WEBSITE

CISGBRAZIL.NET

Tyagusov Mikhail

BURDEN OF PROOF ALLOCATION IN DISPUTES ON NON-CONFORMITY OF GOODS UNDER CISG

Essay for VIII Professor Albert H. Kritzer

Essay Competition

Moscow, Russia

2020

Contents

Introduction: actuality and methodology of the research

The choice of this topic was primarily inspired by the participation in the Willem C. Vis International Commercial Arbitration Moot in 2020. The main issue of the moot problem in substantive law concerned the burden of proof under the United Nations Convention on Contracts for the International Sale of Goods (hereinafter – CISG, Convention, Vienna Convention). It concerned both the general rules on burden and standard of proof and the exceptional rules for the shift of the burden of proof. At the core of the problem lied "the suspicion as non-conformity doctrine" derived from German and Swiss doctrine and court practice (where it is called "Verdacht als Mangel"), meaning that suspicion of non-conformity under certain circumstances can be treated as non-conformity itself. Therefore, teams arguing for claimant relying solely on a suspicion based on a media article did not have any other option except of pleading shift of the burden and suspicion as non-conformity, while respondents relied in their defence on general rules. This fact rightfully gives grounds to call the year 2020 a truly German problem, which material aspect will be reflected in this essay as well.

The research work with sources during the year and the experience of pleadings with other teams from all over the world and in front of the Tribunals from the different legal backgrounds such as Finland, Germany and the United Kingdom showed little consistency with regard to the issue of the burden of proof under CISG. While general rule on the burden of proof under CISG is comparably rather undoubted, the issues of the standard of proof and exceptional rules for the shift of the burden under CISG are vast and uncertain.

We can state that there is an absence of uniform answers on several issues vital for uniform allocation of the burden of proof in disputes under CISG. It is unacceptable as in practice the alleged non-conformity of the goods lies at the core of almost all the disputes under CISG.[1] In this manner the burden of proof becomes a fundamental

[1] FLECHTNER, Harry M. Funky Mussels, a Stolen Car, and Decrepit Used Shoes: Non-Conforming Goods and Notice Thereof under the United Nations Sales Convention (CISG). BU Int'l LJ, v. 26, p. 3, 2008.

concept for international litigation and arbitration as this issue goes through the whole proceedings from evidential process to the decision on the merits.

Thus, this essay attempts to propose unified approach to the issue of the burden of proof allocation under CISG both in terms of general and exceptional rules in accordance with the modern doctrine and tribunal's practice. To reach this goal some comparative remarks will be necessary as well to define the terms and assess whether the unified solution can be found at all. Apart from the contribution to help practitioners in applying the rules on the burden of proof under CISG this essay also contains a valuable comparative material for the national systems in the field of the most successful private law unification.

Primary source for this research will be tribunal's practice analysis, largely from the German-speaking jurisdictions as almost all the precedent decisions were rendered there. Most notable of them include Powdered Milk case in 2002, Paprika cases in 2002 and 2004 and Frozen Pork case in 2005. The doctrinal sources include first of all classic commentaries on CISG such as by Ingeborg Schwenzer and Peter Schlectriem, Stephan Kröll, Christoph Brunner and Benjamin Gottlieb, Ulrich Magnus. The specific comprehensive research s on the burden of proof under CISG are rather rare and it can be said that burden of proof under CISG issue is relatively not developed and researched in the academic sphere. Notable exceptions are the article of Anne L. Linne in 2008, Stephan Kröll in 2011, Djakhongir Saidov in 2013 and Ulrich Schrötter in 2017. Suspicions are even more uncertain with one only English-speaking publication on the matter by Ingeborg Schwenzer and David Tiebel in 2014. Expectably German sources are more informative and include first of works of Thomas Köller and David Jost in 2014, swiss view of the Arnold Rusch in 2012, Barbara Grünewald in 2006 and latest of Stephan Lars Sonde in 2016. Though, this essay is restricted in its research due to the linguistic restrictions of the author and perhaps solution from other legal systems will change the perspective of this essay.

To provide a clear guide to the practitioners in the future, the structure of the essay is divided into two parts, where the first chapter discusses the general rules on the burden of and standard of proof for the non-conformity under CISG. The second

chapter is dedicated to analysis of exceptional rules on the burden of proof under CISG and includes three exceptions: self-acknowledgement by the seller, proof-proximity principle and suspicion as non-conformity doctrine.

Chapter I. General rules on the burden of proving the non-conformity under CISG

Article 35 CISG out the criteria by which the proper performance of the contract is to be determined. The Convention introduces the general key concept of "conformity of the goods", which is the basis for deciding certain aspects of regulation. The Convention assumes that the source of this conformity is both express terms of the contract (Art. 35 para. 1) and implied terms not reflected in the contract but fixed in the Convention itself (Art. 35 para. 2). The concept of express and implied terms of the treaty is not an innovation of the Convention but has been borrowed from the common law system. Under Article 35 para. 1 the goods should be conforming to the quantity, quality and description as set out in the contract. Under Article 35 para. 2 objective criteria include ordinary use of the goods, specific use of the goods communicated by the buyer, sample or model and usual packaging of the goods. However, the Article does not contain any express provision who has to prove the conformity of the goods in the dispute.

Under Art. 7 para.1 CISG the interpretation of convention should be based on firstly its international character and secondly - the need to promote uniform application. International character calls for autonomous interpretation of the Convention without recourse to national law (with the exception when concept derived from specific national system) and promotion of uniform application in turn calls for consideration of foreign literature and case law.[2] So Convention excludes the application of national legislation on those matters that it regulates.

Therefore, in interpretation of the burden of proof under CISG we also have on one hand to determine autonomous conventional interpretation and on the other consider national foreign doctrine and judicial practice. The latter is of crucial importance since rulings are still heavily influenced by national concepts and in this matter uniform approach cannot be fully distinguished from the national concepts.

[2] MAGNUS, Ulrich; MARTINEK, Michael. J. von Staudingers Kommentar zum Bürgerlichen Gesetzbuch mit Einführungsgesetz und Nebengesetzen: Wiener UN-Kaufrecht (CISG). Walter de Gruyter, Art. 7, para. 11, 2005.

Hence, before delving into the burden of proof and standard of proof under CISG, it is vital to have a brief insight into definitions and its differences between adversarial system of common law and inquisitorial system of civil law to decide whether the uniform approach is possible at all.

1.1. Burden of proof under CISG: consistent uniform approach

A. Definition and comparative remarks

Anglo-American terminology has become much more common in international commercial arbitration under CISG and it differentiates *the legal burden* and the *evidential burden.*[3] Other self-explanatory terms for the legal burden include "probative burden", "burden of persuasion", "the risk of non-persuasion". The evidential burden is also referred as "burden of production", "duty of producing evidence", "burden of going forward with the evidence".[4]

The legal burden is exactly more familiarly known as simply the burden of proof. Under the legal burden the party shall convince Tribunal of the facts stated by the party with the degree of certainty provided for by the relevant *standard of proof* (see the second paragraph). This obligation points out the party which suffers the consequences of a non-persuasion by the Tribunal. In order to discharge the legal burden, the relevant party must adduce evidence to prove the facts in issue. A standard of proof is attached to the legal burden and the relevant party must adduce sufficiently probative evidence to meet the standard of proof. If the party bearing the legal burden does adduce sufficient evidence to meet the standard of proof, it is deemed to have discharged the burden of proof.[5]

By contrast, the evidential burden is not a burden of proof in a strict sense. It does not require the party in question to prove facts in issue, it is an obligation on a party to adduce some relevant evidence in order to make an issue a "live" one. In other words, the party bearing the evidential burden must adduce some relevant evidence in

[3] MONAGHAN, Nicola. Law of evidence. Cambridge University Press, p. 39, 2015.
[4] PHIPSON, Sidney Lovell. The Law of Evidence. Stevens and Haynes, para. 6.02, 1907.
[5] СКВОРЦОВ, Олег Юрьевич; САВРАНСКИЙ, Михаил Юрьевич; СЕВАСТЬЯНОВ, Глеб Владимирович. Международный коммерческий арбитраж: Посвящается профессору Валерию Абрамовичу Мусину, p. 662, 2018.

order to persuade the Tribunal that the issue can proceed to the Tribunal. Thus, the evidential burden is also a precondition to file a claim without which it may be rejected.[6] It is sometimes referred to as "the duty of passing the judge".[7] This burden is not satisfied if in the tribunal's opinion no reasonable panel can make a decision in favour of the party based on that evidence. Usually, the party who will bear the legal burden in respect of an issue will first have to discharge the evidential burden in respect of that issue. So, the evidential burden must be discharged before the legal burden is triggered.

As the evidential burden is simply an obligation to raise some evidence but that evidence need not actually prove anything and there is no standard of proof attached, it does not usually raise any complicated issues in practice. If the evidential burden has been discharged, it is said that *"prima facie evidence"* of the facts for claim is provided. The presentation of prima facie evidence is sufficient for the evidentiary initiative to pass to the opponent. Where a party has provided prima facie evidence, the risk of adverse consequences of not providing evidence to the contrary is clearly transferred to the other party.[8]

Continental tradition shows the akin division under the concepts of objective (substantive or *materielle Beweislast, objektive Beweislast, Festellungslast)* and subjective (procedural or *Beweisführungslast, formelle Beweislast, subjektive Beweislast*) burden of proof.[9] In objective meaning it is "the risk of facts not being sufficiently established" and in subjective meaning - "the burden of factual substantiation", equating it essentially to evidential burden and legal burden respectively.[10] The objective burden of proof is fixed by the virtue of law and stays

[6] JAMES, Fleming; GEOFFREY, C. Hazard, and John Leubsdorf. Civil Procedure, p. 338, 1992.
[7] THAYER, James Bradley. A preliminary treatise on evidence at the common law. Little, Brown, p. 221, 1898.
[8] БУДЫЛИН, Сергей Львович. Внутреннее убеждение или баланс вероятностей? Стандарты доказывания в России и за рубежом. Вестник экономического правосудия Российской Федерации (0869-7426), n. 3, p. 35, 2014.
[9] HENNINGER, Michael. Die Frage der Beweislast im Rahmen des UN-Kaufrechts: zugleich eine rechtsvergleichende Grundlagenstudie zur Beweislast. VVF, Florentz, p.29, 1995.
[10] CISG DATABASE. Wire and Cable case. Available at: http://cisgw3.law.pace.edu/cases/040211s1.html. Accessed: 10.04.2020.

during the proceedings on one side, while, the subjective burden falls within one or another party during the proceedings.[11]

In the doctrine the burden of proof sometimes is not divided into objective and subjective, referring only to the shifting of the burden of proof (see the next chapter). Some on the contrary strongly criticize the application of the category "burden of proof" to the shifting of the burden: the burden of proof cannot be shifted except in special cases, so it is not entirely correct to define the *shift of burden of proof* by the same term as the burden of proof.[12] These authors add two definitions to international commercial arbitration: "onus of proof" and "burden of proceeding", preferring the former because of the presence of the word "burden" in the latter, which is identified with the burden of proof. Professor Waincymer suggests that such a confusion of evidentiary definitions has mistakenly led to perception of the burden as dynamic category. Subject to this research is obviously a burden of proof understood as burden of proceedings, not to be mixed with onus of proof.

Distribution of legal burden in common law jurisdictions and objective burden in civil law jurisdictions almost unilaterally follows the principle established in Roman law: *ei incumbit probatio, qui dicit non qui negat* (one is burdened with proof, whoever claims, not the one who denies).[13] This principle is always referred as "rule-exception principle". In German legal theory this principle is referred as theory of the favour structure of the rule (*Tatbestandtheorie*, *Normenbegüstigungsprinzip*, *Normenbegüstigungsklausel*): "each party must assert and prove the conditions of the norm favourable to it".[14]

This general rule influenced almost all continental jurisdictions which codified similar provisions. The same principle can be seen in the Article 217 of the Spanish Civil Code, Article 8 of the Swiss Civil code, Article 6 of the Polish Civil Code, Article 2697 of the Italian Civil Code. The same rule on the burden of proof allocation is

[11] БУДЫЛИН С.Л. Ibid.
[12] WAINCYMER, Jeffrey. Procedure and evidence in international arbitration. Kluwer Law International BV, p. 773, 2012.
[13] LILLY, Graham C. et al. An introduction to the law of evidence. West Publishing Company, p. 41, 1978.
[14] ROSENBERG, Leo. Die Beweislast: auf der grundlage des bürgerlichen gesetzbuchs und der zivilprozessordnung. Liebmann, p. 98, 1923.

adopted in the French Civil Code in Article 1315: "person who claims the performance of an obligation must prove it". French Theory treats this principle to be applicable not only to obligations per se but as a general principle.[15] In Common Law the distribution of the objective burden of proof follows continent: "where a given allegation, whether affirmative or negative, forms an essential part of a party's case, the proof of such allegation rests on him".[16]

This principle is further an international principle in international procedural law on the distribution of the burden of proof. In joint American Law Institute-UNIDROIT Principles on Transnational Procedure the same provision has been agreed in Art. 21.1. In commentary P-21A provides that it is often described as "the burden of proof goes with the burden of pleading" and its allocation is almost always determined by substantive law.[17]

To conclude this brief comparative introduction, both Common and Civil law jurisdiction are relatively consistent on the issue of the burden of proof allocation. Under rule-exception principle dating back to Roman law and Glossographs, the legal (or persuasive) burden generally rests with the party bringing the case to court as the party asserting an issue bears the burden of proving that issue. Thus, as the claimant brings the case involving a matter of non-conformity, it has a burden of proving the facts in issue in his case against the defendant, while the defendant bears the legal burden of proving anything that he raises in his defence.

B. Burden of proof under CISG

Three moments are crucial to determine burden of proof under CISG. First, whether CISG regulates issue of burden of proof at all. Secondly, what is the general rule and what is the exact moment when the burden of proving the non-conformity is on the buyer.

[15] HERZOG, Peter E. et al. Civil procedure in France. Springer, p. 310, 2014.
[16] ZUCKERMAN, Adrian AS. Zuckerman on civil procedure: principles of practice. sweet & Maxwell, para. 4-02, 2006.
[17] UNIDROIT website. ALI/UNIDROIT Principles of Transnational Civil Procedure. Available at: https://www.unidroit.org/instruments/transnational-civil-procedure. Accessed on: 22.04.2020.

Coming to the first question previously scholars, practitioners and tribunals considered burden of proof as an issue of non-harmonized national procedural law since it is not specifically mentioned in the Article 4 CISG which determines the scope of its application. This view was also first of all justified by the drafting history as the delegates thought inappropriate for the Convention dealing with material sale of goods to regulate issue of evidence.[18] Only about 20 years ago decisions stating that burden of proof is not covered by CISG were not rare.[19]

Within the time it became obviously reasonable to include burden of proof in the scope of CISG since it is not a solely technical procedural issue. Contrary to that it resolves material matters which are comparable to substantive provisions.[20] Therefore, the predominant view these days that burden of proof is regulated by CISG. Under Art. 7(2) the burden of proof forms an internal gap in the CISG (except for Art. 79(1) CISG), meaning that an issue only impliedly but not expressly governed by CISG.[21] This view is based on the fact that there is at least one provision in the Convention, article 79, which explicitly addresses the burden of proof. Article 2(a) and 25 CISG are said to impliedly regulating the burden of proof issue as well. Article 25 addresses to some extent the burden of proof of its elements: the burden with respect to the element of Article 25 relating to the foreseeability of breach rests with the party in breach of the contract.

This change of attitude over the time is rather justified. As shown above almost all jurisdictions contain similar basic rule on the burden allocation. The major difference that civil law jurisdictions consider burden of proof as substantive issue and common law – as procedural.[22]

---

[18] HONNOLD, John. Documentary history of the uniform law for international sales: the studies, deliberations, and decisions that led to the 1980 United Nations Convention with introductions and explanations. Kluwer Law Intl, p. 331, 1989.
[19] CISG DATABASE. Spirits case. Available at: http://cisgw3.law.pace.edu/cases/970220s1.html. Accessed: 10.04.2020.
[20] MÜLLER, Tobias Malte. Ausgewählte Fragen der Beweislastverteilung im UN-Kaufrecht im Lichte der aktuellen Rechtsprechung. Sellier European Law Publishers; Quadis, p. 32, 2005.
[21] MÜLLER T.M. Ibid. P. 33.
[22] SKONTZOS, Athanassios V. The burden and standard of proof in model international procedural law: dealing with the burden and standard of proof in international disputes. Uniform Law Review, v. 23, n. 3-4, p. 579, 2018.

Hence coming to the second question, burden of proof allocation under CISG follows the same general principle of "**rule-exception**", meaning that **a party invoking rule for claim or defence should prove facts to substantiate it**.[23] So the distribution of the burden of proof under CISG is based on the relationship between rule and exception that becomes apparent in the wording of a norm: the claimant bears the burden of proof for facts of the constituent elements of the offence which as a rule trigger the legal consequence sought; the burden of proof for the actual preconditions of the exceptional circumstances lies with the opponent.

Vast case practice confirms this principle to be predominant. As pointed out by Prof. Stephan Kröll there are two main categories of such cases.[24] In the first category, the action is being brought by the seller for the purchase price, which buyer refused to pay alleging non-conformity of the goods. In the second category, the buyer acts as a claimant seeking remedies for the alleged non-conformity. *Fiberglass composite materials* case falls in the first category. In that case Swiss Higher Cantonal Court in 2009 confirmed that despite not being regulated explicitly in CISG, judge cannot resort to national law because CISG implicitly provides "rule and exception" allocation of burden. The same ratio can be found in *Oven case*.[25]

Even if the Tribunal does not follow the approach that CISG governs the burden of proof it would come to the same practical results as it was in *Steel bars case* decided by ICC Court in 1993, in which it applied French provisions.[26] Nevertheless, there Tribunal even named **rule-exception as a basic principle in international trade** within the **distribution of the burden**. In *Cocoa beans case* decided in 1998, the Court acknowledged that it is disputable whether CISG governs the burden of proof or in the absence of such regulation a domestic law should be applied.[27] However, it left the

[23] ANTWEILER, Clemens. Beweislastverteilung im UN-Kaufrecht: insbesondere bei Vertragsverletzungen des Verkäufers. Lang, p. 77, 1995.
[24] KRÖLL, Stefan et al. The Burden of Proof for the Non-conformity of Goods Under Art. 35 CISG. Анали Правног факултета у Београду, v. 59, n. 3, p. 164, 2011.
[25] CISG DATABASE. Oven case. Available at: http://cisgw3.law.pace.edu/cases/070427s1.html. Accessed: 10.04.2020.
[26] CISG DATABASE. Steel bars case. Available at: http://cisgw3.law.pace.edu/cases/936653i1.html. Accessed: 10.04.2020.
[27] CISG DATABASE. Cocoa beans case. Available at: http://cisgw3.law.pace.edu/cases/980115s1.html. Accessed: 10.04.2020.

discussion opened since under both approaches the result was the same. In *Condensate crude oil mix case* decided in 2002, Netherlands Arbitration Institute reproduces and referred to the rationale of *Cocoa beans case* in analogy with the Dutch law. These examples also justify the inclusion of the burden in the scope of CISG.

Some scholars indicate that if parties concluded an arbitration agreement selecting arbitration rules which contain provisions on the burden of proof than they derogated from the CISG's burden of proof rules pursuant to Art. 6 CISG.[28] However, this discussion is also purely theoretical as the outcome will be essentially the same. Allocation of the burden of proof in modern international arbitration follows the same principle. The rule-exception principle is included in almost all arbitration rules: for instance, in UNCITRAL Arbitration Rules and ICAC Russia Arbitration Rules.[29]

Coming up to the third question, namely after which moment the burden to prove non-conformity rests within the buyer, one should not be misguided by the physical taking of the goods by the buyer. Additionally, to rule-exception principle one has to take into account the moment of risk passing, which should be assessed in conjunction with Articles 38 and 39 CISG.

Surprisingly even UNCITRAL Digest of Article 35 case law in the section dedicated to burden of proof does not nuance cases in this matter. In doing so digest presents a case law as a patch-work quilt, mistakenly showing that tribunals do not rely on any general principles and sometimes place the burden on the seller, sometimes on the buyer and stating that "burden of proof varies with the context".[30] In fact all the mentioned cases in the digest follow the above mentioned rule-exception principle. The difference in the outcome depends on time for examination under Article 38 CISG and the notice of a defect within reasonable time under Article 39 CISG.

This issue was in detail elaborated in the mentioned *Wire and Cable case* decided by Appellate Court Bern in 2004. It concerned the claim of the buyer to the seller after

[28] KRÖLL, Stefan et al. Cost and Burden of Proof under the CISG–A Discussion amongst Experts. International Trade and Business Law Review, v. 20, p. 214, 2017.
[29] СКВОРЦОВ О. Ю., САВРАНСКИЙ М. Ю., СЕВАСТЬЯНОВ Г. В. Ibid. p. 684.
[30] CISG DATABASE. UNCITRAL Digest of Case Law on the United Nations Convention on the International Sale of Goods. Available at: http://www.cisg.law.pace.edu/cisg/text/digest-art-35.html. Accessed: 10.04.2020.

finding out the incompleteness shortly after the delivery. The rationale for the decision is that the burden is on the seller until the passing of the risk pursuant to Article 36(1) CISG. The norm fixed in the article that the conformity of the goods to the contract should be determined at the moment of transfer of risk to the buyer, follows also the provisions on the risk associated with the destruction or damage to goods.[31] Passing of the risk is determined as a general rule by the agreement of the parties, in the absence of such agreement the passing of risk shall be assessed in accordance with Art. 67 - 69 CISG.[32] Essentially the risk shall pass in the case of sale by delivery to a place other than the place of performance after delivery to the carrier pursuant to Art. 67 para. 1 CISG, in the case of goods in transit upon conclusion of the contract pursuant to Art. 68 CISG and in the other cases upon actual or due acceptance of the goods by the buyer pursuant to Article Art. 69 Abs. 1 CISG. If the parties have agreed an Incoterm clause, the passing of risk shall be determined by it. For example, in accordance with FOB Incoterm 2010, the risk is transferred when the goods are placed on a board of the vessel or in the case of DAP Incoterm 2010 when the offer is made for unloading at the destination.[33]

However, the burden of proof allocation is not limited by the passing of the risk solely but extended by the time for examination and notification about the possible defects made by the buyer pursuant to Articles 38 and 39 CISG. Thus, if the buyer accepts goods without any notification it is the buyer who bears the burden to prove that the goods were non-conforming when the risk passed. On the contrary, if the buyer notifies within the reasonable time about the non-conformity, it is for the seller to prove the conformity of goods when the risk passed under Article 35 CISG.[34] In the literature it is sometimes mistakenly treated as a shifting of the burden of proof but here we are dealing solely with the issue of acceptance of the goods.[35]

[31] RECORDS, OR Official. United Nations Conference on Contracts for the International Sale of Goods, p. 38, 1981.
[32] BRUNNER, Christoph; GOTTLIEB, Benjamin. Commentaries on Articles 35 CISG, p. 227, 2019.
[33] RAMBERG, Jan. ICC guide to incoterms 2010. ICC International Chamber of Commerce, 2011.
[34] SCHWENZER, Ingeborg. Commentary on the UN Convention on the International Sale of Goods (CISG). Oxford University Press, Art. 3 para. 49, 2016.
[35] LINNE, Anna L. Burden of Proof under Article 35 CISG. Pace Int'l L. Rev., v. 20, p. 31, 2008.

Important to note that in principle the buyer is not obliged to carry out such an inspection which will reveal all defects. Notably, the Court in *Wire and Cable case* also expressly stated that it does not mean an obligation of the buyer to examine goods upon the delivery as impractical and unusual business practice due to volume and inconveniences of such immediate examinations. In this case specifically this explanation referred to transport delivery, when trucks arriving to storage areas are eager to leave the premises as soon as possible after delivery.

Important to emphasize that CISG distinguishes time periods for the examination under Art. 38 and for the notice of non-conformity under Article 39 even in the wording: examination should be done in as short period as is practicable within reasonable time. The reason why the exact time frame is not set by the Article 38 instead considering the period as shorts as is practicable in the circumstances is because this frame is different for non-perishable and for perishable goods. The period for long-lasting goods can be as long as 2-3 weeks, while for perishable – 0,5-1 week. [36] Doctrine and case law on the time frames for notice of defects is less consistent, which leaves to the Tribunal decide more on case-by-case basis: average 1-2 weeks[37], 2 weeks[38] or even 1 months.[39] In *Used laundry machine case,* the Swiss court considered that buyer duly notified the seller on 26 August, while the delivery was on 29 of July.[40] Notably, such a notice just has to be communicated by any means (including cell phone) and according to Article 27 CISG the risk of non-delivery of the notice is on the seller.

Time is of the crucial importance in such disputes: after a long delay the burden would rest within the buyer and it would be difficult or even impossible to establish with certainty and provide adequate evidence whether the defects were present at the time the risk passed. In case decided by the Appellate Court of Paris it was established that as the buyer conducted examination within 3 days after delivery on 3 May and

[36] VOGEL, Hans-Josef. Die Untersuchungs-und Rügepflicht im UN-Kaufrecht. na, p. 75, 2000.
[37] VOGEL H. J. Ibid.
[38] MAGNUS U., MARTINEK M. J. Ibid. Art. 39 para. 21, 22
[39] SCHWENZER I. Ibid. Art. 39 para. 17
[40] CISG DATABASE. Used laundry machine case. Available at: http://cisgw3.law.pace.edu/cases/031113s1.html. Accessed: 10.04.2020.

notified within 7 days on May 15, the seller continued to bear the burden to prove the conformity "beyond the time of the passing if the risk […] until the expiration of the period for notification". As the seller failed to discharge the burden, claim was dismissed.[41]

It is a consistent approach of rulings in several jurisdictions. The similar scenario and rationale however without such a detailed analysis could be found in also mentioned by UNCITRAL Digest *Namur-Kreidverzekering v. Wesco* case[42] decided by Belgian Court in 1996, *Garden flowers case*[43] decided by Austrian Court in 1994, *Rainbow trout eggs case*[44] decided by Spanish Appellate Court in 2002. In *Thermo King v. Cigna Insurance* case decided by French Appellate court in Grenoble, the refrigeration unit had broken down shortly after the delivery and subsequently it was the seller to prove non-conformity.[45]

To conclude this paragraph, the majority of case law and doctrine considers burden of proof to fall in the scope of CISG. The general rule to determine its allocation is rule-exception principle. As it is a consistent approach under both civil and common law, both procedural and substantive law, even if Tribunal does not follow that CISG governs this issue, practical outcome is essentially the same. However, an important consideration in the disputes on non-conformity under CISG has to be made to the acceptance of the goods. As soon as the buyer has accepted the goods, they are within his territorial jurisdiction. However, the burden of proof may not immediately fall on the buyer, because according to CISG, acceptance of the goods does not mean physical taking of the goods fixed to the moment of the passing of the risk. Only when the short period for examination of the goods and an additional measured period for notice of defect has elapsed, "exclusive possession" over the goods is established as defined by

[41] CISG DATABASE. Aluminium and Light Industries Company v. Saint Bernard Miroiterie Vitrerie. Available at: http://cisgw3.law.pace.edu/cases/010614f1.html. Accessed: 10.04.2020.
[42] CISG DATABASE. Namur-Kreidverzekering v. Wesco. Available at: http://cisgw3.law.pace.edu/cases/010614f1.html. Accessed: 10.04.2020.
[43] CISG DATABASE. Garden flowers case. Available at: http://cisgw3.law.pace.edu/cases/940701a3.html. Accessed: 10.04.2020.
[44] CISG DATABASE. Rainbow trout eggs case. Available at: http://cisgw3.law.pace.edu/cases/020621s4.html. Accessed: 10.04.2020.
[45] CISG DATABASE. Thermo King v. Cigna. Available at: http://cisgw3.law.pace.edu/cases/960515f1.html. Accessed: 10.04.2020.

the Swiss Court in *Cable drums case*.[46] This measured period differs from the category of goods but can be quite long up to 1,5 months. After this moment, the buyer should bear the burden to prove non-conformity under Article 35 CISG. On the contrary, if a defect is notified within a reasonable period of time, it is the seller must therefore prove that the goods were conforming at the time the risk passed.

1.2. Standard of proof under CISG: more national than uniform yet

A. Definition and difference between common law and civil law

The burden of proof identifies the party charged with the duty to produce the evidence. If the primary burden of proof is met, the passivity of the procedural opponent refusing to provide counterproof will mean that the contested fact is proven. If the opponent presents his counterevidence at the same time or after the burdened party has presented its evidence, the Tribunal shall assess all the evidence in the aggregate and determine whether it is sufficient to establish a contested fact and make a decision based on that fact.[47] Here the key question arises: how does the Tribunal consider the evidence to be sufficient and the burden of proof of the party concerned to be satisfied and the fact in dispute to be established? The Tribunal in evaluating the presented proofs in their totality and correlating them with a position of the parties on the case cannot establish the objective truth with absolute accuracy in most cases. Objective picture of reality exists, the fact that goods were defective is objective. The problem is that months (if not years later) the facts of delivery or the lack thereof can be determined by Tribunal only relatively. Hence, the Tribunal is forced to resolve a dispute under conditions of varying degrees of uncertainty not only with regard to the law (deficiency, inconsistency or ambiguousness of the sources of positive law) but also with regard to factual circumstances. Thus, the Tribunal has to face the parties' divergent views on the facts, their presentation of contradictory evidence and to make decisions along with the doubts about the facts of the dispute.

---

[46] CISG DATABASE. Cable Drums case. Available at: http://cisgw3.law.pace.edu/cases/040707s1.html. Accessed: 10.04.2020.

[47] КАРАПЕТОВ, А. Г.; КОСАРЕВ, А. С. Стандарты доказывания: аналитическое и эмпирическое исследование. Вестник экономического правосудия Российской Федерации, n. 5, p. 45, 2019.

The need at some stage to stop the search for truth and to make decisions based on a degree of conviction is also facilitated by the flow of cases, limited time and resources available. The Tribunal is unable to continue clarifying the facts indefinitely: the search, presentation and study of evidence is quite costly. According to Posner under the economic analysis of law at some stage the marginal social costs of finding, presenting, examining and evaluating evidence begin to exceed the social benefits of increasing the credibility of the parties' position on the facts of the dispute and reducing the probability of erroneous fact-finding.[48]

Therefore, since in most cases (a) it is simply impossible to establish the facts of the past with absolute accuracy and reliability, (b) further search for the truth may be inexpedient due to the excess of the marginal costs of establishing the facts over the marginal benefits of minimizing the risk of a miscarriage of justice, or (c) the parties have exhausted their evidentiary capacity or have simply have not performed reliable evidence at the stage of gathering and presenting evidence, the Tribunal is forced regularly to make decisions based on imperfect and incomplete information and apply the relevant standard of proof.

Standard of proof represents the degree to which the party bearing the legal burden must discharge that burden. By following the standard of proof, the Tribunal may conclude that a party's assertion of factual circumstances is proven.[49] The range of possible degrees of certainty that a tribunal might have is about the limit of doubts about the truth of fact, which is combined with the readiness of the Tribunal to admit the fact proved.

The credibility of the body of evidence presented by the party bearing the burden of proof, which is perceived by the Tribunals as sufficient and used in practice always referred to as the *positive standard of proof*, which basically reflects is a social norm. On the contrast *normative standard of proof* is a yardstick and certain unification of

[48] POSNER, Richard A. Economic Analysis of Law . Aspen Casebook Series, p. 819-820, 2011.
[49] Waincymer J. Ibid. 766.

approaches to determining the permissible level of doubts.[50] In our research we are clearly concentrating on the normative standard of proof.

In any way both positive and normative standard of proof are closely linked to the notion of *probability*. The judge or an arbitrator verifies that the evidence presented meets his or her intuitive or recognized standard of proof by assessing the likelihood that the disputed circumstances are as presented by the party bearing the burden of proof. Naturally, this is most often not a *frequency (objective) probability* based on statistical data on the frequency of occurrence of such phenomena in the past, but rather the so-called *subjective probability* based on the subjective confidence of a person in the truth of fact.[51] According to A.T. Bonner, establishing the circumstances of civil cases on the basis of a high degree of probability in many cases the only possible and necessary way to solve them in conditions where a reliable establishment of truth is virtually impossible.[52] Hence, the accuracy and reliability of the evidence is always a matter of probability.

As the predominant approach under CISG in practice that standard of proof is governed by non-harmonized national law, thus at this point at first place national concepts first have to be evaluated. The main division between two legal systems lies in the subjective and objective criterion of proof. The subjective criterion of proof bases on the conviction and faith, while subjective – on the probability.[53]

The common law system standard of proof for civil cases is "balance of probabilities" with the American synonymous variant "preponderance of the evidence", meaning that the burden is discharged if the fact more probable to be true. The rule was first referred in Miller v. Minister of Pensions (1947) 2 All ER 372, where Judge Lord Dennington gave the definition.[54] This formula is always expressed as "**more likely than not**" or that the **probability exceeds 50%.**

[50] DANE, Francis C. In search of reasonable doubt. Law and Human behavior, v. 9, n. 2, p. 148, 1985.
[51] KAPLAN, John. Decision theory and the factfinding process. Stan L. Rev., v. 20, p. 1065, 1967.
[52] БОРИСОВА, Е. А.; МОЛЧАНОВ, В. В. Боннер АТ Проблемы установления истины в гражданском процессе. Вестник Московского университета. Серия 11. Право, n. 2, p. 44, 2010.
[53] ЕЛИСЕЕВ, Николай Георгиевич. Основные понятия доказательственного права. Законы России: опыт, анализ, практика, n. 1, p.12, 2007.
[54] THOMSON REUTERS PRACTICAL LAW UK. Miller v. Minister of Pensions case (1947) 2 All ER 372. Available at: https://uk.practicallaw.thomsonreuters.com/2-500-6576. Accessed 23.04.2020.

Naturally, mostly the language is not switched to the percentages and usually it is not said that Tribunal is of 90 or 51% sure of the proven fact. It is just a reflection of subjective certainty within a certain continuum, where the absolute "one does not believe" is 0% and "one is convinced without the slightest doubt" is 100%. The very existence of a clearly articulated standard of proof in court disputes is largely due to the role of jury trials in Common law jurisdictions.[55] It is precisely because the facts in them were historically established by the jury and there was a need to develop a constructive and self-explanatory criterion for assessing the evidence. This criterion, e.g. the standard of proof must be sufficiently clear so that the judge can explain it to the jury how this criterion should apply.[56]

The balance of probabilities standard is also justified by economic analysis of law: the standard of proof is designed make the mistake in favour of the claimant and the respondent equal, thus making the public utility maximised.[57] It is due to the factor that the negative consequences of an error in favour of the plaintiff (i.e., an erroneous dismissal) are exactly the same as the negative consequences of an error in favour of the defendant (i.e., an erroneous dismissal).

However, in the continental system the concept of the inner conviction (*l'intime conviction du juge, die richteriche Überzeugeng*) has become more prevalent. Continental legal traditions adopted a free evaluation of evidence principle.[58] The modern procedural law in Russia as well as of many European countries states that a judge evaluates evidence by inner conviction (Article 71 of the Russian Arbitration Procedural Code and Article 67 of the Russian Civil Procedural Code).

To conclude, standard of proof resolves the necessary question of how sure the tribunal of fact must be in any given case be. Standard of proof is needed because it is difficult to establish objective truth within the time, limited evidentiary capacities of the parties and economic efficiency of justice. Contrary to almost identic understanding of the burden of proof in common and civil law traditions, the standard of proof from

[55] БУДЫЛИН С. Л. Ibid. p. 25.
[56] БУДЫЛИН С. Л. Ibid. p. 29
[57] POSNER R. A. Ibid. p. 140.
[58] LEW, Julian DM et al. Comparative international commercial arbitration. Kluwer Law International BV, p. 561, 2003.

the first point of view seems to be understood very differently. Common law determines the standard on the balance of probabilities based on objective evidentiary criterion, while civil standard of inner conviction bases on the subjective criterion of proof.

B. Reasonable degree of certainty as a proposed uniform standard under CISG

All the leading scholars under CISG jurisprudence, including Professors Ingeborg Schwenzer and Peter Schlechtriem[59] or Christoph Brunner and Benjamin Gottlieb[60] promote the view that as the burden of proof and standard of proof are very closely connected, the latter should also be governed by the principles underlying CISG Specifically, scholars refer to the principle of reasonableness.[61] Under this uniform approach the applicable standard of proof under CISG should be **reasonable degree of certainty**.[62]

One should note that in opposition to the aforesaid there is no vast doctrinal and case law elaboration on the definition of the reasonable degree of certainty as a standard. The leading scholar to advocate this view is Professor Djakhongir Saidov, who made a comprehensive analysis in the context of proving losses under Art. 74 CISG, largely trying to project provisions of the Art 7.4.3 UNIDROIT Principles on CISG.[63] This approach in relation of assessing damages is rather consistent and was also included in the para. 6 Article 393 of the Russian Civil Code during the Civil law reform in 2015.[64]

Later Professor Djakhongir Saidov also advocated the same approach as a universal standard of proof under Convention in his work on non-conformity.[65] Provided definition of reasonable certainty standard in fact closely resembles the civil law idea of inner conviction of the judge: “judgment must necessarily depend upon

[59] SCHWENZER I. Ibid. p. 621.
[60] BRUNNER C., GOTTLIEB B. Ibid. p. 118-119.
[61] KRITZER, Albert H. Overview Comments on Reasonableness, p. 2, 2015.
[62] KOLLER, Thomas; MAUERHOFER, Marc. Das Beweismass im UN-Kaufrecht (CISG), p. 32, 2011.
[63] SAIDOV, Djakhongir. Standards of Proving Loss and Determining the Amount of Damages. Journal of Contract Law, v. 22, n. 1, p. 27-53, 2006.
[64] BUTLER, William Elliott (Ed.). Civil code of the Russian Federation. ООО «ЮрИнфоР-Пресс», 2007.
[65] SAIDOV, Djakhongir. Article 35 of the CISG: Reflecting on the Present and Thinking about the Future. Vill. L. Rev., v. 58, p. 547, 2013.

their mental power, their own specific education and life experience, and their emotional characteristics and background".[66]

Under this approach Professors Ingeborg Schwenzer and Peter Schlectriem in their commentary also note that prima facie evidence may be sufficient under the reasonable degree of certainty standard of proof.[67] As stated in the first paragraph on the definition of burden of proof, originally the concept of prima facie evidence emerged in common law and means obvious and sufficient evidence that seems to be reliable in the absence of a rebuttal. However, it should be remembered that prima facie evidence is "the smallest thing that can give rise to a grain of probability of a claim, but it is not always sufficient for a party to achieve a positive result".[68]

Previously court practice did not apply uniform reasonable degree of certainty standard of proof and to applied national procedural rules to the standard of proof. In the *Farm machines and spare parts case* decided by Swiss Court in 2005 it was stated that "extent of proof" and "required extent of conviction of the judge" should be established under the procedural law of forum.[69] Notably Court gives a certain attention to explain that case cannot be decided on the basis of balance of probabilities where judicial conviction is lacking and the facts of the case remain in doubt. Thus the Court stated that internal judicial conviction is a higher standard that balance of probabilities. In *Egyptian cotton case* decided by the Swiss Supreme Court in 2000 it was also found that CISG contains provisions on burden of proof but not on the rules "directing judge on how to reach its own opinion".[70] However recent decisions show the same tendency as once with the burden of proof: courts and tribunals are starting to consider the standard of proof in the scope of CISG and apply uniform reasonable degree of

[66] SAIDOV D. Ibid. p. 548.
[67] SCHWENZER I. Ibid. p. 622.
[68] WAINCYMER J. p. 771.
[69] CISG DATABASE. Farm machines case. Available at: http://cisgw3.law.pace.edu/cases/050523s1.html. Accessed: 10.04.2020.
[70] CISG DATABASE. Egyptian cotton case. Available at: http://cisgw3.law.pace.edu/cases/000915s2.html. Accessed: 10.04.2020.

certainty standard, for example in *CISG-online 2936 case* decided by District Court Wil in 2016.[71]

And though this uniform approach under CISG is not yet widely accepted in practice, a deeper insight into continental and common law differences shows that basically there are not restrictions for the application of reasonable degree of certainty standard.

The problem of the permissible degree of doubt is somewhat clouded by general phrases about the judge's inner, purely subjective conviction.[72] Nevertheless, in recent time standard of proof is also discussed and even sometimes legislate.[73] The Austrian Supreme Court has stated that a minimum standard of proof must correspond to a high probability.[74] The German Supreme Court states that a civil court may admit a fact to be proven if there is **a reasonable level of certainty**, despite the possibility that some doubts may exist.[75] The Swiss Supreme Court states that a court must be convinced of the truth of a contested fact on the basis of objective grounds, but absolute certainty is not required: it is sufficient if the court does not have serious and essential doubts.[76]

The fact that continental courts in practice use a standard of proof in civil cases that at first glance seems to be above a balance of probabilities makes some Common law lawyers wonder how much Europeans are mistaken.[77] For example by citing Austrian Procedural Law, which contains the provision in which a judge should be guided not even be by an inner conviction but by "full conviction" ("*volle überzeugeng*") in evaluating evidence.[78] However, considerable amount of continental

[71] CISG-ONLINE DATABASE. CISG-online case 2936. Available at: http://www.cisg-online.ch/content/api/cisg/display.cfm?test=2936. Accessed: 10.04.2020.
[72] ENGEL, Christoph. Preponderance of the evidence versus intime conviction: A behavior perspective on a conflict between American and Continental European law. Vt. L. Rev., v. 33, p. 440, 2008.
[73] TARUFFO, Michele. Rethinking the standards of proof. The American journal of comparative law, v. 51, n. 3, p. 662-664, 2003.
[74] NUNNER-KRAUTGASSER, Bettina; ANZENBERGER, Philipp. Evidence in Civil Law-Austria. Institute for Local Self-Government and Public Procurement Maribor, p. 11, 2015.
[75] WOLF, Christian; ZEIBIG, Nicola. Evidence in Civil Law-Germany. Institute for Local Self-Government and Public Procurement Maribor, p. 21-22, 2015.
[76] SCHWEIZER, Mark. The civil standard of proof—what is it, actually?. The International Journal of Evidence & Proof, v. 20, n. 3, p. 220, 2016.
[77] CLERMONT, Kevin M.; SHERWIN, Emily. A comparative view of standards of proof. The American Journal of Comparative Law, v. 50, n. 2, p. 248, 2002.
[78] REDFERN, Allan et al. The standards and burden of proof in international arbitration. Arbitration International, v. 10, n. 3, p. 335, 1994.

scholars answer that these assumptions are not true and that in reality continental courts use not that high standard of proof in civil cases.[79] In fact, in practice with a number of exceptions the continental process uses a more flexible standard of proof. It is just not attempted to denote levels of subjective certainty by specific concepts. The courts are given the opportunity to choose implicitly and without declaring it openly in their subjective view the most reasonable and appropriate standard in a particular case. This provides maximum flexibility but creates uncertainty about the content of the standards applied. For example, some German scholars believe that a reasonable degree of certainty, which according to the German Supreme Court should be considered sufficient to prove facts in civil disputes, is reasonably comparable to a balance of probabilities.[80]

Consequentially, empirical studies have led a number of scholars to conclusion that the standard of proof actually applied in civil disputes on the continent is in fact similar to the standard of proof de facto applied in common law countries in similar cases and thus there is no significant disagreement between different understanding of the standard of proof. [81] In the research of Hanotiau it is emphasized that judges do not establish the likelihood precisely, giving all the parties to produce the evidence and then evaluating them.[82] The evidence always goes through the prism of the inner's conviction of a person, even if the "objective" balance of probabilities is applied. [83] The only difference is that the common law tradition tries to clarify the content of the standards in a more specific way, linking them to a certain level of subjective certainty and clearly differentiate them for different categories of disputes, while the continental tradition tends to leave these issues less articulate.[84]

[79] WRIGHT, Richard W. Proving facts: Belief versus probability. In: European tort law 2008. Springer, Vienna, p. 84, 2009.
[80] MURRAY, Peter L.; STÜRNER, Rolf. German civil justice. Carolina Academic Press, p. 331, 2004.
[81] SCHWEIZER M. Ibid. P. 221.
[82] HANOTIAU, Bernard. 'Satisfying the Burden of Proof: The Viewpoint of a 'Civil Law. Lawyer,''Arbitration International, v. 10, p. 341, 1994.
[83] KAZAZI, Mojtaba. Burden of proof and related issues: a study on evidence before international tribunals. Martinus Nijhoff Publishers, p. 336,1996.
[84] WAINCYMER J. p. 771.

American Law Institute/UNIDROIT Principles also call for median approach: in Article 21.2 it is stated that the court should be "reasonably convinced of their [facts] truth". In commentary P-21B it is reflected that on one hand this standard is used is in fact used in civil law countries and on the other common law balance of probabilities standard "functionally is the same".[85]

To summarize this paragraph, discussion over the standard of proof under CISG reflects the same line of argumentation as formerly with the burden of proof. The latter was not also in the first place intended to be regulated by CISG according to travaux préparatoires and initial case practice but later unilaterally was considered to fall within the scope of CISG. In the contemporary CISG doctrine it is unilaterally stated that CISG regulates the standard of proof and that appropriate standard is "reasonable degree of certainty". Nevertheless, tribunals only start to apply this standard in practice, in fact there is not so much difference in common and civil law approaches to the standard of proof as both include objective and subjective criterion of proof. Therefore, in the coming years the practice under CISG will probably start more actively to use reasonable degree of certainty as a uniform standard of proof.

[85] ALI/UNIDROIT Principles of Transnational Civil Procedure. Ibid.

Chapter II. Exceptional rules on the burden of proving the non-conformity under CISG

As brought by A. Zuckerman, burden of proof is essentially is solely a risk allocation for a lack of evidence, making it is an instrument to decide which party would benefit from the uncertainty.[86] At first sight simple rules on the burden allocation become a key issue to decide the whole case if a discovery of non-conformity occurs a considerable time after the risk passed. It becomes even more complicated if the goods have already been processed (e.g. used in production) and it is uncertain what in fact caused a defect. Recent scandal with Kobe Steel in 2017 can be a classic example: the company supplied steel for major car and aircraft manufacturers with false certificates for the steel and at the end could not confirm to its clients whether the steel was affected by the fraud.[87] Unfortunately, no arbitral awards or court decisions could be found in available sources on this scandal;, otherwise it would a very valuable source for the research at hand. At any rate in such circumstances, a strict application of the rule-exception principle and reasonable degree of certainty standard of proof may not be justified and shifting of the burden can be done.

The shift of the burden under CISG is clearly affected by civil law tradition as in the UK or US the courts in case of evidentiary difficulties would use means of disclosure or discovery, rather than the shift of the burden on another party. However, as the UK is not a signatory to the Convention and the overwhelming majority of the signatories are from civil law tradition, the elaboration on exceptional cases to shift the burden is of vital importance.

Elaboration on the case law and doctrine highlights the main problem of the burden of proof allocation under CISG: absence of uniform conventional application. Almost all decisions are influenced by the domestic national concepts. Notably, the German Supreme Court contributed to this most of all in his landmark decisions under

[86] ZUCKERMAN A. Ibid. Para. 21.39
[87] THE FINANCIAL TIMES. Kobe Steel scandal hits Boeing, Toyota and Nissan. Available at: https://www.ft.com/content/a1e494c2-ad9f-11e7-beba-5521c713abf4. Accessed: 22.04.2020.

Convention like *Powder Milk case*, *Paprika case* or *Frozen Pork case*. Therefore, a critical analysis of this and similar extraordinary decisions will be a primary subject of this chapter.

2.1. The first exception: acknowledgement of non-conformity by the seller

The *Powdered Milk case* decided by the German Supreme Court in 2002 illustrates the complexity of burden allocation in such difficult circumstances as drawn above.[88]

The case considered the purchase of a powdered milk from the German seller to the Dutch buyer. Both parties conducted the required examinations upon the delivery and haven't found any deviations. The powdered milk was then exported to the Dutch buyer's customers in Algeria and Aruba, where it was used for the production of the milk. The milk appeared to have rotten and rancid taste, which was found out later, originated from the contamination of the milk powder with inactive lipase. This lipase could only be discovered through an expensive bacteriological examination, but not standard tests applied in industry. The Dutch buyer asserted that contamination originated by the time of passing of the risk, while the German seller insisted that it occurred during the transportation to the customers. Finally, according to expert reports it could not be established whether it was contaminated at the time the risk passed. Thus, the decision was left solely to be dependent upon the burden of proof allocation.

On this matter German Supreme Court stated two major considerations. Firstly, it confirmed that CISG regulates the burden of proof explicitly (e.g. Art. 79) or implicitly (e.g. Art. 2) under rule-exception principle, meaning in application that if goods were delivered and accepted by the buyer without notice of non-conformity pursuant to Article 39, it is the buyer not the seller who should prove that goods did not met contract requirements under Article 35 CISG. Consequentially, stating that recourse to national law in this matter is impossible.

[88] CISG DATABASE. Powdered Milk case. Available at: http://cisgw3.law.pace.edu/cases/020109g1.html. Accessed: 10.04.2020.

Secondly and more debatable in the doctrine, notwithstanding the adherence to uniform approach, the German Supreme Court reversed the burden of proof on the seller as he partially acknowledged non-conformity in one of its letters to the buyer. The German Supreme Court has not provided any argumentation for the justification of the shifting the burden. The Court merely stated that whilst burden of proof allocation is governed by CISG, the shifting the burden is an external gap in CISG according to Art. 4 para. 1 CISG and is being reversed on the prevailed view of German law without further elaboration.

Therefore, at the end it was the respondent to prove that the powdered milk was conforming at the moment of the risk passed as it failed to do so the buyer won the case.

It seems that if the German Supreme Court applied general rule on the burden allocation strictly the buyer would not be able to win its case. Like in *Hungarian wheat case,* in which the buyer did not discharge the burden of proof as the sample tested by a third party had been destroyed by the time of proceedings and likewise in powdered milk it was also impossible to determine conformity by the time the risk passed.[89]

On the other hand, in *Heliotropin case* decided in 1993 the Chinese arbitration body has not the same way elaborated on the ratio but in the same manner decided that as the seller has not made any objection to the buyer's inspection report he is now burdened to prove non-conformity.[90] Professors Ingeborg Schwenzer and Peter Schlechtriem in their commentary also acknowledge this approach under CISG.[91]

Therefore, the first exception from the general rule-exception principle under CISG is the shift of the burden of proof even after acceptance on the seller, if he acknowledged expressly or impliedly the non-conformity of the goods. As in fact this conclusion is quite self-evident and predictable, no extensive elaboration is essentially needed.

---

[89] CISG DATABASE. Hungarian wheat case. Available at: http://cisgw3.law.pace.edu/cases/060208g1.html. Accessed: 10.04.2020.
[90] CISG DATABASE. Heliotropin case wheat case. Available at: http://cisgw3.law.pace.edu/cases/930710c1.html. Accessed: 10.04.2020.
[91] SCHWENZER I. Ibid. p. 632.

2.2. The second exception: proof proximity principle

Two years later in 2004 the German Supreme Court clarified the shift of the burden and established a precedent extending this approach on the CISG in *Paprika Powder case*.[92]

Factual background seems familiar to the former case. The case concerned the paprika powder delivery from the Spanish seller to the German buyer contractually agreed not to be irradiated. Upon the delivery in September buyer conducted examination only for the purity not radiation exposure as such a detailed examination would have been very time-consuming and costly (just like in mentioned *Wire and Cable case)*. The buyer processed the delivered powder by mixing it with chili and sold it to one of its clients 3 months later in December (so the burden to prove non-conformity was already with the buyer). In January an article in a test magazine was published indicating powder irradiation and in March the buyer notified the seller about the non-conformity pursuant Article 39. Consequentially, buyer filed a claim for damages for a production of expert report and replacement of the powder to the customer. While the seller relied on the lack of notice of the defect, buyer relied on the exception provided by Article 40 CISG. According to this article seller cannot invoke Articles 38 and 39, if the buyer was aware or should have been unaware of and did not disclosed.

According to general rule under CISG on the burden of proof the buyer should have discharged its burden of proving such unawareness. However, the Supreme Court further stated that **a strict application of the rule-exception principle can lead to injustices in the area of application of the CISG, which is why a correction is required in individual cases**, though adding the restraint should be advisable.

According to the decision, an exception has to be permitted in the individual cases from the point of view of **proof proximity** (*Beweisnähe*) or if the adducing of evidence would be associated with unreasonable difficulties in proving for the buyer.[93]

[92] CISG DATABASE. Paprika case. Available at: http://cisgw3.law.pace.edu/cases/040630g1.html. Accessed: 10.04.2020.
[93] BAUMGÄRTEL, Gottfried et al. Handbuch der Beweislast im Privatrecht. C. Heymann, p. 28-31, 1981.

On this interpretation Court relied on German CISG commentators, which widely agree that the phrase "could not have been unaware" in Article 39 is equivalent to negligent ignorance.[94] Finally, what is indeed essential in analysed ratio decidendi, under certain circumstances, the required evidence could already "**result from the nature of the defect itself**, so that in the case of gross deviations from the contractual quality, **gross negligence is presumed if the lack of conformity had occurred in the seller's sphere"** (emphasis added). [95]

Applying this doctrinal elaboration to the case, German Supreme Court held that the seller could have at least conduct an examination for a radiation of a sample given the importance of this quality attached by the contract. If it was established that the goods according to the respondent's assertions had not been irradiated either in its area or in the area of its customer, the proof of the lack of conformity would at the same time have been proof of the claim that the powder had been irradiated in the claimant's plant or the plant of its supplier. However, the Respondent could at most make a claim "into the blue" with regard to the internal operating procedures of the claimant; sufficient knowledge of the internal production conditions of its seller could not be expected from it as an external buyer.

In German literature this decision was met with approval.[96] At the same time, this recourse to national German law concept has been rightfully criticized as opposing to the international character of CISG pursuant to Article 7(1).[97] But interestingly the precedent seemed to be a long-lasting one. A less cited and newer case of the Austrian Supreme Court in 2012 concerning paprika powder as well upheld this ratio and assessed its adherence to the international character of CISG.[98]

The Court affirmed that exceptionally in individual cases reasons of equity, for example the greater proximity of evidence or unreasonable difficulties in proving

[94] ACHILLES, Wilhelm-Albrecht. Kommentar zum UN-Kaufrechtsübereinkommen (CISG). Neuwied: Luchterhand, Art. 40, 2000.
[95] ACHILLES W.A. Ibid.
[96] SCHWENZER I. Ibid. Art. 40 para. 12
[97] KRÖLL S. et al. Ibid. p. 182.
[98] CISG DATABASE. Paprika case. Available at: http://cisgw3.law.pace.edu/cases/040630g1.html. Accessed: 10.04.2020.

evidence (*Beweisnotstand)*, may lead to the shift of the burden. According to decision, in principle the buyer bears the burden to prove the fact that the seller knew or should have known the facts on which the lack of conformity is based and did not disclose them to the buyer. However, if the buyer is faced with unreasonable difficulties in proving the facts, the burden of proof is reversed. The Austrian Court also provided an extended evaluation of the Paprika Powder case and its compliance within international character of CISG:

"The decision of the German Supreme Court is in line with the previous jurisprudence of the Austrian Supreme Court on distribution of the burden of proof and an exceptional shift of the burden of proof under CISG. It concerns a relevant precedent; its convincing statements are to be followed with regard to the development of a common worldwide application practice".

According to this rationale Supreme Court rendered to review the case in the Court of Appeal as issues concerning the breach of contract had not been properly decided and to give the respondent an opportunity to prove that he was not aware of the irradiation or that his ignorance was not due to gross negligence.

The doctrinal interpretation by the Supreme Court of the burden of proof shifting under Article 40 when it can result from the nature of the defect itself closely resembles at its core the English tort law doctrine *res ipsa loquitur* ("thing speaks for itself"). This is an evidentiary facility under which for claimant is sufficient to prove only that accident causing the claimant's physical harm always happens as a result of negligent conduct. It is called "thing speak for itself" as the breach of the duty of care, its existence and causation are presumed from the very nature of action. The doctrine first appeared in English law in Byrne v Boadle case and later it was codified in U.S. Law.[99] German law knows a similar concept of *Anscheinbeweiss* or *Prima-facie-Beweis*, which is rather hesitantly admitted by German courts in medical malpractice suits, environmental damages, in cases of labour discrimination and in consumer's relation for the supplier's liability.[100] The doctrine was even codified in Principles of European Tort Law in Articles 4:201 and 4:202, justifying the shift of the burden in light

[99] SKONTZOS A. V. Ibid. p. 579
[100] BRINKMANN, Moritz. Das Beweismaß im Zivilprozess aus rechtsvergleichender Sicht. C. Heymanns, p. 86, 2005.

seriousness of possible damage and likelihood of its occurrence.[101] These doctrines are of little help under CISG disputes. Though in its commentary Professor Stephan Kröll notes to the case outside CISG concerning cardiac stimulators, "but with a potential influence on the application of CISG".[102] The case was decided by the European Court of Justice in 2015 under EU Directive on Product liability which contains the similar provisions to the Article 35 CISG. In the case an internal report indicated that cardiac stimulators could malfunction. There, the court stated that the mere risk of malfunction justified the finding of non-conformity – this risk ran contrary to the buyers' expectations that the goods had to be fail proof. The European Court of Justice there stated that where it is known that class of products or its forming part has a potential defect, such a product can be deemed defective without need to establish that specific good has this defect.[103] In fact, it means shift of the burden on the producer to prove the contrary.

However, influence of the doctrines like this give rise to various interpretations under CISG. For example, A. Linne proposes a "ping-pong" approach to the burden of proof in her article on non-conformity under CISG: in the first step seller has always to produce prima facie evidence of conformity, in the second – burden shifts to the buyer, in the third – if buyer met the burden, seller has to prove why he is not be liable.[104] This approach however is no more than a solely theoretical proposal since it is not in compliance with the international character of CISG pursuant to Article 7. Author bases this proposal on a non-existent presumption influenced by non-harmonized German law that seller always has a duty to provide proof of non-conformity in the first place. What is more, this approach is not justified by any relevant case practice on CISG.

This "American optics" of approach is natural as it follows from the two features of the Common law process of proving facts. Firstly, because evidence there is treated

[101] KOZIOL, Helmut. European tort law 2004. Springer, p. 99, 2005.
[102] KRÖLL, Stefan Michael; MISTELIS, Loukas A.; VISCASILLAS, Pilar Perales (Ed.). UN Convention on Contracts for International Sale of Goods (CISG). Verlag CH Beck, p. 513, 2018.
[103] EUR-LEX DATABASE. Boston Scientific Medizintechnik GmbH v AOK Sachsen-Anhalt. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62013CJ0503. Accessed: 10.04.2020.
[104] LINNE A. L. Ibid. p. 35.

relatively not absolutely like in the civil law, secondly that the process of fact-finding includes 2 stages - assessing by the judge whether the evidence can be passed to the jury and then by the jury according to the balance of probabilities.[105]

Importantly the proof proximity principle is applicable not only in relation to Article 40 CISG but also directly to the non-conformity in itself under Article 35 CISG. International character of this principle is well-recognized in CISG doctrine and case law.[106]

For example in *Spinning mill case* decided by Swiss Appellate Court in 2011, since it was easier for the seller (respondent) to furnish proof in the present case, the burden of proof for complete delivery and thus fulfilment of its contractual obligations was imposed on the seller.[107] In such cases in interest of substantial equity, in deviation from the distribution of the burden of proof indicated by the rule-exception relationship, the burden of proof is placed on the party who can generally provide the evidence more easily financially or organizationally. This is particularly the case in situations where the most important piece of evidence is located within the **territorial jurisdiction** of a party. It does not mean the goods itself solely but can also relate "to the packing lists, consignment notes and similar documents". Hence, the relevant criteria are "relative accessibility and practicality of proof as well as other concerns of public policy".[108]

Furthermore, this proof proximity principle is universal in relation to the non-conformity "in a wide sense". In *CD Media case* Austrian Supreme Court applied the same principle in relation to industrial property rights under Article 42 CISG, under which goods should be not only physically non-conforming but also free from any rights and claims of the third parties.[109]

---

[105] БУДЫЛИН С.Л. Ibid. p. 37
[106] SCHWENZER I. Ibid. p. 621, footnote 51.
[107] CISG DATABASE. Spinning mill case. Available at: http://cisgw3.law.pace.edu/cases/111108s1.html. Accessed: 10.04.2020.
[108] MURRAY, Peter L.; STÜRNER, Rolf. German civil justice. Carolina Academic Press, p. 267-268, 2004.
[109] CISG DATABASE. CD Media case. Available at: http://cisgw3.law.pace.edu/cases/060912a3.html. Accessed: 10.04.2020.

This approach reflects a well-established continental theory of the spheres (*Sphärentheorie, Fefahrenkreis, Verantwortungsbereich, Herrschaftsbereich*): the party that has legally or financially easier access to the mean of evidence falling within its sphere of influence or control and which are therefore better known to the party should bear the relevant burden.[110] In cases where the suspected defect relates to the period in time before the passing of the risk and when the goods were in the seller's control, it is the seller who is better equipped to prove the conformity of the goods.

To conclude this paragraph, shifting the burden of proof under the notion of **proof-proximity** is well-established in modern CISG doctrine and case law and can be considered as a second exception from the general principle of rule-exception for the burden allocation. This principle is applicable to the non-conformity "in a wide sense" both to Article 35 CISG about the non-conformity, third party rights under Article 42 CISG and seller's knowledge of non-conformity under Article 40 CISG. The proof proximity principle is not limited to the physical control over the goods but means the evidence which can be **more easily financially or organizationally** be adduced, consequentially including for example documents attached to the quality of goods.

2.3. The third exception: suspicion as non-conformity doctrine

Third exception hit the CISG jurisprudence in *Frozen Pork case* decided by German Supreme Court under CISG in 2005. In this case the seller claimed the whole purchase price for the delivered pork, which was under suspicion to be contaminated by dioxin.[111]

Such cases are not rare, when already the suspicion of a false declaration or bacterial infestation led that the end consumers stop to buy goods of the suspicious variety and therefore the trade had to accept immense material losses. In other words, the goods due to suspicion are not or hardly conforming for sale or use under Article 35 para. 2(a) CISG, although the suspicion might not have been true. In 2011 a similar serious scandal had occurred when several cases of severe bacterial intestinal infections

[110] PRÖLSS, Jürgen. Beweiserleichterungen im Schadensersatzprozeß. Verlag Versicherungswirtschaft, p. 901, 1966.
[111] CISG DATABASE. Frozen Pork case. Available at: http://cisgw3.law.pace.edu/cases/050302g1.html. Accessed: 10.04.2020.

occurred in Germany, some of them even fatal, caused by the so-called EHEC bacteria. As the entire country was initially warned against the consumption of raw tomatoes, lettuce and above all Spanish cucumbers, the sales of vegetable producers slumped drastically. However, as it later turned out, it was not Spanish cucumbers that caused the infections, but the Egyptian fenugreek seed, from which sprouts were produced in Europe.[112] As a consequence at the end Spanish producers successfully sued Hamburg Health authorities for damages in the six-figure range.[113]

Coming back to the *Frozen Pork case*, the German Supreme Court examined whether and to what extent the provision on hidden defects in Article 36 CISG) can be made useful for cases where the suspicion arises only after the passing of risk.[114]

In the case German buyer had ordered large quantities of pork from a Belgian meat wholesaler with the instruction that the goods were to be delivered by the seller directly to the end customer in Bosnia-Herzegovina. The contract for the supply of Belgian pork had been concluded in April 1999. The deliveries were made in three instalments between mid-April and the first week of May. The suspicion that Belgian pork might be contaminated with dioxins only arose at the beginning of June 1999, and the regulation by which the Germany declared the meat unfit for circulation came into force on 11 June 1999. In response to this suspicion, regulations were issued in Germany, Belgium and the EU to protect consumers from Belgian pork, which declared it to be not fit for circulation unless certificates of safety could be presented to confirm that the goods were free of dioxins. The Bosnian customs then destroyed the pork as suspected to be contaminated by dioxin, because buyer was unable to present quality certificates that the pork was free of dioxin, which was several times

---

112 ROBERT KOCH - INSTITUTE. Final presentation and evaluation of the epidemiological findings in the EHEC O104:H4 outbreak. Available at: https://www.rki.de/EN/Content/infections/epidemiology/outbreaks/EHEC_O104/EHEC_final_report.pdf?__blob=publicationFile. Accessed: 22.04.2020.

113 DEJURE.ORG DATABASE. Landesgericht Hamburg Urt. v. 09.12.2015, Az.: 303 O 379/11. Available at: https://dejure.org/dienste/vernetzung/rechtsprechung?Gericht=OLG%20Hamburg&Datum=31.12.2222&Aktenzeichen=1%20U%20275/15. Accessed: 10.04.2020.

demanded from the seller. Based on that the seller refused the full payment and subsequently buyer claimed for the purchase price.

The German Supreme Court decided the case in favour of the buyer. The court considered the suspicion to be sufficiently substantiated by the public law measures enacted and qualified the goods as defective due to their lack of usability. The Court deduced from this that the properties which (later) led to the seizure and loss of usability had already been inherent in the meat at the time of the passing of risk because it had objectively been established at that time that it originated from stocks suspected of being contaminated with dioxins.[115] The fact that the suspicion only became known weeks later and led to extensive official precautionary measures in Germany, the EU and finally also in Belgium did not alter the existence of the suspected feature at the time the risk passed.

In its defence buyer relied on Article 36 CISG, namely that the seller is liable for hidden defects which already exists at the moment the risk passed but become apparent later. In addition, seller is liable for non-conformity occurred at a later date if it is because he breached his duty. If the Court would strictly apply rule-exception principle, it would be the buyer who would to sufficiently prove the defect was present at the time the risk passed. However, the Court **shifted the burden of proof on the seller** who was the claimant and subsequently the buyer won the case. Hence, at the core of the suspicion lies the **shift of the burden of proof**.

Hence, the rule that the seller is only liable for a lack of conformity which already exists at the time of the transfer of risk under Article 36 CISG also applies to the suspicions. The application of the rule is certain if the usability of the goods was hindered because of the suspicion before the passing of the risk. However, the situation is more delicate if the suspicion only arises after the transfer of risk, i.e. if the goods were (de facto) still usable at the relevant time. From a general rule on the burden of proof allocation, it could be argued that in such case the seller shouldn't be responsible

[115] LOK, Corie; POWELL, Douglas. The Belgian Dioxin Crisis of the Summer of 1999: a case study in crisis communications and management. Guelph: University of Guelph, p. 24, 2000.

for the lack of usability of the goods which only occurred after the transfer of risk. In practice, this would rule out recourse of the buyer against the seller in many cases.

However, such an approach would not be sufficient. The seller is also liable for the non-conformity due to suspicion which only becomes apparent after the passing of risk, provided that it existed at the time of the passing of risk pursuant to Article 36 para.1 CISG. In essence, these considerations of the German Supreme Court ultimately go back to the first *Argentinean Rabbit case,* the first case of such type decided in 1969 by the German Supreme Court. There the German Supreme Court had stated that the hindered usability based on the fact that the goods originated from Argentinean rabbit imports, on which the suspicion of salmonella contamination was based, and was thus based on factual circumstances which had already existed at the time the risk passed.[116]

According to this case law, the mere potential non-conformity at the time of the passing of risk, meaning that the goods are not saleable or usable based on the suspicion is sufficient. In cases of sufficiently serious suspicion, the seller shall not therefore be liable only if the circumstances giving rise to the suspicion have occurred after the passing of risk. For example, in the case of a sale to destination (with passing of risk on handover of the goods to the first carrier) suspicion arises of contamination of foodstuffs by transport-related causes (like the notion of the seller in a *Powdered Milk case)*.

However, it must not be overlooked that the application of the rule on hidden defects in Art. 36 para. 1 CISG can cause difficulties in cases of suspicion. If a suspicion is based on the fact that in other cases quality defects have actually occurred there are concrete circumstances which can be fixed in time. Like in the second *Argentinean Rabbit case*, where the suspected rabbit meat was delivered by the same production plant from which another delivery, partially contaminated due to salmonella

[116] DEJURE.ORG DATABASE. Argentinean Rabbit case 1969. Bundesgerichtshof Urt. v. 16.04.1969, Az.: VIII ZR 176/66. Available at: https://dejure.org/dienste/vernetzung/rechtsprechung?Gericht=BGH&Datum=16.04.1969&Aktenzeichen=VIII%20ZR%20176/66. Accessed: 10.04.2020.

originated.[117] Likewise in analysed *Frozen Pork case*, where effective dioxin residues were detected in Belgian pork in spring 1999.

More difficult circumstances if it turns out that a suspicion is based on mere supposition as was apparently the case with the Spanish cucumbers. In that case there would be no basis for the application of Art. 36 para. 1 CISG, i.e. the seller is only liable for the non-conformity if the usability of the goods has ceased to exist due to suspicion before the passing of risk.

The hindered usability of the goods due to suspicion will usually be easy for the buyer to prove. However, it can often be difficult to prove whether the circumstances giving rise to the suspicion occurred before the transfer of risk (e.g. during the production process) or later (e.g. during transport). Hence, Brunner and Gottlieb in their commentary advocate to presume that the goods are already non-conforming at the time the risk passes if the lack of conformity has been proven in principle.[118] This is at least the case if the lack of conformity becomes apparent relatively soon after the passing of risk. The seller is then free to rebut this presumption by pointing out the contrary. This must also apply to suspected cases. In case of doubt, it must therefore be assumed that the circumstances which led to the suspicion were already present before the transfer of risk.

Therefore, in the prevailing doctrine and jurisdiction, it is recognized for a few case constellations that a suspicion of a defect may constitute a defect of quality according to Art. 35 CISG. Beyond that, however, there is uncertainty in the doctrine on the certain criterions when a suspicion of a defect can be considered a lack of conformity. There is even the theory that Art. 35 CISG is linked only to the "physical condition" of the goods, which is why the mere suspicion that something is not in order with the goods does not constitute a defect.[119]

---

[117] DEJURE.ORG DATABASE. Argentinean Rabbit case 1972. Bundesgerichtshof Urt. v. 14.06.1972, Az.: VIII ZR 75/71. Available at: https://dejure.org/dienste/vernetzung/rechtsprechung?Text=VIII%2520ZR%252075%2F71&Suche=Bundesgerichtshof%20Urt.%20v.%2014.06.1972%2C%20Az.%3A%20VIII%20ZR%2075%2F71. Accessed: 10.04.2020.

[118] BRUNNER C. Ibid. p. 567.

[119] GRUNEWALD, Barbara. Der Verdacht als Mangel. Festschrift für Horst Konzen zum siebzigsten Geburtstag, Tübingen: Mohr Siebeck, p. 136, 2006.

The German Supreme Court and previously Frankfurt Appellate Court[120] in their decisions made a deep analysis of the jurisprudence on the suspicion as non-conformity (*Verdacht als Mangel*). This concept is well-established in German and Swiss legal system and surprisingly unknown to the Austrian legal system, which is very close to German and Swiss as was shown above.[121] Thus as the concept is originally derived from those countries a recourse can be made to the German law under the international character of the CISG under Article 7 para. 1. It should be added that though the majority of cases analysed further was decided under German Civil Code, provisions on the non-conformity in its Article 434 and CISG Article 35 are identical, so the recourse is absolutely justified.[122]

Important to emphasize that the *Frozen Pork case*, *Argentinean Rabbit cases* and other cases which involve cases of contamination should not establish a wrong conclusion that suspicion can relate only to food products and relating health or life-threatening risks. It is true that this concept was initially recognized only in relation to health risks and was originally established on the basis of food intended for resale in the first *Argentinean Rabbit case*: "if there is a suspicion of being harmful to health on account of its origin and this suspicion cannot be eliminated by measures which the purchaser can reasonably be expected to take".[123] This doctrine was first applied before the obligations law reform in Germany in 2001. However, this principle has been extended over time to other types of good and has been retained even after the reform. Thus, for example, the suspicion of recurring dry rot infestation was sufficient later to justify the defectiveness of an acquired house property.[124] Likewise suspicion of moisture in foundation of purchased house justified non-conformity as this sign of

[120] Frozen Pork case. Ibid.
[121] SCHWENZER, Ingeborg; TEBEL, David. Suspicions, mere suspicions: non-conformity of the goods?. Uniform Law Review, v. 19, n. 1, p. 154, 2014.
[122] CODE–BGB, German Civil. Translation provided by the Langenscheidt Translation Service, 2009, juris GmbH. Saarbrücken Edition.
[123] Argentinean Rabbit case 1969. Ibid.
[124] DEJURE.ORG DATABASE. Dry rot case. Landesgericht Bonn Urt. v. 30.10.2003, Az.: 10 O 27/03. Available at: https://dejure.org/dienste/vernetzung/rechtsprechung?Text=VIII%2520ZR%252075%2F71&Suche=Bundesgerichtshof%20Urt.%20v.%2014.06.1972%2C%20Az.%3A%20VIII%20ZR%2075%2F71. Accessed: 10.04.2020.

humidity posed a risk of costly remedial actions.[125] Currently, regardless of the type of the purchase object and detached from the condition of a presumed health hazard, "already the suspicion of a serious defect of the purchase object itself can represent a defect", if the value and thus the usability of the object decreases through this and the suspicion was not disproved by knowledge occurred in the meantime or was cleared by the buyer reasonable measures.[126] Irrelevance of the health risks specifically was been confirmed by the German Supreme Court in its recent decision, in which fodder was at dispute. Court explicitly stated that the danger to the end user is irrelevant and suspected lack of conformity not only affects foods but other objects.[127]

This very far-reaching recognition of the mere suspicion of a defect as a separate material defect within the meaning Article 434 of the German Civil Code is justified by the fact that "the market generally attributes a lower market value to such items which are suspected of being seriously defective, even though this suspicion may in fact be unfounded". As long as this suspicion has not been removed, the latter is liable for the item and impairs the suitability for the use presupposed according to the contract within the meaning of Art. 434 para. 1 sentence 2 of the German Civil Code (analogical to Article 35 para. 2(a) CISG).[128] Therefore, a deeper insight into the German jurisprudence on this matter shows that the suspicion as non-conformity doctrine is construed on the shift of the burden model: after buyer sufficiently shows that the goods are not usable due to the facts relating to the moment before passing of the risk.

However, the idea that the suspicion of defectiveness is inherent in the item itself has not been met with undivided approval even in German-speaking doctrine. In some cases, physical connexity is not regarded as a compelling criterion for the fundamental assumption of suspicion of a defect. This view is strongly advocated in the only English-speaking article on the matter of suspicions by Ingeborg Schwenzer and David

[125] DEJURE.ORG DATABASE. Bundesgericht Urt. v. 16.03.2012, Az.: V ZR 18/11. Available at: https://dejure.org/dienste/vernetzung/rechtsprechung?Text=V%20ZR%2018/11. Accessed: 10.04.2020.
[126] SONDE, Stephan Lars. Das kaufrechtliche Mängelrecht als Instrument zur Verwirklichung eines nachhaltigen Konsums. kassel university press GmbH, p. 152, 2016.
[127] DEJURE.ORG DATABASE. Bundesgericht Urt. v. 22.10.2014, Az.: VIII ZR 195/13. Available at: https://dejure.org/dienste/vernetzung/rechtsprechung?Text=VIII%2520ZR%2520195%2F13&Suche=22.10.2014%20-%20VIII%20ZR%20195%2F13. Accessed: 10.04.2020.
[128] Dry rot case. Ibid.

Tebel.[129] According to them these days it is widely agreed that non-conformity can be based not only on physical features of the goods but also "on the legal and factual relations of the goods to their surroundings" and therefore the only thing which determines the good's conformity is the buyer's expectations about the feature of the goods. This idea closely resembles idea of emotional non-conformity, widely accepted in the international trade.[130] The same view is advocated by Arnold Rusch another Swiss author, who analyses mainly Swiss law (which is in the part of non-conformity also identical to Article 35 CISG), but provides valuable comparison with the German law and CISG.[131] So, this perception of the suspicion can be named a Swiss one in opposition to German one. Under this approach the suspicion is an "environmental relationship lying outside the purchased goods", which according to the narrow definition of material defect cannot lead to the defectiveness of the purchased goods. It means that a suspicion can not necessarily want to make the suspicion of a defect dependent on the question of whether the suspicion can adhere to the item itself. At the end both authors suggest that in the event that this is rejected on the basis of the narrow classic definition of material defect, that the seller be held liable for a breach of the information duty if he has not informed the buyer "of a corresponding, already existing suspicion or its substantiating circumstances". According to this approach, the only relevant thing that should be proved is the fact of reasonable suspicion itself and its impact on goods merchantability. The possible dispelling of the suspicion by the buyer is irrelevant under this approach. Thus, this approach is construed in fact by the model of lowering the standard of proof rather than shifting the burden like in German doctrine.

As the *Frozen Pork case* under CISG was decided by German Supreme Court, which in fact entered the suspicion as non-conformity in the CISG jurisprudence and as Swiss approach remains rather minor view being rather extreme, we would mainly focus on the German law model construed on the shift of the burden model. The

[129] SCHWENZER I., TEBEL D. Ibid. p. 154.
[130] RAMBERG, Christina. 5 Emotional Non-Conformity in the International Sale of Goods, Particularly in Relation to CSR-Policies and Codes of Conduct. 2014.
[131] RUSCH, Arnold F., Verdacht als Mangel, AJP/PJA, Vol. 1., p. 41, 2012.

analysis of the relevant case practice has identified three main scenarios for the reasonable suspicion to be non-conformity: (a) proved defect of one piece legitimates suspicion of defect of further pieces (which is rather self-evident); (b) public law measures (such as general official prohibitions of sale or use, official confiscation) or official warnings may be sufficient to prove non-conformity; (c) suspicion based on mere reports in mass media is also sufficient proof to render non-conformity if it meets three criteria: based on concrete facts, causes fundamental breach and not easily dispelled by the seller (in fact consequential shift of the burden).[132]

A. Proved defect of one piece legitimates suspicion of defect of further pieces

First principle discussed is that **proved defect of one piece legitimates suspicion of defect of further pieces**. As was pointed out earlier, after delivery the buyer has to inspect the goods for possible non-conformities under Article 38 CISG. If the buyer acts as an intermediary, he must therefore also inspect the goods for obvious defects in good time. As a rule, he cannot wait for complaints from his customers and pass them on to his supplier, unless the defect can only be discovered after a long period of use.[133]

As mentioned, the buyer shall inspect the goods in a manner appropriate to the circumstances and customary in the trade (unless special agreements have been made or customs or practices exist), as would be expected of a reasonable person under Article 38 CISG.[134] In the case of the delivery of a large number of items or of bulk goods (especially in the case of foodstuffs), the buyer cannot reasonably be expected to inspect each item individually. He may therefore be satisfied with (representative) random checks.[135] If the random check reveals defects, this usually leads to the defectiveness of the entire delivery, as the buyer cannot normally be expected to filter out the faultless pieces from the entire delivery.

---

[132] KOLLER, Thomas; JOST, David. Rinderlasagne mit Pferdefleisch, Salatgurken mit EHEC-Bakterien, dioxinverseuchtes Schweinefleisch–oft nur ein Verdacht und doch ein Mangel? Überlegungen zum Mangelverdacht bei Lebensmitteln als Vertragswidrigkeit der Ware nach UN-Kaufrecht (CISG). Stämpfli, p. 40, 2014.
[133] CISG DATABASE. Blood infusion devices case. Available at: http://cisgw3.law.pace.edu/cases/970108s1.html. Accessed: 10.04.2020.
[134] SCHWENZER I. Ibid. Art. 38, footnote 14
[135] Ibid.

Consequently, in the case of bulk goods or deliveries of large quantities, the suspicion, based on individual random samples, that the delivery contains further defective items shall suffice for the entire delivery to be deemed defective. The defectiveness based on the suspicion cannot be removed even if it should later turn out that the major part of the delivery was free of defects.[136] In contrast to cases of suspicion based on mere reports in the mass media , it will not be possible here to give the seller the opportunity to dispel the suspicion by "exonerating evidence".[137]

B. Suspicion based on public law measures

Second principle discussed is the suspicion which leads to **public law measures (such as general official prohibitions of sale or use, official confiscation) or official warnings** may be sufficient to prove non-conformity.

As a precautionary measure, authorities often *issue sales or use bans for certain categories of goods on suspicion*, even if it is not certain whether the suspicion (e.g. of bacterial contamination) is true. Such bans actually impair the marketability of the goods. This raises the question of whether the general fitness for use according to Art. 35 para. 2(a) CISG is thereby affected. The problem is very impressively illustrated by the mentioned *Frozen Pork case* decided by German Supreme Court in 2005, in which the merchantability of the goods was affected by the ban in Belgium, Germany and the whole EU after dioxin affair.

What applies in the case of a general prohibition of use or sale can also be transferred to the case of an *official confiscation of foodstuffs* as a result of a suspicion of health hazards. It can be deduced from the *Argentinean Rabbit case*.[138] In the case, the competent authorities in Germany had seized frozen Argentinean rabbit meat on the suspicion of salmonella infestation (what is important irrevocably), although a salmonella infestation could not be determined for sure. Under the ruling of the German Supreme Court, the hindered usability of the goods constituted a defect within the meaning of Art. 459 para. 1 of the German Civil Code in the version applicable at the

[136] MAGNUS U., MARTINEK M. J. Ibid. P. 259.
[137] KRÖLL S., MISTELIS L., VISCASIILLAS. Ibid. p. 513.
[138] Argentinean Rabbit case 1969. Ibid.

time. This must also apply to the CISG, since such a seizure obviously eliminates the marketability required by the CISG in Article 35 para. 2(a).

The fact that even less drastic measures, such as an official warning, can influence marketability is shown by the case of the Spanish cucumbers suspected of being infected with EHEC bacteria. Although no sales ban was issued in Germany, the Federal Ministry of Consumer Protection issued a general warning against the consumption of the cucumbers. Notably, in some federal state it was stipulated that the import of cucumbers was only permitted with proof of harmlessness just like in the *Frozen Pork case*. According to surveys, this warning led the majority of German consumers to refrain from eating the suspect vegetables, which meant that they could no longer be sold in Germany in a reasonable manner. The official warning, like the ban on use in the dioxin case, apparently confirmed the suspicion that the Spanish cucumbers were indeed infected with EHEC bacteria. It is questionable and, as far as can be seen, hardly discussed in the academic world whether such an official warning can be equated with a formal ban on sale or use in the present context. This would probably have to be affirmed. Ultimately, it is not the formal qualification of the public law "intervention" (as a prohibition or as a mere warning) that can be relevant to the question of interest here, but rather the fact that the intervention has a decisive influence on the marketability of the respective product or leads to a substantiation of the suspicion. Consequently, it must also be irrelevant whether the public law measure or official warning was issued validly or was contestable.[139]

C. Suspicion based on mere reports in mass media

Third principle suggests that **suspicion based on mere reports in mass media is also sufficient proof to render goods non-conforming**. A suspicion that certain foods can be harmful to health is often aroused by media reports. However, such reports do not always have to lead to official measures or warnings. Nevertheless, such reports in the mass media can have a major impact on the purchasing behaviour of consumers

[139] SCHLECHTRIEM, Peter. Internationales UN-Kaufrecht: ein studien-und Erläuterungsbuch zum Übereinkommen der Vereinten Nationen über Verträge über den internationalen Warenkauf (CISG). Mohr Siebeck, p. 170, 2007.

to the detriment of buyers and intermediaries. Hence, it becomes extremely relevant whether and under what circumstances this can be considered as non-conformity of the goods according to Art. 35 para. 2(2) CISG. Prof. Stephan Kröll notes that a mere (*bloße*) bad press reports are not sufficient for a lack of conformity under Art. 35 CISG.[140] It is suggested that three components should be present to allow mass media report to be sufficient proof: 1) concreteness of the suspicion; 2) fundamentality of the suspected defect; 3) failure by the seller to sufficiently dispel the suspicion.

First of all, concrete suspicions are required which make the suspicion appear to be justified and substantiated. For comparison purposes, the standard of anticipated breach of contract according to Art. 71 and 72 CISG can be used.[141] According to these articles, if there is an anticipated breach, the contract can be terminated if it becomes obvious that the other party will not fulfil a fundamental part of its duties or will commit a fundamental breach of contract. Both Articles do not require a probability that borders with certainty, but they do require a high degree of probability. An objective standard must be applied for the assessment of probability. This means that the decisive factor is whether a reasonable person in the same position would also assess the suspicion as extremely probable pursuant to Art. 8 Abs. 2 CISG. This assessment must therefore be based on concrete facts and objectifiable circumstances that can be presented and proven. Mere subjective assumptions, fears and anxieties of the buyer (in this case the importer or intermediary) - are irrelevant.

With a media campaign of a certain intensity, which reaches many consumers, the suspicions will usually be sufficiently concrete. If the reported suspicion is not recognizable as untenable for a broad range of addressees, the suspicion must be considered sufficiently objective in the present context. The opposite will only apply if a statement of suspicion in a mass medium quickly becomes generally recognisable as completely implausible.

Secondly, a suspected defect should result in the fundamental breach. According to Art. 25 CISG, a breach of contract is to be qualified as fundamental if a party

[140] KRÖLL S., MISTELIS L., VISCASIILLAS. Ibid. p. 511.
[141] MAGNUS U., MARTINEK M. J. Ibid. p. 266.

essentially misses what it should have expected under the contract and this consequence was foreseeable for the defaulting party. In principle, as with the determination of fitness for purpose, it is the subject of the party contract which defects or to what extent defects are to be qualified as material. However, in the absence of such agreements, only substantial defects can be considered fundamental. These include in particular defects which cannot be repaired within a reasonable period of time pursuant to Article 48 CISG so that the goods remain unusable or unsaleable.[142] On the other hand, there is no fundamental breach of contract if the goods (even at a discount) can still be sold in a reasonable manner.[143] Only if the buyer has to seek unreasonable distribution channels for resale or has to incur high expenses or if he jeopardises his good reputation by reselling the goods, the limit of reasonableness and thus of materiality is probably exceeded.[144]

The whole thing is restricted by the fact that the effect of a breach of contract must have been objectively foreseeable for the seller, i.e. that an informed legal participant in the same circumstances at the time of conclusion of the contract must have had to reckon with the consequences of contractual breach.[145] However, mistake on the part of the party in breach of contract is not presupposed.[146] In the case of foodstuffs, this will mean that the suspicion - as in the case of Spanish cucumbers or Belgian pork, for example - must relate to a significant health hazard: “Apart from police seizure, the mere suspicion of a contamination that is hazardous to health and the inevitable unsaleability that this would cause is also a defect in the case of food intended for resale”.[147]

The same can be said if there is a suspicion that substances not permitted under food law or incorrectly declared have been added in significant quantities - such as

---

[142] CISG-ONLINE DATABASE. CISG-online 413 case. Available at: http://www.cisg-online.ch/content/api/cisg/display.cfm?test=413. Accessed: 10.04.2020.

[143] CISG-ONLINE DATABASE. CISG-online 900 case. Available at: http://www.cisg-online.ch/content/api/cisg/display.cfm?test=1900. Accessed: 10.04.2020.

[144] CISG-ONLINE DATABASE. CISG-online 274 case. Available at: http://www.cisg-online.ch/content/api/cisg/display.cfm?test=274. Accessed: 10.04.2020.

[145] COUNCIL, CISG Advisory. Opinion No 5. The Buyer's Right to avoid the Contract in Case of Non-Conforming Goods or Documents, v. 7, 2005.

[146] Egyptian cotton case. Ibid.

[147] Argentinean Rabbit case 1969. Ibid.

horse meat in beef lasagne - even if the added substances are not harmful to health, provided that only consumers start to avoid the suspect products to a significant extent. The opposite will have to apply, however, if the suspicion is of a lesser weight, for example if a food suddenly claims that it contains too much sugar or salt and is therefore "unhealthy". If this allegation is objectively justified, it does not necessarily constitute a lack of conformity, and if there is one, it will generally not be fundamental. Then a mere suspicion may not be qualified as a lack of conformity.

Thirdly and finally, the suspicion may only lead to a defect if it cannot be eliminated within a reasonable time by examining the goods.[148]

According to Art. 38 para. 1 CISG the buyer is obliged to inspect the goods for defects. In most serious cases of suspicion, however, the buyer will not be able to confirm the suspicion by means of an examination at all, not with reasonable effort or at least not within a reasonable period of time. For example, in the mentioned *Argentinean Rabbit case,* in which the examination of the entire consignment for salmonella infestation would have cost more than the goods themselves.[149] This is not necessary in cases of suspicion either. If the suspicion were to prove to be correct, the lack of conformity would no longer be based on the suspicion itself, but on the defective nature of the goods.

In both *Argentinean Rabbit cases*, the German Supreme Court has described the suspicion as a defect if it is not cleared up.[150] In a later case, the so-called *Glycol Wine case*, which involved wine contaminated by *Diethylene glycol*, the German Supreme Court confirmed this definition and (since the suspicion could be removed there) denied the defectiveness of the goods.[151] This implies that in suspected cases **the seller bears the burden** to prove that the suspicion is unjustified if he does not want to take responsibility for the lack of conformity. This can be transferred to CISG cases under the *Frozen Pork case*, where it was also the first step. The seller must therefore have

[148] MAHNUS U., MARTINEK M. J. Ibid. P. 263.
[149] Argentinean Rabbit case 1969. Ibid. Recital 2a.
[150] Argentinean Rabbit case 1972. Ibid. Recital 3b.
[151] DEJURE.ORG DATABASE. Glycol Wine case. Bundesgerichtshof Urt. v. 07.07.1987, Az.: VI ZR 176/86. Available at: https://dejure.org/dienste/vernetzung/rechtsprechung?Text=NJW-RR%201987,%201430. Accessed: 10.04.2020.

the right to prove that the suspicion is unfounded. In fact, it means **the shift of the burden of proof.**[152] If there is reasonable suspicion in the sense discussed, the seller bears the burden to prove the existence of the quality not the buyer.

However, certain problems are connected with such a "exonerating proof". On the one hand, the seller can only exonerate himself if he clears the suspicion sufficiently reliably and within a reasonable period of time so that the buyer can still resell or use the goods.[153] Especially in the case of food this can lead to considerable difficulties due to the often very limited shelf life. If the seller does not succeed in proving this or not in time, the goods must be considered defective, even if the proof can still be provided later. On the other hand, it is not enough for the seller to dispel the suspicion with his evidence. It is also necessary that tradability or usability is thus restored.[154] In cases of suspicion that are widely covered in the mass media - especially in the food sector - a mere expert opinion will usually not suffice. This will require further efforts on the part of the seller, such as the rapid and convincing dissemination of the successful "exonerating evidence" in the media. Whether it is enough however is left to decide only on a case-by-case basis.

Since the seller is entitled to such "exonerating evidence", the buyer may not immediately exercise the rights to which he is entitled in the event of a breach of contract. This can lead to problems in individual cases, above all because it is often difficult for the buyer to estimate when the period of time granted to the seller for clearing the suspicion has expired.

To summarize, the mere suspicion that the delivered goods are defective does not constitute a lack of conformity. Only if such a suspicion leads to lack of usability, a lack of conformity can be considered at all.[155] In the case of foodstuffs, even a small report in a mass media may under certain circumstances lead to a massive drop in sales to final consumers. However, this is not sufficient in itself to assume a non-conformity of the goods. The goods shall only be considered to be conforming if the suspicion is

[152] GRUNEWALD B. Ibid. p. 137.
[153] MAGNUS U., MARTINEK M. J. Ibid. p. 263
[154] RUSCH Arnold F. Ibid. p.44
[155] GRUNEWALD B. Ibid. p. 138.

strong and reasonable, i.e. if should the suspicion prove to be correct there would be a fundamental breach of contract and if the resellability and usability of the goods cannot be quickly restored by removing the suspicion.

Conclusion: results and hope for the further uniform application

1.1. Originally the issue of the burden of proof was not intended to be regulated by the Vienna Convention as evidenced by travaux préparatoires. However, over the time the doctrine developed an opinion and it was unanimously accepted by jurisprudence that since the issue of the burden is closely linked to the resolution substantive law issues, CISG should also regulate that issue. The basis for this approach is the direct wording of the Article 79 and indirectly Articles 2 and 25 of the CISG.

On the basis of those articles, the general rule for the allocation of the burden of proof is the "rule-exclusion principle" known since Roman times, namely that each party had to prove the factual prerequisites of the provisions on which it wishes to rely in making its claim or defence. The ease with which the burden of proof was included in the regulation of the CISG is explained by the fact that this rule is present in both the civil and common law legal systems. As this principle is inherited almost in all legal systems, recourse to national law is literally useless. This fact enabled the ICC Court in one of its decisions to call rule-exception principle as rule a general principle of "international commercial law". This part of the essay is the most undisputed in tribunal's practice and doctrine.

However, an important observation that complements this general rule specifically with regard to disputes on the quality of goods, which is not even emphasized in the UNCITRAL case law digest under CISG, is the point at which the burden of proving the defects shifts from buyer to seller. Namely, that the moment of risk passing does not equal to the passing of the burden of proof under CISG, but also depends on the time for examination and notifying the seller of possible defects, which in total can add up to 1.5 months to the moment of the risk passing depending on the type of goods. Only after this time an "exclusive possession" of the goods is established.

1.2. The closely related issue of the standard of proof in disputes under the CISG is more controversial and less studied. The doctrine also insists on including the standard of proof in the scope of the Convention under the principle of "reasonable

degree of certainty" as some compromise between the Romano-Germanic "inner conviction of the judge" and the "balance of probabilities" in common law. Recent empirical studies show that in practical terms there is almost no difference between the two standards and so the first decisions applying a uniform standard are already found, although rather rarely. This question thus gradually repeats the fate of the burden of proof under the CISG, which was also firstly rejected to be applied uniformly.

2. Exceptional cases of shifting the burden of proof are even more controversial. Strict application of the general rules can cause substantial inequality of the parties in situations when a serious asymmetry of evidentiary possibilities is present. Case law identifies three main exceptional rules under CISG.

2.1. The most widely accepted case is the principle of "*proof-proximity"* to the evidence of the other party, most extensively analysed in the *Paprika cases* decided by the German and Austrian Supreme Courts. Notably, this principle does not imply the actual possession of the thing, but the relative organizational and financial accessibility of the evidence, meaning including for example documents relating to the goods. The "proof-proximity" is applicable to the non-conformity "in a wide sense" both to Article 35 CISG about the non-conformity, third party rights under Article 42 CISG and seller's knowledge of non-conformity under Article 40 CISG. This principle can be named as a basic one for the shift of the burden under CISG as its international character is widely accepted in the doctrine.

2.2. A rather self-evident exceptional rule of shifting the burden of proof is a situation where the opposing party itself admits that the goods are of poor quality, directly or indirectly, as was the case in the *Powdered Milk case* decided by the German Supreme Court. This exceptional rule is generally accepted in the doctrine but is not often applicable in practice.

2.3. The third and the most controversial exceptional rule is based on "suspicion as non-conformity" doctrine introduced in CISG jurisprudence *Frozen Pork case* by the German Supreme Court in the 2005. This famous case referred to the suspicion of contamination of a large consignment of pork with dioxin. This exceptional rule is the least studied with only one publication by Ingeborg Schwenzer and David Tebel in

English. Since this doctrine has been developed by jurisprudence only in Switzerland and Germany, German sources research this issue deeper.

According to this doctrine, a suspicion may be considered as a distinct non-conformity of goods if three requirements are met:

1) The existence of a reasonable, well-founded suspicion, not based on rumour and speculation but on some circumstantial evidence

2) Fundamentality of the breach on case of the suspicion's realization. A higher standard of proof of the anticipated breach is proposed to be used by analogy.

3) Seller does not dispel the suspicion within the reasonable time and without any reasonable inconvenience to the buyer

Relevant case practice has also identified three main scenarios for the reasonable suspicion to be non-conformity: 1) proved defect of one piece legitimates suspicion of defect of further pieces; 2) public law measures (such as general official prohibitions of sale or use, official confiscation) or official warnings may be sufficient to prove non-conformity; 3) suspicion based on mere reports in mass media is also sufficient proof to render non-conformity if it meets three criteria laid out above.

And if initially the court practice acknowledged only suspicions as non-conformity which were potentially life-threatening and hazardous to health, current practice admits all kinds of goods, even immovable ones.

Summing up the outcomes of the essay, the conservative view on automous conventional rules for burden of proof allocation should include rule-exception principle as a general rule and proof-proximity as an exceptional rule.

Acknowledgement of the non-conformity by the seller himself, the inclusion of the uniform "reasonable degree of certainty" standard of proof and the suspicion as non-conformity doctrine remain more debatable and controversial.

Nevertheless, it is proposed that to promote the uniform approach and the international character of CISG not only the burden of proof but also the standard of proof should be governed by the uniform "reasonable degree of certainty" standard. As there are already cases which use this standard on the disputes on non-conformity under

CISG, it is suggested that inclusion of the standard of proof within the time will become widely acknowledged approach as now the burden of proof itself.

With regard to the suspicions, though there is no case evident after the Frozen Pork in 2005 under CISG which involved the suspicion as non-conformity doctrine, German and Swiss case law deals with such cases frequently and such problems especially in the intermediary sector are not rare in Europe. Bearing in mind that CISG and German law provisions on the non-conformity of goods are identical, it seems reasonable to introduce this doctrine in CISG jurisprudence. It is suggested that its inclusion in the scope of CISG does not alter its international character but only can make its application more effective.

To conclude this essay, the burden of proof under CISG especially in the context of exceptional rules involving its shifting and furthermore evidential difficulties as with suspicions give a rise to the general question who "the superior risk bearer" is.[156] In terms of exceptional rules Ingeborg Schwenzer and Pascal Hachem also come to this political choice and state that neither the buyer nor the seller is to blame and the decision as to where the loss should lie is difficult one. In the majority of cases the buyer will be "the least blameworthy party and therefore deserves some protection" as the cause for the suspicions is most likely to originate in the sphere of control of the seller.[157] Economic analysis of law considerations suggest that an appropriate risk allocation is which most trading partners would reasonably prefer. And the parties would for sure prefer the seller to bear the risk if the seller could bear the relevant risks more easily than the buyer. However, at the end it is left only to the parties to convince the tribunal of who the superior risk bearer is.

[156] RUSCH Arnold F. Ibid. p. 49.
[157] SCHWENZER, Ingeborg; HACHEM, Pascal; KEE, Christopher. Global sales and contract law. Oxford University Press, p. 393, 2012.

List of references

LAWS AND REGULATIONS

1. RECORDS, OR Official. United Nations Conference on Contracts for the International Sale of Goods, p. 38, 1981.

CASE PRACTICE

Arbitral awards and procedural orders

1. CISG DATABASE. Wire and Cable case. Available at: http://cisgw3.law.pace.edu/cases/040211s1.html. Accessed: 10.04.2020.
2. CISG DATABASE. Frozen Pork case. Available at: http://cisgw3.law.pace.edu/cases/050302g1.html. Accessed: 10.04.2020.
3. CISG DATABASE. Spirits case. Available at: http://cisgw3.law.pace.edu/cases/970220s1.html. Accessed: 10.04.2020.
4. CISG DATABASE. Oven case. Available at: http://cisgw3.law.pace.edu/cases/070427s1.html. Accessed: 10.04.2020.
5. CISG DATABASE. Steel bars case. Available at: http://cisgw3.law.pace.edu/cases/936653i1.html. Accessed: 10.04.2020.
6. CISG DATABASE. Cocoa beans case. Available at: http://cisgw3.law.pace.edu/cases/980115s1.html. Accessed: 10.04.2020.
7. CISG DATABASE. UNCITRAL Digest of Case Law on the United Nations Convention on the International Sale of Goods. Available at: http://www.cisg.law.pace.edu/cisg/text/digest-art-35.html. Accessed: 10.04.2020.
8. CISG DATABASE. Farm machines case. Available at: http://cisgw3.law.pace.edu/cases/050523s1.html. Accessed: 10.04.2020.
9. CISG DATABASE. Egyptian cotton case. Available at: http://cisgw3.law.pace.edu/cases/000915s2.html. Accessed: 10.04.2020.
10. CISG DATABASE. Used laundry machine case. Available at: http://cisgw3.law.pace.edu/cases/031113s1.html. Accessed: 10.04.2020.
11. CISG DATABASE. Aluminium and Light Industries Company v. Saint Bernard Miroiterie Vitrerie. Available at: http://cisgw3.law.pace.edu/cases/010614f1.html. Accessed: 10.04.2020.
12. CISG DATABASE. Namur-Kreidverzekering v. Wesco. Available at: http://cisgw3.law.pace.edu/cases/010614f1.html. Accessed: 10.04.2020.
13. CISG DATABASE. Garden flowers case. Available at: http://cisgw3.law.pace.edu/cases/940701a3.html. Accessed: 10.04.2020.
14. CISG DATABASE. Rainbow trout eggs case. Available at: http://cisgw3.law.pace.edu/cases/020621s4.html. Accessed: 10.04.2020.
15. CISG DATABASE. Thermo King v. Cigna. Available at: http://cisgw3.law.pace.edu/cases/960515f1.html. Accessed: 10.04.2020.
16. CISG-ONLINE DATABASE. CISG-online case 2936. Available at: http://www.cisg-online.ch/content/api/cisg/display.cfm?test=2936. Accessed: 10.04.2020.
17. CISG DATABASE. Powdered Milk case. Available at: http://cisgw3.law.pace.edu/cases/020109g1.html. Accessed: 10.04.2020.
18. CISG DATABASE. Paprika case. Available at: http://cisgw3.law.pace.edu/cases/040630g1.html. Accessed: 10.04.2020.
19. CISG DATABASE. CD Media case. Available at: http://cisgw3.law.pace.edu/cases/060912a3.html. Accessed: 10.04.2020.
20. CISG DATABASE. Spinning mill case. Available at: http://cisgw3.law.pace.edu/cases/111108s1.html. Accessed: 10.04.2020.
21. CISG DATABASE. Blood infusion devices case. Available at: http://cisgw3.law.pace.edu/cases/970108s1.html. Accessed: 10.04.2020.
22. CISG-ONLINE DATABASE. CISG-online 413 case. Available at: http://www.cisg-online.ch/content/api/cisg/display.cfm?test=413. Accessed: 10.04.2020.
23. CISG-ONLINE DATABASE. CISG-online 413 case. Available at: http://www.cisg-online.ch/content/api/cisg/display.cfm?test=413. Accessed: 10.04.2020.
24. CISG-ONLINE DATABASE. CISG-online 900 case. Available at: http://www.cisg-online.ch/content/api/cisg/display.cfm?test=1900. Accessed: 10.04.2020.
25. CISG-ONLINE DATABASE. CISG-online 274 case. Available at: http://www.cisg-online.ch/content/api/cisg/display.cfm?test=274. Accessed: 10.04.2020.
26. DEJURE.ORG DATABASE. Landesgericht Hamburg Urt. v. 09.12.2015, Az.: 303 O 379/11. Available at: https://dejure.org/dienste/vernetzung/rechtsprechung?Gericht=OLG%20Hamburg&Datum=31.12.2222&Aktenzeichen=1%20U%20275/15. Accessed: 10.04.2020.
27. DEJURE.ORG DATABASE. Argentinean Rabbit case 1969. Bundesgerichtshof Urt. v. 16.04.1969, Az.: VIII ZR 176/66. Available at: https://dejure.org/dienste/vernetzung/rechtsprechung?Gericht=BGH&Datum=16.04.1969&Aktenzeichen=VIII%20ZR%20176/66. Accessed: 10.04.2020.
28. DEJURE.ORG DATABASE. Argentinean Rabbit case 1972. Bundesgerichtshof Urt. v. 14.06.1972, Az.: VIII ZR 75/71. Available at: https://dejure.org/dienste/vernetzung/rechtsprechung?Text=VIII%2520ZR%252075%2F71&Suche=Bundesgerichtshof%20Urt.%20v.%2014.06.1972%2C%20Az.%3A%20VIII%20ZR%2075%2F71. Accessed: 10.04.2020.
29. DEJURE.ORG DATABASE. Dry rot case. Landesgericht Bonn Urt. v. 30.10.2003, Az.: 10 O 27/03. Available at: https://dejure.org/dienste/vernetzung/rechtsprechung?Text=VIII%2520ZR%252075%2F71&Suche=Bundesgerichtshof%20Urt.%20v.%2014.06.1972%2C%20Az.%3A%20VIII%20ZR%2075%2F71. Accessed: 10.04.2020.

30. DEJURE.ORG DATABASE. Bundesgericht Urt. v. 16.03.2012, Az.: V ZR 18/11. Available at: https://dejure.org/dienste/vernetzung/rechtsprechung?Text=V%20ZR%2018/11. Accessed: 10.04.2020.
31. DEJURE.ORG DATABASE. Bundesgericht Urt. v. 22.10.2014, Az.: VIII ZR 195/13. Available at: https://dejure.org/dienste/vernetzung/rechtsprechung?Text=VIII%2520ZR%2520195%2F13&Suche=22.10.2014%20-%20VIII%20ZR%20195%2F13. Accessed: 10.04.2020.
32. DEJURE.ORG DATABASE. Glycol Wine case. Bundesgerichtshof Urt. v. 07.07.1987, Az.: VI ZR 176/86. Available at: https://dejure.org/dienste/vernetzung/rechtsprechung?Text=NJW-RR%201987,%201430. Accessed: 10.04.2020.
33. THOMSON REUTERS PRACTICAL LAW UK. Miller v. Minister of Pensions case (1947) 2 All ER 372. Available at: https://uk.practicallaw.thomsonreuters.com/2-500-6576. Accessed 23.04.2020.

MONOGRAPHIC PUBLICATIONS AND EDUCATIONAL LITERATURE

1. ACHILLES, Wilhelm-Albrecht. Kommentar zum UN-Kaufrechtsübereinkommen (CISG). Neuwied: Luchterhand, 2000.
2. ANTWEILER, Clemens. Beweislastverteilung im UN-Kaufrecht: insbesondere bei Vertragsverletzungen des Verkäufers. Lang, 1995.
3. BAUMGÄRTEL, Gottfried et al. Handbuch der Beweislast im Privatrecht. C. Heymann, 1981.
4. BRINKMANN, Moritz. Das Beweismaß im Zivilprozess aus rechtsvergleichender Sicht. C. Heymanns, 2005.
5. BRUNNER, Christoph; GOTTLIEB, Benjamin. Commentaries on Articles 35 CISG, p. 227, 2019.
6. BUTLER, William Elliott (Ed.). Civil code of the Russian Federation. ООО «ЮрИнфоР-Пресс», 2007.
7. FLECHTNER, Harry M. Funky Mussels, a Stolen Car, and Decrepit Used Shoes: Non-Conforming Goods and Notice Thereof under the United Nations Sales Convention (CISG). BU Int'l LJ, v. 26, p. 3, 2008.
8. GRUNEWALD, Barbara. Der Verdacht als Mangel. Festschrift für Horst Konzen zum siebzigsten Geburtstag, Tübingen: Mohr Siebeck, p. 136, 2006.
9. HENNINGER, Michael. Die Frage der Beweislast im Rahmen des UN-Kaufrechts: zugleich eine rechtsvergleichende Grundlagenstudie zur Beweislast. VVF, Florentz, 1995.
10. HERZOG, Peter E. et al. Civil procedure in France. Springer, 2014.
11. HONNOLD, John. Documentary history of the uniform law for international sales: the studies, deliberations, and decisions that led to the 1980 United Nations Convention with introductions and explanations. Kluwer Law Intl, 1989.
12. JAMES, Fleming; GEOFFREY, C. Hazard, and John Leubsdorf. Civil Procedure, p. 234-35, 1992.
13. KAZAZI, Mojtaba. Burden of proof and related issues: a study on evidence before international tribunals. Martinus Nijhoff Publishers, 1996.
14. KOLLER, Thomas; JOST, David. Rinderlasagne mit Pferdefleisch, Salatgurken mit EHEC-Bakterien, dioxinverseuchtes Schweinefleisch– oft nur ein Verdacht und doch ein Mangel? Überlegungen zum Mangelverdacht bei Lebensmitteln als Vertragswidrigkeit der Ware nach UN-Kaufrecht (CISG). Stämpfli, 2014.
15. KOLLER, Thomas; MAUERHOFER, Marc. Das Beweismass im UN-Kaufrecht (CISG), 2011.
16. KOZIOL, Helmut. European tort law 2004. Springer, 2005.
17. KRITZER, Albert H. Overview Comments on Reasonableness, 2015.
18. KRÖLL, Stefan Michael; MISTELIS, Loukas A.; VISCASILLAS, Pilar Perales (Ed.). UN Convention on Contracts for International Sale of Goods (CISG). Verlag CH Beck, 2018.
19. LEW, Julian DM et al. Comparative international commercial arbitration. Kluwer Law International BV, 2003.
20. LILLY, Graham C. et al. An introduction to the law of evidence. West Publishing Company, 1978.
21. MAGNUS, Ulrich; MARTINEK, Michael. J. von Staudingers Kommentar zum Bürgerlichen Gesetzbuch mit Einführungsgesetz und Nebengesetzen: Wiener UN-Kaufrecht (CISG). Walter de Gruyter, 2005.
22. MONAGHAN, Nicola. Law of evidence. Cambridge University Press, 2015.
23. MÜLLER, Tobias Malte. Ausgewählte Fragen der Beweislastverteilung im UN-Kaufrecht im Lichte der aktuellen Rechtsprechung. Sellier European Law Publishers; Quadis, 2005.
24. MURRAY, Peter L.; STÜRNER, Rolf. German civil justice. Carolina Academic Press, p. 267-268, 2004.
25. MURRAY, Peter L.; STÜRNER, Rolf. German civil justice. Carolina Academic Press, 2004.
26. NUNNER-KRAUTGASSER, Bettina; ANZENBERGER, Philipp. Evidence in Civil Law-Austria. Institute for Local Self-Government and Public Procurement Maribor, 2015.
27. PHIPSON, Sidney Lovell. The Law of Evidence. Stevens and Haynes, 1907.
28. POSNER, Richard A. Economic Analysis of Law . Aspen Casebook Series. 2011.

29. PRÖLSS, Jürgen. Beweiserleichterungen im Schadensersatzprozeß. Verlag Versicherungswirtschaft, 1966.
30. RAMBERG, Christina. 5 Emotional Non-Conformity in the International Sale of Goods, Particularly in Relation to CSR-Policies and Codes of Conduct. 2014.
31. RAMBERG, Jan. ICC guide to incoterms 2010. ICC International Chamber of Commerce, 2011.
32. ROSENBERG, Leo. Die Beweislast: auf der grundlage des bürgerlichen gesetzbuchs und der zivilprozessordnung. Liebmann, 1923.
33. SAIDOV, Djakhongir. Article 35 of the CISG: Reflecting on the Present and Thinking about the Future. Vill. L. Rev., v. 58, p. 547, 2013.
34. SAIDOV, Djakhongir. Standards of Proving Loss and Determining the Amount of Damages. Journal of Contract Law, v. 22, n. 1, p. 27-53, 2006.
35. SCHLECHTRIEM, Peter. Internationales UN-Kaufrecht: ein studien-und Erläuterungsbuch zum Übereinkommen der Vereinten Nationen über Verträge über den internationalen Warenkauf (CISG). Mohr Siebeck, 2007.
36. SCHWENZER, Ingeborg; HACHEM, Pascal; KEE, Christopher. Global sales and contract law. Oxford University Press, p. 393, 2012.
37. SCHWENZER, Ingeborg. Commentary on the UN Convention on the International Sale of Goods (CISG). Oxford University Press, 2016.
38. SONDE, Stephan Lars. Das kaufrechtliche Mängelrecht als Instrument zur Verwirklichung eines nachhaltigen Konsums. kassel university press GmbH, p. 152, 2016.
39. VOGEL, Hans-Josef. Die Untersuchungs-und Rügepflicht im UN-Kaufrecht. na, 2000.
40. WAINCYMER, Jeffrey. Procedure and evidence in international arbitration. Kluwer Law International BV, 2012.
41. WOLF, Christian; ZEIBIG, Nicola. Evidence in Civil Law-Germany. Institute for Local Self-Government and Public Procurement Maribor, 2015.
42. ZUCKERMAN, Adrian AS. Zuckerman on civil procedure: principles of practice. sweet & Maxwell, 2006.
43. СКВОРЦОВ, Олег Юрьевич; САВРАНСКИЙ, Михаил Юрьевич; СЕВАСТЬЯНОВ, Глеб Владимирович. Международный коммерческий арбитраж: Посвящается профессору Валерию Абрамовичу Мусину. 2018.

PERIODICAL LITERATURE

1. БОРИСОВА, Е. А.; МОЛЧАНОВ, В. В. Боннер АТ Проблемы установления истины в гражданском процессе. Вестник Московского университета. Серия 11. Право, n. 2, 2010.
2. БУДЫЛИН, Сергей Львович. Внутреннее убеждение или баланс вероятностей? Стандарты доказывания в России и за рубежом. Вестник экономического правосудия Российской Федерации (0869-7426), n. 3, p. 35, 2014
3. ЕЛИСЕЕВ, Николай Георгиевич. Основные понятия доказательственного права. Законы России: опыт, анализ, практика, n. 1, p. 4-12, 2007.
4. КАРАПЕТОВ, А. Г.; КОСАРЕВ, А. С. Стандарты доказывания: аналитическое и эмпирическое исследование. Вестник экономического правосудия Российской Федерации, n. 5, p. 45, 2019.
5. CLERMONT, Kevin M.; SHERWIN, Emily. A comparative view of standards of proof. The American Journal of Comparative Law, v. 50, n. 2, p. 243-275, 2002.
6. DANE, Francis C. In search of reasonable doubt. Law and Human behavior, v. 9, n. 2, p. 141-158, 1985.
7. ENGEL, Christoph. Preponderance of the evidence versus intime conviction: A behavior perspective on a conflict between American and Continental European law. Vt. L. Rev., v. 33, p. 440, 2008.
8. HANOTIAU, Bernard. 'Satisfying the Burden of Proof: The Viewpoint of a 'Civil Law. Lawyer,''Arbitration International, v. 10, p. 341, 1994.
9. KAPLAN, John. Decision theory and the factfinding process. Stan L. Rev., v. 20, p. 1065, 1967.
10. KRÖLL, Stefan et al. Cost and Burden of Proof under the CISG–A Discussion amongst Experts. International Trade and Business Law Review, v. 20, p. 203-244, 2017.
11. KRÖLL, Stefan et al. The Burden of Proof for the Non-conformity of Goods Under Art. 35 CISG. Анали Правног факултета у Београду, v. 59, n. 3, p. 162-180, 2011.
12. LINNE, Anna L. Burden of Proof under Article 35 CISG. Pace Int'l L. Rev., v. 20, p. 31, 2008.
13. REDFERN, Allan et al. The standards and burden of proof in international arbitration. Arbitration International, v. 10, n. 3, p. 317-364, 1994.
14. RUSCH, Arnold F., Verdacht als Mangel, AJP/PJA, Vol. 1., p. 41, 2012.
15. SCHWEIZER, Mark. The civil standard of proof—what is it, actually?. The International Journal of Evidence & Proof, v. 20, n. 3, p. 217-234, 2016.
16. SCHWENZER, Ingeborg; TEBEL, David. Suspicions, mere suspicions: non-conformity of the goods?. Uniform Law Review, v. 19, n. 1, p. 152-168, 2014.

17. SKONTZOS, Athanassios V. The burden and standard of proof in model international procedural law: dealing with the burden and standard of proof in international disputes. Uniform Law Review, v. 23, n. 3-4, p. 569-592, 2018.
18. TARUFFO, Michele. Rethinking the standards of proof. The American journal of comparative law, v. 51, n. 3, p. 662-664, 2003.
19. WRIGHT, Richard W. Proving facts: Belief versus probability. In: European tort law 2008. Springer, Vienna, 2009. p. 79-105.

OTHER SOURCES AND MATERIALS

1. ALI / UNIDROIT Principles of Transnational Civil Procedure [Electronic resource] // UNIDROIT website. https://www.unidroit.org/instruments/transnational-civil-procedure (Accessed 22.04.2020).
2. COUNCIL, CISG Advisory. Opinion No 5. The Buyer's Right to avoid the Contract in Case of Non-Conforming Goods or Documents, v. 7, 2005
3. LOK, Corie; POWELL, Douglas. The Belgian Dioxin Crisis of the Summer of 1999: a case study in crisis communications and management. **Guelph: University of Guelph**, 2000.
4. ROBERT KOCH - INSTITUTE. Final presentation and evaluation of the epidemiological findings in the EHEC O104:H4 outbreak. Available at: https://www.rki.de/EN/Content/infections/epidemiology/outbreaks/EHEC_O104/EHEC_final_report.pdf?__blob=publicationFile. Accessed: 22.04.2020.
5. THE FINANCIAL TIMES. Kobe Steel scandal hits Boeing, Toyota and Nissan. Available at: https://www.ft.com/content/a1e494c2-ad9f-11e7-beba-5521c713abf4. Accessed: 22.04.2020.
6. a UNIDROIT website. ALI/UNIDROIT Principles of Transnational Civil Procedure. Available at: https://www.unidroit.org/instruments/transnational-civil-procedure. Accessed: 22.04.2020.