

Dr. Stefan Kröll, LL.M.

Lawyer in Cologne

Visiting Lecturer Bucerius Law School

*stefan.kroell@uni-koeln.de*

## THE BURDEN OF PROOF FOR THE NON-CONFORMITY OF GOODS UNDER ART. 35 CISG

*The article deals with the controversial question of which parties bears the burden to prove the non conformity of the goods at the time the risk passes. It analyses the various approaches adopted in practice and the CISG literature and advocates a graded approach balancing the allocation of the burden of proof with evidentiary privileges at the preceding evidentiary stage.*

Key words: *Burden of proof. Non conformity of the goods. Presumption.*

### 1. INTRODUCTION

In international sales transactions governed by the CISG sellers are required to deliver goods which conform in relation to their quantity, quality, description and packaging to the contractually agreed standard or the standards imposed by Art. 35 (2) CISG. In practice, disputes about the conformity of the goods are probably the most frequent single cause for legal actions.<sup>1</sup>

These actions are often fact driven. The parties are more in disagreement about the underlying facts of the dispute, than about legal consequences following from the facts once established. To take one of the examples from case law discussed below, the issue is more to determine

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<sup>1</sup> P. Schlechtriem, P. Butler, *CISG*, 2009, para. 132; S. Eiselen, in: A. Kritzer et al., *International Contract Manual*, 2008, Vol. 4 § 89:1; H. Flechtner, "Funky Mussels, a Stolen Car, and Decrepit Used Shoes: Non Conforming Goods and Notice thereof under the United Nations Sales Convention", *Boston University International Law Journal* 2008, 3.

the quantities of the goods delivered than about the question of whether this quantity results in the non-conformity of the goods. In a considerable number of such disputes the outcome of an action largely depends on who bears the burden of proof for the various factual requirements necessary for the success of a claim raised. As has been correctly stated by an American authority: ‘A courts allocation of the burden of proof becomes as important as the substantive rule itself’.<sup>2</sup>

In proceedings to determine the seller’s liability for non-conformity, the first issue where the question as to an allocation of the burden of proof arises concern the conformity of the goods as such, i.e. whether the goods delivered were in conformity with the relevant standard at the time when the risk passes. In addition, as the buyer may pursuant to Art. 39(1) CISG ‘lose the rights to rely on a lack of conformity of the goods if he does not give notice to the seller...within a reasonable time’, in numerous actions the additional question arises who bears to burden of proof for the compliance with the notice requirements. Last but not least it may have to be determined who has the burden of proof for an eventual actual or constructive knowledge of the seller about the non-conformity which would exclude any reliance on a belated notice pursuant to Art. 40.

The following article will concentrate on the first question, i.e. that of the conformity of the goods. It is the central issue in the majority of cases and the gateway for all further questions.

## 2. SELECTED EXAMPLES FROM CASE LAW

The issue of burden of proof may arise in a number of different scenarios. The two most important scenarios are well evidenced by the following three decisions coming from various jurisdictions which turned on the burden of proof.

### 2.1. The ‘wire-and-cable’ case of the Swiss Supreme Court

In a decision of 7 July 2004 the Swiss Supreme Court had to deal with the delivery of a larger amount of wire and cable from an Italian seller to a Swiss buyer. Both parties had a long standing business relationship. The goods were picked up by the independent carrier directly at the place of the seller’s supplier in Italy on 2 May. The driver signed a receipt for the entire consignment without making any prior check with respect to the quantity of the goods. The goods were delivered to the seller’s place of business in Switzerland on the next day. Again the documents

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<sup>2</sup> L. DiMatteo et al., *International Sales Law – A critical analysis of CISG juris prudence*, New York, 2005, 172.

were signed without any quantity check by the seller's side manager. Several days later, when the seller tried to resell part of the goods it was discovered that the whole consignment relating to a particular bill of delivery was missing. Despite extensive searches at the seller's and the buyer's premises it was not possible to clarify the fate of the missing part. The buyer made only partial payment and the seller brought an action for the remaining price in the Swiss Courts. The Court or Appeal in Bern rejected the claim, holding that the seller had not discharged his burden of proof concerning amounts of goods delivered. The Swiss Supreme Court reversed the judgment holding that with the acceptance of the goods the burden of proof for their non-conformity shifted to the buyer.

*2.2. Chicago Prime Packers Inc. v. Northam Food Trading  
(US Court of Appeal 7<sup>th</sup> Cir.)*

The second decision concerned the delivery of pork ribs from the US corporation Chicago Prime Packers to the Canadian buyer Northam Food Trading. Chicago Prime Packers bought the frozen ribs from its supplier which had stored it in several of its cold-storage facilities.

On 24 April 2001, the goods were picked up by the trucking company selected by the buyer and delivered directly to the buyer's customer where they arrived one day later. The trucking company signed a straight bill of lading which indicated, however, that the 'contents and condition of contents of packages [were] unknown' at the time of receipt. There had been no proper inspection before the picking up of the goods nor upon their arrival at the customer's place. Irrespective of this also the customer acknowledged in a bill of lading that the ribs were 'in apparent good order' except for '21 boxes [that] were gauged' and were the meat on those boxes showed 'signs of freezer burns'. Due to an internal oversight Northam failed to pay Chicago as agreed upon 1 May. On 4 May, when the buyer's customer started to process pork loin ribs they notice that some ribs appeared to be in an off-condition. Inspections by the US Department of Agriculture first led to a stop of the production process. Northam immediately informed Chicago Prime Packers about the problems with the goods. Upon closer examination the goods were declared to be non-usable and had to be destroyed. As a consequence Northam refused to pay the price and Chicago Prime Packers started court proceedings for payment of the purchase price. The Federal District Court of the Northern District of Illinois as well as the Court of Appeal (7<sup>th</sup> Cir.) ordered payment rejecting Northam's set-off defense based on the alleged non-conformity of the goods. The courts held that Northam bore the burden of proof for the fact that the goods were already defective at the time the risk passed, i.e. when they had been taken over at the cold-storage. They held that the report of the USDA-inspector upon which Northam

relied did not confirm that the ribs examined were actually the ribs delivered by Northam. Moreover, it did not establish that the goods were not damaged upon transport or after their arrival at the buyer's customer.

Like in the first example, the decision concerns an action by the seller for the purchase price in which the buyer refused payment alleging non-conformity of the goods.

### 2.3. The 'powdered-milk case' of the German Supreme Court

The factual background underlying the third decision, rendered by the German Supreme Court on 9 January 2002, covers the second main scenario, where the buyer acts as claimant, trying to enforce his remedies for non-conformity. The dispute as such arose out of the purchase of powdered milk by a Dutch buyer from a German seller. Before sending the powdered milk to the buyer the seller carried out comprehensive sensory physical and microbiological examinations in line with the industry standard. The buyer also made several inspections through spot check without any special results. The powder was then shipped from the buyer to customers in Algeria and Aruba. The milk produced there from the powder had a rancid taste which, as it turned out later, was due to an infestation of the milk powder with inactive lipase, an enzyme. The problem was that inactive lipase can only be discovered through expensive test and not through the standard examination applied in the industry. According to the expert reports it could not be ruled out that the powdered milk was already infested by inactive lipase at the time when the risk passed. The seller, however, alleged that the infestation occurred during transportation which could also not be ruled out. Consequently the outcome of the case depended on the question of who bears the burden of proof. The German Supreme Court held that in principle the buyer had to prove that the good were non-conforming at the time of transfer of the risk. In the present case it assumed, however, a reversal of the burden of proof on the basis of non-harmonized German law, as the seller had in a previous letter acknowledged the non-conformity of the goods for at least a part of the powdered milk.

### 2.4. Characteristics of cases where the burden of proof potentially is relevant

The above mentioned decisions evidence that questions as to the burden of proof arise primarily in cases where the discovery of the non-conformity occurs a considerable time after the risk has passed. That applies obviously to hidden defects, which played a role in the German decision. More importantly, as evidenced by the Swiss and American decisions, also in most contracts involving carriage in the sense of Art. 31(1) (a) CISG the examination and eventual discovery of any defects occurs some time after the risk has passed. In these cases the risk passes at the

time the goods are handed over to the first carrier. The buyer, however, often gets its first chance to examine the goods for their conformity after their arrival at its place of business, following a more or less time consuming transport.<sup>3</sup>

A second but comparable category of cases, in which the allocation of the burden of proof may be crucial, is where the goods are used in combination with other products in a way that defects in the final product could have several different causes.<sup>4</sup>

In addition, questions as to the burden of proof – albeit in different form – may also arise where the alleged non-conformity of the goods is discovered directly at the time the risk passes. For example, the conformity of the goods may be dependent on whether the parties had agreed on a particular standard which may be higher or lower than the fall back standard in Art. 35(2)(a).

### 3. RELEVANT DISTINCTIONS: BURDEN OF PROOF, MEANS OF DISCHARGING THE BURDEN

Any meaningful discussion of the burden of proof requires first a definition what is understood by the concept and how it is distinguished from other concepts. The notion of ‘burden of proof’ has rightly been considered in one of the leading American textbooks on evidence to be one of the ‘slipperiest members of the family of legal terms’.<sup>5</sup>

Leaving aside all national particularities which may influence the development and use of a certain terminology, two broad concepts can be distinguished which are sometimes jointly referred under the notion of ‘burden of proof’. These are the burden of persuasion<sup>6</sup> on the one hand and the burden of adducing evidence<sup>7</sup> on the other hand. Or, as has been

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<sup>3</sup> For a more detailed account of the proof problems arising from transportation see C. Antweiler, *Beweislastverteilung im UN Kaufrecht*, Insbesondere bei Vertragsverletzungen des Verkäufers, Frankfurt 1994, 141 *et seq.*

<sup>4</sup> Audiencia Provincial de Barcelona (Spain), 20 June 1997 (dye for clothes), CISG Online 338 (Pace).

<sup>5</sup> *McCormick on Evidence*, West Group 1984<sup>3</sup>, 965 (One ventures the assertion that ‘presumption’ is the slipperiest member of the family of legal terms, except its first cousin, ‘burden of proof’); see also A. L. Linne, “Burden of Proof under Art. 35 CISG,” *Pace International Law Review* 20/2008, 33, according to whom the content of the notion is also influenced by the nature of the system in which it is used, whether it is an adversarial system or whether it is an inquisitorial system.

<sup>6</sup> Other terms used include ‘probative burden’, ‘the burden of proof on the pleadings’ or ‘the risk of non persuasion’; see *Phipson on Evidence*, London 2010<sup>17</sup>, para. 6 02.

<sup>7</sup> Often also referred to as ‘evidential burden’ see *Phipson on Evidence*, para. 6 02.

stated by the Court of Appeal in Berne in the above mentioned ‘wire and cable’ case on the basis of the Germanic terminology:

“In subjective terms, the party having the burden of proof bears the burden of factual substantiation: burden of proof in its objective sense means the risk of a party bearing the burden of facts not being sufficiently established”.<sup>8</sup>

In civil cases, including disputes involving the CISG, the burden of proof, i.e. the burden of persuasion, and the burden of adducing evidence, i.e. the evidentiary burden, normally coincide.<sup>9</sup> That is, however, not necessarily the case<sup>10</sup> and since both terms refer to different stages of the evidentiary process they should be distinguished.

In any dispute involving in one way or another a seller’s liability for non-conforming goods under Art. 35, the facts resulting in the non-conformity of the goods have to be pleaded to the court or arbitral tribunal and, if contested, have to be proven. In general, the claimant has to convince the court that upon the facts pleaded and assumed to be correct, its claim is justified. It is then for the defendant to contest either the correctness of Claimant’s factual submissions or to plead additional facts which, if assumed to be correct, would justify a defense against the claim. If either party submits and relies for its case on facts which are contested by the other party, these facts have to be proven in an evidentiary process.

During this evidentiary process a party has to convince the court that its allegations of facts are true by adducing admissible evidence, relying on legal presumptions or other evidentiary means such as prima facie evidence. In all those cases, mentioned above, the parties may have considerable difficulties in proving positively that the goods either were or were not conforming at the time the risk passed. In some cases it may in the end even turn out to be impossible to prove the relevant facts with the required degree of probability or certainty imposed by the applicable standard of proof. This is the realm of the concept of burden of proof as understood in this contribution. It merely concerns the question of who should bear the consequences of a possible lack of evidence, i.e. the risk

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<sup>8</sup> Appellationshof Bern (Appellate Court Bern, Switzerland) 11 February 2004 (wire and cable), *IHR* (2006), 149 (150), CISG Online 1191 at para. 3 (Pace).

<sup>9</sup> See for English Law, A. Zuckerman, *Zuckerman on Civil Procedure: Principles of Practice*, Sweet & Maxwell, London 2006<sup>2</sup>, para. 21.39; for German and US law M. Henninger, *Die Frage der Beweislast im Rahmen des UN Kaufrechts*, Munich 1994, 29 *seq.*, 83 *seq.*, explaining also the different dependencies between the two concepts in both jurisdictions.

<sup>10</sup> For examples in the context of English law see A. Zuckerman, para. 21.36; for differences under German law which distinguishes between ‘objektive Beweislast’ (burden of persuasion) and ‘subjektive Beweislast’ (burden of adducing evidence) where the ‘konkrete subjektive Beweislast’ may shift during the process and therefore differ from the burden of persuasion M. Henninger, 29 *seq.*

of error or non-persuasion.<sup>11</sup> How the burden of proof is allocated is in the end a moral and political decision.<sup>12</sup>

#### 4. BURDEN OF PROOF AS A MATTER REGULATED BY THE CISG

##### 4.1. Overview on the different views in practice

Art. 35 does not contain any express rule on the allocation of the burden of proof. Neither does it regulate explicitly who has to prove the relevant standard for conformity, nor who has to prove that the goods were not conforming to the applicable standard at the relevant time.

In light of that and other considerations, a number of commentators consider the burden of proof to be an issue which is beyond the CISG's scope of application and consequently be governed by the non-harmonized national law.<sup>13</sup> One of the main arguments for that view comes from the drafting history. It has been submitted that 'delegations speaking on the burden-of-proof were all quite definite that it was not the intention to deal in the Convention with any questions concerning the burden-of-proof. The consensus was that any such questions must be left to the court as a matter of procedural law'.<sup>14</sup> In addition, these commentators rely on the rejection of a proposal including language allocating the burden of proof in relation to the nonconformity by the drafts as, as stated in the UNCITRAL report, 'it was considered inappropriate for the Convention, which relates to the international sale of goods, to deal with matters of evidence or procedure'.<sup>15</sup>

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<sup>11</sup> A. Zuckerman, para. 21.32; see also *Cross and Tapper on Evidence*, 2010<sup>12</sup>, 120, which in this regard use the term 'burden of proof in the strict sense'.

<sup>12</sup> A. Zuckerman, para. 21.

<sup>13</sup> W. Khoo, "Art. 2", *Commentary on the International Sales Law: The 1980 Vienna Sales Convention* (eds. C. M. Bianca, M. J. Bonell), Giuffrè, Milan 1987, para.3.2; J. O. Honnold, H. M. Flechtner, *Uniform Law for International Sales under the 1980 United Nations Convention*, Kluwer 2009<sup>4</sup>, Art. 4 para. 70.1; V. Heuzé, *Vente Internationale*, L.G.D.J., Paris 2000, para. 299; Arbitral Award, ICC 6653/1993, 26 March 1993 (steel bars) CISG Online 71(Pace).

<sup>14</sup> This is the main argument by W. Khoo, para. 3.2 (citing United Nations Conference on Contracts for the International Sale of Goods (Vienna, 10 March – 11 April 1980), Official Records, New York 1981, at 295–298); see also H. M. Flechtner, "Selected Issues Relating to the CISG's Scope of Application", *Vindobona Journal of International Commercial Law and Arbitration* 13/2009, 102 (Pace).

<sup>15</sup> UNCITRAL, *Report of the Committee of the Whole relating to the draft Convention on the International Sales of Goods* (1977), paras. 177–178, reprinted in O. J. Honnold, *Documentary History of the Uniform Law for International Sales*, Kluwer, Deventer 1989, 330.

The prevailing view, and it is submitted also the preferable one, is that, despite the absence of any explicit regulation, the question of the burden of proof in general and in relation to the non-conformity of the goods in particular is a matter governed by the CISG in the sense of Art. 7(2).<sup>16</sup> Notwithstanding the above referred statements, the drafting history is no conclusive argument against considering the burden of proof to be a matter governed by the CISG. Some of the proposals including explicit rules on the burden of proof were rejected with the arguments that such rules are superfluous as they merely state the obvious.<sup>17</sup> In addition, the burden of proof is characterized in a large number of legal systems, if not the majority, to be a matter of substantive law and not one of procedural law.<sup>18</sup>

The substantive argument of including the burden of proof into the CISG's scope of application is that it is so closely connected with the application of the substantive provisions that it would be impracticable to separate the two.<sup>19</sup> Allocation of the burden of proof is not a mere rule of procedure with no or only limited influence on material justice. Quite to the contrary it resolves about material considerations which are comparable to those underlying the substantive requirements for the creating and existence of rights.

Furthermore, the inclusion of the burden of proof into the CISG leads in practice to greater certainty. Harmonized rules on the burden of proof limit the incentives for forum shopping, as the outcome of a dispute may be less dependent on where the claim is brought.<sup>20</sup>

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<sup>16</sup> F. Ferrari, "Burden of Proof under the CISG", *Pace Review of the Convention on Contracts for the International Sale of Goods* (2000-2001), 1 *et seq.* (Pace); S. Krusinga, *(Non-)Conformity in the 1980 UN Convention on Contracts for the International Sale of Goods: A Uniform Concept?*, Intersentia 2004, 157-86; I. Schwenzer, P. Hachem, "Art. 4", *Commentary on the UN Convention on the International Sale of Goods (CISG)* (eds. P. Schlechtriem, I. Schwenzer), Oxford University Press, Oxford 2010<sup>3</sup>, para. 25 *seq.*; Bundesgerichtshof (Germany) 9 January 2002 (powdered milk), CISG Online 651 (Pace) at 2(b) with note P. Perales Viscasillas, "Battle of the Forms and the Burden of Proof: An Analysis of BGH 9 January 2002", *Vindobona Journal of International Commercial Law and Arbitration* 6/2002, 227 (Pace); Bundesgericht (Switzerland) 13 November 2003 (used laundry machine), CISG Online 840 (Pace) at 5.3 with approving note Mohs, *IHR* (2004), 219 (220); see also the decisions in the following footnotes.

<sup>17</sup> See the detailed discussion of the drafting history by C. Antweiler, 46 *et seq.*; R. Jung, *Die Beweislastverteilung im UN Kaufrecht*, Frankfurt 1996, 24 *et seq.*

<sup>18</sup> A. Zuckerman, para. 21.39; also the European Conflict of Laws provisions in Regulation 593/2008 (Rome I), Art. 18.

<sup>19</sup> T. M. Müller, *Ausgewählte Fragen der Beweislastverteilung im UN Kaufrecht im Lichte der aktuellen Rechtsprechung*, Sellier European Law Publishers, Munich 2005, 32.

<sup>20</sup> Hepting, Müller, "UN Kaufrecht - Vor Art. 1", *Handbuch der Beweislast - Bürgerliches Gesetzbuch, BT 1* (eds. Baumgärtel, Laumen, Prütting), Munich 2009<sup>3</sup>, para. 12.



As a consequence the few provisions in the CISG which like Art. 79(1) either obviously address the burden of proof or at least do it implicitly, such as Art. 2(a) and Art. 25, are no exceptions which deal with a matter otherwise outside the scope of application of the CISG. They constitute clear signs that the burden of proof is a matter which is in principle governed by the CISG.

Some go even further and submit that the CISG also governs (or least should govern) the standard of proof<sup>21</sup> or even the way in which this burden can be discharged.<sup>22</sup> The prevailing view is, however, that national law governs both questions. What is necessary to discharge the burden of proof and by which means a party can do so, as well as other questions relating to the admissibility and weight of evidences are matters of procedural law which are normally considered to be outside the CISG's scope of application. Thus, whether the party may prove the non-conformity by submitting the report of a party-selected expert or whether the non-conformity can only be proven by court appointed experts has in practice generally be determined by reference to a particular national law.<sup>23</sup> The same applies for questions of the evidentiary value and consequences of admissions of non-conformity.<sup>24</sup>

#### 4.2. Relevant principles

It follows from the above, that in absence of an explicit regulation in the CISG, the allocation of the burden of proof in relation to the various factual requirements relating the seller's liability for non-conforming goods has to be done primarily on the basis of the general principles underlying the CISG, as required by Art. 7(2) CISG.

These general principles are to be found first of all in the few provisions which explicitly address the question of burden of proof, in particular Art. 79(1). It states:

<sup>21</sup> I. Schwenzer, "Art. 35", *Commentary on the UN Convention on the International Sale of Goods (CISG)* (eds. P. Schlechtriem, I. Schwenzer), Oxford University Press, Oxford 2010<sup>3</sup>, para. 56.

<sup>22</sup> L. DiMatteo et al., "The Interpretive Turn in International Sales Law", *Northwestern Journal of International Law & Business* 34/2004, 438 seq.

<sup>23</sup> See Tribunale di Vigevano (Italy), 12 July 2000 (sheets of vulcanized rubber used in manufacture of shoe soles), CISG Online 493 (Pace) where the evidence submitted by the German buyer to prove the non conformity, *i.e.* the report and testimony of an expert appointed by the buyer, had been rejected under Italian procedural law; *cf.* Cámara Nacional de Apelaciones en lo Comercial (Argentina) 24 April 2000 (charcoal), CISG Online 699 (Pace) at III; Cámara Nacional de Apelaciones en lo Comercial (Argentina) 21 July 2002 (malt), CISG Online 803 (Pace) requesting proof of non conformity under Art. 476 Commercial Code by submission to independent expert arbitrators.

<sup>24</sup> Bundesgerichtshof (Germany) 9 January 2002 (powdered milk), CISG Online 651 (Pace).

‘A party is not liable for a failure to perform any of his obligations if he proves that the failure was due to an impediment beyond his control and that he could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome it or its consequences.’

From this, as well as Arts 2(a) and 25 CISG it can be deduced that each party has to prove the factual prerequisites of the provisions upon which it wants to rely for its claim or defense. It is often referred to as ‘rule and exception-principle’ or using Roman terminology as the principle *ei incumbit probatio, qui dicit non qui negat* or *actori incumbit probatio*.<sup>25</sup>

This rule is supplemented or modified by considerations of equity according to which each party has to prove those facts which originate from its sphere. The basis for this principle proof proximity in the CISG is less clear and they few decisions which have relied on the principle of proof proximity are of little help. They are primarily from courts in civil law jurisdictions where, in the absence of wide reaching discovery opportunities, the principle is well established in the national law.<sup>26</sup> Consequently the courts have generally limited themselves in stating the existence of the principle without giving any further justification based directly on the CISG. The Swiss Supreme Court in the above mentioned ‘wire and cable’ case merely stated:

‘As one of these principles, it must be taken into account how close each party is to the relevant facts at issue, i.e., a party’s ability to gather and submit evidence for that point. Hence, if a buyer takes on a delivery without giving notice for any claimed deficiencies, thus establishing his exclusive possession of the goods, then he, the buyer, has to prove any claimed lack of conformity of the delivered goods.’<sup>27</sup>

Consequently, the reproach that the courts rely primarily on their national law and not the CISG in establishing the principle of proof proximity is not without merit.<sup>28</sup>

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<sup>25</sup> Appellationshof Bern (Appellate Court Bern, Switzerland) 11 February 2004 (wire and cable), CISG Online 1191 (Pace), in so far not overruled by the Bundesgericht, which had confirmed the principle in *Bundesgericht* (Switzerland) 13 November 2003 (used laundry machine), CISG Online 840 (Pace) at 5.3 with approving note Mohs, *IHR* (2004), 219 (220); sometimes this rule is broken down into two separate rules distinguishing between the burden for a party raising a claim and a party claiming an exception or raising a defence; e.g. F. Ferrari, 1 et seq.

<sup>26</sup> See Bundesgerichtshof (Germany) 30 June 2004 (sweet paprika) CISG Online 874 (Pace) at para. II2b; by contrast proof proximity plays a much more limited role in jurisdictions such as the US which provide for far reaching discovery rights of the parties involved allowing them to get hold of evidence from the sphere of the other party; see M. Henninger, 92 seq.

<sup>27</sup> Bundesgericht (Switzerland) 7 July 2004 (cable drums), CISG Online 848 (Pace) at para. 3.3.

<sup>28</sup> H. M. Flechtner, (2009), 104 seq. (Pace).

Irrespective of this, the drafting history of the CISG allows to consider the principle of proof proximity to be one of the general principles underlying the CISG. Originally Art.25, which at the time was Art. 9 provided that a breach was fundamental if ‘it results in a substantial detriment to the other party *and* the party in breach foresaw or had reason to foresee such a result’.

The ‘and’ was in the end replaced by the present ‘unless’ as it would be very difficult for the non-breaching party to prove that the breaching party did not foresee the result or could not have foreseen it. As the breaching party was much closer to the fact the burden of proof was imposed on it.<sup>29</sup>

## 5. OVERVIEW ON THE VARIOUS ALLOCATIONS OF THE BURDEN OF PROOF IN PRACTICE

Notwithstanding the broad consensus as to the existence and relevance of these two principles, completely divergent views exist as to their consequences in relation to the allocation of the burden of proof for the non-conformity of the goods at the time the risk passes. The various views are in part strongly influenced by the position taken under respective national laws.<sup>30</sup> In addition, it is not rare that the various statements by courts and tribunals or in the literature lack the necessary specificity and distinction to attribute them clearly to a particular view. Thus, the same authors and decisions are sometimes relied upon for different views.<sup>31</sup>

The Swiss courts want to allocate the burden of proof primarily on the basis of the *actori incumbit probatio* principle. Thus, the burden of proof is largely dependent on the position of the parties in the process, i.e. who invokes Art. 35 in its favour. In this respect the Swiss Supreme Court stated as follows:

“According to the principle that a party has to prove the elements of a provision it wants to rely on, a *seller who demands the purchase price* must prove that delivery was effected in conformity with the contract and a *buyer who bases a defense* (e.g., for rescission of the contract or for a reduction of the price) on the lack of conformity of the goods must prove the lack of conformity. Thereby, according to the principle

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<sup>29</sup> See for the drafting history in relation to Art. 25 C. Antweiler, 57 *et seq.*; for a further argument resulting from the drafting history of the provision in the ULIS which later became Art. 35(2)(c) see Hepting, Müller, para. 33.

<sup>30</sup> For a critical analysis of this in the German and French jurisprudence see *Gru ber*, in: *MünchKommBGB* (2008), Art. 35 CISG para.44.

<sup>31</sup> For a detailed discussion of the various positions and issues see the monographs by T. M. Müller, 36 *et seq.*; C. Antweiler, 141 *et seq.*; see also A. L. Linne, 31.

mentioned, *both parties bear the burden of proving conformity* with the contract, to the extent that they derive rights from the presence or lack of such conformity” (emphasis added).<sup>32</sup>

This statement, however, shows that in cases where the seller demands the purchase price and the buyer invokes in this action the defense of non-conforming goods problems arise. If it cannot be established with the required certainty that the goods are non-conforming, the burden of proof, i.e. the burden of persuasion, has to be allocated to one party. It cannot be borne by both parties. In such cases, due to the particularities of Art. 35, the application of the ‘rule-exception’ principle is fraught with uncertainties. Consequently, in most other jurisdictions, courts and literature pay, at best, lip-service to this rule. De facto the burden of proof is allocated largely independent from the procedural position of the relevant parties.

Some courts have held that the burden should generally lie with the seller.<sup>33</sup> Also, in the German literature, influenced by the situation in domestic law, the seller is in principle considered to bear the burden of proof that he properly performed his obligation.<sup>34</sup> In the view of others, the buyer should normally bear the burden of proof.<sup>35</sup>

The prevailing view in practice, however, allocates the burden of proof primarily on the basis of the proof proximity principle. Accordingly the burden shifts from the seller to the buyer in conjunction with the delivery of goods.<sup>36</sup> That means that the seller has to prove the conformity of the goods in cases where the buyer has not yet taken delivery or has

<sup>32</sup> Bundesgericht (Switzerland) 13 November 2003 (used laundry machine), CISG Online 840 (Pace) at 5.3 (in the case the principle is, however, *de facto* overridden by the ‘proof proximity’ principle); Bundesgericht (Switzerland) 13 January 2004 (menthol USP brand crystals), CISG Online 838 (Pace) (UNILEX) at E. 3.1. in two of the cases; in this direction also F. Ferrari, “Divergences in the application of the CISG’s rules on non conformity of goods”, *RabelsZ* (2004), 479; Neumann, “Features of Article 35 in the Vienna Convention; Equivalence, Burden of Proof and Awareness”, *Vindobona Journal of International Commercial Law and Arbitration* 11/2007, 81 at paras 16 *et seq.* (Pace).

<sup>33</sup> Rechtbank van Koophandel Kortrijk (Belgium) 6 October 1997 (crude yarn), CISG Online 532 (Pace); in this direction also Landgericht Berlin (Germany) 15 September 1994 (Shoes), CISG Online 399 (Pace) requiring, however, first a detailed complaint of the buyer.

<sup>34</sup> M. Henninger, 221.

<sup>35</sup> C. M. Bianca, “Art. 36”, *Commentary* (eds. C. M. Bianca, M. J. Bonell), Giuffrè, Milan 1987, para. 3.1; *Mohs*, Case note (Bundesgericht 13 November 2003) IHR (2004) 219 (220); *U.S. Court of Appeals (7<sup>th</sup> Circuit)* (USA) 23 May 2005 Chicago Prime Packers, Inc. v. Northam Food Trading Co. (pork ribs), CISG Online 1026 (Pace), to a large extent *de facto* also Bundesgericht (Switzerland) 13 January 2004 (menthol USP brand crystals), CISG Online 838 (Pace) (UNILEX) at E. 3.1.

<sup>36</sup> See in particular Handelsgericht Zürich (Switzerland) 30 November 1998 (lambskincoats), CISG Online 415 (Pace); Piltz, *Internationales Kaufrecht*, 2008, para. 5 23; I. Schwenger, para. 56; as well as the references in the following footnotes.

made reservations as to the conformity of the goods when taking delivery.<sup>37</sup> By contrast once the buyer has taken delivery of goods without any complaints or reservation as to their conformity the buyer has to prove that the goods were non-conforming at the time risk passes.<sup>38</sup> Different views exist, however, of what constitute ‘taking delivery’ in this context, i.e. at what exact time the burden shift. They range from the mere physical acceptance of the goods<sup>39</sup> over the expiry of a time to examine the goods in the sense of Art. 58(3)<sup>40</sup> to the expiry of the notification period under Art. 39<sup>41</sup>. It is argued that in compensation of the considerable protection afforded by Art. 39 to the seller, it is justifiable to impose the burden of proof on the seller at least until the notification period expires.

In addition, there have been a number of efforts to reduce de facto the importance of the burden of proof by granting the party who bears the burden alleviations during the evidentiary process. The primary tools in this context are presumptions or granting certain facts at least the status of prima facie evidence. Thus, according to one commentator a buyer which has proven that the goods are presently non-conforming can in general rely on a presumption in his favour that this non-conformity also existed at the time the risk passed. It is then for the seller to rebut such presumption by showing that the non-conformity is the consequence of a subsequent event.<sup>42</sup> Others want to limit that exception to the period between the dispatch of the goods by the seller and their arrival to the buy-

<sup>37</sup> Handelsgericht Zürich (Switzerland) 30 November 1998 (lambskin coats), CISG Online 415 (Pace); I. Schwenger, para. 49.

<sup>38</sup> Bundesgericht (Switzerland) 13 November 2003 (used laundry machine), CISG Online 840 (Pace) at 5.3.; Bundesgericht (Switzerland) 7 July 2004 (cable drums), CISG Online 848 (Pace) at 3.3.; Bundesgerichtshof (Germany) 8 March 1995, CISG Online 144 (Pace) (mussels) at II 1(b)(aa); Bundesgerichtshof (Germany) 9 January 2002, CISG Online 651 (Pace) (milkpowder) at 2(a); less explicit also Cour de cassation (France) 24 September 2003, *Aluminium and Light Industries Company v. Saint Bernard Miroiterie Vitre tie*, CISG Online 791 (Pace).

<sup>39</sup> Bundesgericht (Switzerland) 13 November 2003 (used laundry machine), CISG Online 840 (Pace) at 5.3.

<sup>40</sup> Benicke, in: Schmidt (ed.), *MünchKommHGB* (2007), Art. 36 para. 8; Mohs, “Case note (Bundesgericht 13 November 2003)”, *IHR* (2004), 219 (220); I. Schwenger, “Art. 35”, *Kommentar* (German ed.) (eds. P. Schlechtreim, I. Schwenger), 2008, para. 52 note 213.

<sup>41</sup> C. Antweiler, 162 *et seq.*; M. Henninger, 221 *et seq.*; J. Daun, “Öffentlichrechtliche ‘Vorgaben’ im Käuferland und Vertragsmäßigkeit der Ware nach UN Kaufrecht”, *NJW* 1996, 30; see also the earlier Swiss jurisprudence, Handelsgericht Zürich (Switzerland) 30 November 1998 (lambskincoats), CISG Online 415 (Pace); Obergericht Luzern (Switzerland) 12 May 2003 (used textile cleaning machine), CISG Online 846; Appellationshof Bern (Switzerland) 11 February 2004 (wire and cable), CISG Online 1191 (Pace), which has, however, been overruled by the Bundesgericht *supra* note 39.

<sup>42</sup> Magnus, in: *Staudinger Kommentar* (2005), Art. 36 CISG para. 25.

er in cases of contracts including carriage and based on C-Incoterms.<sup>43</sup> One author suggests a three step approach according to which the seller carries an initial burden of establishing a prima facie case of conformity, for example by inspection certificates or routine business practices. Upon fulfillment of this burden, the buyer would then have to establish a case of non-conformity and that this was not caused by the buyer. If the buyer meets that burden of proof, the burden would shift back to the seller to explain why he should not be liable for the non-conformity.<sup>44</sup>

## 6. SUGGESTED APPROACH FOR AN ALLOCATION OF THE BURDEN OF PROOF

A proper allocation of the burden of proof, i.e. the burden of persuasion, in the context of the seller's liability for non-conforming goods cannot be done in an all or nothing approach which sometimes appears to be adopted in practice. It is by no means necessary that one party has to bear the burden of proof for all factual requirements. Quite to the contrary, in general the burden has to be allocated separately for every particular factual requirement.<sup>45</sup>

Consequently, in addition to the above mentioned distinction between burden of proof and burden of presenting evidence, three closely related but still separable questions have to be distinguished in allocating the former. In determining whether the seller has complied with its obligation to deliver conforming goods one has first to determine the applicable standard. The second step relates to the determination of whether the goods are presently in conformity with this standard while at the third step the question arises whether such conformity already existed at the time when the risk passes.

### 6.1. Burden of proof for the relevant standard

The burden of proof for the determination of the relevant standard is governed by the *actori incumbit probatio* principle. The starting point for determining who has to be the burden of proof is the default standard in Art. 35(2)(a). Whenever the conformity or non-conformity of the goods has to be determined against this standard, the buyer bears the burden of proof for the facts relevant to determine what constitute the 'ordinary purpose'.<sup>46</sup> Notwithstanding that the delivery of non-conforming goods

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<sup>43</sup> Piltz, para.5 23.

<sup>44</sup> A. L. Linne, 42 *et seq.*

<sup>45</sup> A. Zuckermann, para. 21.34.

<sup>46</sup> Hepting, Müller, para. 4.

constitutes a breach of contract, the seller's entitlement to payment is not dependent that he proves the delivery of conforming goods.

Whenever a party tries to rely in its favour on a different standard, it has to prove this higher or lower standard. That applies to the subjective standard in Art. 35(1) as well as to the two other objective standards in Art. 35(2)(b)(c). Consequently, a seller who has delivered goods, which are conforming to an alleged contractual standard under Art. 35(1) but which would not meet the 'ordinary purpose' standard of Art. 35(2)(a), has to prove the agreement on the alleged contractual standard to the exclusion of the standard of Art. 35(2)(a). On the other hand, a buyer who alleges that certain further reaching requirements as to conformity have been agreed bears the burden of proof for that.<sup>47</sup>

In this context the question as to who bears the burden of proof must be clearly distinguished from the question by which means this burden can be discharged and how certain proven facts are to be interpreted. In various jurisdictions the existence of a written contractual document limits a possible reliance on antecedent negotiations proven by witnesses.<sup>48</sup> Whether a buyer may rely on witnesses to prove an alleged information about an extraordinary use of the goods requiring a particular packaging where the standard terms included into the contract provide for 'normal packaging' is foremost a question of interpreting the parties agreement in the sense of Art. 8 but no one of burden of proof.

In connection with the standard in Art. 35(2)(b), the burden of proof for the different requirements is even split between the parties. A buyer trying to invoke the non-conformity of the goods with the standard imposed by Art. 35(2)(b) has to proof that the particular purpose was made known to the seller.<sup>49</sup> The seller then bears the burden of proof for the fact that the buyer did not rely upon the seller's skill and judgment or that it was unreasonable for him to do so.<sup>50</sup>

<sup>47</sup> Oberlandesgericht Zweibrücken (Germany) 2 February 2004 (milling equipment), CISG Online 877 (Pace) origin of goods; Landgericht Hamburg (Germany) 6 September 2004 (containers), CISG Online 1085 (Pace) year of production.

<sup>48</sup> On that topic see F. Ferrari, "Remarks concerning the implementation of the CISG by the Courts (the Seller's Performance and Article 35)", *Journal of Law and Commerce* 25/2005 06, 234 *et seq.*

<sup>49</sup> Bundesgericht (Switzerland) 13 January 2004 (menthol USP brand crystals), CISG Online 838 (Pace) (UNILEX) at E. 3.1; Neumann., 81 at paras 38 *et seq.* (Pace).

<sup>50</sup> I. Schwenzer, (2010) para. 54; Magnus, in: *Staudinger Kommentar* (2005), Art. 35 para.56; Maley, "The Limits to the Conformity of Goods", *International Trade & Business Law Review* 12/2009, 118 *et seq.* (Pace); hesitant in relation to the reliance requirement Hyland, "Conformity of Goods", *Einheitliches Kaufrecht und nationales Obligationenrecht* (ed. P. Schlechtriem), 1987, 322.

## 6.2. Burden of proof for the non-conformity of the goods with the standard

Contrary to the above, the allocation of the burden of proof for the second question, that of whether or not the goods are presently in conformity with the applicable standard, should primarily be governed by the principles of proof proximity.<sup>51</sup> Whoever is in possession of the goods is, in principle, in the most appropriate position to take the necessary evidence to prove their conformity or non-conformity. Thus, until the goods have been delivered, the seller has to prove that the goods are conforming. By contrast, once the buyer has taken delivery of the goods without any complaints or reservations as to their conformity, he has to prove that the goods were non-conforming at the time risk passes.<sup>52</sup>

In cases where the buyer has accepted delivery only with complaints or reservations the burden of proof remains with the seller, irrespective of the fact, that the possession of the goods has been transferred to the buyer. That is justified as the seller was still in possession of the goods at the time when the complaint or reservation was declared. Thus, the seller was able to verify the justification of any complaint and, if necessary, take a sample to prove the conformity of the goods. A shift of the burden of proof in such cases would de facto punish the buyer for accepting defective goods with reservations. That would run contrary to the general objective of the CISG to avoid the macroeconomic costs associated with returning goods which have already been delivered. It is rare that the non-conformity of the goods reaches the threshold of fundamental breach, which would justify an avoidance pursuant to Art. 49(1)(a).

This allocation of the burden of proof, however, applies only to cases where the reservation or complaint was declared upon delivery. It is not to be extended until the end of the inspection period under Art. 58(3). This additional period merely plays a role at the third stage, i.e. for the determination of whether a proven present non-conformity existed already at the time the risk passed. By contrast for the allocation of the burden of proof for the present non-conformity of the goods only the buyer's possession remains relevant.

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<sup>51</sup> For the primary relevance of the principle see also Benicke, in: Schmidt (ed.), *MünchKommHGB(2007)*, Art. 36 para. 8; cf. Bundesgericht (Switzerland) 7 July 2004 (cable drums), CISG Online 848 (Pace) at 3.3.

<sup>52</sup> Bundesgericht (Switzerland) 13 November 2003 (used laundry machine), CISG Online 840 (Pace) at 5.3; Bundesgericht (Switzerland) 7 July 2004 (cable drums), CISG Online 848 (Pace) at 3.3; Tribunale di Vigevano (Italy), 12 July 2000 (sheets of vulcanized rubber used in manufacture of shoe soles), CISG Online 493 (Pace); Bundesgerichtshof (Germany) 8 March 1995 (mussels), CISG Online 144 (Pace) at II 1(b)(aa); Bundesgerichtshof (Germany) 9 January 2002 (Milk powder), CISG Online 651 (Pace) at 2 (a).



### 6.3. Burden of proof for the existence of the non-conformity at the time the risk passes

The third, and in practice often crucial issue, is the allocation of the burden of proof for the question whether an established non-conformity of the goods already existed at the time risk passed, or has at least its origin in circumstances which already existed at that time. As the above mentioned examples show, in practice it is often no problem to establish that the present status of the goods is not in compliance with the applicable standard. What cannot be determined with the necessary certainty is whether the present status of the goods is due to events which occurred after the risk has passed or not.

It has been suggested to impose the burden of proof upon the seller where the buyer gives notice of the non-conformity of the goods within the notification period of Art. 39.<sup>53</sup> Such an allocation of the burden of proof, however, does not give sufficient weight to the principle of proof proximity. In light of the possible length of the notification period in Art. 39, the seller would be faced with considerable problems fulfilling an obligation to prove that the goods were conforming at the time risk passed. Unlike the buyer, the seller normally has no information about the treatment of the goods during the time between delivery and the notification of the non-conformity.<sup>54</sup> Notwithstanding that the need to secure evidence also plays a role for the notification requirement in Art. 39, the latter also serves additional purposes. Consequently, the allocation of the burden of proof or a possible shift should not be directly linked to the expiry of the notification requirement.<sup>55</sup>

The guiding principle for the allocation should again be the *actori incumbit probatio* principle. Thus, the buyer, as the party invoking the seller's liability for the delivery of non-conforming goods, has in the end to prove that the non-conformity existed already at the time when the risk passed. As a consequence, a buyer in an *ex works* contract, where the risk passes with the handing over of the goods to the carrier, has not met his burden of proof for non-conformity if it cannot be established whether defects result from manufacturing or from transportation.<sup>56</sup> The same ap-

<sup>53</sup> . Antweiler, 162 *et seq.*; M. Henninger, 221 *et seq.*; J. Daun, 30.

<sup>54</sup> Bundesgericht (Switzerland) 13 November 2003 (used laundry machine), CISG Online 840 (Pace) at 5.3 with approving note Mohs, *IHR* (2004) 219 (220); Schwenger, in: Schlechtriem, Schwenger, *Kommentar* (German ed. 2008), Art. 35 para. 52, giving up an earlier support for extending the period.

<sup>55</sup> See Benicke, in: Schmidt (ed.), *MünchKommHGB* (2007), Art. 36 para.8, who fears that a linkage of both could lead to pressures to shorten the time for notification endangering a uniform interpretation of the CISG.

<sup>56</sup> Cour de cassation (France) 24 September 2003, *Aluminium and Light Industries Company v. Saint Bernard Miroiterie Vitretie*, CISG Online 791 (Pace).

plies for FOB contracts, where the buyer has to establish that the non-conformity already existed at the time the risk passed at the mentioned place.<sup>57</sup>

However, this allocation of the burden to the buyer should at least to a certain extent be counterbalanced at the preceding evidentiary stage. To what extent the burden of proof becomes decisive for the decision of the case depends to a large extent upon what is required from that party at the evidentiary stage to convince a court or tribunal with the necessary degree of certainty about the relevant facts. For a party bearing the burden of proof it is much easier to discharge it, if the relevant standard is merely a preponderance of probability and not a high degree of probability or even the degree of reasonable certainty. Equally, it may be of considerable help for a party in discharging its burden if it can rely on presumptions or *prima facie* evidence.

The latter should play a role in the context of a seller's liability pursuant to Arts 35 and 36. A buyer who has given notice about the non-conformity of the goods within the time period foreseen in Art. 58(3) should normally be considered to have presented at least *prima facie* evidence for the fact that the goods were already non-conforming at the time the risk passed. In so far at least the burden of presenting evidence should shift to the seller to destroy this impression.

That may in particular be done by presenting documents issued in relation to the goods which appear to show that the goods have been conforming at the time of risk passing. Examples are clean bills of lading, packing lists and invoices which may constitute *prima facie* evidence of the facts described in them.<sup>58</sup> In particular, inspection certificates issued by third parties can be of crucial relevance in determining the conformity of the goods. They lose, however, their evidentiary value if there is a considerable time between the inspection and the passing of the risk, during which the goods may have deteriorated or have been exchanged.<sup>59</sup>

## 7. CONCLUSION

Taking into account that allocating the burden of proof is in the end a 'political' decision relating to the attribution of risks, the approach sug-

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<sup>57</sup> See the example in O. J. Honnold, H. M. Flechtner, para. 242 example 36A.

<sup>58</sup> Landgericht Tübingen (Germany) 18 June 2003 (computers and accessories), CISG Online 784 (Pace) relating to a shortfall in delivery, assumes a great likelihood 'that the customers received exactly the goods that were ordered and for which the invoice was sent'.

<sup>59</sup> Tribunale d'Appello Ticino (Switzerland) 15 January 1998 (cocoa beans), CISG Online 417 (Pace), SGS inspection certificate issued three weeks before shipment largely disregarded in determining the conformity of the goods.

gested above tries to allocate the risks associated with such a burden in a balanced way. The differentiation between the various questions and the separate allocation of the burden for each question has the advantage that it allows for a graded approach. That is even more so if one counterbalances the allocation of the burden on one party with evidentiary privileges for this party at the preceding evidentiary stage. Granting a party who bears the burden in particular for the crucial third issue the benefits of presumptions or prima facie evidence or even lowering the standard of proof reduces the importance of the burden of proof.

That raises at the same time the question of whether the traditional view, that the national procedural law determines the relevant standard of proof and not the CISG, is justified. The obvious connection between the standard of proof and the importance of the burden of proof provides good arguments that they should not be regulated completely independent from each other.<sup>60</sup>

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<sup>60</sup> In this direction I. Schwenzer, para. 56.