CHAPTER 10

Cator Can't Compete: Caveat Emptor under CISG Article 35(3)?

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1. The resolution of a given buyer's non-conformity claim is likely to reflect an attempt to balance competing interests: the countervailing pulls between traditional *caveat emptor* doctrine (what you see is what you get) and the buyer's expectation that the seller should be responsible for certain defects (*caveat venditor*).[1] Since the Danish (and other Scandinavian) domestic solutions to this conundrum do not match the international solution set forth in Article 35(3) of the CISG Convention,[2] and since Article 35(3) has itself been subjected to differing interpretations, there is reason to ask whether these differences might lead to a Scandinavian CISG "homeward trend."[3]

2. Many centuries ago Danish commercial law belonged to a larger legal community surrounding the Baltic Sea.[4] Back then, *caveat emptor* provided the starting point, both in domestic and international sales. So if, in the year 1228, a Russian saw and bought a lame horse from a German in Lübeck, the Russian could not later return it. *Kauf vor Augen*; *what you see is what you get!*[5]

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1. Accord René Henschel, *Conformity of Goods in International Sales* (Copenhagen, 2005), 17-18.
2. *United Nations Convention on Contracts for the International Sale of Goods, Apr. 11, 1980, S. Treaty Doc. No. 98-9 (1983), 19 I.L.M. 668 (1980) [hereinafter CISG] (entered into Force on Jan. 1, 1988), Available in 15 U.S.C.A. App. at 49 (West Supp. 1996), 52 Fed. Reg. 6262-80, 7737 (1987), U.N. Doc. A/Conf. 97/18 (1980)*, 1980.
3. Franco Ferrari, "Homeward Trend and Lex Forism Despite Uniform Sales Law," *Vindobona Journal of International Commercial Law & Arbitration* 13 (2009): 15-42.
4. Tamm, Ditlev, "Østersø Og Middelhav – et Retshistorisk Perspektiv," in *Suum Cuique* (DJØF Publishing, 1991), 73.
5. See ibid., 79.

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3. The situation would of course have been different if the German seller fraudulently concealed the fact that the horse was lame or if he expressly assured the buyer that the horse was sound: indeed, even the Romans recognized similar situations as exceptions to their caveat emptor rule.[6]

4. Of equal importance are the many cases where the buyer had not had an opportunity to inspect the goods (and thus could not have seen the defect concerned). For example, when a buyer in Lübeck in the year 1403 ordered wheat "sight unseen" from a seller in Denmark, that buyer could rightfully expect more than just "wheat"; he could expect wheat of good mercantile quality (*Kaufmannsgut*),[7] i.e. let the Danish seller who delivers goods *unfit for ordinary purposes* beware!

5. If we fast forward to currently applicable Danish domestic law, we see that buyers continue to enjoy the protection of implied contract terms, not only as regards fitness of goods for ordinary purposes, but also, in some circumstances, fitness for buyer's *particular purposes*,[8] for example, the fitness of a particular horse for high-level competition (the Olympic Games). But even today, if a buyer in Denmark inspects a horse *before* she buys it from a Danish seller, and the horse proves to be lame, the buyer can't complain about defects which she *saw or ought to have seen*.[9]

6. Lawyers in other domestic sales systems will hardly find this Danish domestic position surprising. Consider, for example, the virtually identical American rule in § 2-316(3)(b) of the Uniform Commercial Code: when the buyer before entering into the contract has examined the goods ... as fully as he desired or has refused to examine the goods there is no implied warranty

6. See *The Law of Obligations: Roman Foundations of the Civilian Tradition*, Reinhard Zimmermann (Oxford, 1996), 308 ff, http://www.amazon.com/reader/019876426X?_encoding=UTF8&query=caveat#reader_019876426X.
7. See Tamm, Ditlev, "Østersø Og Middelhav – et Retshistorisk Perspektiv," 80.
8. In Denmark these rules impliedly supplement the express provisions of the Sale Act of 1906 (Købeloven). See Joseph Lookofsky and Vibe Ulfbeck, *Køb – Dansk Indenlandsk Købsret*, 3rd ed., 2007, chap. 4.2.b; in Sweden, as elsewhere in Scandinavia, the fitness rules are now codified in the sales statutes themselves: see Jan Ramberg & Johnny Herre, *Köplagen. En Kommentar*, vol. 2nd ed. (Stockholm, 2013), chap. 5; see also generally Rabel, Ernst, *Das Recht Des Warenkaufs*, vol. 2 (Tübingen, 1958), 101 ff.
9. ... unless the seller acted fraudulently. Regarding § 47 of the Danish Sales Act (Købeloven) see Lookofsky and Ulfbeck, *Køb – Dansk Indenlandsk Købsret*, 99-103; Jacob Nørager-Nielsen et al., *Købeloven Med Kommentarer*, 3rd ed. (Copenhagen: GAD, 2008), 906 ff.

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with regard to defects which an examination *ought* in the circumstances to have *revealed* to him.[10]

7. These days, however, most *international* sales between merchants are governed (not by domestic sales law rules, but) by the CISG Convention.[11] To be sure, CISG Article 35(2) requires that the goods be fit for (a) ordinary purposes and (b) any particular purpose expressly or impliedly made known to the seller at the time of contracting.[12] But the rule in 35(2) is subject to an exception which differs from many domestic caveat emptor analogues: under Article 35(3) the seller is "not liable ... for any lack of conformity of the goods if at the time of the conclusion of the contract the buyer *knew or could not have been unaware* of such lack of conformity."[13]

8. Note in this connection that the Finnish, Norwegian and Swedish Sales Acts, which matched the Danish Act for nearly a century, were later radically amended, so as to track the CISG rule-set "to the greatest possible extent."[14] But unlike most other rules in these amended Sales Acts (which are virtually identical to their CISG counterparts), Section 20 of these Acts represents a new Northern legal hybrid which (in translation)[15] provides:

(1) The buyer may not rely on a defect which he *must have been aware* of at the time of the conclusion of the contract.
(2) If the buyer, before the conclusion of the contract, has examined the goods or, without acceptable reason, has failed to comply with the sell-

10. See also James White and Robert Summers, *Uniform Commercial Code*, 6th ed., 2010 § 13-6(b).
11. As to the CISG field of application see generally Joseph Lookofsky, *Understanding the CISG*, 4th Worldwide Edition, 2012, chap. 2A.
12. Except, as to the latter, where the circumstances show that the buyer did not rely, or that it was unreasonable for him to rely, on the seller's skill and judgment. See *CISG* Article 35(2)(b).
13. Emphasis added. Regarding the subtle relationship between Article 35(1) and Article 35(2)-(3) see Henschel, *Conformity of Goods in International Sales*, 283-290; compare René Henschel, "Conformity of Goods in International Sales Governed by CISG Article 35: Caveat Venditor, Caveat Emptor and Contract Law as Background Law and as a Competing Set of Rules," *Nordic Journal of Commercial Law* 1 (2004): 9, http://www.cisg.law.pace.edu/cisg/biblio/henschel2.html (citing the rejection of a Norwegian proposal to expand the provision's express scope as arguably supporting the proposition that application to 35(1) is in principle ruled out, at least as regards qualities set forth in parties' the agreement).
14. Jan Ramberg & Johnny Herre, *Köplagen. En Kommentar,* p. 33.
15. Translation mine. Compare the unofficial translation of the Finnish Ministry of Justice available at *www.finlex.fi/en/laki/kaannokset/1987/en19870355.pdf*

er's invitation to examine the goods, he may not rely on a defect that he *ought to have discovered* in the examination, unless the seller's conduct was contrary to good faith [...][16]

9. Seen in isolation, paragraph (2) contains nothing new: it's simply a "copy" of the old Scandinavian Sales Act rule (which still stands as the entire Danish caveat emptor rule, since Denmark's domestic Sales Act has not in this or other any respect been revised to track the CISG). But *paragraph (1)* of the domestic caveat emptor rule which now applies in other parts of Scandinavia, is new, and as noted by a prominent Swedish commentator, the *model* for paragraph (1) of these new domestic Acts is CISG Article 35(3);[17] in fact, the *legislative history* of the Swedish Act confirms that the meaning of the "must-have-been-aware" requirement in paragraph (1) is the *same* as in the CISG: the starting point for paragraph (1) is the buyer's *actual knowledge*, in that the "must have been aware" (*måsta antas ha känt*) is – as in the CISG rule – simply intended to lighten the seller's burden of *proving* the impossible (what buyer really/subjectively knew).[18]

10. Returning now to the larger *international* context, CISG Article 35(3) has become the subject of some controversy, not least because the CISG rule would seem to represent a move in a more buyer-friendly direction.[19] But in order to determine more specifically the *extent* to which Article 35(3) represents such a move, we should consult various sources of CISG law:[20] (a) the rule's wording, (b) its legislative history, (c) relevant CISG case law and (d) scholarly opinion.

11. As with any contract between nations, the CISG treaty should be interpreted in accordance with the *ordinary meaning* to be given to its terms

16. According to paragraph 3 (omitted here): The provisions of paragraph (2) shall apply also when the buyer, before the conclusion of the contract, had an opportunity to examine a sample of the goods and the defect relates to a property of the goods that appeared in the sample.
17. Jan Ramberg & Johnny Herre, *Köplagen. En Kommentar* p. 217: "förbilden i CISG art. 35(3)."
18. Ibid., p. 219.
19. Regarding § 77b of the Danish Sales Act, refecting increased consumer-protection mandated by the European Union Consumer Guarantees Directive (99/44/EC) , see Nørager-Nielsen et al., *Købeloven Med Kommentarer*, 1293-1295; see also Lookofsky and Ulfbeck, *Køb – Dansk Indenlandsk Købsret*, 266-269; compare as regards American law White and Summers, *Uniform Commercial Code* § 12-6 (official comments to UCC § 2-216(3)(b) suggest layman's inspection subject to less rigorous standard).
20. See generally Lookofsky, *Understanding the CISG* §§ 2.8-2.10.

(within their context and in the light of the treaty's object and purpose)[21] – in this case the ordinary meaning of the phrase "knew or could not have been aware." The ordinary meaning of knew (the past tense of know) is to perceive or understand as fact or truth; to apprehend clearly and with certainty, to be cognizant or aware of.[22] To test this quickly in the Article 35(3) context, suppose a given CISG buyer (B) actually *sees a horse limp before she buys him* and that after she buys him she *admits she knew* he was lame. Under those circumstances Article 35(3) would clearly relieve the seller of liability for lack of conformity,[23] since B got exactly what she *saw and knew* when the contract was made.[24]

12. But without such an admission of knowledge, S (who bears the burden) could hardly prove what B *knew* when she bought the horse, not even if B admitted she had her "eyes wide open" at the time of the sale.[25] And since "aware" is defined as *having knowledge*,[26] the difference (if any) between "knew" and "could not have been unaware" might well seem minimal.[27]

21. This within their context and in the light of the treaty's object and purpose United Nations, "Vienna Convention on the Law of Treaties (text)," 1969, http://legal.un.org/ilc/texts/1_1.htm Article 31(1).
22. http://dictionary.reference.com/browse/know. This definition corresponds to the legal definition of knowledge: "awareness or understanding of a fact or circumstance." See Garner, ed., *Black's Law Dictionary*, 7th ed., 1999.
23. The same would hold true if, as in the real Cator case, the buyer's knowledge was "imputed knowledge" of its Danish agent's dealings on the buyer's behalf. See ibid.
24. See Lookofsky, *Understanding the CISG*, 76 with note 103 (the application of caveat emptor is the functional equivalent of saying that the goods conform to the contract); compare: Case nr. C1 97 167 (http://www.unilex.info/case.cfm?pid=1&id=311&do=case) (Tribunal Cantonal de Vaud, Switzerland 1997) where the seller had expressly informed the buyer about the current state of the second hand bulldozer, which the buyer had even tested before making its purchase order; see also Henschel, *Conformity of Goods in International Sales*, 286, arguing that this Swiss decision was incorrectly based on Article 35(3), since the machine conformed to the contract on the basis of Article 35(1): see in this connection note 13 supra.
25. The seller surely bears the burden of proof on this Article 35(3) issue. Accord John Honnold and Harry Flechtner, *Uniform Law for International Sales under the 1980 United Nations Convention*, 4th ed., 2009, 339; "UNCITRAL Digest of Case Law on the United Nations Convention on the International Sales of Goods – 2012 Revision," 2012, http://www.uncitral.org/uncitral/en/case_law/digests.html, Digest of Article 35(3) with cases cited in note 76.
26. http://www.thefreedictionary.com/awareness.
27. Accord Honnold and Flechtner, *Uniform Law for International Sales under the 1980 United Nations Convention*, 339 (little practical difference between facts party "knows" and facts of which a party "could not have been unaware").

13. But the ordinary meaning of Article 35(3) also depends on its five other equally authentic versions, and according to the French version: *Le vendeur n'est pas responsable, au regard des alinéas a) à d) du paragraphe précédent, d'un défaut de conformité que l'acheteur connaissait* ***ou*** *ne pouvait ignorer au moment de la conclusion du contrat.*[28] So in the French version of the treaty text, the alternative to "knew" (*connaissait*) is "could not ignore" (*ne pouvait ignorer*).

14. Does the French formulation differ substantively from the English: is there a real difference between "could not have been unaware" and "was not able to ignore"? Well, not in my (linguistically amateur) opinion: (a) because *ignore* in English means (roughly) the same thing as *ignorer* in French,[29] (b) because you can only ignore a fact if you *wilfully* refuse to acknowledge its existence, and (c) because you can only so acknowledge if you are *aware* (have knowledge) that the fact exists. And I think that deductive conclusion – that the English and French texts are essentially the same – accords with the polite command in CISG Article 7(1) that Contracting States (and their courts) have regard to the treaty's *international* character when they interpret its terms, striving, I submit, for harmonious interpretation of all its authentic versions.

15. Now, the conclusion that the French version means the same thing as the English version does not prove that "could not have been unaware" means exactly the same thing as "knew." On the contrary, we should be loath to conclude that the drafters of Article 35(3) meant to say the same thing twice, since we should avoid a "manifestly absurd or unreasonable interpretation."[30]

16. In instances where the text of a Convention rule seems ambiguous, courts and arbitrators sometimes consult "supplementary means of interpretation," i.e. "secondary sources" of CISG law, including the treaty's legislative history (*travaux préparatoires*), for possible evidence of legislative intent.[31] Unfortunately, the often voluminous documentation available is seldom suited for the resolution of concrete questions of CISG interpretation.[32] And as re-

28. http://www.cisg.law.pace.edu/cisg/text/salecf.html#35 (emphasis added here).
29. http://www.wordreference.com/enfr/ignore
30. See United Nations, "Vienna Convention on the Law of Treaties (text)" Article 32.
31. Ibid., Article 32 (recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, when the interpretation according to article 31: (a) leaves the meaning ambiguous or obscure; or (b) leads to a result which is manifestly absurd or unreasonable).
32. See Honnold and Flechtner, *Uniform Law for International Sales under the 1980 United Nations Convention*, § 419.3: (interpretation based on discussions by large legislative body is more meaningful for decisions of broad issues of policy than for

gards the Article 35(3) issues raised here, CISG scholars have found little relevant information in the treaty's *travaux*,[33] with the possible exception of certain evidence relating to the connection (or non-connection) between Article 35(3) and Articled 35(1), which deals with a seller's *express* "warranties."[34]

17. Many *CISG scholars* have ventured academic opinions as to the meaning of "could not have been unaware." For present purposes I find it convenient to make use of the analyses done by a Danish scholar (René Henschel)[35] and a Dutch scholar (Sonja Kruisinga), since their own conclusions take account of the opinions previously set forth by numerous other academics.[36]

18. In his analysis Professor Henschel concludes that the "prevailing" (i.e. majority) view among prominent CISG scholars can be summarized as follows: (1) "could not have been unaware" cannot mean "simple negligence," as represented by the "ought to have known" standard still found in many (seller-friendly) domestic laws, and (2) there should *at least* be a showing of buyer's "gross negligence."[37] As regards the scholars who consider gross negligence to be sufficient, Henschel suspects some have been influenced by their somewhat more seller-friendly domestic laws – a phenomenon which Henschel finds natural,[38] although he remains doubtful as to whether it leads to a better evaluation than the view expressed by Honnold and Flechtner, for whom the only real difference between knew and ought to have known in Ar-

detailed applications); in accord (with concrete examples): Lookofsky, *Understanding the CISG*, 29-30.

33. See Ingeborg Schwenzer, ed., *Schlechtriem & Schwenzer, Commentary on the UN Convention on the International Sale of Goods (CISG)*, 3rd ed., 2010, 586-88; Henschel, *Conformity of Goods in International Sales*, chap. 9.
34. Regarding the rejection of a Norwegian proposal include a reference in paragraph 3 to paragraph 1, see Henschel, *Conformity of Goods in International Sales* p. 282, but this hardly precludes the possibility of application by analogy: see infra No. 24.
35. Ibid., chap. 9.
36. Sonja A. Kruisinga, *(Non-)Conformity in the 1980 UN Convention on the International Sale of Goods: A Uniform Concept?*, 2004.
37. One important observation regarding the relationship between the caveat emptor rule in Article 35(3) and corresponding rules of Danish domestic and European Union sales law can be found in footnote 42 on page 292 of Henschel's main text which explains that Denmark's limitation of its 100-year-old domestic rule (§ 47 of the Sales Act) to sales between merchants was required by the wording of the EC Directive on consumer sales 1999/44/EC ("could not reasonably be unaware) – a rule which precluded application of Denmark's general "ought to have known" standard to consumer sales. See Henschel, *Conformity of Goods in International Sales*, 292, note 42.
38. Ibid., 294-295.

ticle 35(3) relates to the seller's *burden of proof*;[39] i.e. for these (in this particular context more buyer-friendly) American scholars, a showing of gross negligence is simply not enough under Article 35(3).[40]

19. In some respects Professor Kruisinga's position is compatible with Henschel's, although she seems a bit more critical of those who opine that gross negligence is enough to let a CISG seller of the hook.[41] In an interesting illustration of the homeward trend regarding a related aspect of Article 35(3), Ms. Kruisinga explains how the unofficial Dutch version of the CISG text contains inconsistent translations of the phrase "could not have been aware" (as used in several CISG rules) – a fact which has led some Dutch commentators to *erroneously* conclude that Article 35(3) *requires* a buyer to perform a pre-contractual inspection.[42]

20. Fortunately, the unofficial Danish translation of the treaty does not suffer from such flaws, nor does Danish scholarly opinion condone the prevailing view among *non*-Danish scholars, for whom a showing of buyer's gross negligence is suffice to get a CISG seller off the Article 35(2) hook. I, for one, support that more buyer-friendly position, *not only* because there is no bright line between simple and gross negligence, *but also* because the injection of any element of negligence into 35(3) reflects undue domestic influence, thus contributing to the *homeward trend* which I presume most CISG scholars would prefer to avoid.[43]

21. When we interpret the CISG treaty, we shall (i.e. must) have regard to the need to promote uniformity in its *application*.[44] And since we now have access to a coherently organized collection of CISG decisions,[45] *CISG foreign case law* has become a most significant secondary CISG source – this even

39. Honnold and Flechtner, *Uniform Law for International Sales under the 1980 United Nations Convention*, 339.
40. See (adhering to the Honnold/Flechtner view) Schlechtriem & Schwenzer, *Commentary on the UN Convention on the International Sale of Goods (CISG)*, 3rd ed., 2009, 586 with notes 169-170.
41. See Sonja A. Kruisinga, *(Non-)Conformity in the 1980 UN Convention on the International Sale of Goods: A Uniform Concept?*, 53 ff.
42. See ibid., 52 with note 103.
43. As to this phenomenon see generally Ferrari, "Homeward Trend and Lex Forism Despite Uniform Sales Law."
44. *CISG* Article 7(1).
45. "UNCITRAL Digest of Case Law on the United Nations Convention on the International Sales of Goods – 2012 Revision"; "UNILEX on CISG & UNIDROIT Principles, Http://www.unilex.info/," accessed February 24, 2011, http://www.unilex.info/.

though the absence a "supreme" international court means that a given CISG decision rendered in State A can at best be regarded as *persuasive* in State B.[46]

22. When it comes to Article 35(3), the case law is skimpy,[47] but a few previously reported cases do shed some light on the meaning and application of the rule. In two Swiss decisions, rendered in 1997 and 1998, the buyers concerned clearly "knew or could not have been unaware" of the alleged lack of conformity.[48] Both these decisions are consistent with the position taken here, as they both rely on the black letters of Article 35(3).

23. In a 1996 decision by a German appellate court,[49] a seller sold a used car with *knowledge* that the documentation falsely described the car's vintage. Holding for the buyer on the basis of CISG Article 35(1), the court rightly opined that a seller guilty of fraudulent conduct cannot avail itself of the safety valve in Article 35(3), even if buyer's conduct could be described as "grossly negligent."[50] But this decision does not tell us whether a *non*-fraudulent seller should escape liability vis-à-vis a grossly negligent buyer pursuant to Article 35(3), nor does tell us if gross negligence falls within the category of what a CISG buyer "knew or could not have been unaware."

46. See Lookofsky, *Understanding the CISG*, 32-33 (noting the absence of any international or supranational court at the top the CISG "pyramid" with authority to iron out differences in opinion expressed by national courts, as well as the absence of any established system or scale which a given national court (or arbitral tribunal) might use to evaluate the "weight" (precedential value) to be attributed to foreign "precedents" on point).
47. "UNCITRAL Digest of Case Law on the United Nations Convention on the International Sales of Goods – 2012 Revision" Digest of Article 35.
48. See Tribunal Cantonal de Vaud (1997), available at http://www.unilex.info/case.cfm?id=311; Tribunal Cantonal de Sion (1998), available at http://www.unilex.info/case.cfm?id=366.
49. Germany, Appellate Court Köln (Used car case), English translation at http://cisgw3.law.pace.edu/cases/960521g1.html (1996).
50. See ibid., para. 3: It has to be inferred from the basic idea of Art. 40 CISG, whereby a seller is not entitled to rely on the conduct of the buyer if the seller is to blame more, in connection with Art. 7(1) CISG, that in case of a fraudulent conduct of the [seller], the [seller] has to accept responsibility even if the [buyer] could not be unaware of the non-conformity. Therefore, the statements of the [seller] pertaining to the supposed possibilities of perception of the [buyer]'s wife – which, as has to be pointed out supplementary, cannot be equated with the possibilities of perception of the [buyer] himself – are not relevant. Even a grossly negligent unknowing buyer appears to be more protection-worthy than a seller acting fraudulently (von Caemmerer/Schlechtriem, Kommentar zum einheitlichen UN-Kaufrecht, CISG, 2nd edn., Art. 35, Annotation 37 with further evidence). Consequently, when there is fraudulent conduct of the seller, the inapplicability of Art. 35(3) CISG follows from Art. 40 in connection with Art. 7(1) CISG.

24. Note in this connection that Article 35(3), by its *own terms*, applies *only* to *implied* terms under Article 35(2).[51] For this reason, and given my own position that a buyer's (gross or simple) negligence should *never* activate the rule in Article 35(3) so as to preclude a buyer's right to remedial relief under 35(2), I found little occasion within the confines of this brief paper to "balance" a buyer's knowledge of defects in relation to Article 35(3) with what a seller, in a given Article 35(1) content, might be required to disclose in good faith as regards defects known to him.[52]

25. Returning to CISG case law as regards the meaning of "knew or could not have been unaware," a relevant contribution was provided in 2011 by the Federal Court of Australia:[53]

> Article 35(3) of the CISG, properly construed, *excludes liability only* where the circumstances which give rise to the liability for lack of conformity alleged by the buyer are *known* to the buyer. It is *only* if the buyer *knew* of the "lack of conformity" which gives rise to the liability that Article 35(3) operates to render that liability unenforceable. [...] The focus of Article 35(3) is upon the "liability" in respect of which the buyer seeks to recover its loss. It is only if the facts which give rise to that liability are *known* to the buyer at the time of making the contract that Article 35(3) affords the seller a defence against the buyer's attempt to enforce its claim. This construction of Article 35(3) reflects the *natural and ordinary meaning* of the text.[54]

Notably, the Australian court's opinion deals only with facts which the buyer "knew." Perhaps to correct a suspected error, the UNILEX abstract of this case puts a few more words in the court's mouth,[55] but I prefer to read the decision as correctly affirming that the difference, if any, between "knew" and "could not have been unaware" relates at most to the burden of proof.

26. I now turn to *Cator's case* decided by a Danish City Court in 2012.[56] Since I find the decision interesting, both from a Danish as well as an interna-

51. Compare Jan Ramberg and Johnny Herre, *Internationella Köplagen (CISG)*, 3rd ed., 2009 p. 448 f (skeptical of the majority view which rejects the application of Article 35(3) to Article 35(1) by analogy); accord Lookofsky, *Understanding the CISG* p. 76 with note 104.
52. Accord: Henschel, *Conformity of Goods in International Sales* pp. 286-287.
53. Castel Electronics Pty. Ltd. v. Toshiba Singapore Pte. Ltd., http://www.unilex.info/case.cfm?pid=1&id=1641&do=case (Federal Court of Australia 2011).
54. Ibid. (premises 309-311, emphasis added here).
55. http://www.unilex.info/case.cfm?pid=1&do=case&id=1641&step=Abstract (adding "or could not have been unknown").
56. Retten i Horsens, BS 150-1302/2010 (Julie George v Kristian Skovridder) (7. December 2012).

tional perspective, and since it has not (as yet) been reported elsewhere, I will report it here in some detail.

27. But before proceeding to report this particular case, I see reason to note that Danish City Court judgments, although matters of public record, are *never reported* in the Danish Weekly Gazette (*Ugeskrift for Retsvæsen*). For this reason alone, Danish City Court judgments enjoy *little precedential value in Denmark*, whereas their precedential value at the *international* level is, in my opinion, roughly the *same* as that enjoyed by *first instance decisions* rendered in other Contracting States. Notably, both CLOUT and the *UNCITRAL Digest on CISG Case Law* contain dozens of reports of decisions rendered at this level by American, European and other national courts,[57] *inter alia* a curiously similar Danish City Court decision involving pre-contractual inspection of a defective horse.[58] The precedential impact of *any* given CISG case at the international level will of course *in part* depend on the "prominence" of the judgment-rendering court, but since there is no established system or scale to evaluate the weight to be attributed to foreign CISG precedent, the persuasive – or unpersuasive – nature of any such precedent will also depend on other factors, including the force of the reasoning in the opinion, the apparent soundness of the result and the extent to which the decision gains support in other jurisdictions.[59]

28. Turning now to the *facts* of Cator's case: In 2009 a Canadian resident (B) was in the market for a horse for her daughter (D) for use in jumping competitions at the highest international level, including qualification for the 2012 Olympic Games in London. To help select a suitable horse, B enlisted advisor (A) who contacted Danish seller (S), a horse-trader who sometimes also operated as an agent for potential buyers. Having located some 6-8 Danish "warmbloods" for sale, S took D and A to various stables where they could be considered and test-jumped. The two she liked best were named *Ca-*

57. See http://www.uncitral.org/uncitral/en/case_law/national_correspondents.html. See also generally "Case Law on UNCITRAL Texts (CLOUT), Http://www.uncitral.org/uncitral/en/case_law.html," accessed February 22, 2011, http://www.uncitral.org/uncitral/en/case_law.html; "UNCITRAL Digest of Case Law on the United Nations Convention on the International Sales of Goods – 2012 Revision."
58. See "Case Law on UNCITRAL Texts (CLOUT), Http://www.uncitral.org/uncitral/en/case_law.html" Case 992; "UNCITRAL Digest of Case Law on the United Nations Convention on the International Sales of Goods – 2012 Revision" digest of Article 1, para. 28 with note 89.
59. See generally Joseph Lookofsky, "Digesting CISG Case Law: How Much Regard Should We Have?," *Vindobona Journal of International Commercial Law and Arbitration* 8 (2004): 181-94.

tor and *Ferrari*. Cator was a 9-year old gelding with a competitive record comprising at least 9 high-level events. D got to test-ride Cator on November 8th and 9th. Since D found Cator to be a good jumper, she engaged a Canadian veterinarian (V-1) to examine him at an animal hospital in Denmark. V-1 summarized his results as follows:

Risk Assessment: Considering the intended use of the horse, available history, and the findings of the examinations, a subjective estimation of risk is made. Risk is defined as the likelihood or probability that illness, physical limitation or unsoundness is present at the time of the examination and likely to affect the horse in its intended use at this time or in the immediate future. Summation of risk factors is used to assign the horse a *subjective "level of risk" ranging from no apparent increased risk to high risk ...*

Comments: My first impressions of Cator are that he is a relaxed, confident, strong horse. [...] He has substantial bone mass in his limbs and few blemishes, swellings, or other indications of limb pathology. [...] There was no major health or soundness issue identified on this examination which suggests a high degree of risk. Most of the abnormalities of concern are associated with the right front limb. Each one of these findings is fairly minor on its own, but because there are several findings associated with a particular area they have an additive effect in increasing the perceived level of risk. The horse exhibited a slight positive flexion test on the right fore and showed a very slight degree of intermittent right front limb lameness when circling to the left. He also has a very mild radiographic variation in the right front coffin bone. These *findings suggest an increased level of risk for right front foot lameness. However, there is no major evidence of weakness or pathology in this area.*[60]

29. One week after V-1 submitted his report S sold Cator to B for 550,000 Euros, then roughly equivalent to 4 million Danish kroner. Cator was delivered to B in Denmark on December 9th 2009 and then flown (on the same plane as *Ferrari*) to Miami, Florida. On January 2nd 2010, D advised S that Cator, who had begun to limp, could no longer be ridden. On January 5th Cator was examined by veterinarian (V-2) who observed a presumably preexisting injury to Cator's right front leg. On September 10, 2010, following the parties' failure to agree on an amicable solution proposed by S (the exchange of Cator for a different horse), B filed a lawsuit against S in Denmark, seeking avoidance of the contract and damages. In order to obtain an impartial evaluation of Cator's condition at the time of contracting, the Danish court arranged for the issuance of yet another expert veterinary opinion, this time by V-3. In his report V-3 found it *likely* that Cator *at the time of delivery suffered* from one or more disorders in his right front leg *and* that he was *pre-*

60. Retten i Horsens, BS 150-1302/2010 (Julie George v Kristian Skovridder) (2012) (emphasis adjusted here).

disposed for an orthopedic disorder; V-3 also found it highly likely that these disorders were connected to the findings V-1 made prior to the conclusion of the contract of sale. During the trial, S testified he had not read V-1's report prior to the conclusion of the contract. And although he conceded that *he* would not normally buy a horse with that description, he observed that many riders become less "risk-averse" as the date for the Olympics draws near.

30. Having considered these facts, the City court rendered a unanimous (3-0) decision in favor of B. First, as regards the *non-conformity* issue, the *court held* that Cator at the time of delivery was, at the very least,[61] *predisposed to develop* one or more of the *disorders* observed shortly after his delivery and which rendered him useless as a jumper. For this reason and since B had purchased Cator for use as a jumper at the highest competitive level, the court further held that *Cator at the time of delivery did not conform to the contract of sale*.[62] (While not citing Article 35(2)(b) in this particular connection, the court – in the very next sentence of its judgment – held that the sale was not a "consumer sale" by reason of CISG Article 2(a)[63] and that the contract was therefore governed – not by Danish domestic law, but – by the CISG.[64])

31. The court then proceeded to determine the *CISG remedies* to which B might be entitled, the first question being whether she was entitled to *any* remedial relief by reason of seller's breach (non-conformity). In this connection the court noted that under Article 35(3) – as accurately translated in unofficial Danish version of the treaty – the seller is not liable for a nonconformity if the buyer at the time of the conclusion of the contract *knew or could not been unaware* of such a nonconformity.[65] The court continued (in near-literal English translation) as follows:

> In consideration of the evidence the court finds that, prior to the conclusion of the contract, the buyer was informed that Cator had never been lame, had never received injections, and that he had been used continuously, and without pause attributable to his condition, as a jumper in high level competition. The court further finds that [V-1] during his examination

61. Ibid. ("i hvert fald").
62. Ibid.("ikke kontraktsmæssig ved levering").
63. Considering the purpose for which Cator was bought, the fact that D's only occupation was riding, competing, and dealing with horses, and notwithstanding the fact that her income from these activities was limited. See ibid., 39.
64. See Lookofsky and Ulfbeck, *Køb – Dansk Indenlandsk Købsret*, chap. 2 and 10; Lookofsky, *Understanding the CISG* § 2.5.
65. See Retten i Horsens, BS 150-1302/2010 (Julie George v Kristian Skovridder) (2012) p. 4 (at sælger ikke er ansvarlig for en mangel, hvis køberen på tidspunktet for aftalens indgåelse kendte eller ikke kunne have været uvidende om en sådan mangel).

of Cator observed a mild degree of sensitivity, together with mild stiffness or intermittent lameness in the right front leg, whereas he – also in consideration of Cator's positive history – did *not* opine that these findings were *serious* or gave occasion to additional tests, in that he assessed the *risk level* in such a sale as being between low and medium. Lastly, the court-appointed expert [V-3] – both in his report and his testimony – stated that [V-1] ought to have conducted additional tests and also observed Cator over a period of time before he had a sufficient basis for determining whether Cator was fit for use as a jumper in high-level competition. In addition [V-3] stated that the observations made by [V-1] were compatible both with a conclusion that the findings were insignificant, as well as with a conclusion that that the findings were serious.

In light of the above-described facts the court is *not* in a position to declare that [B] *knew or could not have been unaware* of Cator's disorders or predisposition for those disorders, *nor* that [B] had exhibited *such a degree* of *negligence* that she by virtue of CISG Article 35(3) is precluded from remedial relief for nonconformity.

In consideration of the fact that Cator was purchased for use as a jumper at the international level and that Cator is *not fit for this purpose and is of no value as a jumper*, the court holds that B by virtue of CISG Article 49(1) is *entitled to avoid the sale. Her claim that S, upon return of the horse, shall return the purchase price of 550,000 Euro is therefore accepted by the court.*[66]

32. Cator's case proved to be quite controversial in Danish equestrian circles, *inter alia* because Danish horse-traders are as yet unfamiliar with CISG.[67] Although I will not include my own subjective opinion when I (as Danish National Correspondent for UNCITRAL) report this case objectively in CLOUT,[68] I will in the present context suggest two different ways to understand the Danish court's decision, the *first* of these being the traditional, essentially *formalistic* approach which accepts the court's stated reasons at face value. Taking that approach, I would say the court's decision is basically sound as regards the application of the relevant CISG rules, in particular the primary findings (1) *that* Cator did not conform to the contract and (2) *that* S failed to prove that B could not have been unaware of that nonconformity. On the other hand I am not comfortable with the court's supplementary finding on that second issue – that B had not acted negligently (to some unstated degree), even if that finding might find some support in the view of those CISG scholars who read Article 35(3) as including gross negligence. Perhaps the Danish court simply intended to beef up its holding – i.e. that the buyer, not-

66. Ibid. (emphasis added here).
67. See Britt Carlsen, "Handelssag Med Uforståeligt Udfald," *Ridehesten*, August 2013, http://www.ridehesten.com/dk/Heste-magasiner/Artikelsoegning/?Magasin=1&PageIndex=5&ID=127823.
68. Regarding the UNCITRAL requirement that CLOUT abstracts be "politically correct," see Lookofsky, "Digesting CISG Case Law: How Much Regard Should We Have?".

withstanding V-1's inspection, was not precluded from remedies for breach – but since negligence relates only to the Danish domestic law ("ought") standard, I fear that this part of the decision suggests a dose of the *homeward trend* to which courts in some CISG jurisdictions regrettably succumb.[69]

33. But the Danish court's opinion can also be understood in another way, this being the approach of *Scandinavian Realism*, pursuant to which the court seized "reasons backwards," thus putting (I can't resist saying) "the cart before the horse." Seen this way, the court, having considered *all relevant facts*, intuitively reached a *tentative result* (B should win); having done that, the court then applied the relevant *rules of law* (Article 35) to *test the correctness* of its tentative result.[70]

34. That said, I will emphasize that the court mentions "risk level" solely to confirm that *V-1 did not* consider the *risk of lameness to be serious* (or that his findings gave occasion to additional testing). For this reason, I do not view the court's carefully reasoned decision as a "balancing of risks."

35. Had S been allowed to keep the price paid, he would have reaped a huge profit.[71] And while no evidence was presented which suggests that he acted in bad faith,[72] I'm quite sure that the court, interpreting both parties' statements and conduct in light of "all relevant circumstances,"[73] could hardly ignore the mere "horsemeat value" which B got for her money (4 million kroner).[74] Alas, we'll never know if these Danish judges put the cart before

69. See Ferrari, "Homeward Trend and Lex Forism Despite Uniform Sales Law"; text supra with notes 7 and 9.
70. Regarding Danish legal theory on this point see Joseph Lookofsky, *Consequential Damages in Comparative Context – From Breach of Promise to Monetary Remedy in the American, Scandinavian and International Law of Contracts and Sales* (Jurist- og Økonomforbundets Forlag, 1989), 192-193; regarding the common traits and probable common sources of American and Scandinavian legal pragmatism see generally Sverre Blandhol, *Nordisk Rettspragmatisme*, 2005.
71. Retten i Horsens, BS 150-1302/2010 (Julie George v Kristian Skovridder), pp. 6-8. According to S's testimony, but presumably unbeknownst to B on the day of sale, S became Cator's owner that same day, when he bought him from Y for 1.1 million DKR (150,000 Euros); this was also the day Y bought Cator from X for 1 million DKR (roughly 135,000 Euros). X had placed Cator in a stable owned by Y on the understanding that Y would get a commission if Cator was sold. The record does not show if S was to share the price he received from B with X and/or Y.
72. Regarding the autonomous concept of good faith under CISG Article 7(1) see generally Lookofsky, *Understanding the CISG* § 2.10.
73. See CISG Article 8(1) and 8(3).
74. Although the court's ratio does not refer to the value-price factor, V-3 testified that Cator was fit only for use as "horsemeat" and the plaintiff alleged that the price paid

this particular horse, but do think that the evidence set forth in the judgment strongly suggests that *justice was done* in Cator's case. And viewed from a purely Danish perspective, that's clearly the most important thing.[75]

36. The comments to be made by my Discussant and other Conference participants might give me occasion to reconsider some arguments set forth above, but my tentative conclusions are these:

a. CISG Article 35(3) represents a more buyer-friendly rule than its Danish domestic analogue. There is a significant difference between what a buyer on the basis of an examination "knew or could not have been unaware" and what he "ought" to discover.
b. Although most courts and commentators acknowledge that fact that Article 35(3) is stricter than such domestic rules, some would in effect narrow the gap between the CISG and domestic law by equating knowledge with gross negligence. In my opinion, however, there are no convincing arguments to justify such a deviation from the letter of the Convention, i.e. no justification for courts or commentators to alter the balance between caveat emptor and caveat venditor upon which the Convention clearly is based.
c. CISG case law and scholarship are too often plagued by the *homeward trend*.[76] And while the "homeward" feature of the holding in Cator's case pales in comparison with some decisions rendered elsewhere,[77] it would have been better if the Danish court had not elected to supplement its main premise based on the clear message of Article 35(3).

supports the view that the buyer at the time of contracting did not know the horse was predisposed to injury. Se Retten i Horsens, BS 150-1302/2010 (Julie George v Kristian Skovridder) (2012).

75. See Joseph Lookofsky, "Precedent and the Law in Denmark," in *Precedent and the Law*, ed. E. W. Hondius, 2006.
76. See generally Ferrari, "Homeward Trend and Lex Forism Despite Uniform Sales Law."
77. See (e.g.) Joseph Lookofsky and Harry Flechtner, "Nominating Manfred Forberich: The Worst CISG Decision in 25 Years?," *Vindobona Journal of International Commercial Law and Arbitration* 9, no. 1 (2005): 199-208.