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THE INTERNATIONAL CHARACTER OF THE UN CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS: AN ITALIAN CASE EXAMPLE

Francesco G. Mazzotta*

I. The Decision	437
II. The Dispute	440
1. Whether the CISG is applicable to the dispute	442
2. Notice of lack of conformity	443
3. Does the CISG govern burden of proof? If so, who bears the burden of proof	449
III. Conclusion.....	451

I. THE DECISION

The main goal of these comments is to explain why the *Tribunale di Vigevano* (the “Italian Court” or “Court”) decision¹

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¹ “Tribunale” can be defined as the Italian ordinary court of first instance. See Tribunale di Vigevano [District Court] n. 856/1997, 12 July 2000 (Italy), available at <http://cisgw3.law.pace.edu/cases/000712i3.html>; *Decision of the Tribunal di Vigevano, Italy, July 12, 2000*, 20 J.L. & COM. 209 (2001) [hereinafter Tribunale di Vigevano]. An extensive collection of case law, including summaries and translations, as well as scholar writings and bibliography concerning the CISG are available at Pace University Institute of International Commercial Law database at www.cisg.law.pace.edu. See also <http://www.un.or.at/uncitral> (providing case summaries maintained by the United Nations Commission on International Trade Law (UNCITRAL) that publishes Case Law on UNCITRAL Texts (CLOUT)). Other useful CISG sources include: The University of Freiburg Institute of Foreign and International Private Law CISG web site at www.jura.uni-freiburg.de/ipr1/cisg; Centre for Comparative and Foreign Law Studies UNILEX database. The Centre web site is: <http://soi.cnr.it/~crdcs/crdcs/index.htm>.

should be considered an example of how the international character of the United Nations Convention on Contracts for the International Sale of Goods ("CISG")² can be achieved.

The Italian Court dealt with various highly debated issues, such as the availability of implicit exclusion of the CISG, the concept of reasonable time, the content of notice of non-conformity, and burden of proof.

The decision is impressive because of the large number of foreign (*rectius*, not Italian) cases cited.³ This decision certainly shows a certain willingness to take into consideration foreign decisions and it also shows a depth of knowledge and research of foreign case law, which has not been very common among courts of many countries.⁴ Such an attitude toward relevant precedent, although deemed not binding, is an implementation in practice of the highly debated issue of the autonomous interpretation of the CISG. According to several authors,⁵ to determine the meaning of the CISG, one must not rely on purely

² The United Nations Convention on Contracts for the International Sale of Goods, Apr. 11, 1980, Doc. A/CONF.87/18, Annex I (1980) *reprinted in* United Nations: Conference on Contracts for International Sale of Goods 19 I.L.M. 668 (1980) [hereinafter CISG].

³ Forty foreign cases were cited and only four Italian cases.

⁴ Similarly, other recent decisions that may be considered good examples of considering case law of various jurisdiction are: *Al Palazzo S.r.l. v. Bernardaud di Limoges S.A.*, Tribunale di Rimini [District Court] 3095, 26 Nov. 2002 (Italy), available at <http://cisgw3.law.pace.edu/cases/2021126i3.html> and *Netherlands Arbitration Institute*, no. 2319, 15 Oct. 2002 (Neth.), available at <http://cisgw3.law.pace.edu/cases/021015n1.html>. On the other hand, as to bad examples, a recent U.S. case must be mentioned, *Chicago Prime Packers v. Northam Food Trading Co.*, 2003 WL 21254261 (N.D. Ill. May 29, 2003), available at <http://cisgw3.law.pace.edu/cases/030529u1.html>. In one respect, *Chicago Packers* is the exact opposite of *Vigevano*. By going to <http://cisgw3.law.pace.edu/cisg/text/e-text-39.html> and clicking the link "Cases involving CISG Article 39," one can access over 250 such case presentations. However, the *Chicago Packers* court disdained reference to any Article 39 cases. In lieu thereof, the *Chicago Packers* court (like some other U.S. courts) cites only U.S. UCC case law, under the belief that UCC domestic case law - in this instance, U.S. domestic case law on the UCC counterpart to CISG Article 39 - has a bearing on the manner in which CISG Article 39 ought to be interpreted. In other words, the U.S. court suggests that if one wants to understand a law, instead of looking to case law on that law, one should look to case law on a different law.

⁵ See, e.g., John O. Honnold, *The Sales Convention in Action - Uniform International Words: Uniform Applications?* 8 J.L. & COM. 207 (1988); BERNARD AUDIT, *LA VENTE INTERNATIONALE DE MARCHANDISES* 47 (1990); Andrew Babiak, *Defining "Fundamental Breach" Under the United Nations Convention on Contracts for the International Sales of Goods*, 6 TEMP. INT'L & COMP. L.J. 113, 117 (1992); Franco

domestic interpretations of certain provisions that may have specific meanings within certain countries. By allowing an autonomous interpretation of the CISG, it becomes possible to achieve one of the most important goals of the CISG: uniformity.⁶

As CISG Article 7 states, in interpreting the Convention, "regard is to be had to its international character," "to the need to promote uniformity in its application" and to the "observance of good faith in international trade."⁷ The *Tribunale di Vigevano* decision clearly complies with the requirements set forth by CISG Article 7. The decision of the Court reflected the international character of the Convention as it relied on decisions from several European courts. The decisions cited by the Italian Court were drafted in English, German, Dutch, and French and were made by courts representing legal systems quite different from each other. The Italian Court also promoted the uniform application of the Convention by putting forth solutions that "are tenable on an international level."⁸ Finally, it must be noted that neither the parties nor the Court raised issues of good faith. However, the Court also managed to promote observance of good faith in international trade.⁹

To determine whether a notice of non-conformity was timely, the Italian Court not only made an average of what is normally accepted by courts as notice given within reasonable time,¹⁰ but also resorted to case law to determine the goal of the requirement.¹¹ Bearing in mind the purposes of the provision, given the case law that dealt with similar situations, and considering the set of facts of the case, the Court determined that the notice given under the circumstances was not timely and was not specific as to the claimed defects.¹² The decision, there-

Ferrari, *Tribunale di Vigevano: Specific Aspect of the CISG Uniformly Dealt With*, 20 J.L. & COM. 225, 239 (Spring 2001).

⁶ See Ferrari *Tribunale di Vigevano*, *supra* note 6, at 231.

⁷ CISG, *supra* note 2, art. 7.

⁸ ULRICH MAGNUS, WIENER UN-KAUFRECHT (CISG) 155 (1999).

⁹ As the Italian Court did not deal with the issue, this author believes that any discussion concerning the concept of "good faith" under the Convention is beyond the scope of this commentary. No preferences are expressed as to the numerous definitions of "good faith" proposed by the courts and legal commentators.

¹⁰ See *Tribunale di Vigevano*, *supra* note 1, at 215.

¹¹ See *id.* at 215-20.

¹² *Id.* at 219.

fore, clearly reiterates the rule requiring that notice be given in a reasonable time frame and that the notice must give indications as to the defects claimed. These requirements are set forth to ensure good faith in international trade as the seller must be given the opportunity to respond to the claims as long as claims are raised in a reasonable period of time and mention the nature of the non-conformity.¹³

II. THE DISPUTE

The Italian Court faced four basic issues, which will be discussed after a quick overview of the case, its procedural facts, and outcome. The case, brought before the *Tribunale di Vigevano*, dealt with sheets of rubber used in manufacturing shoe soles. It was decided on July 12, 2000. The parties to this dispute include: Atlarex S.r.l. (Seller, defendant, an Italian company) and Rheinland Versicherungen (buyer's assignee, plaintiff, a German insurance company); also to be taken into consideration: Eder GmbH & C (buyer, assignor, German company); Hogl & Lorenz (Austrian company, buyer); Sovintersport L.T.D. (Russian company, buyer); ASA (a company specializing in salvaging defective or damaged items); and Allianz Subalpina S.p.A. (seller's insurance company).

Atlarex, which produces sheets of rubber, sold some of these sheets to Eder GmbH & C (Eder) pursuant to a supply contract. Eder, which makes soles out of these sheets of rubber, sold some soles to Hogl & Lorenz. Hogl & Lorenz, which produces shoes, sold shoes to Sovintersport, L.T.D. . Sovintersport returned those shoes to Hogl & Lorenz because these were not suitable for the purpose for which they were bought. Hogl & Lorenz returned the shoes to Eder. Eder, through its insurance company, was compensated for the damages that arose out of the defective items. ASA, which was hired by the plaintiff, was able to sell 895 of the returned pair of shoes at a lower price than Eder's costs for producing the shoes.

In particular, as to the notice of lack of conformity, it should be said that Eder gave such a notice to Atlarex four months after receiving the goods, and that the notice, which was not offered as evidence, did not explain the nature of the lack of

¹³ See Ferrari Tribunale di Vigevano, *supra* note 5, at 236.

conformity; it merely stated that the supplied goods "caused some problems."¹⁴

Rheinland Versicherungen brought action against Atlarex asking to hold the seller responsible for the damages, and for inflation costs and interest incurred by the buyer due to the low quality of the material produced by the seller. The plaintiff also argued that it brought action against the defendant pursuant to Article 1201, of the Italian Civil Code, which allows an insurance company to stand in for all contractual and extra-contractual rights of the buyer. The defendant, on the other hand, among other claims, argued that it still had a credit against Eder, that the notice to it was not given on time, and sought to plead in Allianz Subalpina S.p.A. The seller's insurance company asserted all sellers' defenses and argued that the damages sought by the buyer were beyond the scope of the existing coverage offered by the insurance contract.

The Italian Court, which solved the case by applying the CISG, held in favor of the defendant because the buyer did not give the notice of lack of conformity within a "reasonable time" period, as required by the CISG;¹⁵ the notice was not specific as to the claimed defects of the goods as required by the CISG;¹⁶ and because the buyer failed to meet its burden of proof under the rules of the CISG¹⁷ as well as under the Italian and German law.¹⁸

As mentioned, the Court faced the following issues: whether the CISG¹⁹ was applicable to the dispute; whether the notice requirements were satisfied, whether the CISG governs

¹⁴ Tribunale di Vigevano, *supra* note 1, at 219.

¹⁵ See Tribunale di Vigevano, *supra* note 1, at 218.

¹⁶ See *id.* at 219.

¹⁷ See *id.* at 221.

¹⁸ See *id.* at 222.

¹⁹ In Italy, the CISG, known as *Convenzione delle Nazioni Unite sui contratti di vendita internazionale di merci*, was ratified and executed by statute dated December 11, 1985, # 765, and it entered into force on January 1, 1988. The Convention has been published in S.O. Gazz. Uff. # 303, December 27, 1985. Since Italian is not the official language of the Convention, there is not an official Italian translation of the Convention. However, Lina Rubino has done an unofficial translation, with the cooperation of Mirzia Bianca, Carla de Cupis, and Angela Zangara available in LE NUOVE CIVILI COMMENTATE 89, 1. The text of the Convention is also available in COMMENTARIO BREVE AL CODICE CIVILE, LEGGI COMPLEMENTARI, TOMO I 1443 (1999).

the issue of burden of proof; and finally the standard required by the CISG concerning burden of proof.

1. *Whether the CISG is applicable to the dispute*

According to Article 1, the CISG will apply to contracts of sale of goods when the parties have their relevant place of business in different States,²⁰ and the States are Contracting States or when rules of private international law lead to the application of the law of a Contracting State.²¹ However, applicability can be avoided, according to Article 6, or the parties may "derogate from or vary the effect of any of its provision."²² In the present case, the Court noted that parties were located in two different countries, both countries were Contracting States at the time of the conclusion of the contract, and parties neither excluded nor modified the applicable CISG rules.²³

As to the possibility of excluding the CISG, the Italian Court cited three German cases stating that parties may tacitly exclude the CISG: OLG München,²⁴ LG München,²⁵ OLG Celle.²⁶ The Court also cited two decisions that contrast such a ruling: LG Landshut,²⁷ and U.S. of International Trade.²⁸

The fact that both parties refer to Italian law as the law applicable to this case, without any reference to the CISG, does not necessarily mean that both parties meant to exclude the application of the CISG.²⁹ On this point the Court cited four cases

²⁰ CISG, *supra* note 2, art. 1(1)(a).

²¹ CISG, *supra* note 2, art. 1(1)(b).

²² CISG, *supra* note 2, art. 6.

²³ See Tribunale di Vigevano, *supra* note 1, at 213.

²⁴ See Oberlandesgericht [OLG] [Provincial Court of Appeals] Munchen 7 U 2246/97, 9 July 1997 (F.R.G.), available at <http://cisgw3.law.pace.edu/cases/970709g2.html>.

²⁵ See Landgericht [LG] [District Court] Munchen 21 O 23363/94, 29 May 1995 (F.R.G.), available at <http://cisgw3.law.pace.edu/cases/950529g1.html>.

²⁶ See Oberlandesgericht [OLG] [Provincial Court of Appeals] Celle 7 U 2246/97, 24 May 1995 (F.R.G.), available at <http://cisgw3.law.pace.edu/cases/950529g1.html>.

²⁷ See Landgericht [LG] [District Court] Landshut 54 O 644/94, 5 Apr. 1995 (F.R.G.), available at <http://cisgw3.law.pace.edu/cases/950405g1.html>.

²⁸ See *Orbisphere v. U.S.*, 726 F. Supp. 1344, 1355 (Ct. Int'l Trade 1989), available at <http://cisgw3.law.pace.edu/cases/891024u1.html>.

²⁹ See CISG, *supra* note 2, art. 7(1). See also Franco Ferrari, *Applying the CISG in a Truly Uniform Manner: Tribunale di Vigevano (Italy), July 12, 2000*, UNIFORM L.R. 203-215 (2000-1); Kevin Bell, *The Sphere of Application of the Vienna Convention on Contracts for the International Sale of Goods*, 8 PACE INT'L L.J.

that confirm such a statement³⁰ along with two cases against such a ruling.³¹

Finally, the Italian Court cited an Italian case³² according to which the Court makes its own decision as to the law applicable to the dispute regardless of the allegations offered by the parties: *iura novit curia*.³³ A German Bundesgerichtshof [Supreme Court] case of July 23, 1997³⁴ has been also offered to support such a view.

2. Notice of lack of conformity

Once the Court established that the CISG was applicable to the dispute, the Court found that Article 35 of the CISG governed the matter of lack of conformity. Article 35 provides:

- (1) The seller must deliver goods which are of the quantity, quality and description required by the contract and which are contained or packaged in the manner required by the contract.
- (2) Except where the parties have agreed otherwise, the goods do not conform with the contract unless they:
 - (a) are fit for the purpose for which goods of the same description would ordinarily be used;

237, 243 (1996); Jacopo Cappuccio, *La deroga implicita nella Convenzione di Vienna del 1980*, in DIRITTO DEL COMMERCIO INTERNAZIONALE, 867 (1994); S. Carbone and R. Luzzato, *I contratti del commercio internazionale*, in TRATTATO DI DIRITTO PRIVATO (1984). But see Isaak Dore, *Choice of Law Under the International Sales Convention: A U.S. Perspective*, 77 AM. J. INT'L L. 521, 532 (1983); Caroline Delisle Kleper, *The Convention for the International Sale of Goods: A Practical Guide for the State of Maryland and its Trade Community*, 15 MD. J. INT'L L. & TRADE 235, 235 (1991); Maureen T. Murphy, *United Nations Convention on Contracts for the International Sale of Goods: Creating Uniformity in International Sales Law*, 12 FORDHAM INT'L L.J. 727, 728 (1989).

³⁰ See Bundesgerichtshof [BGH] [Supreme Court], VIII ZR 134/96, 23 July 1997 (F.R.G.), available at <http://cisgw3.law.pace.edu/cases/970723g2.html>; Ste. Ceramique Culinaire de France v. Ste. Musgrave Ltd., Cour de Cassation, 17 Dec. 1996 (Fr.), available at <http://cisgw3.law.pace.edu/cases/961217f1.html>; Landgericht [LG] [District Court] Düsseldorf 20506/94, 11 Oct. 1995 (F.R.G.), available at <http://cisgw3.law.pace.edu/cases/951011g1.html>.

³¹ See A. Sch. v. J.T. AG, Bezirksgericht [BG] [District Court], 23 Nov. 1998 (Switz.), available at <http://cisgw3.law.pace.edu/cases/981123s1.html>.

³² See Tribunale di Cuneo [District Court], 31 Jan. 1996 (Italy), available at <http://cisgw3.law.pace.edu/cases/960131i1.html>.

³³ The *iura novit curia* principle, which means that the court freely determines the applicable rules regardless of any suggestion made by the parties, can also be referred to as *narra mihi factum, dato tibi ius*.

³⁴ See BGH VIII ZR 134/96, *supra* note 30.

- (b) are fit for any particular purpose expressly or impliedly made known to the seller at the time of the conclusion of the contract, except where the circumstances show that the buyer did not rely, or that it was unreasonable for him to rely, on the seller's skill and judgment;
 - (c) possess the qualities of goods which the seller has held out to the buyer as a sample or model;
 - (d) are contained or packaged in the manner usual for such goods or, where there is no such manner, in a manner adequate to preserve and protect the goods.
- (3) The seller is not liable under subparagraphs (a) to (d) of the preceding paragraph for any lack of conformity of the goods if at the time of the conclusion of the contract the buyer knew or could not have been unaware of such lack of conformity.³⁵

According to Article 38, when a buyer receives the goods, he must examine them (or cause them to be examined) within as short a period of time as is practicable.³⁶ This duty to examine is only qualified if the contract involves the shipment of the goods, where examination may be deferred until after the goods have actually arrived to their destination.³⁷

While the Italian Court did not have a difficult time in following the applicable rules of law up to this point, the Court then had to determine the length of the time within which the buyer had to notify the seller about the goods' lack of conformity. To determine this period, the Court has a general rule that must be taken into account in such an evaluation. In fact, Article 39 states:

- (1) The buyer loses the right to rely on a lack of conformity of the goods if he does not give notice to the seller specifying the nature of the lack of conformity within a reasonable time after he has discovered it or ought to have discovered it.
- (2) In any event, the buyer loses the right on a lack of conformity of the goods if he does not give the seller notice thereof at the latest within a period of two years from the date on which the goods were actually handed over to the buyer, unless this time-limit is inconsistent with a contractual period of guarantee.³⁸

³⁵ CISG, *supra* note 2, art. 35.

³⁶ CISG, *supra* note 2, art. 38(1).

³⁷ CISG, *supra* note 2, art. 38(2).

³⁸ CISG, *supra* note 2, art. 39(1)-(2).

The major issue at this point is to determine what constitutes the reasonable time standard. Lacking any precise determination within the text of CISG, the Italian Court relied on Italian and foreign cases and established that the length of this time must be determined on a case-by-case basis³⁹ considering both the nature of the goods⁴⁰ and the parties' will.⁴¹

As to the nature of the goods, the Italian Court considered two cases⁴² according to which a notice of lack of conformity for perishable goods is usually shorter than for non-perishable goods. As to the parties' will, the Italian Court considered, first of all, that the parties did not exclude or change the rule as laid down by the CISG as to the time frame within which notice should be given. The power of the parties to exclude or modify the application of the CISG, as stated by Article 6, includes the length of the time within which the notice should be given. However, the contract between the parties in this case did not mention any specific rule as to the time frame for such notice. Therefore, the Court found that if the buyer does not comply with such a provision, he/she would lose the right to rely on a lack of conformity. As to this point, the Italian Court cited a German case⁴³ where:

[T]he court accepted that the parties had made a binding agreement that notice must be given within 8 days of delivery. . . . [T]he court specifically stated that it considered the agreement a derogation from the time frame of 'reasonable time' in Article 39, which was in accordance with Article 6, indicating that a period of

³⁹ See Tribunale di Cuneo, *supra* note 33; OLG Munchen, 7 U 3758/94, *supra* note 24; Oberlandesgericht [OLG] [District Court] Düsseldorf, 6 U 32/93, 10 Feb. 1994 (F.R.G.).

⁴⁰ See Amtsgericht Augsburg [AG] [Petty District Court] 11 C 4004/95, 29 Jan. 1996 (F.R.G.), available at <http://cisgw3.law.pace.edu/cases/960129g1.h=tml>; Fallini Stefano & Co. S.N.C. v. Foodik BV, Arrondissementsrechtbank [Rb.] [District Court] Roermond 900336, 19 Dec. 1991(Neth.), available at <http://cisgw3.law.pace.edu/cases/911219n1.html>.

⁴¹ See Tribunale di Vigevano, *supra* note 1, at 216.

⁴² See CME Cooperative Maritime Etaploise S.A.C.V. v. Bos Fishproducts Urk BV, Arrondissementsrechtbank [Rb] Zwolle HA ZA 95-640, 5 Mar. 1997 (Switz.), available at <http://cisgw3.law.pace.edu/cases/970305n1.html>; Amtsgericht Augsburg [AG] 3 C 925/93, 6 Oct. 1995 (F.R.G.).

⁴³ See Landgericht [LG] [District Court] Giessen 6 O 85/93, 15 July 1994, (F.R.G.), available at <http://cisgw3.law.pace.edu/cases/940705g1.html>.

eight days for examination and notice did not leave a 'reasonable time' for giving notice in the sense of Article 39(1).⁴⁴

To establish how long a reasonable time should be under this case, the Italian Court considered similar cases where a notice had been given after four months,⁴⁵ three months,⁴⁶ two months,⁴⁷ and even twenty-five days⁴⁸ was considered untimely. However, the Italian Court also considered a German case (BGH, March 8, 1995)⁴⁹ and a Swiss case (OG Kanton Luzern, January 8, 1997)⁵⁰ where the notice was considered timely even though was given after one month from the discovery of the defect.

The other step taken by the Italian Court to define the parameters of a reasonable time frame was to focus on the aim of the CISG provision establishing that notice must be given within a "reasonable time" after the buyer has discovered or should have discovered the lack of conformity.⁵¹ To do that, the Court considered two German cases which both held that the purpose of the notice was to give the seller a timely warning whether the buyer had anything to complain about concerning the delivered goods.⁵² In fact, the court in the first case⁵³ stated as follows:

The purpose of the obligation [of giving timely and specified notice] is to quickly give the seller clarity concerning the question whether any objections can be made to his claim for the purchase

⁴⁴ CAMILLA ANDERSEN, PACE REVIEW OF THE CONVENTION ON CONTRACTS FOR INTERNATIONAL SALE OF GOODS 111 (1998), available at <http://cisgw3.law.pace.edu/cases/940705g1.html>.

⁴⁵ W.M.J.M. Bronneberg v. Ceramica Belvédère S.p.A., Hoge Raad der Nederlanden [HR] [Supreme Court] 16.442, 20 Feb. 1998 (Neth.), available at <http://cisgw3.law.pace.edu/cases/980220n1.html>.

⁴⁶ *Fallini Stefano & Co. S.N.C. v. Foodik BV*, *supra* note 40.

⁴⁷ OLG Düsseldorf, 6 U 32/93, *supra* note 39.

⁴⁸ Oberlandesgericht [OLG] [Provincial Court of Appeal] Düsseldorf 17 U 136/92, 12 Mar. 1993 (F.R.G.), available at <http://cisgw3.law.pace.edu/cases/930312g1.html>.

⁴⁹ See Bundesgerichtshof [BGH] [Federal Supreme Court] VIII ZR 159/94, 8 Mar. 1995 (F.R.G.), available at <http://cisgw3.law.pace.edu/cases/960308g3.html>.

⁵⁰ Obergericht des Kantons Luzern [OG] [Appellate Court] 11 95 123/357, 8 Jan. 1997 (Switz.), available at <http://cisgw3.law.pace.edu/cases/970108s1.html>.

⁵¹ See Tribunale di Vigevano, *supra* note 1, at 217.

⁵² See *id.*

⁵³ Oberlandesgericht [OLG] [Provincial Court of Appeals] Düsseldorf 17 U 82/92, 8 Jan. 1993 (F.R.G.), <http://cisgw3.law.pace.edu/cases/930108g1.html>.

price. Thus, the seller, if no notice has been given within a reasonable period of time, must be able to assume that there are no legal doubts with respect to his claim for the purchase price.⁵⁴

In the second case (LG Kassel, February 15, 1996):⁵⁵

[T]he court stated that the purpose of the Article 39(1) notice provision was not only in general interests of the industry to have a quick settlement of legal issues, but also first and foremost the seller's opportunity to undertake measures (which will become more difficult in time) to defend himself from claims such as damages.⁵⁶

Finally, the Italian Court considered another German case in which the buyer had the burden of providing evidence that a timely notice had been given.⁵⁷

In short, the Court in making its decision considered that in the majority of the cases a period of one month or longer in similar situations had been considered unreasonable, that the aim of the provisions (Articles 38 and 39) was to ensure that the business relationship would not be vulnerable to possible claims for an extended period, that it was not possible in the dispute to evaluate whether the goods were affected by any hidden defect which would have made reasonable even what is usually considered a long period, and that the burden was on the buyer to prove that the notice was given on time.⁵⁸ The Court concluded that the notice given by the buyer was not given in a reasonable time as provided by Article 39 of the CISG.⁵⁹

The Court also addressed another question arising out of the requirements of the notice. As Article 39 requires, the notice has to specify "the nature of the lack of conformity." In particular, the Court also evaluated the content of the notice under compliance with Article 39.⁶⁰ With regard to this issue, the

⁵⁴ *Id.*

⁵⁵ Landgericht Kassel [LG] [District Court] 11 O 4185/95, 15 Feb. 1996 (F.R.G.), available at <http://cisgw3.law.pace.edu/cases/960215g1.html>.

⁵⁶ ANDERSEN, *supra* note 44, at 79.

⁵⁷ Landesgericht [LG] [District Court] Frankfurt 3/13 O 3/94, 13 July 1994 (F.R.G.), available at <http://cisgw3.law.pace.edu/cases/940713g1.html>.

⁵⁸ See generally, Tribunale di Vigevano, *supra* note 1.

⁵⁹ See Tribunale di Vigevano, *supra* note 1, at 219.

⁶⁰ As to the content of the notice, see, e.g., Secretariat Commentary on Article 37 of the 1978 Draft: "The purpose of the notice is to inform the seller what he must do to remedy the lack of conformity, to give him the basis on which to conduct

Court stated that the notice did not meet the requirements of specificity called for under Article 39.⁶¹ To reach this conclusion, the Court stated that the notice must be supported by specific claims of lack of conformity.⁶² A generic claim of lack of conformity would not be enough to make the notice comply with Article 39.⁶³ To support this proposition, the Court cited four cases. The first case⁶⁴ stated that a notice does not require a particular way of expression; thus even a notice given via telephone is sufficient. The second case⁶⁵ stated that the purpose of the notice, which has to be timely and specific as to the claim of lack of conformity, is aimed at giving the seller the opportunity to verify the ground and accuracy of the claim. The third⁶⁶ and fourth cases⁶⁷ stated that a notice that generically alleges defective goods, without any other explanations, does not meet the requirements of Article 39. The Court, therefore, concluded that the buyer's notice of lack of conformity did not meet the requirements stated by CISG Article 39 both because the notice was not given in a timely fashion and because it was not specific as to claimed defects.⁶⁸

his own examination of the goods, and in general to gather evidence for use in any dispute with the buyer over the alleged lack of conformity. Therefore, the notice must not only be given to the seller within a reasonable time after the buyer has discovered the lack of conformity or ought to have discovered it, but it must specify the nature of the lack of conformity.”; as to case law, *see, e.g.*, Oberlandesgericht [OLG] [Provincial Court of Appeals] Koblenz 2 U 31/96, 31 Jan. 1997 (F.R.G.), available at <http://cisgw3.law.pace.edu/cases/970131g1.html>. *See also* FRITZ ENDERLEIN, INTERNATIONAL SALE OF GOODS: DUBROVNIK LECTURES 133-201 (Petar Sarcevic & Paul Volken eds., 1996) (stating “[t]he buyer’s notice should enable the seller to take the necessary steps to remedy the non-conformity. For this reason, an exact description of the non-conformity is required. The notice should relate to the essential result of the examination of the goods.”).

⁶¹ *See* Tribunale di Vigevano, *supra* note 1, at 217.

⁶² *See id.*

⁶³ *Id.* at 219.

⁶⁴ *See* LG Frankfurt 3/13 O 3/94, *supra* note 57.

⁶⁵ *See* OLG Düsseldorf, 17 U 82/92, *supra* note 53.

⁶⁶ *See* T. SA v. R. Établissement, Handelsgericht [HG] [Commercial Court] 930634/O, 30 Nov. 1998 (Switz.), available at <http://cisgw3.law.pace.edu/cases/981130s1.html>.

⁶⁷ 46 Oberlandesgericht [OLG] [Provincial Court of Appeals] Frankfurt 5 U 15/93, 18 Jan. 1994 (F.R.G.), available at <http://cisgw3.law.pace.edu/cases/940118g1.html>.

⁶⁸ *See* Tribunale di Vigevano, *supra* note 1, at 219.

3. *Does the CISG govern burden of proof? If so, who bears the burden of proof?*⁶⁹

The Court considered that some scholars and a minority view in case law consider the burden of proof issue as being outside the scope of the CISG.⁷⁰ This view has garnered support through a case before the Court of Arbitration of the International Chamber of Commerce⁷¹ where the Tribunal stated that the question of which party had the burden of establishing the lack of conformity was not addressed by the CISG, and, therefore, such an issue fell within the purview of applicable local law. On this issue, the Italian Court considered a Swiss case⁷² in which the court stated that as a matter of principle, attribution of the burden of proof is to be determined by the law applicable on the merits, which, in this case, was the CISG. The court noted that the CISG does not contain any particular rule on the burden of proof as to conformity of goods. Furthermore, it noted that views on this matter as expressed by scholars are divided: according to some, the CISG implies that the buyer should bear the burden, whereas others would attribute the burden in accordance with domestic law. The court was able to leave the issue open because, under the law of forum as well as under the CISG, the buyer had to bear the burden of proof.⁷³

However, according to the Italian Court, the view that considers burden of proof as indirectly dealt with by the Convention is the prevailing and better reasoned view.⁷⁴ This view relies on CISG Article 79, paragraph 1, which deals with the topic of a party's failure to perform any of its obligations. Article 79 provides:

⁶⁹ See, e.g., Franco Ferrari, *Burden of Proof Under CISG*, in PACE REVIEW OF THE CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS (CISG) 1-8 (2000-2001). As to recent case law dealing with the issue, see, e.g., Bundesgerichtshof [BGH] VIII ZR 304/00, 9 Jan. 2002 (F.R.G.), available at <http://cisgw3.law.pace.edu/cases/020109g1.html>.

⁷⁰ See Tribunale di Vigevano, *supra* note 1, at 220.

⁷¹ Maaden v. Thyssen, Int'l Comm. Arb. 6653 (Syria- F.R.G. 1993), available at <http://cisgw3.law.pace.edu/cases/936653i1.html>.

⁷² See Lugano, Cantone del Ticino, La Seconda Camera Civile del Tribunale d'appello, 12.97.00193, 15 Jan. 1998 (Italy), available at <http://cisgw3.law.pace.edu/cases/980115s1.html>.

⁷³ *Id.*

⁷⁴ See Tribunale di Vigevano, *supra* note 1, at 220.

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.⁷⁵

The Court concluded that where the issue of burden of proof is not expressly included in the Convention, for the reasons already mentioned, this issue indirectly falls within the scope of the CISG.⁷⁶ Burden of proof, contrary to other situations where the CISG does not deal with such issues, not even indirectly, must be solved according to the CISG.

In addition, the Court gave a long list of issues that do not fall within the scope of the CISG, and therefore must be solved according to the applicable domestic conflicts of law rules.⁷⁷ Issues not regulated by the CISG include set-off;⁷⁸ forfeiture frame-time;⁷⁹ assignment of a credit by means of a contract;⁸⁰ power of attorney;⁸¹ and penalty clauses.⁸²

Although the CISG does not directly govern the burden of proof issue, it nevertheless falls within the purview of the Convention. In such a situation where the CISG is applicable, as expressly stated by a German case,⁸³ the burden of proof issue must be solved according to Article 7, paragraph 2, which provides:

⁷⁵ CISG, *supra* note 2, art. 79(1).

⁷⁶ See Tribunale di Vigevano, *supra* note 1, at 220.

⁷⁷ See *id.* at 220-21.

⁷⁸ See OLG München 7 U 2246/97, *supra* note 24; OLG Koblenz 2 U 31/96, *supra* note 60.

⁷⁹ See LG Düsseldorf 20506/94, *supra* note 30; Oberlandesgericht [OLG] [Provincial Court of Appeals] Hamm 11 U 191/94, 9 June 1995 (F.R.G.), available at <http://cisgw3.law.pace.edu/cases/960609g1.html>; Int'l Comm. Arb. (Czechoslovakia-Italy 1994), available at <http://cisgw3.law.pace.edu/cases/947660i1.html>.

⁸⁰ Oberlandesgericht [OLG] [Provincial Court of Appeals] Hamm 11 U 206/93, 8 Feb. 1995 (F.R.G.), available at <http://cisgw3.law.pace.edu/cases/960208g3.html>.

⁸¹ OGH, 20 June 1997, in *ÖSTERREICHISCHE JURISTEN-ZEITUNG* 829 (1997), as reported by the decision.

⁸² Int'l Comm. Arb. 7331 (Italy- Yugo. 1994), available at <http://cisgw3.law.pace.edu/cases/947331i1.html>; Oberlandesgericht [OLG] [Provincial Court of Appeals] München 8 Feb. 1995 (F.R.G.).

⁸³ See Landesgeriecht [LG] [District Court] Frankfurt 3/13 O 3/94, 13 July 1994 (F.R.G.).

Questions concerning matters governed by this Convention which are not expressly settled in it are to be settled in conformity with the general principles on which it is based or, in the absence of such principles, in conformity with the law applicable by virtue of the rules of private international law.⁸⁴

According to the Italian Court, CISG Article 79 states the principle that would be applied in the present dispute.⁸⁵ According to Article 79, the party that could not perform any of its obligations is not liable if it proves that the failure was due to an impediment beyond its control.⁸⁶ Reading such a rule *a contrario*, the Court concluded that the party that claims the other party's failure to perform bears the burden of proof. In other words, the Court concluded that it must apply the general principle according to which *ei incumbit probatio cui dicit, non qui negat* (the burden of proof does not bear on the party that denies an argument, but on the party that maintains it).⁸⁷ The Court then cited three cases that reached similar conclusions.⁸⁸ In addition, as a result of this rule, the party that raises objections must prove them.⁸⁹

The Court concluded that the CISG governs the burden of proof issue, and that the party who raises the claim bears the burden of proof.⁹⁰ Applying these rules, the Court stated in this case that the burden of proof was on the buyer and that the buyer failed to prove his/her claim.⁹¹

III. CONCLUSION

This paper is intended to demonstrate the relevance of an Italian decision regarding the issue of ensuring the interna-

⁸⁴ CISG, *supra* note 2, art. 7(2).

⁸⁵ See Tribunale di Vigevano, *supra* note 1, at 221.

⁸⁶ CISG, *supra* note 2, art. 79(1).

⁸⁷ See Tribunale di Vigevano, *supra* note 1, at 221.

⁸⁸ Handelsgericht [HG] [Commercial Court] Zurich, 920670, 26 Apr. 1995 (Switz.), available at <http://cisgw3.law.pace.edu/cases/960426s1.html>; T. SA v. R. Établissement, Handelsgericht [HG] [Commercial Court] Zürich 930634/O, 30 Nov. 1998 (Switz.), available at <http://cisgw3.law.pace.edu/cisg/wais/db/cases2/981130s1.html>; Dansk Blumsterexport A/s v. Frick Blumenhandel, OLG Innsbruck, 4 R 161/94, 1 July 1994 (Aus.), available at <http://cisgw3.law.pace.edu/cases/940701a3.html>.

⁸⁹ See T. SA v. R. Établissement, *z supra* note 88.

⁹⁰ See Tribunale di Vigevano, *supra* note 1, at 222.

⁹¹ See *id.*

tional character of the CISG. The message that stems from this decision is quite clear: foreign decisions, although not binding, must be considered to ensure the international character of the Convention. The decision exemplifies an ideal model for other courts to follow. The research, the access to foreign sources and the willingness to deal with and consider so many foreign cases to ensure the international character of the CISG merits emulation.