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Anna L. Linne

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# BURDEN OF PROOF UNDER ARTICLE 35 CISG

Anna L. Linne<sup>1</sup>

## GENERAL REMARKS

One of the important goals of the United Nations Convention on Contracts for the International Sale of Goods (“CISG” or “Convention”) is to achieve uniformity in its application.<sup>2</sup> In achieving uniformity, Professor Camilla Baasch Andersen stressed the importance of examining international case law “where interpretation is called for by the judiciary, i.e., cases where the rules are not self-explanatory, but can be guided by existing decisions from other States.”<sup>3</sup> Burden of proof for conformity of goods under Article 35 of the CISG is an issue that calls for interpretation by the judiciary and is the focus of this essay. This essay discusses issues related to burden of proof as interpreted by courts and tribunals through the examination of cases related to Article 35 of the CISG, and proposes a three-step burden shifting approach in resolving non-conformity disputes under Article 35.

In international contractual disputes, exact fact-finding can prove to be extremely difficult. Despite the difficulty, a court or an arbitral tribunal “must always decide the case before it, even if the relevant facts remain unclear.”<sup>4</sup> The question then becomes which party would benefit from the uncertainty and which party would be burdened by that uncertainty. Exper-

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<sup>1</sup> The author is indebted to Prof. Albert Kritzer of Pace Law School for his encouragement, guidance, feedback, and friendship, without which the essay would never have been written.

<sup>2</sup> Vikki M. Rogers & Albert H. Kritzer, *A Uniform International Sales Law Terminology*, in *FESTSCHRIFT FÜR PETER SCHLECHTRIEM ZUM 70. GEBURTSTAG*, 223-53 (Ingeborg Schwenzer & Günter Hager eds., 2003), available at <http://cisgw3.law.pace.edu/cisg/biblio/rogers2.html> (last visited Apr. 10, 2008).

<sup>3</sup> Camilla Baasch Andersen, *The Uniform International Sales Law and the Global Jurisconsultorium*, 24 *J. L. & COM.* 159, 164 (2005), available at <http://cisgw3.law.pace.edu/cisg/biblio/andersen3.html> (last visited Apr. 10, 2008).

<sup>4</sup> Juliane Kokott, *The Burden of Proof in Comparative and International Human Rights Law* xvii (1998).

perienced lawyers have long known that the outcome of a lawsuit depends more often on how the fact-finder appraises the facts than on a disputed construction of a statute or interpretation of a line of precedents. Thus, as Justice Brennan of the United States Supreme Court noted, “the procedures by which the facts of the case are determined assume an importance fully as great as the validity of the substantive rule of law to be applied.”<sup>5</sup>

“The prevailing view appears to be that the issue of burden of proof is a matter governed, at least implicitly, by the CISG,”<sup>6</sup> justified by the language in Article 79 of the CISG, requiring the party seeking the benefit of Article 79 to prove that his failure to perform was due to an impediment beyond his control.<sup>7</sup> In fact, because of the importance burden of proof has on the outcome of the case, the issue of burden of proof should be treated as substantive law governed by the CISG upon consideration of the following definition:

Substantive law is that part of the law which: (a) creates and defines primary rights, or which regulates them, or (b) which, by rules of evidence or of procedure or otherwise, creates or defines secondary rights, incidental, but essential, to primary rights.<sup>8</sup> This definition purports to include as substantive law what may have been considered “procedural” but is essential to defining the rights of the parties. In this regard, burden of proof would fall squarely within this definition of substantive law.

There are no clear and detailed rules on the burden of proof in international law of the kind that are found in many national legal systems. “Legal writers who consider the issue of burden of proof as one governed by the CISG” have concluded “that the allocation is based upon the principle *ei incumbit probatio, qui dicit, non qui negat*” (the proof lies upon the one who affirms,

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<sup>5</sup> *Speiser v. Randall*, 357 U.S. 513, 520 (1958).

<sup>6</sup> Franco Ferrari, *Burden of Proof under the CISG, in Review of the Convention on Contracts for the International Sale of Goods (CISG) 1-8* (Pace Int'l L. Rev. ed., 2000-2001), available at <http://cisgw3.law.pace.edu/cisg/biblio/ferrari5.html> (last visited Apr. 10, 2008).

<sup>7</sup> See *id.* See also United Nations Convention on Contracts for the International Sale of Goods [hereinafter *CISG*], art. 79(1), Apr. 11, 1980, 1489 U.N.T.S. 3, 19 I.L.M. 671.

<sup>8</sup> Mark Shain, *Res Ipsa Loquitur Presumptions and Burden of Proof* 15-16 (2d ed. 1947).

not the one who denies).<sup>9</sup> It is generally accepted in international law that the burden of proof is on the party who makes an assertion. “This may be either the plaintiff, under the maxim *onus probandi actori incumbit*,<sup>10</sup> or the defendant to prove relevant contentions under the maxim *reus in exceptione fit actor*, as the burden of proof may shift during the course of the proceedings, depending on how parties formulate their assertions or propositions of law.”<sup>11</sup> “It should be emphasized. . .that the applicability of the rule stems from the flexibility built into it by the interpretation of the term ‘actor’ as signifying not only the party that sets the wheels of the proceedings in motion, but equally the party that claims a fact in defence.”<sup>12</sup>

The term “burden of proof” may also be interpreted differently depending on whether it is in an adversarial system or in an inquisitional system. In adversarial systems, such as the American system, burden of proof means both the burden of persuasion and the burden of producing evidence.<sup>13</sup> In inquisitional systems, such as German constitutional law or some international tribunals, burden of proof means only the burden of persuasion.<sup>14</sup> International contractual disputes in front of an arbitral tribunal can be adversarial or inquisitional, or even a mixture of the two.<sup>15</sup> Given that, “the principle that each party has to prove its claim, or *onus probandi actori incumbit*, can be somewhat overstated or misleading” because it is not uncommon for a tribunal to ask for and produce additional evidence on its own.<sup>16</sup> “Furthermore, there is no technical burden of producing evidence which automatically requires the court to dismiss the non-complying party’s claim under international law.”<sup>17</sup>

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<sup>9</sup> See Ferrari, *supra* note 6, at 5; Leonardo Graffi, *Overview of Recent Italian Court Decisions on the CISG*, 4 EUR. LEGAL F. 240, 243 (2000/01).

<sup>10</sup> “The one who alleges a fact has to prove it.”

<sup>11</sup> U.N. General Assembly, Int’l Law Comm’n, *Third Report on Diplomatic Protection*, ¶ 102, U.N. Doc. A/CN.4/523 (March 7, 2002) (prepared by John Dugard), available at [http://untreaty.un.org/ilc/documentation/english/a\\_cn4\\_523.pdf](http://untreaty.un.org/ilc/documentation/english/a_cn4_523.pdf) (last visited Apr. 10, 2008).

<sup>12</sup> MOJTABA KAZAZI, BURDEN OF PROOF AND RELATED ISSUES: A STUDY ON EVIDENCE BEFORE INTERNATIONAL TRIBUNALS 369 (1996).

<sup>13</sup> See KOKOTT, *supra* note 4, at 177.

<sup>14</sup> *Id.*

<sup>15</sup> *Id.* at 177-78.

<sup>16</sup> *Id.* at 187-88.

<sup>17</sup> *Id.* at 188.

Additional consideration lies in the fact that other legal devices may be employed in relation to burden of proof. Under the principle *lex non requirit verificari quod apparet curiae* (the law does not require proof of that which is apparent to the court), a tribunal may take judicial notice of certain facts on its own.<sup>18</sup> Presumption has a similar effect to that of burden of proof in addressing difficulties in the fact finding process.<sup>19</sup> Resorting to presumption or to *prima facie* evidence is often based on similar considerations of policy and justice and may exclude the application of the burden of proof.<sup>20</sup>

### CASE DISCUSSION

As discussed in the UNCITRAL Digest under Article 35,<sup>21</sup> courts and tribunals have various interpretations on the issue of burden of proof. More often, courts have concluded that the Convention itself contains a general principle that the party who is asserting or affirming a fact bears the burden of proving it, resulting in an allocation of the burden to a buyer who asserts that goods did not conform to the contract.<sup>22</sup> On the other

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<sup>18</sup> BLACK'S LAW DICTIONARY 912 (6th ed. 1990).

<sup>19</sup> See SHAIN, *supra* note 8, at 23. "It is important to note. . . that a presumption, whether conclusive or rebuttable, is not merely a rule of evidence, because the term has often been referred to either as a rule of evidence or as an inference, which implies that it is evidentiary. However. . . it is now generally accepted that a true presumption is never a rule of evidence or an inference, but is a rule of law." *Id.*

<sup>20</sup> See *id.* at 22-23.

<sup>21</sup> UNCITRAL Digest of Case Law on the U.N. CISG, Art. 35, available at <http://cisgw3.law.pace.edu/cisg/text/digest-art-35.html> (last visited Apr. 10, 2008).

<sup>22</sup> *Id.* See also Tribunale [District Court] di Vigevano, 12 July 2000, n. 405, available at <http://cisgw3.law.pace.edu/cases/000712i3.html> (last visited Apr. 10, 2008) (containing an extended discussion of the issue); [HG] [Commercial Court] Zürich HG930138. U/HG93, 9 Sept. 1993 (Switz.), available at <http://cisgw3.law.pace.edu/cases/930909s1.html> (last visited Apr. 10, 2008). (One court has noted the view that the Convention contains a general principle allocating the burden to the buyer, but it neither adopted nor rejected this approach because the contrary view led to the same result (buyer bore the burden). See Lugano, Cantone del Ticino, La seconda Camera civile del Tribunale d'appello [Appellate Court] 12.97.00193, 15 Jan. 1998 (Switz.), available at <http://cisgw3.law.pace.edu/cases/980115s1.html> (last visited Apr. 10, 2008). See also Neth. Arb. Inst. 2319, 15 Oct. 2002, available at <http://cisgw3.law.pace.edu/cases/021015n1.html> (last visited Apr. 10, 2008) (without expressly discussing the issue, several decisions appear to have impliedly adopted the view that the CISG allocated the burden of proving lack of conformity to the buyer). See [OLG] [Provincial Court of Appeal] Innsbruck 4 R 161/94, 1 July 1994 (Austria), available at <http://cisgw3.law.pace.edu/cases/940701a3.html> (last

hand, courts have indicated that the seller bears the burden of proving that goods were conforming at the time risk of loss passed, but the buyer bears the burden of proving a lack of conformity after the risk shifted if it has accepted the goods without immediately notifying the seller of defects.<sup>23</sup>

A Belgian court has twice indicated that the seller bears that burden in non-conformity disputes,<sup>24</sup> most likely under the principle of *onus probandi actori incumbit* (the party who makes allegations regarding a disputed fact or issue bears the burden of proving such fact or issue). In one case, the seller filed a counterclaim and in the other, the seller was the plaintiff.

In contrast, several tribunals have concluded that the buyer bears the burden of proving non-conformity when the buyer was the claimant. The tribunals have arrived at their decisions either by finding that the CISG does not expressly address the burden of proof issue and applying domestic law, or by applying the Convention itself. A 1993 International Chamber of Commerce arbitration case allocated the burden to the buyer as the party alleging non-conformity of the goods.<sup>25</sup> Some decisions suggest that the burden of proof varies with the context. Thus, one court has stated that the buyer bears the burden of

visited Apr. 10, 2008) (buyer failed to prove that the goods did not conform to the contract); [LG] [District Court] Düsseldorf 31 O 27/92, 25 Aug. 1994 (F.R.G.), available at <http://cisgw3.law.pace.edu/cases/940825g1.html> (last visited Apr. 10, 2008) (buyer failed to prove lack of conformity).

<sup>23</sup> See [HG] [Commercial Court] Zürich 930634/O, 30 Nov. 1998 930634/O (Switz.), available at <http://cisgw3.law.pace.edu/cases/981130s1.html> (last visited Apr. 10, 2008); Appellationshof Bern [Appellate Court] 304/II/2003/wuda/scch, 11 Feb. 2004 (Switz.), available at <http://cisgw3.law.pace.edu/cases/040211s1.html> (last visited Apr. 10, 2008).

<sup>24</sup> See Rechtbank van koophandel [District Court] Kortrijk A.R. 4143/96, 6 Oct. 1997 (Belg.), available at <http://cisgw3.law.pace.edu/cases/971006b1.html> (last visited Apr. 10, 2008); Rechtbank van koophandel [District Court] Kortrijk A.R. 4328/93, 16 Dec. 1996 (Belg.), available at <http://cisgw3.law.pace.edu/cases/961216b1.html> (last visited Apr. 10, 2008).

<sup>25</sup> See Maaden v. Thyssen, ICC Ct. of Arb. Case No 6653 (Ger.- Syria 1993), available at <http://cisgw3.law.pace.edu/cases/936653i1.html> (last visited Apr. 10, 2008) (a Swiss court has acknowledged the view that the burden of proving a lack of conformity should be allocated by applying domestic law, but it neither adopted nor rejected this approach because the contrary view led to the same result (buyer bore the burden)); Lugano, Cantone del Ticino, La seconda Camera civile del Tribunale d'appello [Appellate Court] 12.97.00193, 15 Jan. 15 1998 (Switz.), available at <http://cisgw3.law.pace.edu/cases/980115s1.html> (last visited Apr. 10, 2008).

proving a lack of conformity if it has taken delivery of the goods without giving immediate notice of non-conformity.<sup>26</sup>

In *Chicago Prime Packers, Inc. v. Northam Food Trading Co.*, the seller and the buyer contracted for frozen ribs.<sup>27</sup> The buyer hired a third party trucking company to pick up the ribs. In accepting shipment, the trucking company signed a bill of lading acknowledging that the goods were "in apparent good order."<sup>28</sup> The bill of lading also indicated that the "contents and condition of contents of packages [were] unknown."<sup>29</sup> A few days later, after the ribs had been transferred to the buyer's customer, the customer examined the ribs and found them to be in an "off condition."<sup>30</sup> In the end, the customer was forced to condemn the ribs. The district court held that the buyer bore the burden of proving non-conformity at the time of the transfer and had failed to discharge the burden.<sup>31</sup> In affirming the district court's decision, the appellate court considered that the buyer had "offered no credited evidence showing that the ribs were spoiled at the time of transfer or excluding the possibility that the ribs became spoiled after the transfer."<sup>32</sup> In addition, as noted by the court, the buyer presented no evidence that the seller's agent "stored the ribs in unacceptable conditions that could have caused them to become spoiled before the transfer."<sup>33</sup> Finally, the court added that the buyer's customer "did not present a witness. . .to respond to the evidence suggesting that the ribs examined. . .were not those sold to [the buyer by the seller]."<sup>34</sup>

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<sup>26</sup> See Bundesgerichtshof [Federal Supreme Court] VIII ZR 159/94, 8 Mar. 1995 (F.R.G.), available at <http://cisgw3.law.pace.edu/cases/950308g3.html> (last visited Apr. 10, 2008) (one court has found that, because it was shown that a refrigeration unit had broken down soon after it was first put into operation, the seller bore the burden of proving that it was not responsible for the defect); Cour d'appel [Regional Court of Appeal] Grenoble 94/0258, 15 May 1996 (Fr.), available at <http://cisgw3.law.pace.edu/cases/960515f1.html> (last visited Apr. 10, 2008).

<sup>27</sup> See *Chicago Prime Packers, Inc. v. Northam Food Trading Co.*, 408 F.3d 894 (7th Cir. 2005).

<sup>28</sup> *Id.* at 896.

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> *Id.* at 900.

<sup>32</sup> See *Chicago Prime Packers, Inc. v. Northam Food Trading Co.*, 408 F.3d 894, 900 (7th Cir. 2005).

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

Not surprisingly, as it was in an adversarial system, the court in *Chicago Prime Packers, Inc.* required the buyer to bear both the burden of persuasion and the burden of producing evidence. In addition, the buyer's burden of producing evidence required demonstration of non-conformity at the time of transfer even though the buyer was not the party involved in the transfer, and even though the third party truck company indicated that the contents and the conditions of the contents were unknown. Perhaps the buyer in *Chicago Prime Packers, Inc.* did not provide sufficient evidence to demonstrate that it did not contribute to the spoiling of the ribs. However, it does not seem fair to set an unyielding standard to require the buyer to prove that perishable goods were non-conforming, especially when it was impossible to conduct an examination at the time of transfer, or when ordinary business practice did not call for an examination at the time of transfer, even though it is indisputable that the buyer ended up condemning the goods.

If a party is injured by no fault of its own, and the other party had exclusive control of the circumstances, should the injured party be required to establish proof that it was the other party that caused the injury even though it would be impractical for the injured party to obtain the proof? An inflexible adherence to the principle *onus probandi actori incumbit* would unfairly require the injured party to establish such proof under the circumstances. By analogy, the tort concept of *res ipsa loquitur* addresses similar issues. Chief Justice Erle's statement in the famous case of *Scott v. The London and St. Katherine Docks Company* "has been accepted as an accurate definition of the doctrine from which the rule results."<sup>35</sup> He stated:

There must be reasonable evidence of negligence. But where the thing is shewn to be under the management of the defendant or his servants, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendants, that the accident arose from want of care.<sup>36</sup>

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<sup>35</sup> SHAIN, *supra* note 8, at 20.

<sup>36</sup> *Id.* at 20-21 (quoting *Scott v. The London and St. Katherine Docks Company*, 3 H. & C. 596, 15 Eng. Rep. 655 (1865)).

According to Shain, “[t]he plaintiff’s proof and the application of the doctrine in that particular case established that the defendant was responsible for the plaintiff’s injury, absent an explanation by the defendant.”<sup>37</sup>

Note that the doctrine creates a presumption and shifts the burden to the defendant.

The accident and the injury were proved, and also the surrounding circumstances, and negligence of the defendant was presumed by the court, as a matter of law, as it took *judicial notice* that, in the ordinary course of things, such an accident does not happen if the party in control of the instrumentality which caused the injury had taken due care to prevent it.<sup>38</sup>

“Thus the doctrine *res ipsa loquitur* is given practical effect. . .to award justice to whom justice is due, and this is accomplished through a presumption.”<sup>39</sup> Similarly in the *Chicago Prime Packers, Inc.* case, if the buyer proved its injury through the evidence that it had to condemn the ribs, and if the buyer provided evidence that it did not contribute to the “spoiling” of the ribs, then the seller should be presumed to have delivered non-conforming goods. Therefore, the burden would shift to the seller to demonstrate that it did deliver conforming goods.

In the *Wire and Cable* case,<sup>40</sup> decided by the Appellate Court in Bern, Switzerland, the court did not inflexibly adhere to the principle *onus probandi actori incumbit* (the party who makes allegations regarding a disputed fact or issue bears the burden of proving such fact or issue) and therefore produced a fairer outcome. In that case, the buyer was the claimant, but the court concluded that the seller bore the burden of proving the conformity of goods at the time risk passed.<sup>41</sup> The seller arranged for a delivery company to deliver the goods (wire and cable), with the delivery company having to pick up most of the goods from the seller’s supplier.<sup>42</sup> When the goods changed hands, the bill of lading was signed by the representative of the

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<sup>37</sup> *Id.* at 21.

<sup>38</sup> *Id.* at 21-22.

<sup>39</sup> *Id.* at 22.

<sup>40</sup> AH [Appellate Court] Bern 304/II/2003/wuda/scch, 11 Feb. 2004 (Switz.), available at <http://cisgw3.law.pace.edu/cases/040211s1.html> (last visited April 10, 2008).

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

delivery company and subsequently by the representative of the buyer, but without an examination of the quantity.<sup>43</sup> The buyer later discovered that the delivery was non-conforming due to a shortage in quantity.<sup>44</sup>

In concluding that the seller bore the burden of proving conformity of goods at the time risk passed, the court in the *Wire and Cable* case accepted the principle that the seller should bear the burden of proof of having properly fulfilled its obligation to deliver the goods as a circumstance which would destroy the buyer's claim for performance.<sup>45</sup> As the court noted, "Schlechtriem/Schwenzer also assume that the seller has to prove the conformity of the goods at the time of the passing of the risk if the buyer notifies the non-conformity pursuant to Article 39 CISG."<sup>46</sup> Therefore, the court continued, "it can be concluded beyond doubt that the conformity with the contract is explicitly shaped as a seller's obligation within the CISG (Article 35) and is thus a requirement in order to establish an unmitigated claim for payment by the seller."<sup>47</sup>

The court further noted that a seller "will not be indefinitely burdened with having to prove conformity of the goods."<sup>48</sup> The corresponding burden of proof "rests on the seller only until the time of passing the risk."<sup>49</sup> "After an acceptance of the goods without having raised complaints. . . it is for the buyer to demonstrate that the actual condition of the goods deviates from the condition required by the contract at the relevant time of passing of risk."<sup>50</sup> The court pointed out that "acceptance without complaint does not mean that the buyer is under a duty to examine the goods at the moment of delivery and to notify of possible defects."<sup>51</sup> Examining the goods at the moment of delivery

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> [AH] [Appellate Court] Bern 304/II/2003/wuda/scch, Feb. 11, 2004 (Switz.), available at <http://cisgw3.law.pace.edu/cases/040211s1.html> (last visited Apr. 10, 2008).

<sup>46</sup> *Id.* (citing Schlechtriem/Schwenzer, Art. 3 para. 49).

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

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

<sup>50</sup> [AH] [Appellate Court] Bern 304/II/2003/wuda/scch, Feb. 11, 2004 (Switz.), available at <http://cisgw3.law.pace.edu/cases/040211s1.html> (last visited Apr. 10, 2008).

<sup>51</sup> *Id.*

is “unusual and often ultimately impossible for practical reasons.”<sup>52</sup> The court concluded that, so long as the buyer has notified the seller of the non-conformities within the time frame of Articles 38 and 39 of the CISG (naturally, the buyer bears the burden to prove that he has done these acts), “the burden of proof in relation to the conformity of the goods at the time of passing of risk stays with the seller.”<sup>53</sup>

Shifting the burden to the seller after a buyer has demonstrated that the goods were non-conforming and that the buyer did not contribute to the non-conformity is also consistent with fundamental fairness and the CISG’s general principle of cooperation, which is also stressed in the UNIDROIT Principles. Article 5.1.3 of the UNIDROIT Principles states: “Each party shall cooperate with the other party when such co-operation may reasonably be expected for the performance of that party’s obligations.”<sup>54</sup> The duty of cooperation on the part of a seller prevents a seller from being free of obligations after an innocent buyer has suffered the consequence of non-conforming goods. Following the CISG’s Article 7 requirement for good faith and fair dealing would arrive at the same result. Therefore, the principle *onus probandi actori incumbit* (the party who makes allegations regarding a disputed fact or issue bears the burden of proving such fact or issue) must be interpreted in such a way that it would allow the flexibility of shifting the burden to the seller to prove that the conformity of the goods once the buyer has sufficiently demonstrated non-conformity of goods and that it did not do anything to contribute to the non-conformity.

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<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

<sup>54</sup> UNIDROIT Principles of International Commercial Contracts 2004 art. 5.1.3, April 21, 2004, available at <http://www.unidroit.org/english/principles/contracts/principles2004/blackletter2004.pdf> (last visited Apr. 10, 2008). See also JOHN O. HONNOLD, UNIFORM LAW FOR INTERNATIONAL SALES UNDER THE 1980 UNITED NATIONS CONVENTION, 373 n.2 (3d ed. 1999) (citing CISG arts. 19(2), 21(2), 32, 48(2), 58(3), 60(a), 65, 71, 73(2), 79(4) and 85–88, and stating that “[t]hese many instances suggest that providing needed cooperation is one of the ‘general principles on which [the Convention] is based.’”), available at <http://cisgw3.law.pace.edu/cisg/biblio/honnold.html> (last visited Apr. 10, 2008); HONNOLD at 350 n.1 (citing CISG arts. 19(2), 21(2), 32(2) & (3), 48(2), 58(3), 60(a), 65, 71, 73(2), 79(4), and 85–88, stating that “[i]t may add a bit of romance to commercial law to suggest that the parties’ inter-related steps resemble old-fashioned ballroom dancing.”).

Other cases have indicated that certain courts place the burden of producing evidence of non-conformity on the buyer. In a Belgian case, the Court rejected the buyer's contention of non-conformity for its failure to provide proof.<sup>55</sup> In the German *Hungarian* wheat case, the Court ruled that the buyer cannot satisfy the burden of proof requirement when the sample tested by a third party was destroyed.<sup>56</sup>

Certain courts have noted the need for the burden of proof to shift in the interest of fairness. In the Austrian Supreme Court's *CD media* case, the buyer withheld payment because it was suspicious of whether the seller possessed proper intellectual property rights for the CDs it purchased.<sup>57</sup> The court placed the burden on the seller to prove title because the seller has a duty to deliver goods free from any right or claim of a third party.<sup>58</sup> The court stated: "it was not for [Buyer] to prove the existence of [Licensor]'s industrial property right and [Seller]'s awareness of it at the time of conclusion of contract. [Section 139(3) of the German Law on Patents, section 155 of the Austrian Law on Patents, and Article 34 of the Agreement on Trade-Related Aspects of Intellectual Property Rights provided for the burden of proof to shift to [Seller]."<sup>59</sup>

The court also states that, "generally, under the CISG, the burden to prove the factual prerequisites of a provision is on the party that intends to employ it to its own advantage,"<sup>60</sup> but further states that "in exceptional circumstances, considerations of equity can lead to a shifting of the burden of proof, e.g., a closeness to evidence or unacceptable difficulties for one party to furnish evidence."<sup>61</sup>

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<sup>55</sup> [Hof] [Appellate Court] Antwerpen 2002/AR/2087, 24 Apr. 2006 (Belg.), available at <http://cisgw3.law.pace.edu/cases/060424b1.html>. (last visited Apr. 10, 2008).

<sup>56</sup> [OLG] [Provincial Appellate Court] Karlsruhe 7 U 10/04, 08 Feb. 2006 (F.R.G.), available at <http://cisgw3.law.pace.edu/cases/060208g1.html#cabc>. (last visited Apr. 10, 2008).

<sup>57</sup> [OGH] [Supreme Court] 10 Ob 122/05x, 12 Sept. 2006 (Austria.), available at <http://cisgw3.law.pace.edu/cases/060912a3.html> (last visited Apr. 10, 2008).

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> *Id.* (citing Schlechtriem/Schwenzer/Ferrari, *Kommentar zum Einheitlichen UN-Kaufrecht* [2004], Art. 4 ¶¶ 50, 52; Art. 7 ¶ 56; Antweiler, *Beweislastverteilung im UN-Kaufrecht* [1995], 197).

<sup>61</sup> *Id.* (citing Staudinger/Magnus [2005], Art. 4, ¶ 69 with further references; Schlechtriem/Schwenzer/Ferrari, Art. 4, ¶ 51).

In the *Dust Ventilator* case, a German court also held that the seller bore the burden of proof.<sup>62</sup> The court stated that the seller did not respond to or eliminate the defects that the buyer objected to.<sup>63</sup> The court assumed that the dust ventilator was nonconforming because “instead of sucking in the dust, the machine diffused it around the room. In addition, the paper board containers in the dust ventilator are too small, causing the ventilator to switch off too early.”<sup>64</sup> In other words, after the buyer proves that it could not use the goods, the burden should shift to the seller to prove why the goods were nevertheless conforming.

In the French case *Aluminum and Light Industries Company v. Saint Bernard Miroiterie Vitretie*, when goods could possibly be damaged in the process of transportation, the French Supreme Court held that it was the buyer’s burden to prove non-conformity before the risk was transferred.<sup>65</sup> In the German *Doors* case, the buyer was also required to prove non-conformity even though the buyer could not ordinarily examine the doors due to their packaging.<sup>66</sup>

In the Chinese *Heliotropin* case before the China International Economic & Trade Arbitration Commission [CIETAC], the arbitral tribunal placed the burden to prove conformity on the seller after the buyer’s inspection report showing non-conformity.<sup>67</sup> The tribunal found that the seller’s export inspection certificate did not completely reflect the quality and was not an official inspection certificate.<sup>68</sup> In addition, the tribunal held that because the buyer sent the inspection report to the seller, and the seller did not make any objection within a reasonable

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<sup>62</sup> [OLG] [Provincial Appellate Court] München 24 U 501/06, 17 Nov. 2006 (F.R.G.), available at <http://cisgw3.law.pace.edu/cases/061117g1.html> (last visited Apr. 10, 2008).

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

<sup>65</sup> [CASS] [Supreme Court] 1312 FS-P, 24 Sept. 2003 (Fr.), available at <http://cisgw3.law.pace.edu/cases/030924f1.html> (last visited Apr. 10, 2008).

<sup>66</sup> [OLG] [Provincial Appellate Court] Saarbrücken 1 U 69/92, 13 Jan. 1993 (F.R.G.), available at <http://cisgw3.law.pace.edu/cases/930113g1.html> (last visited Apr. 10, 2008).

<sup>67</sup> [CIETAC] [China International Economic & Trade Arbitration Commission] CISG/1993/09, 10 July 1993 (P.R.C.), available at <http://cisgw3.law.pace.edu/cases/930710c1.html> (last visited Apr. 10, 2008).

<sup>68</sup> *Id.*

time, the seller accepted and admitted the buyer's inspection report.<sup>69</sup>

#### CONCLUSION AND FURTHER REMARKS

The issue of burden of proof concerns substantive law and is governed by the CISG. The general principle *onus probandi actori incumbit* may not be sufficient in providing courts and tribunals with guidance for uniform application.

To achieve uniformity, the law must not only be predictable, but it must also be capable of being stated in a way that could be applied fairly in different situations. In order to achieve that, the author proposes the following rules concerning the burden of proving non-conformity under Article 35. The burden of proving non-conformity should not always be placed on the buyer because this would ignore the fact that, to begin with, the seller has an affirmative obligation to deliver conforming goods.<sup>70</sup> The burden of proof should not always be placed on the seller because by the time the buyer alleges non-conformity, the seller may not have possession of the goods. It would be even more unpredictable to always place the burden of proof on the claimant, since either the buyer or the seller can be the claimant, and the causes of action can vary widely from case to case.

Rather, the rules for burden of proof should be a three step burden-shifting approach:

*First*, considering that the seller always has a duty to deliver conforming goods, the seller should carry the initial burden of establishing a *prima facie* case of conformity, e.g., official inspection certificate, routine business practices, etc.

*Second*, once the seller establishes a *prima facie* case of conformity, the burden shifts to the buyer to establish a case of non-conformity and that such non-conformity was not caused by the buyer.

*Third*, if the buyer meets its burden of proof, the burden shifts back to the seller to explain why it should not be liable for the non-conformity.

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<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

The burden of proof here refers to both the burden of persuasion and the burden of producing evidence. In an inquisitional proceeding, the other party will be under the duty of cooperation to assist the production of evidence. The three-step burden-shifting approach takes into account the complex nature of the modern day conformity issues and may be fairer because it distributes the burden between the parties and does not require any one side to bear the entire weight of proof.