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## Overview of Recent Italian Court Decisions on the CISG


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INTERNATIONAL AND EUROPEAN COMMERCIAL AND COMPANY LAW

# Overview of Recent Italian Court Decisions on the CISG

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## I. Introduction

The entry into force of the 1980 Vienna Convention on the International Sale of Goods in Italy dates back to 1988[1]. Since then, the Convention has witnessed a limited number of judicial applications in Italian courts,[2] in spite of the large number of international sales controversies throughout the world which involve Italian parties.[3] Considerable lack of knowledge of international instruments on the part of Italian legal practitioners also played a key role in determining this shortage of case-law concerning the CISG. However, it is encouraging to see that recently there begins to exist some case law even in Italy. In this respect, two Italian court decisions have to be mentioned, rendered respectively by the Tribunale di Pavia[4] and by the Tribunale di Vigevano.[5] These cases are particularly significant, not only because the courts applied the Convention correctly, but also, and above all, because in doing so, they have referred to foreign case-law.[6]

Unfortunately, in another recent case, a different court, the Italian Supreme Court,[7] did not refer to foreign case-law, thus reaching a conclusion contrary to that to be found in all other countries. Indeed, contrary to foreign case law, it held that the Convention was applicable to distribution agreements. Although foreign court decisions are not binding,[8] as expressly stated by the decisions of the Tribunale di Pavia and that of Vigevano, they have to be taken into account since they constitute a useful means to the need to promote uniformity referred to in Article 7(1).

The two recent Italian court decisions are highly significant for Italian practitioners since they have (correctly) addressed several of the most important issues under the CISG, in particular, the issues of the applicability by virtue of private international law rules, the exclusion of the Convention, the timeliness of the notice of non-conformity, the issue of interest rates, as well as the allocation of the burden of proof.

## II. Applicability of the Convention by Means of the Rules of Private International Law Pursuant to Article 1(1)(b)

As far as the issue of applicability is concerned, the Tribunale di Pavia had to determine which law should govern the contract of sales concluded between an Italian party and a Greek party. Although the parties had their places of business in two different States, the CISG could not be directly applied by virtue of the first criterion provided by Article 1(1)(a), since Greece[9] was not a party to the Convention at the time of the conclusion of the contract. Hence, the Court had to look into the criterion of Article 1(1)(b), according to which the CISG is "indirectly"[10] applicable whenever the rules of private international law of the forum lead to the law of a Contracting State. The Court chose not to determine the applicable law

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1 The CISG was ratified in Italy on 11 December 1985 and entered into force on 1 January 1988.

2 The following Italian decisions have applied the CISG: Cass. Sez. Un. 24 October 1988, Foro Italiano 1989, I, at 2878 et seq.; Pretura di Parma-Fidenza (I), 24 November 1989, Unilex; Corte Cost., 19 November 1992, Giust. civ. 1994, at 314 et seq.; Trib. Monza (I), 14 January 1993, Foro it. 1994, I, at 916 et seq.; App. Genova (I), 25 March 1995, Diritto marittimo 1995, at 1059 et seq.; Cass. Sez. Un. (I), 9 June 1995, Foro pad. 1997, I, at 2 et seq.; Trib. Cuneo,(I) 31 January 1996, Unilex; Pretura Torino (I), 30 January 1997, Giur. it. 1998, at 982 et seq.; Trib. Verona (I), 19 December 1997, Riv. ver. giur. ec. impr., 1998, at 22 et seq.; App. Milano (I), 20 March 1998, Riv. dir. int. priv. proc. 1999, at 112 et seq.; Cass. Sez. Un. (I), 14 December 1999, Giust. civ. 2000, at 2333 et seq.

3 For a list of cases dealing with the CISG has been applied, with an express indication of the parties nationality, see *Will*, Twenty Years of International Sales Law Under the CISG: International Bibliography and Case Law Digest (1980-2000), The Hague (NL), 2000.

4 See, Trib. Pavia (I), 29 December 1999, in this issue pp. 244 et seq. and also Corr. giur. 2000, at 932 et seq., with a comment on the decision by *Ferrari*, ibid., at 933 et seq.

5 See Trib. Vigevano (I), 12 July 2000, EuLF 2000/01 (E), at 93 et seq.

6 Whereas the Tribunale di Pavia limited itself to quote a Swiss Court decision written in Italian, the Tribunale di Vigevano cited an impressive number (40) of foreign cases, both judicial and arbitral, written in many different languages. One should note that before these two decisions, only another Italian court had quoted foreign case law (a Swiss case and a German case) when applying the CISG, see Tribunale di Cuneo (I), 31 January 1996, Unilex. For a comment on this decision, see *Bonell/Liguori*, The U.N. Convention on the International Sale of Goods: A Critical Analysis of Current International Case Law, Unif. L. Rev. 1997, at 385 et seq.

7 See Italian Supreme Court, 14 December 1999, EuLF 2000/01 (E), at 11 et seq.; for a critical comment to this ruling, see, *Ferrari*, Il contratto di distribuzione quale contratto (non) contemplato dalla Convenzione di Vienna, ibid., at 7 et seq.

8 It must be noted, however, that, according to a minority view, foreign case-law should be given binding force; there is even one author who advocates the creation of a "supranational stare decisis". For this view see *Dimatteo*, An International Contract Law Formula: The Informality of International Business Transactions Plus the Internationalisation of Contract Law Equals Unexpected Contractual Liability, Syracuse J. Int'l L. & Com. 1997, at 79.

9 The CISG entered into force in Greece only on 1 February 1999.

10 For a detailed discussion of the direct and indirect criteria of application and an extensive reference to case-law, see *inter alia*, *Ferrari*, International Sale of Goods, Basel/Brussels (CH/B), 1999, 56-86; *idem,* La vendita internazionale, applicabilitá ed applicazioni della Convenzione di Vienna del 1980, 1997, at 57-90; *Bell*, The Sphere of Application of the Vienna Convention on Contracts for the International Sale of Goods, Pace Int'l L. Rev. 8 1996, at 237 et seq.; *Siehr*, Der Internationale Anwendungsbereich des UN-Kaufrechts, RabelsZ 1988, at 587 et seq.

pursuant to the 1980 EEC Convention on the Law Applicable to Contractual Obligations (hereinafter 1980 EEC Convention), as wrongly suggested by the claimant, but rather to resort to the 1955 Hague Convention on the Law applicable to Contractual Obligations[11] (hereinafter 1955 Hague Convention). One must bear in mind that the coming into force of the 1980 EEC Convention in a particular State does not mean that the issue of determining which law should be applicable to international sales contracts is necessarily to be solved by resorting to its provisions. In this regard, legal practitioners should be aware of the existence of Article 21 of the 1980 EEC Convention, stating that the Convention "shall not prejudice the application of international Conventions to which a Contracting State is, or becomes, a party". Thus, a pre-existing, more specific Convention will not be superseded by the 1980 EEC Convention. This is the case of the 1955 Hague Convention, which is, therefore, still to be used even in countries[12] that entered into force the 1980 EEC Convention, such as Italy[13] and France.[14] Considering that according to Article 3 of the 1955 Hague Convention the law governing an international sales contract is that in force in the country of the seller,[15] the Italian law was held applicable and, thus, the CISG.

### III. Implicit Exclusion of the CISG

The Tribunale di Vigevano dealt with an issue closely related to that of applicability, i.e., the parties' possibility to exclude the Convention from governing their contract (Article 6). It is common knowledge that Article 6 of the CISG grants the parties the right to waive the application of the Convention. The parties may do so, for example, by adopting a so called "opting out" clause in their contract, and this would amount to an explicit exclusion of the CISG. Whereas an express declaration to derogate from the Convention's provisions has always been considered admissible, the same is not true[16] as far as implicit exclusions are concerned. There is, yet, a recent trend in case-law[17] to allow the parties to exclude the Convention implicitly.

It is rather problematic, however, to determine whether an implicit exclusion was made. The Tribunale di Vigevano faced this issue, for it had to decide whether a plea entirely based on Italian domestic law (despite the fact that all the criteria for the applicability of the CISG were met), would constitute a sufficient indication of the parties' intention to exclude the application of the CISG under Article 6. The Court correctly held, and in doing so it referred to foreign case-law,[18] that the parties' mere reference to the domestic non-uniform law of one specific country could not be considered *per se* an exclusion of the Vienna Sales Convention. In order for the parties' reference solely to domestic law of a particular country to amount to an exclusion, another requirement has to be met. The parties must be aware of the CISG's applicability to their transaction. The Court found that the parties based their arguments on a specific domestic law simply because they ignored the existence of the Convention, in other words they were unaware of the Convention's applicability. On the basis of the principle *iura novit curia*, the Court decided which law to apply. Finally, it applied the CISG.

### IV. Notice of Non-Conformity "within a reasonable time"

Having found that the CISG was applicable, the Tribunale di Vigevano moved on to determine whether the notice of non conformity by the buyer met the requirements set forth in Article 39. In other words, the Court had to ascertain whether the buyer's notice was timely. This was important, since the failure to do so would have deprived him of his right to rely on the remedies to which he was entitled under the Convention in case of a lack of conformity, such as the right to claim

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11 For the text of this Convention, see the Hague Conference web-site at www.jus.uio.no/lm/hcpil.applicable.law.sog.convention.1955/doc.html.

12 The following countries have implemented the 1955 Hague Convention on the Law Applicable to Contractual Obligations: Belgium, Denmark, Finland, France, Italy, Luxembourg, Netherlands, Norway, Sweden and Spain. Note, however, that Belgium has denounced the Convention.

13 For Italian cases applying the 1955 Hague Convention as opposed to the 1980 EEC Convention, see App. Milano (I), 20 March 1998, Rivista di diritto internazionale privato e processuale 1998, at 170 et seq.

14 For French cases applying the 1955 Hague Convention as opposed to the 1980 EEC Convention, see most recently, Appel Colmar (F), 24 October 2000, in: CISG France at www.jura.uni-sb.de/FBLS/Witz/cisg.htm.

15 One should note, however, that this rule is subject to exceptions. Article 3 of the 1955 Hague Convention also provides in its paragraph 2 that: "(...) a sale shall be governed by the domestic law of the country in which the purchaser has his habitual residence, or in which he has the establishment that has given the order, if the order has been received in such country, whether by the vendor or by his representative, agent or commercial traveller."

16 The Tribunale di Vigevano (I) cited the following cases that held that the CISG could not be implicitly excluded: LG Landshut (D), 5 April 1995 in: CISG Online at www.jura.uni-freiburg.de/ipr1/cisg; Orbisphere Corp. v United States, 726 F. Supp. at 1344, 1990. Note, however, that most legal scholars are in favour of an implicit exclusion. Amongst the others, see *Ferrari* (*supra* note 10), at 150 et seq.; *Schlechtriem*, Commentary on the UN Convention on the International Sale of Goods (CISG), Munich (D), 1998, at 54, stating that: "Although the CISG does not refer expressly to the possibility of implicit derogation, as Article 3 ULIS did, such implicit derogation remains possible under CISG"; *Witz*, L'exclusion de la Convention des Nations Unies sur le contrats de vente internationale de marchandises par la volonté des parties (Convention de Vienne du 11 avril 1980), Recueil Dalloz Sirey 1990, at 107.

17 The following cases were cited by the Tribunale di Vigevano (I): OLG Munich (D), 9 July 1997, Forum International (E) 1997, at 158 et seq.; LG Munich (D), 29 May 1995, NJW 1996, at 401 et seq.; OLG Celle (D), 24 May 1995, in: CISG Online www.jura.uni-freiburg.de/ipr1/cisg.

18 The following decisions were reported in support of the Court's argument: Cour de Cassation (F), 17 December 1996, Revue critique de droit international privé 1997, at 72 et seq.; LG Dusseldorf (D), 11 October 1995 in: CISG Online www.jura.uni-freiburg.de/ipr1/cisg, Arbitral Court of the ICC, award No. 7565, in: ICC International Court of Arbitration Bulletin, November 1995, at 64 et seq.; see also BGH, 23 July 1997, NJW 1997, at 3309 et seq.; OLG Munich (D), 8 February 1995, Unilex. The Court also referred to cases in which the opposite view was held: BG Weinfeld (CH), 23 November 1998, Schweizerische Zeitschrift für internationales und europäisches Recht 1999, at 198; Appel Colmar (F), 26 September 1995, in: www.witz.jura.uni-sb.de/CISG/decisions/260995.htm; see also Arbitral Tribunal of Florence (I), 19 April 1994, Dir. comm. int. 1994, at 862, where it was held that the wording of a contractual clause stating that the contract was to be governed exclusively by Italian law amounted to an implicit exclusion of the CISG.

damages (Articles 45(1) lit. b) and 74-77), to require specific performance by the seller (Article 46), to avoid the contract (Article 49) and to reduce the price (Article 50). The Tribunale di Vigevano's starting point was that the period of notice ("reasonable time") should be regarded as a "general clause".[19] Thus, in determining what constitutes a "reasonable time", courts are required to take into account all the relevant circumstances of the case.[20] This means that the standards for a timely notice are subject to variations and largely depend on factual elements, such as the nature of the goods. Having this in mind, it is more likely, as the Court pointed out, that, for example, the concept of reasonable time for notice will be calculated in a narrower way if the defective goods are perishable,[21] rather than durable in nature. Another element to be taken into account, as pointed out by the Court, is that of party autonomy. The parties are allowed to fix a specific period of time within which notice has to be given. In the case at hand, however, no such period was established. The Court reached the conclusion that the four-month period which had elapsed before the notice was given could not be deemed reasonable by any means. In its reasoning, the Court made reference to foreign cases[22] where, under similar circumstances, notices of non-conformity had been considered to be late, although the buyer forwarded them to the seller within shorter periods of time (two[23] or three[24] months, or even 25[25] days).

## V. Specificity of Notice of Non-Conformity

Although the Court established that the buyer's notice was late, and therefore the buyer could not rely upon the non-conformity, the Tribunale di Vigevano went on to consider the issue of specificity of the notice.

Before addressing this issue, the Court grasped the occasion to point out that a proper notice by means of Article 39 does not require any specific form; it can also be made orally[26] or by telephone.[27]

With regards to the specificity of the notice, the Italian court held that, since the buyer failed to sufficiently specify the lack of conformity, it had lost its right to rely upon that lack. In fact, it was correctly stressed that a notice merely stating that "the goods have caused problems", or other generic statements of the like[28] do not provide the seller with indications that allow him to cure these defects. It is to enable the seller to choose how to behave that the specificity requirement had been introduced, as mentioned by this Court, as well as by other courts[29] and in the literature.[30]

Moreover, the Tribunale di Vigevano found no reasons to prevent the buyer from losing his right to rely on the non-conformity pursuant to Articles 40 and 44 of the CISG. According to these two provisions, the failure to give proper notice is of no consequence for the buyer, respectively if the seller knew or could not be unaware of the lack of conformity (Article 40), or the buyer had "a reasonable excuse for his failure to give the required notice" (Article 44).

## VI. The Issue of the Rates of Interest on Sums in Arrears

It was up to the Tribunale di Pavia to decide another important issue, that of the rates of interest. This issue has raised a number of questions, due to the laconic wording of Article 78 CISG, which limits itself to attribute to the creditor a general entitlement to interest on sums in arrears. The drafters failed, however, to elaborate on how to determine the rate of this interest. In this regard, one must note that during the Diplomatic conference held in Vienna in 1980 all the attempts[31] to fix the rate of interests were unsuccessful, including that of retaining in the CISG the criterion set forth in Article 83[32] of the 1964 Ulis (Uniform Law on the international Sale of Goods).

Due to the great practical relevance of the issue, many views

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19 For this conclusion, see Pretura di Torino (I), 30 January 1997, Giur. it. 1998, at 982 et seq.

20 For a similar statement, see *Schlechtriem*, Commentary on the UN Convention on the International Sale of Goods (*supra* note 17), at 314, 16.

21 This opinion was expressed also in two other court decisions, respectively a German and a Dutch one, quoted by the Tribunale di Vigevano (I): AG Kehl (D), 6 October 1995, NJW-RR 1996, at 565 et seq.; Rechtbank Zwolle (NL), 5 March 1997, Unilex.

22 See, Dutch Supreme Court, 20 February 1998, Nederlands Juristenblad 1998, at 566 et seq.

23 See, OLG Dusseldorf (D), 10 February 1994, RIW 1995, at 53 et seq.

24 See, Rechtbank Roermond (NL), 6 May 1993, Unilex.

25 See, OLG Dusseldorf (D) 10 February 1994, in: www.jura.uni-freiburg.de/ipr1/cisg; similarly, OLG Karlsruhe (D) 25 June 1997, CLOUT, No. 230, stating that a notice given after 24 days is late and that "for durable goods, notice should be given to the seller within 8 days after the lack of conformity ought to have been discovered."

26 For this conclusion, see *Magnus*, Wiener UN-Kaufrecht (CISG), in: J. von Staudingers Kommentar zum Bürgerlichen Gesetzbuch mit Einführungsgesetz und Nebengesetzen, Berlin (D), 1994, at 322.

27 For this view see also, LG Frankfurt (D), 13 July 1994, NJW-RR 1994, at 1264 et seq.; note, however, that another court held that notice via telephone was not sufficient, see LG Kassel (D), 15 February 1996, NJW-RR 1996, at 1146 et seq.

28 Even a notice merely stating that the shoes purchased "are partially very badly stitched" was considered not specific enough, *see* LG Stuttgart (D), 31 August 1989, IPRax 1990, at 317, cited in: *Ferrari*, International Sale of Goods (*supra* note 10), at 198, where other examples of non-specific statements are reported.

29 A Swiss case and a German case were cited by the Tribunale di Vigevano (I); HG Zürich (CH), 30 November 1998, Schweizerische Zeitschrift für internationales und europäisches Recht 1999, at 185 et seq.; OLG Frankfurt (D), 18January 1994, NJW 1994, at 1013; see also HG Zürich (CH), 21 September 1998, CLOUT note 252, stating that: "fulfilment of the requirement of specificity (...) should put the seller in the position of having been adequately informed as to the lack of conformity. Notification in general terms is therefore not enough, although this requirement should not be exaggerated. A more precise description can be expected from a specialist than from a lay person."

30 See *Ferrari*, International Sale of Goods (*supra* note 10), at 197; *Honnold*, Uniform Law for International Sales under the 1980 United Nations Convention, 1999, 278; *Schlechtriem*, Commentary on the UN Convention (*supra* note 17), at 311-312.

31 For a detailed list of such attempts, see *Ferrari*, International Sale of Goods (*supra* note 10), at 208 et seq.

32 Article 83 of Ulis set forth a pre-established criterion to determine the rate of interest due on sums in arrears. According to this provision, "where the breach of contract consists of delay in the payment of the price, the seller shall in any event be 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 or, if he has no place of business, his habitual residence, plus 1 %".

were expressed on this matter, both in the case-law[33] and in the legal literature.[34] Amongst these views, the prevailing one seems to be that, shared by the Tribunale di Pavia, according to which the determination of the rate of interest on sums in arrears is a gap which falls outside[35] the scope of the Convention. Thus, the rate of interest due on the sums in arrears cannot be fixed by resorting to the general principles of the Convention pursuant to Article 7(2). Being an external gap, the rate is to be filled in accordance with the domestic law applicable to the contract pursuant to the rules of private international law.

Consequently, the Italian Court correctly had recourse to Article 3 of the 1955 Hague Convention[36] and has, thus, applied the Italian law (the law of the seller) to the determination of the rate of interest. In awarding interest to the seller, the Tribunale di Pavia also grasped the occasion to point out that the creditor's entitlement to them did not depend on the issuance of any prior formal notice to the debtor.[37] The interest was, instead, due upon the expiry of the deadline established for the payment of the price.[38]

The Tribunale di Pavia also had to rule on the plaintiff's claim for damages. It noted that, the claim for damages is independent from the claim for interest.

A party's entitlement to interest depends exclusively on the debtor's failure to pay the price within the fixed time, without that party needing to prove a loss. This latter proof (along with that of other requirements, such as foreseeability of loss, causal connection, etc.) is, instead, required when a party seeks recovery of damages under Article 74.

## VII. The Burden of Proof

The Tribunale di Pavia held that there was no evidence to show that the buyer's failure to pay the price within due time had amounted to an additional loss for the plaintiff. The Court also stated, and in doing so it quoted Articles 7(2) and 79 of the CISG, that the burden of proof rested on the plaintiff (damaged party). The Court agreed with the view expressed by some other courts,[39] as well as some legal authors,[40] according to which the issue of the allocation of the burden of proof is a matter falling within the scope of application of the Convention, and therefore "to be settled in conformity with the general principles on which it is based." (Article 7(2)).

The Tribunale di Vigevano as well shared this view, on the grounds that the wording of Article 79 provides for a case of allocation of the burden of proof, and that the issue of the allocation cannot, therefore, be considered as not dealt with in the Convention. In effect, it rejected the contrary view[41] which leaves the question of who should bear the burden of proof to the applicable domestic law.

As far as Article 79 is concerned, it exempts the party that failed to perform its contractual obligation from liability, if that party proves that the failure was due to an impediment beyond its control. In determining which party should bear the burden of proof, the Court made recourse to the general rule to be extracted from this provision, according to which *ei incumbit probatio qui dicit, non qui negat.*[42] Thus, on the basis of this principle, the Tribunale di Vigevano concluded that it was up to the party invoking the remedies for the lack of conformity to bring evidence for it.

Since the buyer had failed to prove that lack of conformity, the Tribunale di Vigevano held that the buyer was not entitled to remedies. Lastly, it should be mentioned that whereas the allocation of the burden of proof is a gap which can be filled by means of the general principles on which the Convention is based, the rules concerning the issue as to how the given proof has to be evaluated are those of the *lex fori.*[43]

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33 In a large number of cases, the courts determined the rate of interest on the grounds of the applicable domestic law by virtue of the rules of private international law of the forum, as also recently stated in LG Darmstadt (D), 9 May 2000, CLOUT, n. 343; KG Zug (CH), 25 February 1999, CLOUT, n. 327; KG Wallis, 30 June 1998, CLOUT, n. 255; Tribunal Cantonal du Valais (F), 29 June 1998, CLOUT, n. 256. On the other hand, however, there are cases stating that the issue of the rate of interest falls within the scope of the Convention and should therefore be solved in conformity with its general principles, see the awards rendered by the Internationales Schiedsgericht der Bundeskammer der gewerblichen Wirtschaft in Österreich (A), Nos. 4366 and 4318, RIW 1995, at 590 et seq.; in another award, even the *lex monetae* was applied, see Hungarian Chamber of Commerce and Industry Court of Arbitration, 5 Decembder 1995, Unilex.

34 For a discussion on the different views expressed both in the legal literature and in the-case law, see *Ferrari*, International Sale of Goods (*supra* note 10), at 215-225.

35 For authors stating that the issue of the rate of interest is not governed by the Convention see *Ferrari*, Tasso degli interessi ed applicazione uniforme della Convenzione di Vienna sui contratti di vendita internazionale, Riv. dir. civ. 1995/II, at 277 et seq.; *Witz*, La Convention de Vienne sur la vente internationale de marchandises á l'épreuve de la jurisprudence naissante, Receuil Dalloz chron. 1995, at 146.

36 In doing so, the Italian Court quoted a Swiss decision: Pretura di Locarno-Campagna (CH), 16 December 1991, Rechtsprechungsbericht des Schweizerischen Bundesamtes der Justiz, SZIER 1993, at 653, 655

37 For this conclusion see, *Schlechtriem* (*supra* note 17), at 593; see also *Tallon*, The Buyer's Obligation under the Convention on Contracts for the International Sale of Goods, in International Sales, by Galston/Smit, New York (USA), 1984, VII-14; for decisions stating that a formal notice is not required for the creditor to be entitled to interest, see Pretura di Locarno-Campagna (CH) (*supra* note 37), AG Augsburg (D), 29 January 1998, Unilex; Appel Grenoble (F) 26. 4. 1995, Unilex; ICC Award, No. 7585, Unilex.

38 This view was also held by another court, see *supra* note 25.

39 See HG Zürich (CH), 26 April 1995, Unilex; HG Zürich (CH), 9 September 1993, ibid.

40 See *Antweiler*, Beweislastverteilung im UN-Kaufrecht. Insbesondere bei Vertragsverletzungen des Verkäufers, Frankfurt (D), 1995; *Ferrari*, La vendita internazionale (*supra* note 10), at 139-140; *Giovannucci Orlandi*, Procedural law issues and uniform law Conventions, Unif. L. Rev. 2000-1, at 23 et seq.; *Magnus*, Stand und Entwicklungen des UN-Kaufrechts, ZeuP 1995, at 207.

41 *Khoo*, Article 2, in *Bianca/Bonell*, Commentary on the International Sales Law. The 1980 Vienna Sales Convention, Milan (I) 1987, at 39; *Huber*, Der UNCITRAL-Entwurf eines Übereinkommens über internationale Warenkaufverträge, RabelsZ 1979, at 479 et seq.

42 A recent Swiss Court decision has made recourse to the same rule, see HG Zürich (CH), 10 February 1999, in: CLOUT, No. 331, holding that: "the CISG does not contain any stipulations regarding the burden of proof. However, it follow[s] from the underlying principles, that the party making the claim should be the one bearing the burden of proof."

43 For this statement see *Schlechtriem*, Commentary (*supra* note 17), at 621; see also *Giovannucci Orlandi*, Procedural issues and uniform law Conventions (*supra* note 41), *passim*.