IV ZR 173/01 (“Nach ständiger

wordings to express such blatant facts are possible and are often employed—as evidenced in the CISG case law. Some continental European courts that are familiar with the concept of gross negligence in their domestic law tend, however, to expressly refer to this standard.<sup>269</sup> In other courts' decisions, alternative formulations are used, presumably because the text of the Convention itself does not *expressis verbis* refer to gross negligence or define the concept.<sup>270</sup> A few decisions refer to the gross negligence standard first and thereafter also make use of more illustrative alternative language such as “must fall into the eye.”<sup>271</sup>

What all these alternative formulations have in common is that they do not refer to the normal simple (ordinary) negligence standard (in the sense of what a reasonable person in the same circumstances would or ought to have known) but, instead, add to this test and indicate a higher degree of negligence by requiring more than simple negligence (*culpa levis*)—which in the Roman law is referred to as *culpa lata*, in common law as “gross negligence” and in German/Nordic law as “*grobe Fahrlässigkeit*” and “*grov uagtsomhed*.” To read these alternative illustrative formulations as indicating a different degree of negligence than gross negligence (in the sense of “more than gross negligence”) or a *de facto* knowledge test under the CISG is not convincing. On the contrary, the formulations *ins Auge*

Rechtsprechung der Zivilsenate des [BGH] wird der Rechtsbegriff der groben Fahrlässigkeit grundsätzlich einheitlich bestimmt . . . . An diesem Grundsatz ist schon aus Gründen der Rechtssicherheit festzuhalten.”); see also [BGH], No. XII ZR 197/05.

<sup>269</sup> See, e.g., *Used Mercedes Benz case*, *supra* note 86, ¶ 2 (“[G]rob fahrlässig unwissende . . . .”) (emphasis added); *Clay case* OLG, *supra* note 114.

<sup>270</sup> For formulations regarding CISG Article 35(3) see *Electricity generator case*, *supra* note 91, at 4 (“musste . . . nicht aufdrängen”); *Julie George v. Kristian Skovridder*, *supra* note 90 (“[S]uch a degree of negligence . . . .”) (emphasis added); *RJ & AM Smallmon v. Transp. Sales Ltd.*, *supra* note 88 (“[F]or them (and anyone else) to see . . . .”) (emphasis added). For formulations regarding CISG Article 40 see *Cashmere clothing case*, *supra* note 169 (“[A]ugenfällige und gravierende Mängel ihrer Ware übersehen hat, die schon bei Anwendung einfachster Sorgfalt zu erkennen waren . . . .”) (emphasis added); Oberlandesgericht Koblenz [OLG] [Higher Regional Court of Koblenz] Sept. 11, 1998, No. 2 U 580/96 (Ger.) (“Diese Vorstellung mußte sich der Beklagten auch nicht aufdrängen.”) (emphasis added); *Beijing Light Automobile Co. Ltd. v. Connell Ltd. P’ship*, *supra* note 161 (“[A] conscious disregard of facts that meet the eyes . . . .”) (emphasis added); *Milling equipment case*, *supra* note 222 (“[I]ns Auge springende Vertragswidrigkeit hinwegsetzt.”) (emphasis added).

<sup>271</sup> See Oberlandesgericht Hamm [OLG] [Higher Regional Court of Hamm] Apr. 2, 2009, No. 28 U 107/08 (Ger.), available at <http://www.cisg-online.ch/content/api/cisg/urteile/1978.pdf> (“Dass dem Beklagten diese Mängel nicht unbekannt geblieben sein konnten, was zumindest grobe Fahrlässigkeit verlangt . . . lässt sich auch nicht feststellen. Der Kläger behauptet nicht, dass es sich um Mängel handelt, die bei einer bloßen Sichtprüfung hätten *ins Auge fallen müssen*.”) (emphasis added).

*springende* or *le défaut saute aux yeux* (jumps into the eye);<sup>272</sup> *ins Auge fallen* (falls into the eye); *augenfällig* (obvious to the eye); *for them (and anyone else) to see; facts that meet the eye*, or other imaginable formulations are quite similar.<sup>273</sup>

The spectrum of expressions is manifold and will continue to develop as such in the future. Therefore, it is strongly recommended that the undefined wording “could not be unaware of” in the CISG is expressly referred to as an autonomous uniform “gross negligence” concept.

#### 4. The Objective Basis of the Gross Negligence Test

The final question to be considered is whether the basis of the gross negligence test is an objective or a subjective standard. The doctrine on the CISG addresses the issue only rarely.<sup>274</sup> The German commentary on the ULIS took a stand in the comments on ULIS Article 36 and argued, in line with German domestic law, that gross negligence could not be a purely objective standard.<sup>275</sup> During the 1980 Diplomatic Conference on the CISG, Canada’s proposed rewording of Article 33 was partly based on the concern that the knowledge test in the *caveat emptor* rule *knew or could not be unaware* appeared to be subjective and on the belief that the test should be objective.<sup>276</sup> In the author’s opinion, there are convincing arguments to

<sup>272</sup> KARL HEINZ NEUMAYER ET AL., CONVENTION DE VIENNE SUR LES CONTRATS DE VENTE INTERNATIONALE DE MARCHANDISES: COMMENTAIRE 285 (1993).

<sup>273</sup> See generally Bundesgerichtshof [BGH] [Federal Court of Justice] May 11, 1952, No. IV ZR 170/52 (Ger.) (describing gross negligence as “jedem hätte einleuchten müssen”); Østre Landsretsdom [ØLD] [Danish Eastern Court of Appeal] Dec. 16, 1949, UGESKRIFT FOR RETSVÆSEN [UfR] 1941.416, 419 [Den.] (regarding § 53 of the Sale of Goods Act: “conspicuous even by a superficial inspection”—“*iøjnefaldende selv ved en flygtig Besigtigelse*”); Højesteret [Danish Supreme Court] Jan. 11, 1961, UGESKRIFT FOR RETSVÆSEN [UfR] 1961.160, 164 (Den.) (regarding § 5 of the Real Estate Registration Act: “must have been clear . . . with all likelihood—“*måtte det have stået . . . klart, . . . efter al sandsynlighed . . .*”); Vestre Landsretsdom [VLD] [Danish Western Court of Appeal] Sept. 19, 2001, UGESKRIFT FOR RETSVÆSEN [UfR] 2001.2552, 2555 (Den.) (“[C]learly must realize”—“*klart måtte indse*”).

<sup>274</sup> See Schwenzler, *supra* note 151, at 595.

<sup>275</sup> See Stumpf, *supra* note 59, at 280 (referencing German domestic law and § 277 BGB [German Civil Code] “Im Gegensatz zur gewöhnlichen Fahrlässigkeit (Art. 13) ist der Maßstab bei der Bestimmung der groben Fahrlässigkeit **kein rein objektiver.**”) (emphasis in original).

<sup>276</sup> *Official Record*, *supra* note 68, at 308 (“The ascribed knowledge of defects should be based on an objective standard, not a subjective one. The Canadian amendment would have introduced that element of objectivity.”). See also HONNOLD, *supra* note 65, at 398.

support the view that both simple and gross negligence under the CISG are objective knowledge tests.

*Firstly*, the assessment and standards of the CISG are generally regarded as objective standards,<sup>277</sup> which support a uniform and autonomous interpretation of the convention and leads to a more predictable and certain application of the CISG. *Secondly*, subjective standards are difficult to administer in practice and thus create uncertainty. The argument put forward in favour of a partly subjective test is that the expertise of a party needs to be taken into account.<sup>278</sup> This argument is convincing to the extent that the seller or buyer may be such an expert on the goods such that he or she can readily determine if the goods delivered or received are defective or substandard, or an intermediate trader rapidly reselling or buying the goods on the market with less or no detailed knowledge of the quality or professional expertise to assess the quality of the goods. However, the objective knowledge test specifically evaluates the knowledge of a reasonable businessman in the same position and with the same professional skills. Thus, there are no convincing reasons to deviate from the usual objective standards under the CISG—although such a deviation is supported by some domestic laws.<sup>279</sup> This would force the courts applying the CISG to investigate a party's mind, subjective weakness, and mental state and does not seem recommendable in a commercial CISG setting. Just as the simple negligence test is based on the behaviour of a reasonable man in the same situation (a *bonus pater familias* figure), the gross negligence test is equally capable of being based on an

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<sup>277</sup> See Magnus, *supra* note 151, at 210 (“Die objektive Sichtweise, . . . , ist darüber hinaus durchgehend für die gesamte Konvention zugrunde zu legen . . . .”) (emphasis in original); *id.* at 333 (“**Interessenbewertung auf objektiver Grundlage**”) (emphasis in original); *id.* at 854.

<sup>278</sup> Schwenzer, *supra* note 151, at 595.

<sup>279</sup> Bundesgerichtshof [BGH] [Federal Court of Justice] May 11, 1953, No. IV ZR 170/52 (Ger.) (“[H]ierbei sind auch subjektive in der Individualität des Handelnden begründete Umstände zu berücksichtigen . . . .”). See also Bundesgerichtshof [BGH] [Federal Court of Justice] July 8, 1992, No. IV ZR 223/91 (Ger.), available at [https://www.jurion.de/Urteile/BGH/1992-07-08/IV-ZR-223\\_91](https://www.jurion.de/Urteile/BGH/1992-07-08/IV-ZR-223_91); Bundesgerichtshof [BGH] [Federal Court of Justice] Jan. 29, 2003, No. IV ZR 173/01 (Ger.), available at <https://openjur.de/u/66087.html>; Bundesgerichtshof [BGH] [Federal Court of Justice] July 7, 2007, No. XII ZR 197/05 (Ger.), available at <https://openjur.de/u/77120.html> (regarding a case about agreed standard terms in a rent contract: “auch in subjektiver Hinsicht unentschuldbares Fehlverhalten handeln . . . .”) (emphasis added). This definition of gross negligence in German domestic law has apparently influenced the view under both the ULIS and the CISG by German scholars. See Stumpf, *supra* note 59, at 280 (discussing identical language); Schwenzer, *supra* note 151, at 595.

objective reasonable man test.<sup>280</sup> To promote legal certainty under the CISG regime, all businessmen should be treated alike according to an objective commercial standard. Moreover, an objective interpretation of the gross negligence standard under the CISG regime is in accordance with the no-fault principle (CISG Article 45(1)(b) and Article 61(1)(b)), strict liability (CISG Article 79), and objective reasonable person interpretation (CISG Article 8(2)).

## VII. PRE-CONTRACTUAL EXAMINATION

### *A. No Duty of the Buyer to Make Pre-contractual Examination under the CISG*

The knowledge test of *de facto* knowledge or grossly negligent unawareness in the *caveat emptor* rule in CISG Articles 35(3) and 42(2) leads to a clear conclusion that the CISG does not impose a duty on the buyer to make a pre-contractual examination of the goods being traded.<sup>281</sup> This understanding had been supported by Rabel<sup>282</sup> and was the prevailing view under the ULIS.<sup>283</sup> The doctrine under the CISG almost concurs in this view and case law seems to go along with it as well.<sup>284</sup> According to the *caveat emptor*, the buyer, therefore, has no duty to conduct the detailed examination required in CISG Article 38 before the conclusion of the contract, and neither does the seller, under CISG Article 40, have a duty to make an Article 38 examination of the goods before the (re)sale.<sup>285</sup>

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<sup>280</sup> See also BGH, No. IV ZR 223/91 (concerning insurance in a traffic accident and grossly negligent behavior of the policy holder under the German Insurance Contract Act, where the BGH defines gross negligence as both an objective and subjective test (“objektiv grob fahrlässig gehandelt . . .” and “die subjektiven Voraussetzungen für die Wertung dieses Verhaltens als grob fahrlässig . . .”). Thus, under German law, gross negligence requires an objective and subjective assessment, and this results in a higher overall standard for the gross negligence test.

<sup>281</sup> PETER SCHLECHTRIEM & CLAUDE WITZ, CONVENTION DE VIENNE SUR LES CONTRATS DE VENTE INTERNATIONALES DE MARCHANDISES n.210 (2008).

<sup>282</sup> RABEL, *supra* note 48, at 173 (“[N]ur grobfahrlässige Unkenntnis wird dieser Kenntnis gleichgestellt. Hier braucht der Käufer nicht vor Kaufabschluß zu untersuchen.”).

<sup>283</sup> See Stumpf, *supra* note 59, at 280.

<sup>284</sup> See Magnus, *supra* note 151, at 430–31.

<sup>285</sup> See, e.g., Oberlandesgericht Hamm [OLG] [Higher Regional Court of Hamm] Apr. 2, 2009, No. 28 U 107/08 (Ger.), available at <http://www.cisg-online.ch/content/api/cisg/urteile/1978.pdf> (“Ein

Therefore, even when the seller invites the buyer to inspect and examine the goods before contract conclusion, the buyer's failure to conduct a pre-contractual inspection is not considered gross negligence.<sup>286</sup> The crucial question, then, concerns the importance of a *de facto* pre-contractual examination by the buyer in the light of the gross negligence test.

### *B. Importance of a De Facto Examination by the Buyer*

Another consequence of the knowledge test based on *de facto* knowledge or grossly negligent unawareness is that it relaxes the requirement that the buyer (or the seller under Article 40 CISG) conduct an examination.<sup>287</sup> Therefore, under the CISG *caveat emptor* rule, if a pre-contractual inspection is done, a buyer only loses the right to claim a lack of conformity if a superficial examination would have revealed evident, obvious, and striking facts relating to the lack of conformity. If the parties have agreed on a certain requirement for conformity, the *caveat emptor* rule in CISG Article 35(3) does not require the buyer performing a *de facto* examination to search for and test to see whether the requirements are actually fulfilled.<sup>288</sup> Similarly, if the seller invites the buyer to do an inspection in order to show the buyer the obvious actual state of the goods, in particular of old or second-hand goods, and if the buyer declines the opportunity to conduct a superficial examination, the buyer's behaviour may, in the concrete circumstance, be held to be gross negligence. It goes without saying, however, that the CISG seller cannot escape liability and the *caveat venditor* principle in CISG Article 35(2) simply by making invitations for buyers to inspect the goods sold.

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Autohändler, der ein Fahrzeug zum Verkauf anbietet, ist grundsätzlich nur gehalten, es im Hinblick auf Mängel einer Sichtprüfung zu unterziehen . . .”).

<sup>286</sup> Under the ULIS this interpretation is confirmed by the legislative history as a proposal from Denmark under the negotiations to amend ULIS Article 36 in line with the domestic Danish (and the old Nordic SGA) *caveat emptor* rule (today Danish SGA § 47) so that the seller would not be liable for a lack of conformity if the seller invited the buyer to examine or the buyer had been given the opportunity to inspect the goods but subsequently did not do so. *See Riese, supra* note 60, at 48–49. *See also* Stumpf, *supra* note 59, at 280 (denying a pre-contractual duty to inspect under the ULIS).

<sup>287</sup> OLG Hamm, No. 28 U 107/08 (“Dass sich der Beklagte auf die Angaben seiner ihm als zuverlässig bekannten Lieferantin verließ und das Fahrzeug selbst *nur auf sichtbare Mängel untersuchte, ist ihm nicht als grobes Verschulden vorzuwerfen.*”) (emphasis added).

<sup>288</sup> *See Electricity generator case, supra* note 91, at 4.



In conclusion, it does very much depend on the concrete circumstances, but the starting point is *that* the CISG seller under *caveat venditor* is obliged to deliver goods fit for ordinary use, *that* the CISG buyer under *caveat emptor* is not obligated to conduct a pre-contractual inspection, even if it receives an invitation or has an opportunity to do so, and *that* the buyer who conducts a *de facto* pre-contractual inspection need only make a superficial inspection to find evident, obvious, and striking facts relating to the lack of conformity.

#### VIII. THE BURDEN OF PROOF FOR *DE FACTO* OR CONSTRUCTIVE KNOWLEDGE

The final issue to be addressed in this analysis of the knowledge test under the CISG is the practical importance of the placement of the burden of proof. As a starting point, most domestic procedural laws follow the principle *actori incumbit probatio* (on the plaintiff rests the proving; i.e., the burden of proof) or *onus probandi incumbit ei qui dicit, non qui negat* (the burden of the proof lies upon him who affirms, not he who denies). Following this general principle, each party bears the burden of proof for the factual circumstances which, according to the relevant provision in the CISG, become the basis of a claim or defense. The prevailing and convincing view sees a substantive regulation of the placement of the burden of proof in many CISG provisions and, thus, in many situations, regards the burden of proof question as being governed by the Convention.<sup>289</sup>

There are good arguments to support the position that the CISG provides only partial regulation of the allocation of the burden of proof. *Firstly*, the allocation of the burden of proof is increasingly regarded as an

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<sup>289</sup> For the prevailing view in doctrine see Magnus, *supra* note 151, at 150; Kröll, *supra* note 40, at 532–33; NEUMAYER ET AL., *supra* note 272, at 77–79; Franco Ferrari, in KOMMENTAR ZUM EINHEITLICHEN UN-KAUFRECHT (CISG) 187 (Peter Schlechtriem et al. eds., 6th ed. 2013). For the different (and not prevailing) opinion see Warren Khoo, in COMMENTARY ON THE INTERNATIONAL SALES LAW 34, 39 (C. Massimo Bianca & Michael Joachim eds., 1987); HEUZÉ, *supra* note 80, at 261; HONNOLD & FLECHTNER, *supra* note 83, at 86. For an overview of the current dispute in case law and doctrine see Harry M. Flechtner, *Conformity of Goods: Inspection and Notice*, in INTERNATIONAL SALES LAW: A GLOBAL CHALLENGE 215, 220–22 (Larry A. DiMatteo ed., 2014).



issue of substance, not of procedure.<sup>290</sup> *Secondly*, in the provision on a possible exemption, CISG Article 79(1) regulates *expressis verbis* (“if he proves that”) the burden of proof. *Thirdly*, the view that the CISG provides an indirect substantive regulation of the burden of proof follows from various presumptions and the principle-exception rule in a number of the Convention’s provisions, as indicated by the use of the wording “unless” (CISG Articles 2(a), 3(1), 14(2), 28, 33, 41, 47, 63), “except where” (CISG Article 35(2)(b)), “is assumed to include” (CISG Article 48(3)), or the structure of other provisions.<sup>291</sup> Therefore, there are no reasons for an *e contrario* interpretation from CISG Article 79. The principle-exception rule is particularly clear under the *caveat emptor* rule in CISG Articles 35(3), 42(2) and the good faith provision in CISG Article 40.<sup>292</sup>

Under the *caveat venditor* principle underlying the default conformity rule in CISG Article 35, the seller is, in principle, liable for a lack of conformity. To escape this liability, the seller must prove that the buyer had *de facto* or constructive knowledge of the defect under the *caveat emptor* rule.<sup>293</sup> Similarly, under CISG Articles 38 and 39, the buyer, in principle, has a duty to give the seller timely notice of lack of conformity; hence, the buyer must prove that the seller had the required knowledge under CISG Article 40 or a “reasonable excuse” for not giving timely notice of lack of conformity under CISG Article 44.<sup>294</sup> In case of the buyer-friendly *caveat*

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<sup>290</sup> See Convention on the Law Applicable to Contractual Obligations Opened for Signature in Rome, 1980 O.J. (L 266) 5 (EC), available at <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:L:1980:266:FULL&from=EN> [hereinafter *Rome Convention*]; Regulation No. 593/2008, of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations, 2008 O.J. (L 177) 15 (EU), available at <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32008R0593&from=EN> [hereinafter *Rome I*]. See also NEUMAYER ET AL., *supra* note 272, at 77 (“Selon un principe généralement admis, dans sa détermination de la répartition du fardeau de la preuve, le juge ne doit pas perdre de vue la teneur de la loi matérielle applicable, le *lex causa*, qui est ici par hypothèse la Convention [CISG].”).

<sup>291</sup> See NEUMAYER ET AL., *supra* note 272, at 77–79 (concurring in this view).

<sup>292</sup> See, *inter alia*, the implicit regulation of the burden of proof that can be deduced from CISG Article 35(2)(b) where the buyer must prove that a particular purpose is “expressly or impliedly made known to the seller,” but on the other hand the seller thereafter needs to prove the exception that “circumstances show that the buyer did not rely, or that it was unreasonable for him to rely, on the seller’s skill and judgement.” CISG, *supra* note 1, at art. 35. See also Magnus, *supra* note 151, at 151.

<sup>293</sup> See *Castel Elecs. Pty. Ltd. v. Toshiba Singapore Pte. Ltd.*, *supra* note 85.

<sup>294</sup> See Cour d’appel de Paris [CA] [Court of Appeal of Paris] Feb. 25, 2005, No. 03/21335 (Fr.), available at <http://www.unilex.info/case.cfm?pid=1&do=case&id=1095&step=FullText> [hereinafter *Computer motherboard case*] (stating that there is no presumption regarding the knowledge of the seller

*emptor* rule, the seller's proof that the buyer had constructive knowledge with the required high degree of negligence will facilitate and alleviate the demonstration of such proof under the domestic procedural law on evidence of the *lex fori*.<sup>295</sup>

According to the position advocated here, this is as far as the CISG goes in terms of substantive regulation of the burden of proof. The CISG governs only substance and occasionally, either directly or indirectly, the placement of the burden of proof. It does not touch upon or govern procedure, including the law of evidence, the standard of proof, the proximity of proof, or a reversal of a burden of proof for one reason or the other. Therefore, an evidentiary principle of proximity of proof and a rule for a reversal of the burden of proof as an underlying principle of the CISG seems to be critical and oversteps the scope of the Convention.<sup>296</sup> The limitation of the scope of application of the CISG, followed by the non-prevailing view, should therefore be followed.<sup>297</sup>

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of a lack of conformity under CISG Article 40 and that the buyer bears the burden of proof: "tandis que la Convention de Vienne ne fait peser sur le vendeur professionnel aucune présomption de connaissance de défaut de conformité en sorte qu'il incombe à l'acquéreur d'établir que ce vendeur avait la connaissance tant de l'usage et de la destination du produit acquis que de la non conformité alléguée . . ."). See also *Pamesa Ceramica v. Yisrael Mendelson Engineering Technical Supply Ltd.*, *supra* note 14; *Austrian paprika case*, *supra* note 217.

<sup>295</sup> AUDIT, *supra* note 157, at 99 ("Il appartient toutefois au vendeur de faire la preuve de cette connaissance. La convention la lui facilite en assimilant à ce cas celui où l'acheteur ne pouvait ignorer.").

<sup>296</sup> For German case law on Article 40 see *German paprika case*, *supra* note 214, at 7 ("Für Fälle der vorliegenden Art bedeutet dies zunächst, daß grundsätzlich der Käufer die tatsächlichen Voraussetzungen des Art. 40 CISG darzutun und gegebenenfalls zu beweisen hat, da er sich auf die Ausnahme von der (Regel-) Bestimmung des Art. 39 CISG über den Verlust des Rückrechts beruft. Das Berufungsgericht hat jedoch nicht ausreichend berücksichtigt, daß eine Ausnahme im Einzelfall unter dem Gesichtspunkt der Beweishöhe oder dann zuzulassen ist, wenn eine Beweisführung mit unzumutbaren Beweisschwierigkeiten für den Käufer verbunden wäre."). The *German paprika case* was considered and confirmed by the Austrian Supreme Court. *Austrian paprika case*, *supra* note 217, at 16–17 ("Ist der klagenden Partei [the buyer] obliegende Beweis der Bestrahlung der Ware vor Anlieferung als gelungen anzusehen, erscheint es daher nicht ausgeschlossen, dass der grundsätzlich beweispflichtigen klagenden Partei unter dem *Gesichtspunkt der Unzumutbarkeit einer eigenen Beweisführung und der Beweishöhe* der beklagten Partei eine Umkehrung der Beweislast zugutekommen soll. In diesem Fall träfe die beklagte Partei [the seller] die Beweislast für ihre Gutgläubigkeit.") (emphasis added).

<sup>297</sup> The non-prevailing view is argued strongly by HONNOLD & FLECHTNER, *supra* note 83, at 86.

IX. THE KNOWLEDGE TEST AND A *DE MINIMIS BONA FIDE* REQUIREMENT

When applying the knowledge test under the CISG a *de minimis* requirement of *bona fide* acting and dealing by the contracting parties is a prerequisite in order to reach this desirable equilibrium of the rights and obligations of the parties to a sales contract. So far, it may be assumed that legal comparatists and the doctrine on the CISG—despite the differing views of the good faith principle within the CISG—are in agreement about some sort of *de minimis* requirements for *bona fide* conduct by the parties. The CISG regime does not support fraudulent behaviour or acting in bad faith. For example, bad faith would be the case if a contracting party could rely on the other party's failure to perform when it was that contracting party's act or omission that had caused the other party's failure to perform,<sup>298</sup> or when that contracting party prevented the other party's contract performance.<sup>299</sup> Additionally, there would be bad faith if a contracting party were allowed to rely on a contract term—e.g., a non-oral modification or merger clause—that was contrary to the subsequent conduct of that same party and the reasonable expectations of the other party caused by that conduct.<sup>300</sup> Finally, there would be bad faith if a buyer could claim lack of conformity or a seller could rely on the lack of or a too-late notice of lack of conformity in situations where the buyer or seller had *de facto* or constructive knowledge of the non-conformity and failed to disclose this knowledge.<sup>301</sup> The source of this *de minimis bona fide* requirement in international commerce is not exclusively in CISG Article 7(1), as is argued by part of the doctrine and reiterated by some (mostly) continental European decisions in case law on the CISG.<sup>302</sup> On the contrary,

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<sup>298</sup> See CISG Article 80 which should be regarded as a provision grounded on a good faith principle. CISG, *supra* note 1, at art. 80.

<sup>299</sup> See CISG, *supra* note 1, at art. 60 (“[I]n doing all acts which could reasonably be expected of him in order to enable the seller to make delivery . . .”).

<sup>300</sup> See the principle underlying Article 29(2)—the *venie contra factum proprium* principle. CISG, *supra* note 1, at art. 29.

<sup>301</sup> See Article 35(3), 42 and the provision in Article 40 underlying good faith. CISG, *supra* note 1, at arts. 35, 40, 42.

<sup>302</sup> The wording in CISG Article 7(1) is—similar to VCLT Article 31(1)—concerned with treaty interpretation and, thus, is in principle directed to the State's party to the Convention. CISG, *supra* note 1, at art. 7 (“In the interpretation of this Convention, regard is to be had to . . . the observance of good faith in international trade.”).

the legal source of this *bona fide* principle is an underlying principle of CISG Article 7(2), which can be deduced and developed from various provisions within the Convention itself.

To illustrate the operation of the knowledge test and the delicate balance between the *caveat venditor* principle and the *caveat emptor* rule, we can return to the *Clay cases* discussed in Part IV.B.2 d) decided by the OLG Koblenz<sup>303</sup> and the appeal by the BGH in 2012.<sup>304</sup> One interesting part of the decision concerned the *caveat emptor* rule. The OLG Koblenz held that at the time of the conclusion of the contract, the buyer was not, under CISG Article 35(3), aware or gross negligently unaware of the dioxin contamination of the clay.<sup>305</sup> Both courts found that the seller *de facto* was aware of the contamination and was therefore precluded from relying on the lack of notice according to CISG Article 40.<sup>306</sup> Another interesting finding in the German court's decision was the importance the court attached to the *in casu* well-known problems of dioxin contamination of clay delivered from Germany, which had been discussed in the public media, including specific mention of the clay delivered from the area in which the German seller had its production.<sup>307</sup>

The relevant facts of the *Clay case* concerning the dioxin contamination of the delivered clay were as follows. *Firstly*, the parties had a long business relationship since the 1990s in trading with clay originating from the German seller but sold through Dutch supply company.<sup>308</sup> In 2002, the Dutch supply company was taken over by the German seller. In previous sales transactions, dioxin contamination had never before been any issue.<sup>309</sup>

*Secondly*, the Dutch buyer used the clay in a process that separated out large potatoes meant for French fries and salad for human consumption while the small potatoes together with the potato peels were used in animal feed.<sup>310</sup> The seller knew about the buyer's separation process and thus *de*

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<sup>303</sup> *Clay case* OLG, *supra* note 114.

<sup>304</sup> *Clay case* BGH, *supra* note 115.

<sup>305</sup> *Clay case* OLG, *supra* note 114, at 11.

<sup>306</sup> *Id.* at 13; *Clay case* BGH, *supra* note 115, at 10–11.

<sup>307</sup> *Clay case* OLG, *supra* note 114, at 13.

<sup>308</sup> *Id.* at 3.

<sup>309</sup> *Id.*

<sup>310</sup> *Id.*

*facto* knew about the expected use of the clay—which the BGH deemed to be an ordinary use according to CISG Article 35(2)(a).<sup>311</sup>

*Thirdly*, in 1999 the high levels of natural dioxin had been found in clay extracted from pits in the area of Westerwald, Germany, including from the pit used by the German seller.<sup>312</sup> In July 1999, a German statutory public law act prohibited the German seller from distributing the clay as an admixture in feedstuff.<sup>313</sup> The German seller did not inform the buyer thereof.<sup>314</sup>

*Fourthly*, the seller had disregarded dioxin contamination and continued from 2002 onwards to deliver to the Dutch buyer clay extracted from that concrete clay without providing any information or warnings concerning the *de facto* or at least very high likelihood of dioxin contamination.<sup>315</sup>

*Fifthly*, the facts of the case revealed that there had been media reports about the dioxin contamination in both the Netherlands and Germany and, moreover, that the EU legislature in 1999 had intervened with various measures for reducing the dioxin levels in food and feedstuff, and that this had led to a general awareness thereof, including for the buyer.<sup>316</sup> Both the OLG Koblenz and the BGH, however, held that the Dutch buyer was not specifically aware of the dioxin contamination in the concrete deliveries originating from the German seller's pits.<sup>317</sup>

*Sixthly*, despite the general knowledge of the dioxin problem, the buyer used the contaminated clay delivered by the German seller in the separation potato process without testing or taking cleaning precautions

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<sup>311</sup> *Clay case* BGH, *supra* note 115, at 10–11.

<sup>312</sup> *Clay case* OLG, *supra* note 114, at 3.

<sup>313</sup> *Id.* (“Verfügung der Bezirksregierung Koblenz vom 13.07.1999 wurde daraufhin der Firma . . . [Seller] untersagt, ihre Mahltone in den Verkehr zu bringen, soweit sie dazu bestimmt sind, bei der Herstellung von Futtermitteln als Zusatzstoff verwendet zu werden.”) (internal quotations omitted).

<sup>314</sup> *Id.*

<sup>315</sup> *Id.*

<sup>316</sup> *Id.* at 13.

<sup>317</sup> *Id.* at 13 (“Zwar hätte die Klägerin, wie noch auszuführen sein wird, wissen müssen, dass aus Deutschland stammende Tonerden Dioxin enthalten konnten. Dass aber gerade der an sie verkaufte Ton aus der Grube der Firma . . . [the seller] ganz erheblich dioxinbelastet war, musste der Klägerin nicht bekannt sein. Denn unstreitig wurde auch im Westerwald Ton gefördert, der nicht oder nicht in nennenswertem Umfang dioxinhaltig war.”)

and, furthermore, resold the potato products in the Dutch food and feed markets.<sup>318</sup>

*Finally*, in the fall of 2004, following deliveries of clay to the Dutch buyer in July, increased dioxin levels were found in milk and milk products in the Netherlands and, subsequently, in November 2004, the Dutch authorities tested the deliveries of the German seller's clay at the buyer's place of business and found that the dioxin levels were too high.<sup>319</sup>

From these facts, the general question of knowledge of the parties and of a fair equilibrium in this sales contract for the delivery of clay for the expected ordinary use in a potato-separation process arises and sets the legal CISG scene. Taking all relevant circumstances into account, how do we arrive at a fair assessment of the parties' contractual rights and obligations? What did the *caveat venditor* principle demand of the German seller, and how should the *caveat emptor* rule, i.e., the general knowledge of the Dutch buyer, and the buyer's sale of the potato products in the market without taking safety precautions be evaluated?

At first sight, it seems as if both parties chose the easy solution and simply closed their eyes to the evident fact or suspicion of dioxin contamination hoping that the elevated dioxin levels would not be noticed. Their wish was not fulfilled, and a discussion of the *de minimis* requirement of a *bona fide* acting and dealing of the contracting parties therefore seems relevant. This in fact was the main issue addressed by the OLG Koblenz and the BGH, but from a different point of departure.

While the OLG Koblenz utilized the broad good faith principle developed in the German language doctrine on the CISG and extended the *caveat venditor* principle to embrace an obligation of the German seller to inform, thereby, leaving the conformity issue open,<sup>320</sup> the BGH resolved the case exclusively using the non-conformity provision in CISG Article 35(2)(a).<sup>321</sup> In its reasoning under the ordinary use requirement in CISG Article 35(2)(a), the BGH demanded that the goods be suitable for use according to their material and technical character and to the expectation of commerce. If the goods to some degree fall short of such an ordinary

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<sup>318</sup> *Id.* at 11.

<sup>319</sup> *Id.* at 7.

<sup>320</sup> This is quite clearly illustrated by the reference to the CISG doctrine. *Id.* at 12.

<sup>321</sup> *Clay case* BGH, *supra* note 115, at 10–11.

expected use, the seller must make a clear *caveat* regarding the limitation. Thus, in its decision in the appeal case, the BGH deduced an obligation to inform from the default rule on conformity in CISG Article 35(2)(a) and, hence, the underlying *caveat venditor* principle, when a (high) quality demand is not met or when there is uncertainty about what the proper use is.<sup>322</sup> It is quite an extensive obligation to provide information and take precautions, which according to the BGH follows directly from CISG Article 35(1) and (2)—the *caveat venditor* principle:

*Vielmehr hätte gerade die fehlende Kenntnis, ob ein sicherer Einsatz des gelieferten Separierungstons bei der Klägerin gewährleistet war, die Beklagte zur Vorsicht veranlassen müssen. Deshalb wäre ein entsprechender Gefahrenhinweis geboten gewesen, um von vornherein jegliche Gefahrwirklichkeit durch den dioxinverunreinigten Separierungston bei der anschließenden Futtermittelproduktion auszuschließen.*<sup>323</sup>

The OLG Koblenz deduced an identical obligation to provide information from an extensive general *bona fide* principle.<sup>324</sup> Although a broad good faith principle—similar to the general German domestic principle “*Treu und Glauben*” in BGB section 242—is not supported in the CISG doctrine and case law, that the CISG has a *de minimis* requirement that the contracting parties act and deal *bona fide* with each other seems to be unquestionable. That said, the exact scope and content of such a limited

<sup>322</sup> *Id.* (“Zwar muss sich eine Ware, um diesen Verkehrserwartungen zu genügen, nicht für alle theoretisch denkbaren Verwendungsformen und Verwendungsmöglichkeiten eignen, sondern nur für diejenigen, die nach ihrer stofflichen und technischen Auslegung und der hieran anknüpfenden Verkehrserwartung nahe liegen. Wird allerdings eine an sich nahe liegende Verwendung von den tatsächlich vorhandenen Verwendungs- und Einsatzmöglichkeiten nicht mehr abgedeckt, fehlt ihr die von Art. 35 Abs. 2 Buchst. a CISG geforderte Eignung zum gewöhnlichen Gebrauch, *sofern der Verkäufer die bestehende Einschränkung nicht deutlich macht . . .*”) (emphasis added).

<sup>323</sup> *Id.* at 13.

<sup>324</sup> *Clay case OLG, supra* note 114, at 12 (“Der Begriff ‘good faith’ wird ausdrücklich zwar nur verwendet in Art. 7 Abs. 1 CISG, zu folgen ist aber der herrschenden Meinung, dass in der Gesamtheit der Bestimmungen des UN-Kaufrechts das Gebot der Beachtung von ‘good faith’ als allgemeiner Grundsatz zum Ausdruck kommt . . . Art. 7 Abs. 1 CISG schreibt vor, dass bei der Auslegung des Übereinkommens neben dessen internationalem Charakter und der Notwendigkeit einer einheitliche Anwendung auch ‘die Wahrung des guten Glaubens’ (‘the observance of good faith,’ ‘d’assurer le respect de la bonne foi’) im internationalen Handel zu beachten sind. Die Verwendung des Begriffes ‘guter Glaube’ in der—nicht verbindlichen—deutschen Übersetzung ist allerdings insofern verfehlt, als die Bedeutung von ‘good faith’ (‘la bonne foi’) sich deutlich von dem deutschen Rechtsbegriff des guten Glaubens unterscheidet (. . .) und dem Prinzip von Treu und Glauben i. S. von § 242 BGB sehr nahekommt . . .”).

good faith principle is, and will remain, debatable and will need to be decided on a case-by-case basis. The reasoning of the OLG Koblenz in *Clay case* from 2011 does, however, set convincing conditions for determining the framework in which a *de minimis* good faith principle can be applied: “Die Verkäuferin verfügte also über einen für den Vertragszweck wesentlichen Wissensvorsprung gegenüber ihrer Vertragspartnerin. Indem sie ihr Wissen der Klägerin vorenthielt und diese so ‘ins offene Messer laufen ließ,’ verstieß sie gegen ein—auch im internationalen Handel anerkanntes—Prinzip des Verhaltens eines ehrbaren Kaufmanns.”<sup>325</sup>

In situations in which either the seller or the buyer has a “fundamental knowledge advantage” which can easily be passed on to the other contracting party, and when such information is crucial for the fulfilment of the purpose of the contract, it should be disclosed to the other party and necessary precautions should be made. This is underlined by the *caveat venditor* and the *caveat emptor* principles. A commercial gentleman will not let the other contracting party run into a trap. This would be against a principle of the behaviour of an honourable businessman (“*Prinzip des Verhaltens eines ehrbaren Kaufmanns*”).

#### X. CONCLUSION AND OUTLOOK

The discourse has illuminated the difficult but immense importance of determining the knowledge of contracting parties, which is not only a procedural problem of evidence. In practice the question has immense importance as the knowledge the parties have will decisively shape the rights and obligations of the parties. The question concerns the required diligence of a businessman in order for him to be aware and not negligently unaware of relevant facts and information. If a businessman does not act with the required diligence—which can be ordinary diligence or more or less diligence—in his conduct and behaviour, he may be put on a constructive (fictive) knowledge different from *de facto* (actual) knowledge. This required diligence will depend on the knowledge test

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<sup>325</sup> *Id.* at 13–14.



applied. It is vital for a harmonized global sales law regime that the content of the knowledge test is as clearly described and defined as possible.

Throughout history and since Roman times, the topic of the constructive (fictive) knowledge and of the different degrees of negligence has occupied doctrine and case law in various jurisdictions. Setting a global commercial framework for the knowledge test under the CISG is not an easy endeavour. However, I have said this much because we are faced with a large body of inconsistent CISG case law using a wide spectrum of vocabulary and formulations and, moreover, challenged with various opinions in the CISG doctrine, and also because I think it is an issue of great importance for international commercial law. I hope—like the English Justice Holt years ago as he elaborated on the degrees of negligence—that the analysis has cleared the main issues and made a more prospered outlook for the future of the knowledge test under the CISG:

I have said thus much in this case, because it is of great consequence, that the law should be settled in this point, but I don't know whether I may have settled it, or may not rather have unsettled it. But however that happen, I have stirred these points, which wiser heads in time may settle.<sup>326</sup>

The article demonstrates that the undefined knowledge test under the CISG consists of the threefold distinction based on *de facto* knowledge, gross negligence (*culpa lata*) and simple or ordinary negligence (*culpa levis*—the latter being a reasonable businessman test, i.e., the *bonus pater familias* test). This threefold distinction is supported by the wording of the CISG, legislative history, convincing arguments and, moreover, a strong view in doctrine and case law.

In addition, the analysis provides for guidance on a definition of the knowledge test under the CISG and addresses in particular the interpretation of the formulation “could not have been unaware,” which is the disputed part of the knowledge test under the CISG. This wording of the CISG knowledge test is interpreted differently and finds all sorts of more or less clear expressions in case law. The article concludes that the formulation “could not have been unaware” expresses a gross negligence (*culpa lata*) standard.

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<sup>326</sup> *Coggs v. Bernard*, (1703) 92 Eng. Rep. 107 (K.B.) 114 (Lord Holt, C.J.)

It is strongly recommended that the wording “could not have been unaware” under the CISG is used by the parties in their contract drafting and by courts and tribunals in their decisions together with an express reference to a gross negligent standard in order to achieve uniformity in expressions and results. This should be done for the purpose of promoting certainty in determining the subjective intention of parties and ensuring the meeting of the minds (*animus contrahendi*) under CISG Article 8 and for the purpose of maintaining the balance that the CISG strikes between the rights and obligations of the seller and of the buyer. The identical terms on the knowledge test “could not have been unaware” in, *inter alia*, CISG Article 8(1), 35(3) and Article 40 must be interpreted in the same way in order to maintain the equilibrium of the sales contract established by the Convention and its drafters and achieve uniformity in the application of the CISG. The threefold distinction of simple or ordinary negligence (*culpa levis*), gross negligence (*culpa lata*) and *de facto* knowledge expresses underlying principles for the knowledge test of the global CISG.

When applying the knowledge test under the CISG a *de minimis* requirement of *bona fide* acting and dealing by the contracting parties is a prerequisite in order to reach the desirable equilibrium of the rights and obligations of the parties to a sales contract and to encourage and oblige contracting parties to exchange knowledge and information to the benefit of global commerce. The knowledge test under the CISG should be applied in conjunction with a minimum good faith requirement regarding the parties’ conduct and statements.