

# **COST AND BURDEN OF PROOF UNDER THE CISG — A DISCUSSION AMONGST EXPERTS**

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## **Abstract**

*CISG — Cost — Burden of Proof — 23<sup>rd</sup> Willem C Vis Arbitration  
Moot — International Dispute Resolution — Arbitration —  
Substantive Law — Procedural Law — Common Law — Civil Law  
— United States of America Jurisdiction — German Jurisdiction*

*This article discusses the relationship between costs and burden of proof under the CISG and the continual debate between diverging views across jurisdictions on the topics. It conveys the significance of the issues in dispute resolution, which is supported in particular by key arbitration decisions. In addition, the article describes the relevance of the issue in both substantive and procedural law, emphasising the contrasting perspectives of the United States of*

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*America ('US') and Germany through significant case law and deliberation.*

# I INTRODUCTION (STEFAN KRÖLL)

At first sight, it appears strange to combine the topics of burden of proof and costs under the CISG in one discussion. A closer look reveals however, that there are more similarities between them than merely having been a part of the problem for the 23<sup>rd</sup> Willem C Vis Arbitration Moot ('Vis problem'). First, both topics are of considerable practical importance in international dispute resolution, in particular, arbitration. Second, both topics concern the intersection of substantive and procedural law. Third, there still seems to be a common law/civil law divide, or to be more precise a US/Germany divide, in the treatment of these problems.

## *A The Practical Relevance of the Topics*

The practical importance of both topics is often underestimated, not only by students, but also by parties.<sup>1</sup> In law school, the discussion normally concerns which legal principles apply to a particular case. In practice however, the cases frequently turn more on the facts than on the law. The applicable legal principles are clear; the primary issue is how to prove the facts are necessary for their application. Documents, and in particular required signed versions of them, may have been lost, witnesses may no longer be available, or the parties

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<sup>1</sup> See, for the lack of substantive pleadings of the parties on the question of costs, John Y Gotanda, 'Bringing Efficiency to the Awarding of Fees and Costs in International Arbitration' in Stefan Michael Kröll et al (eds), *International Arbitration and International Commercial Law: Synergy, Convergence and Evolution* (Kluwer Law International, 2011) 141–2.

may, for other reasons, have no access to the evidence needed. If the remaining evidence is not sufficient for the tribunal or the court to form a view on what has happened with the required certainty, the question inevitably arises: which party bears the burden of proof for a particular fact?

The practical relevance of the cost question results from the fact that arbitration is by no means cheap, despite the cost advantages which might exist in comparison to court proceedings, at least if they involve several proceedings. An extreme example for this is *Brunswick Bowling & Billiards Corporation v Shanghai Zhonglu Industrial Co Ltd*.<sup>2</sup> According to the Hong Kong Court of Appeal, which rejected the request to set aside the award, both parties spent more than US\$10 million for an arbitration which resulted in an award ordering the respondent to pay US\$89 106.10 with interest and to return 2000 bowling balls.<sup>3</sup> An issue generally found in arbitration is that costs escalate even beyond such extreme cases as this one, which is well evidenced by criticism raised by users<sup>4</sup> and the various initiatives taken by institutions to curb costs. The International Chamber of Commerce ('ICC') for example has issued a number of guidelines in its brochure on how to avoid costs and delay in arbitration.<sup>5</sup>

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<sup>2</sup> [2009] HKCFI 94; [2011] HKLRD 707.

<sup>3</sup> Ibid.

<sup>4</sup> See Paul Hobeck, Volker Mahnken and Max Koebeke, 'Time for Woolf Reforms in International Construction Arbitration' [2008] 11(2) *International Arbitration Law Review* 84.

<sup>5</sup> International Chamber of Commerce Arbitration Commission, 'Report on Techniques for Controlling Time and Costs in Arbitration' (Report 861-1, International Chamber of Commerce Arbitration Commission, 2012).

*B Intersection Between Procedural Law and Substantive Law*

The second common feature is that they are located at the borderline of procedural law and substantive law. In the majority of cases, costs are determined by arbitral tribunals on the basis of guidelines contained in procedural rules. These are often the applicable arbitration rules or — primarily in ad hoc arbitration — the applicable national arbitration law.<sup>6</sup> Typical for the content of such rules is art 37 of the ICC Arbitration Rules. It provides under the heading ‘Decisions as to the Cost of the Arbitration’ in the relevant paras 3–5 that:

3. At any time during the arbitral proceedings, the arbitral tribunal may make decisions on costs, other than those to be fixed by the Court, and order payment.
4. The final award shall fix the costs of the arbitration and decide which of the parties shall bear them or in what proportion they shall be borne by the parties.
5. In making decisions as to costs, the arbitral tribunal may take into account such circumstances as it considers relevant, including the extent to which each party has conducted the arbitration in an expeditious and cost-effective manner.<sup>7</sup>

In particular, where the guiding principle of cost allocation is a ‘costs-follow-the-event’ approach, the flipside of these rules and laws granting procedural powers to the tribunal, is a claim by the winning party — based on procedural law — to be reimbursed for costs incurred. In the end, it is for each tribunal to allocate the costs incurred during the arbitration or in connection with the underlying dispute. The rules applicable in arbitral proceedings regulate not only the allocation of the costs but also which costs are required to

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<sup>6</sup> See for example, *German Code of Civil Procedure* § 1057.

<sup>7</sup> International Chamber of Commerce, *International Court of Arbitration Arbitration Rules Mediation Rules* (2013) [3]–[5].



be reimbursed. At the same time, they normally provide much more flexibility to the tribunal than a court has in litigation, where the rules are often drafted with purely domestic cases in mind. In light of that, and the greater complexity of the disputes resulting later in international arbitral proceedings, the parties often ask for the reimbursement of costs which go beyond those legal fees incurred directly from the arbitral proceedings.

That may involve not only costs incurred before the arbitral proceedings were initiated when the parties tried to settle their case amicably, but also costs incurred in actions before the State courts either for interim relief or to make arbitration proceedings possible at all. In particular, in the latter cases, the question arises whether such costs can be reimbursed in the arbitral proceedings in so far as they have not been reimbursed in the court proceedings. These costs may be either closely connected to proceedings or, having been spent in actions without which the proceedings may not have been possible, necessary or reasonable for the proper pursuit of a case.

At the same time, the cost incurred for the proceedings are also a direct consequence of the other party's breach of contract.<sup>8</sup> The question which arises is how these two different claims are connected with each other; in particular, whether the substantive claim is pre-empted by the procedural rules or vice versa. Equally, the question of burden of proof may involve both substantive and procedural elements. That is well evidenced by the Italian decision

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<sup>8</sup> José Rosell, 'Arbitration Costs as Relief and/or Damage' (2011) 28 *Journal of International Arbitration* 115, 116.

of the Tribunale di Vigevano [District Court Vigevano] in *Rheinland Versicherungen v Atlarex*.<sup>9</sup>

There, the Court came to the conclusion that the question of burden of proof for the non-conformity of the goods was a question of substantive law, as it was so closely related to the substantive claim. Consequently, the question to be considered was governed by the CISG. At the same time, the Court submitted the question: by which evidentiary means could the buyer discharge its burden pursuant to Italian law? This issue was considered to be procedural and therefore governed by the *lex fori*. The question as to which law governs the standard of proof was not addressed explicitly, despite its relevance and connection with the question of which party bears the burden of proof.

At the same time, the need for sophisticated rules on the burden of proof depends to a certain extent on what access parties have to evidence. Where a party can obtain all the evidence it needs, on the basis of procedural rules allowing for discovery, there is less need to think about whether it is appropriate to impose the burden of proof upon it.<sup>10</sup>

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<sup>9</sup> *Rheinland Versicherungen v Atlarex*, Tribunale di Vigevano (District Court Vigevano), No 405, 12 July 2000 reported in (2001) 20 *Journal of Law and Commerce* 209, 218–21.

<sup>10</sup> For the interaction between the rules on taking evidence in procedural law and the question of burden of proof, which in the majority of jurisdictions is considered to be a rule of substantive law, see Rolf Trittman, 'The Interplay Between Procedural and Substantive Law in International Arbitration' (2016) *SchiedsVZ German Arbitration Journal* 7.

C Common Law — Civil Law Divide

The third common feature, closely related to the second, is that there still seems to be a divide between common law and civil law. That is well reflected by the following discussion and the case law presented therein. There may be several different reasons for that, starting from the thinking in remedies or claims over different approaches to statutory interpretation, to a generally different attitude to an extensive interpretation of the CISG. Last but not least, differences in procedural law may contribute to the different approaches.

II BURDEN OF PROOF: GOVERNED BY THE CISG  
(ULRICH SCHROETER)

Although I personally hold a more sceptical view about this issue,<sup>11</sup> I will (in the following) try to describe what has often been referred to as the ‘majority view’<sup>12</sup> under the CISG, namely that the Convention governs the allocation of the burden of proof,<sup>13</sup> and

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<sup>11</sup> See Peter Schlechtriem and Ulrich G Schroeter, *Internationales UN-Kaufrecht*, (Mohr Siebeck, 5<sup>th</sup> ed, 2013) 100.

<sup>12</sup> Milena Djordjevic, ‘Article 4’ in Stefan Kröll, Loukas Mistelis and Pilar Perales Viscasillas (eds), *UN-Convention on Contracts for the International Sales of Goods (CISG)* (Verlag CH Beck oHG and Hart Publishing, 2011) 62 [34]; Franco Ferrari, ‘Burden of Proof under the CISG’, (2000–01) *Review of the Convention on Contracts for the International Sale of Goods (CISG)* 1.

<sup>13</sup> Oberster Gerichtshof [Austrian Supreme Court], CISG-online No 1364, 12 September 2006; Bundesgerichtshof [German Federal Supreme Court], CISG-online No 651, 9 January 2002 reported in (2002) *Neue Juristische Wochenschrift* 1651; Bundesgerichtshof [German Federal Supreme Court], CISG-online No 847, 30 June 2004 reported in (2004) *Neue Juristische Wochenschrift* 3181;

exhaustively at that.<sup>14</sup> Whether the same applies to the standard of proof is yet another matter that will not be covered here.<sup>15</sup>

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*Rheinland Versicherungen v Atlarex*, Tribunale di Vigevano (District Court Vigevano), No 405 12 July 2000 reported in (2001) 20 *Journal of Law and Commerce* 209, 218–21; Djordjevic, above n 12, 62; Franco Ferrari, ‘Article 4’ in Peter Schlechtriem and Ingeborg Schwenzer (eds), *Kommentar zum Einheitlichen UN-Kaufrecht — CISG* — (CH Beck, 6<sup>th</sup> ed, 2013) 127; Franco Ferrari, ‘Burden of Proof under the CISG’ (2000-01) *Review of the Convention on Contracts for the International Sale of Goods (CISG)* 1; Stefan Kröll, ‘The Burden of Proof for the Non-Conformity of Goods under Art 35 CISG’ (2011) *LIX Belgrade Law Review* 162, 168; Ulrich Magnus, ‘Wiener UN-Kaufrecht (CISG)’ in J von Staudinger (ed), *Kommentar zum Bürgerlichen Gesetzbuch mit Einführungsgesetz und Nebengesetzen* (2013), Art 4 [69]; Ingeborg Schwenzer and Pascal Hachem, ‘Article 4’ in Ingeborg Schwenzer (ed), *Schlechtriem & Schwenzer: Commentary on the Convention on the International Sale of Goods (CISG)*, (Oxford University Press, 4<sup>th</sup> ed, 2016) 68.

<sup>14</sup> See Bundesgerichtshof [German Federal Supreme Court], CISG-online No 651, 9 January 2002, reported in (2002) *Neue Juristische Wochenschrift* 1651: ‘...the CISG regulates the burden of proof [...], so that consequently, recourse to the national law is pre-empted to that extent’.

<sup>15</sup> See Kantonsgericht Nidwalden [District Court Nidwalden], CISG-online No 1086, 23 May 2005, reported in (2005) *Internationales Handelsrecht* 253, 254; Peter Schlechtriem and Ulrich G Schroeter, *Internationales UN-Kaufrecht* (Mohr Siebeck, 5<sup>th</sup> ed, 2013) 101: standard of proof is not governed by the CISG; contra Ingeborg Schwenzer, ‘Article 74’ in Ingeborg Schwenzer (ed), *Schlechtriem and Schwenzer Commentary on the UN Convention on the International Sale of Goods (CISG)*, (Oxford University Press, 4<sup>th</sup> ed, 2016) 1085: standard of proof is governed by the CISG.

*A CISG Provisions Explicitly Addressing the Burden of Proof*

The CISG contains a number of provisions that explicitly address the allocation of the burden of proof. Among them, the clearest one is art 79(1) of the CISG, which provides that '[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'.<sup>16</sup> In addition, a number of other CISG provisions address the burden of proof for certain of the prerequisites contained therein through the term 'unless...'. An example is art 2(a), which provides that the CISG does not apply to sales of goods bought for personal, family or household use, 'unless the seller, at any time before or at the conclusion of the contract, neither knew nor ought to have known that the goods were bought for any such use'.<sup>17</sup>

It is commonly said that the wording of art 2(a) indicates that the party alleging that the seller neither knew nor ought to have known that the goods were bought for personal, family or household use bears the burden of proving this fact.<sup>18</sup> This understanding of the use of the term 'unless', which in the case of art 2(a) is supported by the

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<sup>16</sup> Emphasis added.

<sup>17</sup> *United Nations Convention on Contracts for the International Sale of Goods* ('CISG'), opened for signature 11 April 1980, 19 ILM 668, (entered into force 1 January 1988) art 2(a).

<sup>18</sup> John O Honnold, *Uniform Law for International Sales under the 1980 United Nations Convention*, (Kluwer Law International, 3<sup>rd</sup> ed, 1999) 48; Ingeborg Schwenzer and Pascal Hachem, 'Article 2' in Ingeborg Schwenzer (ed), *Schlechtriem & Schwenzer: Commentary on the Convention on the International Sale of Goods (CISG)*, (Oxford University Press, 4<sup>th</sup> ed, 2016) 36; Frank Spohnheimer, 'Article 2' in Stefan Kröll, Loukas Mistelis and Pilar Perales Viscasillas (eds), *UN-Convention on Contracts for the International Sales of Goods (CISG)*, (Hart Publishing, 2011) 45.

provisions' drafting history,<sup>19</sup> mirrors a classical civil law-style regulation of the burden of proof. It has therefore — maybe not surprisingly — found a particularly strong support among CISG commentators with a civil law background. Apart from art 2(a), other CISG provisions containing an 'unless' clause are arts 3(1), 9(2), 14(2), 18(2), 19(2), 21(2), 25(2), 27, 28, 33(b), 35(2), 39(2), 41, 46(1), 46(3), 47(2), 48(4), 49(2), 58(3), 62, 63(2), 64(2), 66 and 93(3), although its use certainly does not in each case signify an allocation of the burden of proof.

Finally, art 35(2)(b) employs a similar expression:

Except where the parties have agreed otherwise, the goods do not conform with the contract unless they [...] are fit for any particular purpose expressly or impliedly made known to the

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<sup>19</sup> See the discussion of art 2(a) CISG within the 'UNCITRAL Working Group' in (1975), VI *UNCITRAL Yearbook* 49, 51 Nos 25, 26: 'It was also observed that in some legal systems the use of the word "if" as used in the text proposed by Working Party II would require the party relying on the "if" clause to prove that which was in the clause. In contrast, the use of the word "unless", as in the text presented by the observer, would put the burden on the seller to prove his knowledge or lack of knowledge of the intended use of the goods. [...] The Working Group adopted the text proposed by the observer; see also the comments by delegate Ludvik Kopać, during the Vienna Diplomatic Conference, *United Nations Conference on Contracts for the International Sale of Goods*, UN GAOR, 39<sup>th</sup> Comm, 1<sup>st</sup> sess, UN Doc A/CONF.97/19 (10 March — 11 April 1980) 238: 'He had no objection to the principle behind the paragraph but felt the wording could be improved. The crucial part of the provision was the clause beginning "unless the seller"... and in the form in which it was currently worded it implied that there was an obligation to prove an absence of knowledge that the goods were bought for personal, family or household use ...'.

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 judgement.<sup>20</sup>

It is widely accepted that the phrase 'except where the circumstances show that the buyer did not rely [...] on the seller's skill and judgement' imposes a burden of proof on the person arguing that fact.<sup>21</sup> Interestingly, this use of the term 'except where' appears only in art 35(2)(b) and nowhere else within the Convention.

*B General Principle on the Burden of Proof Allocation  
Underlying the CISG*

Against the background of the provisions just described, the current majority opinion under the CISG goes a step further by suggesting that the Convention is based on a general principle of the burden of proof allocation in the sense of art 7(2) of the CISG.<sup>22</sup> Accordingly, all questions arising with respect to the burden of proof under CISG

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<sup>20</sup> CISG, above n 17, art 35(2)(b).

<sup>21</sup> Harry M Flechtner, 'Moving Through Tradition Towards Universalism under the UN Sales Convention (CISG): Notice of Lack of Conformity (Article 39) and Burden of Proof in the Bundesgerichtshof Opinion of 30 June 2004' in Johan Erauw et al (eds), *Liber Memorialis Professor Petar Sarcevic* (Sellier European Law Publishers, 2006) 457, 467; Stefan Kröll, 'The Burden of Proof for the Non-Conformity of Goods under Art 35 CISG', (2011) *LIX Belgrade Law Review* 162, 176; Ingeborg Schwenzer, 'Article 35' in Ingeborg Schwenzer (ed), *Schlechtriem & Schwenzer: Commentary on the Convention on the International Sale of Goods (CISG)*, (Oxford University Press, 4<sup>th</sup> ed, 2016) 621.

<sup>22</sup> See the extensive references in Djordjevic, above n 12, [36]; Kröll above n 1, 168; Schwenzer and Hachem, above n 13, 68.



contracts supposedly have to be answered in accordance with this general principle as well as in those cases where no explicit provisions listed above applies. Consequently, any recourse to domestic law relating to the burden of proof is forbidden.

According to the majority view, the CISG's underlying general principle on the burden of proof essentially has three prongs. First, that every party has to prove the facts on which its claim, right, or defence is based.<sup>23</sup> Second, that the party relying on an exception must prove this exception.<sup>24</sup> Third, in exceptional circumstances, considerations of equity — for example the notion of proximity of proof or unacceptable difficulties for one party to furnish evidence — can lead to a shifting of the burden of proof.<sup>25</sup> In other words,

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<sup>23</sup> Bundesgerichtshof [German Federal Supreme Court], CISG-online No 651, 9 January 2002 reported in (2002) *Neue Juristische Wochenschrift* 1651; Oberster Gerichtshof [Austrian Supreme Court], CISG-online No 1364, 12 September 2006; Schwenzer and Hagem, above n 13, 68.

<sup>24</sup> Bundesgerichtshof [German Federal Supreme Court], CISG-online No 847, 30 June 2004 reported in (2004) *Neue Juristische Wochenschrift* 3181.

<sup>25</sup> Bundesgerichtshof [German Federal Supreme Court], CISG-online No 847, 30 June 2004 reported in (2004) *Neue Juristische Wochenschrift* 3181; Oberster Gerichtshof [Austrian Supreme Court], CISG-online No. 1364, 12 September 2006; Franco Ferrari, 'Artikel 4' in Ingeborg Schwenzer (ed), *Schlechtriem/Schwenzer Kommentar zum Einheitlichen UN-Kaufrecht — CISG* — (CH Beck, 6th ed, 2013) 127; Franco Ferrari, 'Burden of Proof under the CISG', *Review of the Convention on Contracts for the International Sale of Goods (CISG)* [2000–01] 1; Ulrich Magnus, 'Wiener UN-Kaufrecht (CISG)' in J von Staudinger (ed), *Kommentar zum Bürgerlichen Gesetzbuch mit Einführungsgesetz und Nebengesetzen* (Sellier/De Gruyter, 2013) art 4, 69.



where facts are so closely connected to the sphere of one party that it is impossible for the counter-party to prove these facts, the burden of proof must be allocated or shifted to the first party.<sup>26</sup>

For such an overwhelming majority view, it is interesting that the reasons supporting this three-prong general principle seem surprisingly thin. As far as the wording of the CISG is concerned, art 79(1) CISG could be read as confirming the first prong, whereas art 2(a) CISG (and similar ‘unless ...’ provisions) could confirm the second prong. However, in spite of these factors, it could as convincingly be argued that arts 79(1) and 2(a) CISG as well as similar provisions are superfluous if a general principle of the type described above is really underlying the CISG. This would leave the argument that the drafters of the CISG wanted to make sure that the burden of proof allocation could be easily discerned in instances in which this seemed particularly important to the drafters — however, there is only limited support in the *travaux préparatoires* for this assumption.<sup>27</sup>

Further, difficulties are highlighted by case law decided under the CISG, according to which the CISG’s burden of proof rules do not reach further than the Convention’s substantive scope as defined in art 4.<sup>28</sup> Accordingly, the question of whether, and possibly which, evidentiary consequences an actual admission of liability by one

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<sup>26</sup> Schwenzer and Hachem, above n 13, 68.

<sup>27</sup> For references to the *travaux préparatoires* that indicate the contrary — namely that the drafters did *not* want to regulate the burden of proof through specific terms in CISG provisions — see Harry M Flechtner, ‘Selected Issues Relation to the CISG’s Sphere of Application’ (2009) 13 *Vindobona Journal of International Commercial Law and Arbitration* 91, 102–5.

<sup>28</sup> CISG, above n 17, art 4.

party has, is supposedly not governed by the CISG but by domestic law.<sup>29</sup> The limited scope of the CISG thereby opens a backdoor to a non-uniform treatment of matters that are arguably as closely related to the burden of proof and its discharge as the rules of substantive law.<sup>30</sup> An argument made by supporters of the prevailing view — namely, that the burden of proof is so closely connected with the application of the substantive provisions that it would be impracticable to separate the two — therefore sounds somewhat hollow.<sup>31</sup>

### *C Shifting the Burden of Proof: A Decisive Test Case*

It is, however, the third prong that appears to be the most troublesome. It was used by the German Federal Supreme Court when applying art 40 of the CISG to a case in which the buyer argued that the seller was not entitled to rely on the lack of a notice of non-conformity by the buyer under art 39. This was because the lack of conformity of the goods (paprika powder) allegedly related to facts of which the seller knew or could not have been unaware of and which he did not disclose to the buyer.<sup>32</sup>

The burden of proof for the existence of such facts known to the seller would normally have been borne by the buyer however, under the general principle's second prong, the buyer relied on the

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<sup>29</sup> Bundesgerichtshof [German Federal Supreme Court], CISG-online No 651, 9 January 2002 reported in (2002) *Neue Juristische Wochenschrift* 1651.

<sup>30</sup> Flechtner, above n 21, 104–5.

<sup>31</sup> Djordjevic, above n 12, 36; Kröll, above n 13, 169.

<sup>32</sup> Bundesgerichtshof [German Federal Supreme Court], CISG-online No 847, 30 June 2004 reported in (2004) *Neue Juristische Wochenschrift* 3181.

exception of art 40. The Federal Supreme Court held that an exception to this rule may be necessary in individual cases under the notion of ‘proof-proximity’ (*Beweisnähe*) or if an evidentiary showing results in unreasonable difficulties of proof for the buyer.<sup>33</sup> In support of the principle’s third prong thus created, the Court argued that it is recognised within the scope of the CISG ‘that a strict application of the “exception-to-the-rule” principle can lead to inequities’.<sup>34</sup> Therefore, a correction is ‘necessary according to the principles set forth herein’,<sup>35</sup> but it remains that ‘prudence is appropriate’.<sup>36</sup>

The Court further elaborated as follows:

The law allows for this aspect within the framework of Article 40 CISG in that it does not always demand proof of the seller’s knowledge of the facts on which the contractual breach is based, but rather deems it sufficient that the seller ‘could not have been unaware of’ those facts; thus, Article 40 CISG also

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<sup>33</sup> Ibid.

<sup>34</sup> Bundesgerichtshof [German Federal Supreme Court], CISG-online No 847, 30 June 2004 reported in (2004) *Neue Juristische Wochenschrift* 3181.

<sup>35</sup> The Federal Supreme Court refers to Gerhard Hepting, ‘Vor Art 1 WKR’ in Gottfried Baumgärtel and Hans-Willi Laumen (eds), *Handbuch der Beweislast im Privatrecht (Handbook on the Burden of Proof in Private Law)* (Carl Heymanns Verlag, 2<sup>nd</sup> ed, 1999) vol 2, 28–30; Magnus, above n 13, art 4 [69]; Ferrari, in *Schlechtriem/Schwenzer Kommentar zum Einheitlichen UN – Kaufrecht — CISG* — (CH Beck, 6th ed, 2013) 127.

<sup>36</sup> Bundesgerichtshof [German Federal Supreme Court], CISG-online No 847, 30 June 2004 reported in (2004) *Neue Juristische Wochenschrift* 3181.

covers cases of negligent ignorance.<sup>37</sup> Under certain circumstances, the required proof can already be deduced from the type of defect itself so that, in the case of extreme deviations from the contractually agreed upon condition, gross negligence is assumed if the breach of contract occurred in the seller's domain.<sup>38</sup> According to the principles mentioned above, it may be necessary to limit the buyer's burden of proof in the case of a gross breach of contract and in view of the aspect of 'proof-proximity' (*Beweisnähe*) in order to avoid unreasonable difficulties in providing proof.<sup>39</sup>

It is striking that the Federal Supreme Court, in resorting to the so-called *Beweisnähe*, used a legal concept developed under German civil law and applied it to the CISG<sup>40</sup> — an approach that is difficult to reconcile with both the regard to the CISG's international character and to the need to promote uniformity in its application, as called for in art 7(1). Assuming that the allocation of the burden of proof is a matter governed by the CISG (as the prevailing view

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<sup>37</sup> The Federal Supreme Court refers to Wilhelm-Albrecht Achilles, *Kommentar zum UN-Kaufrechtsübereinkommen* (2000), art 40 [1]; Alexander Lüderitz, 'Artikel 40 EKG' in Hans Theodor Soergel (ed), *Kommentar zum Bürgerlichen Gesetzbuch* (Kohlhammer, 12<sup>th</sup> ed, 1991), 1; Alexander Lüderitz and Dirk Schübler-Langeheine, 'Artikel 40 CISG' (Article 40 CISG) in Hans Theodor Soergel (ed), *Kommentar zum Bürgerlichen Gesetzbuch* (Kohlhammer, 13<sup>th</sup> ed, 2000) 1–2.

<sup>38</sup> The Federal Supreme Court refers to Wilhelm-Albrecht Achilles, *Kommentar zum UN-Kaufrechtsübereinkommen* (2000) art 40 [4]; Lüderitz, above n 37, 1; see also Lüderitz and Schübler-Langeheine, above n 37, 3; Magnus, above n 13, 13.

<sup>39</sup> Bundesgerichtshof [German Federal Supreme Court], CISG-online No 847, 30 June 2004 reported in (2004) *Neue Juristische Wochenschrift* 3181.

<sup>40</sup> See, eg, Flechtner, above n 21, 104–5; Kröll, above n 13, 168.

believes), any shifting of this burden to the other party would have to be based on arguments drawn from the CISG itself. In this respect, one could think of an interpretation of the CISG's burden of proof rules in accordance with good faith in international trade<sup>41</sup> in cases in which a party is faced with unreasonable difficulties in providing the required evidence.

*D Arbitration Agreements as a Potential Derogation from the CISG's Burden of Proof Rules in art 6 of the CISG?*

Finally, it is useful to consider why the question of whether the CISG regulates the burden of proof, and thereby pre-empts domestic law (including 'procedural' law, however defined), may potentially not matter in cases where the parties have agreed to arbitration. The reason is housed in art 6, which gives the parties the right to derogate from or vary the effect of any of the CISG's provisions (with the exception of art 12), including the general principles underlying the CISG, in accordance with art 7(2). Such derogation may, according to the prevailing and convincing view, also occur implicitly.<sup>42</sup>

Against this background, an arbitration agreement between the parties selecting arbitration rules which contain provisions on the burden of proof (for example, as in the UNCITRAL Arbitration

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<sup>41</sup> CISG, above n 17, art 7(1).

<sup>42</sup> Cour de Cassation [French Court of Cassation], 99–12.87, 25 October 2005, CISG-online No 1226; Oberster Gerichtshof [Austrian Supreme Court], CISG-online No 828, 17 December 2003; Ingeborg Schwenzer and Pascal Hachem, 'Article 6' in Schlechtriem & Schwenzer, *Commentary on the UN Convention on the International Sale of Goods (CISG)*, (Oxford University Press, 4<sup>th</sup> ed, 2016) 102.

Rules)<sup>43</sup> or on the taking of evidence by the arbitral tribunal (for example, as in the Vienna Arbitration Rules)<sup>44</sup> could potentially be read as a derogation from the CISG's burden of proof rules. Whether such a derogation was intended by the parties has to be determined on a case-by-case basis applying the interpretative standards of art 8 of the CISG. It remains a particularly interesting and challenging question which proof-related rules prevail in cases in which the parties have chosen both the CISG and the above types of arbitration rules.

### III A MATTER OF GOOD INTENTIONS: PLACING THE ISSUE OF THE ALLOCATION OF BURDEN OF PROOF WITHIN THE CISG (LARRY DiMATTEO)

Professor Schroeter eloquently summarises the rationales given in support of the mainstream view that the allocation of the burden of proof is within the scope of the CISG. The main arguments are based on analogical reasoning among the provisions of the CISG and, alternatively, through the recognition of the burden of proof as an implied general principle. The existence of burden-allocating words, such as 'prove', 'unless', and 'except' allow for the inference that the allocation of the burden of proof is expressly dealt with by the CISG. The mainstream argument advances that these provision-specific cases should be read as reflecting an implied general

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<sup>43</sup> *UNCITRAL Arbitration Rules*, GA RES 65/22, UN GAOR, 65<sup>th</sup> sess, Agenda Item 77, UN Doc A/65/465 (10 January 2011) art 27(1): 'Each party shall have the burden of proving the facts relied on to support his claim or defence'.

<sup>44</sup> Vienna International Arbitration Centre, *Vienna Rules of Arbitration* (1 July 2013) art 29(1): 'If the arbitral tribunal considers it necessary, it may on its own initiative collect evidence, question parties or witnesses, request the parties to submit evidence, and call experts'.

principle based on the international character of the CISG, the commonality of burden allocations across legal systems and the importance of harmonisation of laws.

This section will focus on three areas: firstly, it will demonstrate why the burden of proof is not within the scope of the CISG; secondly, it will examine why that question is not of great importance; and finally, it will determine, if the burden of proof is within the scope of the CISG, whether the standard of proof is also within its scope. As to the first point, it will be argued that nothing in the drafting history of the CISG indicates that the burden of proof was intended to be within its scope. The burden of proof is essentially a matter of procedure to be determined by the court of the *lex fori* and the nuances of burden of proof presumptions and burden shifting vary across legal systems.

The internal-external gap distinction is a good place to start any discussion of whether a particular issue or topic is within the coverage of the CISG. An internal gap or *praeter legem*, is a topic that is not expressly dealt with in the CISG by way of an express principle or rule, but the issue is one commonly found in an area that the CISG covers. The internal gap argument is that the 'rule gap' is attached to an express rule or principle of the CISG and therefore, the gap is to be filled using CISG interpretive methodology; the court or arbitral panel shall develop an autonomous interpretation. Autonomous interpretation in relation to filling in an internal gap means the creation of an autonomous rule or principle free of national law bias. Its autonomy is derived mainly through analogical reasoning from the most pertinent CISG provisions and general principles.



An external gap or *intra legem* is an area of sales or contract law that is expressly or implicitly outside the scope of the CISG.<sup>45</sup> There is a much larger group of issues that are implicitly excluded from the CISG, the reason being that the CISG is largely a non-comprehensive set of legal rules.<sup>46</sup> Article 4 states the extent of the scope of the CISG as governing 'only the formation of the contract of sale and the rights and obligations of the seller and the buyer arising from such a contract'.<sup>47</sup> Also, art 4's description of coverage indicates that the CISG is a body of substantive, and not procedural rules.

If this is the case, one argument against the inclusion of the issue of the burden of proof within the CISG is that it does not come within the substantive sweep of art 4. However, the CISG is a bit more nuanced than is indicated by this substantive law argument. For example, art 11 provides a rule of evidence allowing for the admission of extrinsic evidence, including witness testimony. As noted by Professor Schroeter, art 79 expressly allocates the burden of proving the existence of an impediment to the claiming party 'if he *proves* that the failure was due to an impediment'.<sup>48</sup>

In determining whether the burden of proof is an internal or external gap, the following rationales will be explored: the legislative history, the purpose and general principles of the CISG, and the substantive-procedural law distinction. The drafting history of the

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<sup>45</sup> There are a handful of issues and topics expressly excluded from the reach of the CISG. See CISG, above n 17, arts 2, 3, 4, 5 and 28.

<sup>46</sup> Examples include pre-contractual liability or the duty of good faith negotiations, limitation period, duty of confidentiality, mistake, misrepresentation, undue influence, and duress.

<sup>47</sup> CISG, above n 17, art 4 (emphasis added).

<sup>48</sup> Ibid art 79 (emphasis added).



CISG is at best ambiguous when it comes to the allocation of the burden of proof. Again, the main example given by proponents of the position that the burden of proof is an internal gap is that some CISG provisions contain indications of the burden of proof, such as art 79(1).<sup>49</sup> The fact that a few provisions in the CISG reference the burden of proof is a thin reed to imply that more general rules relating to the burden of proof are within its scope. A broader, yet stronger, argument posed by Professor Schroeter is that the primary purpose of the CISG is the harmonisation of law, and therefore, it should be broadly construed. Thus, when in doubt, the courts and arbitral tribunals should avoid the nuance of national sales laws in favour of an extension of the CISG. Against this argument is the legislative history supporting the view that the CISG does not regulate the burden of proof.<sup>50</sup>

Despite the 'broadly' construed argument noted above, the scope of the CISG must be determined through CISG interpretive methodology and other traditional methods of interpretation.<sup>51</sup> First, one should use general principles. However, the problem of general principles — such as good faith and international character — is that they are empty vessels that can be filled in different ways depending upon the motivation of the interpreter. Almost any issue can be bootstrapped to such language to include the issue within the scope of the CISG. However, arguments for recognising some of these issues not expressly dealt with by CISG language and treating them

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<sup>49</sup> CISG, above n 17, Official Records II 238 s.

<sup>50</sup> Ibid II ss 295.

<sup>51</sup> André Janssen and Larry DiMatteo, 'Interpretive Uncertainty: Methodological Solutions for Interpreting the CISG' (2012) 2 *Nederlands Tijdschrift voor Handelsrecht* (Netherlands Journal of Commercial Law) 52.

as internal gaps are plausible, whereas others are so extenuated that they are wholly implausible.

An example of a plausible connection of an issue to CISG coverage is the issue of the rate of interest. Article 78 states that:

If a party fails to pay the price or any other sum that is in arrears, the other party is entitled to interest on it, without prejudice to any claim for damages recoverable under article 74.<sup>52</sup>

This provision demonstrates a common problem with CISG provisions: the lack of detail and guidance as to the scope of the provision's intended coverage, leaving many questions unanswered. What does 'sums that is in arrears' actually mean? Does it cover all sums in arrears? Does it cover just the buyer's non-payment or belated payment of the price? Does it include the period of time in which a seller holds payment that is subsequently refunded? Does it include the payment of interest on the period from which damages are awarded in court or arbitration and the time that the judgment or award is actually satisfied? Finally, should determining the rate of interest be considered an internal gap to be filled through the use of art 7 or is it an external gap to be filled under national laws?

The legislative history pertaining to art 79 notes that the 'ICC proposes that paragraph (5) be amended to assure that an exemption would not preclude the injured party from claiming interest or compensation due to any change in currency rates'.<sup>53</sup> Further, the

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<sup>52</sup> CISG, above n 17, art 78.

<sup>53</sup> Comments and Proposals by Governments and International Organisations on the Draft Convention on Contracts for the Sale of International Sale of Goods, and on Draft Provisions Concerning Implementation, Reservations and Other Final Clauses, UN Doc A/CONF.97/9 (21 February 1980).

legislative history shows that there were a number of issues not dealt with directly by the language of art 78:

Interest on delay in receiving price or any other sum in arrears:

78A1 Must the sum be 'liquidated'? Delay in paying damages.

78B Rate of interest.

78B2 Aggrieved party's loss from borrowing; current interest rates.

78B3 Applicable domestic law; compounding of interest.<sup>54</sup>

The original text of art 78 provided a fuller coverage relating to the issue of claiming interest as damages. It states that 'the seller is in any event entitled to interest on such sum as is in arrears at a rate equal to the official discount rate in the country where he has his place of business'.<sup>55</sup> Subsequent legislative history uses the term 'the party in default'.<sup>56</sup> Professor Schlechtriem notes that 'the interest question provoked extraordinary difficulties at the Conference'.<sup>57</sup> He notes that the payment of interest was discussed in the negotiations leading to the 1978 Draft Convention in a very narrow context, resulting in a single provision concerning the payment of interest related to the seller's duty to refund the price

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<sup>54</sup> *UNCITRAL Outline of the CISG (The UNCITRAL Thesaurus)*, UN Doc A/CN.9/SER.C/GUIDE/1 (12 September 1995).

<sup>55</sup> 'Report of Committee of the Whole I Relating to the Draft Convention on the International Sale of Goods' UN Doc A/32/17 (23 May-17 June 1977) annex I.

<sup>56</sup> *Report of the First Committee*, UN Doc A/CONF.97/11 (7 April 1980).

<sup>57</sup> Peter Schlechtriem, *Uniform Sales Law — The UN-Convention on Contracts for the International Sale of Goods* (Manz, 1986) 98.

after avoidance of the sales contract'.<sup>58</sup> In a subsequent version, the scope of the interest provisions broadened with a general statement that 'the obligation to pay interest as a general rule [is] so that a debtor still remains liable for interest payments even if his default is due to an impediment beyond his control'.<sup>59</sup> It is also interesting to note that the payment of interest relates to different CISG provisions. For example, the legislative history discusses that 'if the seller is bound to refund the price, he must also pay interest thereon from the date on which the price was paid',<sup>60</sup> which was subsequently embedded in art 84.

Courts and scholars are divided on whether the rate to be charged is within or outside the scope of the CISG. This is similar to the split on the issue of the burden of proof, although the majority opinion is that the burden of proof is within the scope of the CISG. In the case of the rate of interest, unlike the burden of proof, there is an express provision dealing with the issue of the payment of interest. A Vienna arbitration panel reasoned, in a manner much like those who assert that the burden of proof is with the scope of the CISG, that the issue of the rate of interest was an internal gap 'because the immediate recourse to a particular domestic law may lead to results which are incompatible with the principle embodied in art 78'.<sup>61</sup>

However, the arbitration panel conditioned the above statement by noting that this should be the case 'at least in the cases where the

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<sup>58</sup> Ibid.

<sup>59</sup> Ibid 99.

<sup>60</sup> *Report of the First Committee*, UN Doc A/CONF.97/11 (7 April 1980).

<sup>61</sup> *Rolled Metal Sheets Case* (Award, Case No SCH-4366, Vienna Arbitration Proceeding, 15 June 1994).

law in question expressly prohibits the payment of interest'.<sup>62</sup> Nonetheless, numerous scholars and courts have held the issue of the rate of interest to be outside the scope of art 78. A German court held that the rate of interest was outside of the scope of the CISG by noting, 'that a uniform solution could not be achieved at the conferences for the drafting of the CISG, as the different opinions about the interest obligation were irreconcilable'.<sup>63</sup> Some scholars and courts have argued that it is within the coverage of art 78.<sup>64</sup>

Another case study involving the scope of the CISG will be undertaken before proceeding to the issue of the burden of proof. An example of an implausible extension of the scope of the CISG would be to argue that the issue of hardship is within the scope of 'impediment' found in art 79. There is a debate between those who view hardship as a form of impediment covered under art 79 and those that view that art 79 should be strictly construed as covering only impossibility or *force majeure*. The neutrality provided by the word 'impediment' is no doubt an attempt to avoid the rift between countries that recognise hardship and those that do not. For example, the common law and German civil law are divided on whether hardship or changed circumstances can provide an excuse or

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<sup>62</sup> Ibid.

<sup>63</sup> *Landgericht Aachen* (District Court Aachen), Case No 41 O 111/95, 20 July 1995).

<sup>64</sup> *Lugano, Cantone del Ticino, Tribunale d'appello* (Appellate Court Lugano, Canton of Ticino, Case No 12.97.00193, 15 January 1998; Court of Arbitration of the International Chamber of Commerce, Case No 9448, July 1999; See also EA Farnsworth, 'CISG Article 78: Endless disagreement among commentators, much less among the courts' in C M Bianca and Michael J Bonell (eds), *'Commentary on the International Sales Law: The 1980 Vienna Sales Convention'* (Fred B Rothman & Co 1987) 570.

exemption from liability for breach of contract. Hardship is not grounds for excuse under the common law.<sup>65</sup> In contrast, the German law's concept of change of circumstances provides relief for cases of objective and subjective impossibility, frustration of purpose and hardship.<sup>66</sup>

Professor Honnold has noted that the word impediment was substituted for the word 'circumstances' to disallow the granting of an exemption 'merely because performance became more difficult or unprofitable'.<sup>67</sup> Peter Schlechtriem also examined whether mere unaffordability could support a claim of impediment and concluded that 'increased procurement and production costs do not constitute exempting impediments'.<sup>68</sup> However, he argues that the lack of coverage of hardship in art 79 is an internal gap under the harmonisation rationale, reasoning that it would prevent the entry of divergent national law views on the subject.<sup>69</sup>

However, the case law has narrowly construed art 79 and courts have not provided exemptions due to hardship. For example, in a Dutch case, a seller claimed an exemption because a frost had prevented the delivery of the contract amount of mandarin

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<sup>65</sup> However, the notion of hardship is captured within the American Uniform Commercial Code under the doctrine of impracticability, see UCC § 2-615 (2002). In practice, the courts rarely use the excuse of impracticability to relieve a party from its contractual obligations.

<sup>66</sup> See Bürgerliches Gesetzbuch [Civil Code] (Germany) §§ 275, 313; See also L. DiMatteo, 'Contractual Excuse Under the CISG: Impediment, Hardship, and the Excuse Doctrines' (2015) 27 *Pace International Law Review* 258, 261.

<sup>67</sup> DiMatteo, above n 66, 279.

<sup>68</sup> Ibid 280.

<sup>69</sup> Schlechtriem, above n 57, 100.

oranges.<sup>70</sup> Instead of using general principles, the Court looked to French and Swiss law to find a possible hardship. The Court then applied the good faith principle, arguing that the buyer should have accepted a lesser quality substitute, and avoided the key issue of whether the changed circumstances amounted to an impediment under art 79.

The Belgian Supreme Court in the *Scaform International* case rejected the lower court's decision that the issue of hardship was an external gap.<sup>71</sup> The Court structured an argument that the general principles of art 7, especially the duty of good faith, supported the inclusion of hardship within the scope of art 79. However, this decision can be criticised as placing a civil law perspective on the issue of the scope of impediment, instead of making an autonomous interpretation as required under art 7. First, the Court did not make a convincing argument that the notion of impediment goes beyond impossibility to mere hardship. Second, the notion of hardship as espoused by the court was aligned with the German civil law concept of 'changed circumstances' and not discussed within a neutral, international perspective.

Third, the Court referenced the Principles of International Commercial Contracts ('PICC')<sup>72</sup> to support the argument that

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<sup>70</sup> CA Colmar Cour d'appel (French Appellate Court) Case No 1 A 199800359, 12 June 2001; See Tribunale Civile di Monza (District Court Monza), RG 4267/88, 14 January 1993.

<sup>71</sup> Hof van Cassatie [Court of Cessation — Supreme Court], C.07.0289.N, 19 June 2009 June 19, 2009 ('*Scaform International* case').

<sup>72</sup> '[T]o fill the gaps in a uniform manner adhesion, should be sought with the general principles which govern the law of international trade. Under these principles, as incorporated *inter alia* in the



hardship can be viewed as an impediment under art 79. In fact, the Court went further by suggesting that the PICC can be directly used to interpret art 79. This is problematic because the PICC contains both an excuse or impossibility provision and a hardship provision, while the CISG possesses the single provision of impediment.<sup>73</sup> The *Scaform International* case fails to live up to the mandate of autonomous interpretation of CISG provisions by borrowing concepts of civil law countries — hardship, contractual disequilibrium, and the right-duty of renegotiation. Despite the findings in *Scaform International*, art 79 cases have focused on the more traditional excuse of impossibility.

If the restrictive or narrow view of art 79, as espoused in the Secretariat Commentary and sustained by existing case law, remains true, then it becomes the oddest article in the CISG. A major rationale in support of a more expansive view of art 79 is the duty of good faith in art 7. However, that general principle is another example of civil law jurists and scholars bootstrapping a duty of good faith in the performance and enforcement of contracts, political reasons aside, to the clear mandate of art 7 that good faith is restricted to the interpretation of CISG provisions. By neglecting the literal meaning of art 7, a general duty of good faith in sales contracts was smuggled into the CISG under rationales, including its usage in trade or its ancillary application to the reasonableness standard found throughout the CISG.

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Unidroit Principles of International Commercial Contracts, the party who invokes changed circumstances that fundamentally disturb the contractual balance is also entitled to claim the renegotiation of the contract'.

<sup>73</sup> DiMatteo, above n 66, 284.



In the end, whether it is a legitimate interpretation or not, a general duty of good faith has been ensconced in CISG jurisprudence. Eventually, as the CISG expands its reach, the underlying principle of good faith should encourage a wider use of art 79, especially when parties overreach and risks are unintentionally misallocated and where real substantive injustices dictate acts of judicial and arbitral discretion. Article 79 has a long way to go to be interpreted as providing exemptions in cases of hardship. In practice, the malleability of phrases, such as 'impediment', 'foreseeability' and 'beyond a party's control' have been used to render art 79 a most restrictive excuse doctrine.

A more liberal interpretation of art 79 may include recognising exemptions for severe hardship, as supported by the CISG Advisory Council.<sup>74</sup> In the words of Professor Ulrich Magnus, 'although not often granted, the CISG's exemption provision is always theoretically applicable'.<sup>75</sup> However, the approach that a provision of the CISG is 'always theoretically applicable' is a slippery slope that pro-CISG scholars, courts and the CISG Advisory Council have fallen prey to. The idealistic quest for the harmonisation of international sales law must not overreach to arbitrarily expand what is clearly a non-comprehensive sales law instrument. The non-comprehensiveness of the CISG must be recognised and respected.

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<sup>74</sup> CISG-AC Opinion No. 7, Exemption of Liability for Damages under Article 79 of the CISG, Rapporteur: Professor Alejandro M. Garro, Columbia University School of Law, New York, NY, USA. Adopted by the CISG-AC at its 11th meeting in Wuhan, People's Republic of China, on 12 October 2007.

<sup>75</sup> Ulrich Magnus, 'Remedies: Damages, Price Reduction, Avoidance, Mitigation, and Preservation' in L DiMatteo (ed), *International Sales Law: A Global Challenge* (Cambridge University Press, 2014) 257, 261.

In comparing the gaps of arts 78 and 79, there is greater plausibility in arguing that the rate of interest is an internal gap. This is given that there is an explicit provision on interest within the CISG. Tying hardship to the concept of impediment is much less plausible given the different meanings applied to the concepts of impossibility or *force majeure* and hardship. It is less implausible for the German courts to argue subjective impossibility is within the notion of impediment. However, an autonomous interpretation should lead them to the recognition that subjective impossibility is unique to German law, while objective impossibility, event or obstacle external to the parties is the core concept of national excuse doctrines and most *force majeure* clauses. The issue of the allocation of the burden of proof as being within the CISG also fails the plausibility test. There is no express provision like 'interest' in art 78 or 'impediment' in art 79 to rationalise it as other than an external gap.

Again, the harmonisation and substantive or substantive-like rationales for the inclusion of the burden of proof are extenuated at best. Article 4 of the CISG states that the 'CISG governs only the formation of the contract of sale and the rights and obligations of the seller and the buyer'. Thus, the strongest case for the inclusion of the burden of proof within the scope of the CISG is that it is a rule of substantive law, which is clearly not the case. An alternative argument is that it is of such importance that it is substantive-like. If it is so important as to be closely linked to substantive law, why was an express provision dealing with the burden of proof not incorporated into the CISG? The arbitral panel in *Maaden v*

*Thyssen*<sup>76</sup> asserted that if it was part of substantive law it is an external gap to be determined by 'rules of private international law',<sup>77</sup> and if it is part of procedural law, then it would be determined by the *lex fori*.<sup>78</sup>

A further danger of including the burden of proof within the scope of the CISG is that the next logical step would be to argue that it should be extended to include the standard of proof. Unlike the allocation of the burden of proof, whose allocation is relatively consistent across legal systems, the standard of proof varies greatly across legal systems. For example, the standard of proof is similar in nature between the US ('preponderance of the evidence') and the United Kingdom ('balance of probabilities'), but vastly different in Germany ('conviction close to certainty so that reasonable doubts are silenced') and Italy ('facts unproven even if possible or likely'). Thus, the possibility of a court bringing the issue of standard of proof within the scope of the CISG would be problematic. Alternatively stated, if harmonisation is the objective, then an autonomous interpretation of the standard of proof would be much more important than the allocation of the burden of proof. However, just like the burden of proof, that type of harmonisation is not as sustainable as the simple filling of an internal gap in the CISG.

Furthermore, how does the implied allocation of the burden of proof relate to a choice of law or forum selection clause? The insertion of choice of law or forum selection clauses implies that the parties agree to the procedural rules of the chosen law or court. Would the

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<sup>76</sup> *Maaden v Thyssen*, Court of Arbitration of the International Chamber of Commerce, Case No 6653 of 1993, 26 March 1993.

<sup>77</sup> *Ibid.*

<sup>78</sup> *Ibid.*

choice of law or forum be considered a derogation of the so-called CISG implied allocation of burden of proof rule? Possibly not, because such clauses do not expressly derogate from this implied burden of proof allocation. This is another example of the problem created by bringing the allocation of the burden of proof within the scope of the CISG. One final point is that allocation of the burden of proof is a much more nuanced issue than a simple allocation would imply, since there is variation of national rules on presumptions and exceptions related to the shifting of the burden of proof. This may again be rationalised by the notion of harmonisation, but in fact the complexity of burden of proof issues would leave a sordid mess for courts to autonomously interpret when presumptions are to be given or burdens shifted. This is simply too far afield and best left to domestic law where it belongs. In sum, there is at least a persuasive argument that the allocation of the burden of proof is a topic implicitly within the scope of the CISG.

#### IV ATTORNEY FEES: INCLUDED (ANDRÉ JANSSEN)

The question of whether the recovery of attorney's fees is covered by the CISG is important because domestic civil procedural laws on the topic vary worldwide. In the first place, it matters in the US and the few countries that follow the so-called American Rule. As a default rule, it requires each party to a legal dispute to bear their own legal costs. The winning party pays its own legal costs and cannot collect those costs as damages. In such legal systems, the question of whether attorney's fees can be considered as damages under the CISG is an important one as it would pre-empt the application of the American Rule. The majority of common and civil law countries, including Germany (civil) and Australia (common), have procedural rules that abide by the 'costs-follow-the-event' principle, also known as the loser pays rule, which allows the winning party to recover at least a portion of its legal costs as damages.

Thus, whether the CISG is applicable to the issue of the recoverability of legal costs would make a substantial difference in damages. If legal fees are within the scope of the CISG, whether or not they are recoverable would pre-empt the application of the loser pays rule, just as it would the American Rule. First, if it is determined that legal fees are within the scope of the CISG and are not recoverable as damages, then the normal damages awarded under the loser pays rule would be diminished. Second, if the case is within the scope of the CISG and costs are recoverable, then the exact amount recoverable would be determined by an autonomous interpretation unbiased from the nuances of the loser pays rule across national legal systems.

The uncertainty of the recoverability of legal costs as damages under art 74 of the CISG is partially due to a division among judges and scholars as to whether they are recoverable, as well as the diverging legal arguments used to support the different views. Arguably, the majority of scholars<sup>79</sup> hold the view espoused in Opinion No 6 of the CISG Advisory Council, that attorney's fees are not recoverable under the CISG and are purely a procedural question governed by national civil procedure laws.<sup>80</sup> However, several scholars have asserted that attorney's fees are recoverable as part of the damages allowed under art 74 of the CISG.<sup>81</sup>

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<sup>79</sup> See I Schwenzer, 'Rechtsverfolgungskosten als Schaden?' in P Gauch, F Werro and P Pichonnaz (eds), *Mélanges en l'honneur de Pierre Tercier* (Schulthess, 2008) 417.

<sup>80</sup> CISG Advisory Council Opinion No 6: Calculation of Damages Under CISG Article 74 (Rapporteur: Professor John Y Gotanda).

<sup>81</sup> See B Piltz, 'Litigation Costs as Reimbursable Damages,' in L DiMatteo (ed), *International Sales Law: A Global Challenge* (Cambridge University Press, 2014) 286.

The courts have failed to find a common or uniform approach on the matter and are unlikely to do so in the immediate future. For example, some civil law countries that follow the loser pays rule, such as Belgium,<sup>82</sup> Germany,<sup>83</sup> the Netherlands<sup>84</sup> and Switzerland<sup>85</sup> have interpreted art 74 to include the collection of attorney's fees as reimbursable damages. In the opposite direction, US courts, with the exception of the District Court decision in the *Zapata* case<sup>86</sup> (subsequently reversed on appeal), have held that whether or not attorney's fees are recoverable is a purely national issue and outside

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<sup>82</sup> Rechtbank van Koophandel te Hasselt (Commercial Court Hasselt), CISG-online No 1107, 12 January 2006.

<sup>83</sup> Landgericht München (District Court München), CISG-online No 1998, 18 May 2009; Landgericht Potsdam (District Court Potsdam) CISG-online No 1979, 7 April 2009; Landgericht Hamburg (District Court Hamburg), CISG-online No 1999, 17 February 2009; Oberlandesgericht Köln (Provincial Appellate Court Cologne), CISG-online No 1218, 3 April 2006; Oberlandesgericht Düsseldorf (Provincial Appellate Court Düsseldorf), CISG-online No 916, 22 July 2004; Oberlandesgericht Düsseldorf (Provincial Appellate Court Düsseldorf), CISG-online No 201, 11 July 1996.

<sup>84</sup> Rechtbank Rotterdam (District Court Rotterdam), CISG-online No 2098, 17 March 2010; Rechtbank Rotterdam (District Court Rotterdam), CISG-online No 1815, 21 January 2009; Hof's-Hertogenbosch (Hof District Appeal Court), CISG-online No 550, 2 October 1997.

<sup>85</sup> Kantonsgericht Zug (District Court Zug), CISG-online No 2024, 27 November 2008; Handelsgericht des Kantons Aargau (Commercial Court Aargau), CISG-online No 418, 19 December 1997.

<sup>86</sup> *Zapata Hermanos Sucesores, SA v Hearthside Baking Co Inc d/b/a Maurice Lenell Cooky Co*, 155 F Supp 2d 969 (ND Ill, 2001); Later overruled by *Zapata Hermanos Sucesores, SA v Hearthside Baking Co Inc d/b/a Maurice Lenell Cooky Co*, 313 F 3d 385 (7<sup>th</sup> Cir, 2002).

the scope of the CISG.<sup>87</sup> However, the US District Court of New York in the *Stemcor* case expressed doubts, stating that 'Article 74 ... does not unambiguously bar recovery of legal fees and costs'.<sup>88</sup> It is yet to be seen whether the *Stemcor* decision has any impact on future cases involving the application of the CISG by US courts.

*A First Argument for the Recoverability of Attorney's Fees Under the CISG: Plain Meaning of the CISG*

To find the correct answer to the question of whether attorney's fees are recoverable under the CISG as damages requires an interpretation of the wording of the CISG. Article 4(1) states that '(t)his Convention governs (only) the formation of the contract of sale and the rights and obligations of the seller and the buyer arising from such a contract'.<sup>89</sup> There is no specific exclusion of the legal costs issue in art 4(2) or elsewhere in the CISG. Article 74 states that 'damages for breach of contract by one party consists of a sum equal to the loss, including loss of profit, suffered by the other party as a consequence of the breach'.<sup>90</sup>

Reading art 4 in conjunction with art 74, using the plain meaning of the language, the most plausible argument is that attorney's fees should be recoverable under the full compensation principle ('sum equal to the loss') of art 74. In addition, there is nothing further in

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<sup>87</sup> See only *Zapata Hermanos Sucesores, SA v Hearthside Baking Co Inc d/b/a Maurice Lenell Cooky Co*, 313 F 3d 385 (7<sup>th</sup> Cir, 2002); *Ajax Tool Works Inc v Can-Eng Manufacturing Ltd* (ND Ill, 2003).

<sup>88</sup> *Stemcor USA Inc v Miracero, SA de CV*, 66 F Supp 3d 394 (SD NY, 2014)

<sup>89</sup> CISG, above n 17, art 4(1).

<sup>90</sup> Ibid art 74.



the CISG or official CISG documents that limits the phrase 'sum equal to the loss'. Anecdotally, to emphasise the plain meaning approach, the attorney's fees problem was posed to 50 law students in an International Sales Law class. The students were asked to read the texts of art 4 and 74 and give their opinions on whether the recoverability of attorney's fees is within the scope of the CISG. All 50 students answered that the wording of the CISG unambiguously supported the recoverability of legal costs as damages.

*B Second Argument for the Recoverability of Attorney's Fees Under the CISG: The Principle of Full Compensation*

One of the fundamental principles on which the CISG is based is the principle of full compensation for all losses.<sup>91</sup> There are only two requirements which need to be fulfilled in order to recover damages related to a breach of contract:<sup>92</sup> (1) proof of damages; and (2) that those damages were a foreseeable consequence of the breach at the time of the conclusion of the contract.<sup>93</sup> The incurrence of legal costs due to a breach of contract is foreseeable and a direct consequence of the breach under art 74. Placing the recoverability of attorney's fees outside the scope of the CISG would interfere with the underlying principle of full compensation. Only an express exclusion of legal costs as recoverable damages can pre-empt the application of fundamental principles, such as full compensation for any loss.<sup>94</sup>

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<sup>91</sup> Ibid arts 45, 61, 74.

<sup>92</sup> Ibid arts 45, 61.

<sup>93</sup> Ibid art 74.

<sup>94</sup> See Piltz, above n 81, 293.

### C Summary

This contribution has demonstrated that there are good arguments — the plain meaning interpretation of the CISG and the principle of full compensation — for the recoverability of attorney's fees as damages under art 74 CISG. However, considering the diverging case law and views in the legal literature, it is obvious that this important practical issue is far from being resolved. The failure of the courts to apply CISG interpretive methodology properly, by applying general principles of uniformly to interpret the CISG on this subject is unsettling. Best practice suggests that the issue of the recoverability of attorney's fees should be expressly dealt with in the contract.<sup>95</sup>

### V ATTORNEY FEES: NOT INCLUDED (CAMILLA BAASCH ANDERSEN)

It is fascinating, to a (slowly) ageing academic, how fashion has an ebb and flow: beehive hair, short skirts, platform shoes, even shoulder pads. Eventually, everything comes back into fashion. So it is with legal issues under the CISG as well it seems, as we now find ourselves revisiting an old classic: should attorney's fees be recoverable as damages under art 74? The topic is in fashion again.<sup>96</sup>

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<sup>95</sup> Although, it should be noted that 'attorney fee clauses' are routinely disregarded under the American rule. In the US, they are considered as pre-empted by the rules of civil procedure or as illegal penalties.

<sup>96</sup> This issue was covered extensively in academic literature around the time of the Zapata case. See, amongst others (some more recently): John Felemegas, 'The Award of Counsel's Fees under Article 74 CISG, in *Zapata Hermanos Sucesores v Hearthside Baking Co* (2002) 6 *Vindobona Journal of International Commercial Law and Arbitration* 30–39; Bruno Zeller 'Interpretation of Article 74 — *Zapata Hermanos v Hearthside Baking* — Where Next?' (2004) 1

Ah, how I remember with fondness the days of the *Zapata v Hermanos* case,<sup>97</sup> how we toiled over that *Amicus Curiae*<sup>98</sup> — oh, how we lamented for the bakery and how we sulked when the *Certiorari* was denied.<sup>99</sup> Ah yes, what a missed opportunity for the US Supreme Court. However, I will get back to that ... Now let's get to the point; why should art 74 not include attorney's fees?

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*Nordic Journal of Commercial Law* 1, 1–11; Norman J Shachoy symposium, 'Attorneys' Fees: Last Ditch Stand?' in 'Assessing the CISG and Other International Endeavors to Unify International Contract Law: Has the Time Come for a New Global Initiative to Harmonize and Unify International Trade?' (2013) 58 *Villanova Law Review* 4, 761–71; Milena Dordevic, 'Mexican Revolution' in Vasiljevic et al (eds), *CISG Jurisprudence and Case-Law: Attorneys' Fees as (Non) Recoverable Loss for Breach of Contract*, in *Private Law and Law Reform in South East Europe: Liber Amorcorum Christa Jessel-Holst* (Faculty of Law, University of Belgrade, 2010) 199; Harry Flechtner, 'Recovering Attorneys Fees as Damages under the UN Sales Convention: A Case Study on New International Practice and the Role of Foreign Case Law in CISG Jurisprudence, with comments on *Zapata Hermanos Sucesores SA v Hearthside Baking Co* (2002) 22 *Northwestern Journal of International Law & Business* 121; Joseph Lookofsky, 'Comments on *Zapata Hermanos v Hearthside Baking*' (2002) 6 *Vindobona Journal of International Commercial Arbitration* 27; Joseph Lookofsky, *Viva Zapata! CISG Article 74 and the American Rule* (8 January 2003) Pace Law School Institute of International Commercial Law <<http://www.cisg.law.pace.edu/cisg/biblio/lookofsky7.html>>.

<sup>97</sup> *Zapata Hermanos Sucesores, SA v Hearthside Baking Co Inc d/b/a Maurice Lenell Cooky Co*, 313 F 3d 385 (7<sup>th</sup> Cir, 2002).

<sup>98</sup> *Ibid.*

<sup>99</sup> *Ibid.*

*A Right but Wrong*

My learned colleague Professor Jansen has promoted the argument in favour of applying art 74 to attorney's fees and — although I am representing the opposing view — allow me to confess that from a personal and subjective perspective, as a legal theorist and a civil lawyer: I agree! Surprise ... art 74 is a no-fault full compensation rule, and as such it seems logical to include attorney's fees.

However — and here I reverse my opinion 180 degrees — my subjective opinion on the application of a no-fault full compensation rule is irrelevant. What is relevant is that this rule is a shared international rule, and my subjective perspective is that of a civil lawyer, to whom the procedural and substantive distinction is largely immaterial in the context of full compensation.<sup>100</sup> Article 7 requires this shared rule to apply with 'international character' and 'uniformity'.<sup>101</sup> Experience tells us, quite clearly, that this uniformity is not achieved if we try to force States to submit to practices which are contrary to their own legal systems.<sup>102</sup> Therefore, let us look at this issue from a transnational comparative law perspective.

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<sup>100</sup> As of 3<sup>rd</sup> March 2016 UNCITRAL reports that 84 States have adopted the CISG, see UNCITRAL, *Status Unites Nations Convention on Contracts for the International Sales of Goods (Vienna, 1980)* (2016).

<sup>101</sup> CISG, above n 17, art 7(1) prescribes that: 'In the interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade'.

<sup>102</sup> See generally Camilla Andersen, *Uniform Application of the International Sales Law* (Kluwer Law International, 2007).

*B Homeward Trends in Cases and in Scholarships*

All the reported cases where art 74 has been stretched to include lawyers' fees are — to my knowledge — from civil law jurisdictions which embrace the loser pays doctrine, and do not distinguish the lawyers' fees too much from the substantive compensation elements. However, to the common lawyer, especially the (on this occasion, misunderstood) Americans who do not embrace 'loser pays', this issue is so blatantly one of procedure and not subject to the substantive regulation of the CISG. I recall my former mentor Lookofsky debating the issue with passion, referring to the judge which was swayed by the civil law approach as 'soft in the head' (I am hoping memory serves me here, and that I am not sued) and revering Possner's reversal of the Zapata findings. Academics do not get much more passionate than that ... so where does that leave us?

On the one hand, broadly speaking, we have civil lawyers, scholars and judges who are happy to stretch art 74 to lawyers' fees in pursuit of a uniform approach — because it does not shake their world too much, and seems like a sound pursuit of a lofty goal. They use art 74 analogously to the procedural issue of lawyers' fees because they do not distinguish as religiously between the two and because using art 74 is convenient due to their procedural 'loser pays' rule under which they would have awarded those damages anyway. On the other hand, we have a set of very disturbed common law lawyers, scholars and judges to whom this is simply wrong. Some of the more internationalised ones are willing to entertain the notion that this should be compromised on the altar of uniformity. However, the reality is that — especially on the benches — these are a very small minority.

### C Safeguarding Uniformity

So we cannot include lawyers' fees under art 74. To stretch this uniform substantive regulation into the area of procedure is fine if all players agree to do it to pursue uniformity across borders. However, to do it only in some parts, while others refuse due to a different legal classification and legal culture in the area, is folly. Let the civil lawyers continue to award damages under art 74 if they must — but let it be clear that they are using it analogously to embrace full compensation in a procedural field. Let it be clear that we are not — and cannot — force our common law cousins to do it. So to produce certainty and predictability we must advise our clients that this issue is outside the scope of the CISG. To advise otherwise, and to prescribe otherwise in a scholarly context, is to sow uncertainty and unpredictability unnecessarily.

So, back to the *certiorari* and the *Amicus* — did we toil in vain? No, we did not. I still lament the fact that the US Supreme Court did not feel inclined to rule on this issue. What we needed at the time was a strong judicial voice considering the uniformity issues raised in the *certiorari* alongside the civil law cases citing, deciding, in principle, that this is procedural and that the US does not wish to extend art 74 as far as others have done. Posner's reversal in the Court of Appeal in *Zapata* centred on foreseeability and not the inclusion issue. The *certiorari* was never about wanting US courts to side with the German and Italian case law, but to at least consider the issue of uniform application and make a deliberate decision in the light of that. I can almost see Al Kitzner smiling down on me from his cloud as I write this. It was a shame that the US Supreme Court missed this opportunity to raise awareness of the application of the international character of the CISG while making a clear decision on the issue of inclusion — many other US issues could have been averted.

However then — a silver lining — perhaps if the *certiorari* had not been denied, we would have had a different question for the Vis problem this year? I rest my case and look forward to ensuing discussions and dissenting opinions.

## VI CONCLUSION

The above discussion proves two widely accepted findings when dealing both with international transactions and the harmonisation of the law applicable to them. First, it is crucial to define the terms used precisely and to explain what is meant by them. The same term may often be used with a different scope in different jurisdictions. Without a precise terminology which clearly distinguishes, for example, between the various aspects of the burden of proof, the standard of proof and the means to meet such standard, there is a high risk that apples will be compared to pears. Second, the tendency to fall back on domestic concepts to interpret broad terms under the CISG will probably continue until case law across various jurisdictions has developed a commonly acknowledged meaning for such terms. That applies *a fortiori* when it comes to filling gaps in the CISG either by the general principles underlying the CISG or by reference to national law. Thus, it can only be hoped that the highest courts in every jurisdiction take every chance to contribute to the development of such a commonly accepted interpretation.



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