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## BURDEN OF PROOF AND LACK OF CONFORMITY UNDER THE CISG FROM THE ITALIAN LAW PERSPECTIVE

*The article studies the interaction between the model of sale and purchase provided by the CISG and that of the Italian Civil Code. This is done with a twofold purpose to verify: a) whether, as things stand, the applicability of the domestic law legislation or of the general principles governing the CISG is indifferent in relation to the burden of proof concerning the lack of conformity, and consequently also to the debate concerning whether this aspect is of a procedural or substantive nature; b) whether this burden of proof can move independently of the subjective or objective conception of performance and of whether the seller's performance is associated with an obligation or a guarantee.*

Key words: *lack of conformity, burden of proof, Italian Civil Code, CISG*

### INTRODUCTION AND APPROACH

An interesting article on “metronome music”<sup>1</sup> reports on two phenomena related to oscillatory movements in time.

On the one hand, if we place numerous metronomes with the same period on a surface and start them at different times, they initially generate different oscillations. However, with the passage of time, they will progressively ali-

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<sup>1</sup> Piergiorgio Odifreddi, “La musica dei metronomi”, *Le scienze*, No. 22, 2014, 547.

gn themselves in unison. As has been noted, this occurs thanks to “a trick”, i.e. the oscillation that takes place on the support surface, which is not fixed but flexible, so that it absorbs the different vibrations and transmits its own until the same vibration is reached. The proof is that, once this coordination has been achieved, it disappears if we put the metronomes back on a rigid support surface and they are out of phase again.<sup>2</sup>

On the other hand, pendulums of different lengths located in the same axis of oscillation and set off at the same time have different fluctuations, but – cyclically, as time passes – sometimes move together as if they were one, then separate, and so on.<sup>3</sup>

In the same way various models of purchase and sale, remedies, concepts of non-performance or burdens of proof may or may not initially diverge from each other. This has been the case especially in the forty years since the CISG was introduced.

Within each country’s current framework, up to four scenarios of sale and purchase<sup>4</sup> can operate, which can be reduced in those systems that have opted for a unitary conformation of certain contractual models of private law.<sup>5</sup>

The CISG finds application in this heterogeneous conceptual scenario, and influences its movements. Thus, in the last decades, there has been a frenetic neo-codification driven by the model of the Vienna Convention or its derivatives (e.g.

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<sup>2</sup> Visually the phenomenon can be seen in the video “Synchronization of Metronomes”, published in the channel *Harvard Natural Sciences Lecture Demonstrations*, <https://www.youtube.com/watch?v=Aaxw4zbULMs>.

<sup>3</sup> The same author reports that the phenomenon can be seen on YouTube in the video “Pendulum Waves” published in the *Harvard Natural Sciences Lecture Demonstrations* channel (<https://www.youtube.com/watch?v=yVkdjfj9PkRQ>) which essentially reproduces a more complicated reasoning described by Galileo Galilei: Galileo Galilei, *Discorsi e dimostrazioni matematiche intorno a due nuove scienze*, impression Anastaltique Culture et Civilisation, Bruxelles, 1966, 106–107.

<sup>4</sup> That between private individuals (P2P), that between professionals (B2B), that with consumers (B2B), to which can be added, where ratified, the model of the Vienna Convention in the case of movable goods contracted in B2B mode.

<sup>5</sup> Thus, Italy and Argentina have switched to a one-tier system and established a code of private law combining private and commercial law. In contrast to this there is the antithetical approach which aims to maintain the differences, as evidenced by a dualistic system of civil and commercial code as for example in Germany, France or Spain. For a reconstruction as regards Italian law, as well as bibliographic references, see: Alfredo Ferrante, “La modernización del derecho mercantil en Italia”, *La modernización del derecho mercantil. Estudios con ocasión del sesquicentenario del Código de Comercio de la República de Chile* (ed. Jaime Alcalde Silva, José Miguel Embid Irujo), Marcial Pons, Barcelona, 2018, 227 ff.

Directive 1999/44<sup>6</sup> and Directives 2019/770 and 771<sup>7</sup>), and with the reform of the *Bürgerliches Gesetzbuch* and then with the reform of the *Code*, which also undermined the convictions of Napoleon, who regarded his Civil Code as an immortal instrument.<sup>8</sup>

Confronted with this vision, the Italian Civil code has remained static. However, this does not mean that a hidden dynamism has not been produced, not only through legal formants such as doctrine and case law, but also through interaction with external legislative phenomena. Thus, although we are sometimes convinced that we remain immobile and static, the interaction with external phenomena renders us in flux and changing, *nolens volens* (whether we like it or not). Therefore, whilst the Civil Code of 1942 – in the section relating to sale and purchase – has remained unaltered, it has in fact changed. The legislator of 1942 had in mind or in fact came to regulate a single model of sale, applicable to sales between private individuals, in B2C, in B2B, as well as in international sales contexts.<sup>9</sup>

Gradually, the ratification and implementation of the CISG<sup>10</sup> and the embedding in the European Union with the subsequent adoption of Community consumer legislation have, in fact, partly provoked the emptying of this instrument as it was originally conceived. Hence the sale initially conceived as unitary

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<sup>6</sup> Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees (OJ L 171, 7.7.1999, 12–16).

<sup>7</sup> Directive (EU) 2019/770 of the European Parliament and of the Council of 20 May 2019 on certain aspects concerning contracts for the supply of digital content and digital services (OJ L 136, 22.5.2019, 1–27); Directive (EU) 2019/771 of the European Parliament and of the Council of 20 May 2019 on certain aspects concerning contracts for the sale of goods, amending Regulation (EU) 2017/2394 and Directive 2009/22/EC, and repealing Directive 1999/44/EC (OJ L 136, 22.5.2019, 28–50).

<sup>8</sup> For instance, he famously boasted, “[m]y true glory is not to have won 40 battles... Waterloo will erase the memory of so many victories.... but... what will live forever, is my Civil Code”. The title of the study on this aspect of the French reform is symptomatic: John Cartwright, Simon Whitaker (ed.), *The Code Napoléon Rewritten. French Contract Law after the 2016 Reforms*, Hart Publishing, 2017.

<sup>9</sup> In this context, the Convention relating to a Uniform Law on International Sale of Goods (ULIS) of 1964, signed by Italy on 23.12.1964, and ratified on 22.2.1972, had not yet been perceived, and only came into force in Italy on 22.08.1972. The other antecedent of CISG is the Uniform Law on the Formation of Contracts for the International Sale of Goods (ULF) also done at The Hague on 1 July 1964.

<sup>10</sup> Law No. 765/1985, dated 11.12.1985, Ratification and implementation of the United Nations Convention on Contracts for the International Sale of Goods, adopted in Vienna on 11 April 1980. (*Official Gazette* General Series No. 303 of 2.12.1985 – Ordinary Supplement).

at that moment was reproduced in four models – four metronomes – which were activated at different times.

As in an oscillating movement of pendulums, or metronomes, the Italian legal system, the CISG, their concept of subjective and objective performance – related to the buyer's guarantee or warranty – and the burden of proof move in a rhythmic swing whose asynchronous bases potentially generate unbalanced fluctuations.

This article aims at assessing the interaction between two metronomes relating to sale and purchase: the Italian Civil Code and that of the CISG. More concretely, the purpose is to consider a) whether, in the current state of affairs, the application of the rules of domestic law or of the general principles governing the CISG is indifferent with respect to the burden of proof concerning the lack of conformity and, consequently, whether the debate concerning the question as to the procedural or substantive nature of this aspect is also irrelevant; b) whether this burden of proof can move independently of the subjective or objective conception of performance and of whether the seller's performance is associated with an obligation or a warranty.

To do so, the article will begin with a brief reflection on the general landscape, including why this problem arises, before delving into the two specific aspects.

#### AN OVERVIEW

“Whether the burden of proof is covered by the CISG or not is subject to lengthy debate,”<sup>11</sup> and the question as to whether it is a matter of substantive law or procedural law would appear to be in part still open,<sup>12</sup> also because – if it is clear that this aspect is considered to be of the utmost importance and “thorny”<sup>13</sup> –

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<sup>11</sup> Milena Djordjevic, “Art. 4” in *UN-Convention on Contracts for the International Sales of Goods (CISG)*, (eds. Stefan Kröll, Loukas Mistelis, Pilar Perales Viscasillas), 2nd ed Verlag CH Beck OHG and Hart Publishing, 2018, 81. See also Ingeborg Schwenzer, “Art. 4”, in Schlechtriem & Schwenzer, *Commentary on the UN Convention on the International Sale of Goods (CISG)*, 4th ed., edited by I. Schwenzer, Oxford University Press, Oxford, 2016, 74 ff (about the difference between burden of proof and standard of proof, op. ult. cit., 84-84). Recently, also reflecting, in particular, on the Italian Code of Civil Procedure: Chiara Giovannucci Orlandi, “Burden of proof, standard of proof, and evidence issues under the CISG”, *Journal of Law and Commerce*, Vol. 38, 2019-2020, 123 ff.

<sup>12</sup> Already in 2000 it was noted that the issue “was not clear” despite there being a majority position: Franco Ferrari, “Problematiche tipiche della Convenzione di Vienna sui contratti di Vendita Internazionale di Beni Mobili risolte in una prospettiva uniforme”, *Giurisprudenza italiana*, No. 2, 2001, 281–285.

<sup>13</sup> As a result, it was highlighted that “another thorny – and important – issue is whether the CISG governs the question of who bears the burden of proving the factual elements of the rules of

it must be noted that “the drafting history of the CISG is at best ambiguous when it comes to the allocation of the burden of proof,”<sup>14</sup> and this is only narrowly regulated in Art. 79 CISG.<sup>15</sup>

Thus, an analysis of the Digest of the CISG<sup>16</sup> reveals the extreme practical relevance of the burden of proof; this theme characterizes the commentary of many provisions, especially those relating to lack of conformity (e.g., Arts 4, 7, 35, 36, 39, 66, 74-76, 79 CISG<sup>17</sup>).

This article does not intend to examine all the debates or positions on the subject, but rather aims to analyze the matter in a concise and comparative manner, and only with reference to the conformity of goods and in relation to Italian law. This derives from the fact that one of the leading cases on this point has been Italian,<sup>18</sup> and also because the Italian Supreme Court of Cassation,

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the Convention”: John Honnold, *Uniform Law for International Sales under the 1980 United Nations Convention*, 4<sup>th</sup> ed., Kluwer Law International, The Netherlands, 2009, 86.

<sup>14</sup> Larry Di Matteo “A Matter of Good Intentions: Placing the Issue of the allocation of Burden of proof Within the CISG”, *Cost and Burden of Proof under the CISG – A Discussion amongst Experts*, (eds. Stefan Kröll, Larry Di Matteo, Ulrich G Schroeter, Andre Janssen, Camilla Baasch Andersen), *International Trade and Business Law Review*, No. 20, 2017, 192.

<sup>15</sup> In this sense, it is not entirely correct to state that “[t]he CISG does not contain any provisions concerning the burden of proof”: Sonja Kruisinga, “What do consumer and commercial sales law have in common? A comparison of the EC Directive on consumer sales law and the UN Convention on contracts for the international sale of goods”, *European Review of Private Law*, No. 2/3, 2001, 186.

<sup>16</sup> Uncitral, *Digest of Case Law on the United Nations Convention on the International Sales of Goods* – 2016.

<sup>17</sup> See for example Melissa Radosavac, Bruno Zeller, “The buyer’s burden of proof under Articles 38-39 CISG: is it reasonable?”, *Vindobona Journal of International Commercial Law and Arbitration*, No. 1, Vol. 17, 2013, 63 ff; Stefan M. Kröll, “The Burden of Proof for the Non-Conformity of Goods under Art. 35 CISG”, *Annals of the Faculty of Law, Belgrade Law Review*, Year LIX, No. 3, 2011, 162 ff.

<sup>18</sup> Tribunale di Vigevano, No. 405/2000, dated 12.7.2000, *Giurisprudenza italiana*, 2001, 281 ff. On the judgment: Anna Veneziano, “Mancanza di conformità delle merci ed onere della prova nella vendita internazionale: un esempio di interpretazione autonoma del diritto uniforme alla luce dei precedenti stranieri. Nota a Trib. Vigevano 12.07.2000”, *Diritto del commercio internazionale*, No. 2, 2001, 497 ff; F. Ferrari, “Problematiche tipiche della Convenzione di Vienna sui contratti di Vendita Internazionale di Beni Mobili risolte in una prospettiva uniforme”, op. cit., 281 ff; Franco Ferrari, “Burden of Proof under the United Nations Convention on Contracts for International Sale of Goods (CISG)”, *International Business Law Journal*, No. 5, 2000, 665 ff; Franco Ferrari, “Applying the CISG in a Truly Uniform Manner: Tribunale di Vigevano (Italy), 12 July 2000”, *Uniform Law Review*, 2001, No. 1, Vol. 6, 203 ff; Franco Ferrari, “Tribunale di Vigevano: Specific Aspects of the CISG Uniform Dealt with”, *Journal of Law and Commerce*, 2001, 225 ff; Franco Ferrari, “Recent Italian Court Decisions on the CISG”, *International Business Law Journal*, 2001, No. 1, 224 ff; Franc-

in Joint Civil Chambers (*Cassazione italiana Sezioni Unite*), has recently issued a judgment<sup>19</sup> on the issue of domestic sales and purchase. This therefore allows the question to be analyzed in relation to a series of rulings pertaining to the same legal framework, assuming particular relevance in terms of consistency.<sup>20</sup>

THE LIMBO THAT LEAVES OPEN ART. 4 AND ART. 7.2 CISG,  
ALSO IN RELATION TO THE BURDEN OF PROOF

The only reference to the burden of proof is included in Art. 79.1 CISG, in relation to damages, stating 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 and that he could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome it or its consequences”.<sup>21</sup>

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esco Mazzotta, “Art. 4”, *A Practitioner’s Guide to the CISG* (eds. Camilla Baasch Andersen, Francesco Mazzotta, Bruno Zeller), JurisNet, Huntington, 2nd, 2018, 53 ff.

<sup>19</sup> Supreme Court, Joint Civil Chambers No. 11748/2019, dated 3.5.2019: For example, published and annotated by Roberto Calvo, “Luci ed ombre nella cornice del congedo dalla garanzia edilizia”, *Giurisprudenza italiana*, No. 7, 2019, annotated by Gianroberto Villa, “L’onere di provare il vizio della cosa venduta: un’occasione per una nuova meditazione sulla prova dell’inadempimento”, *Corriere Giuridico*, No. 6, 2019, 744 ff; annotated by Tommaso Dalla Massara, “L’onere della prova dei vizi del bene venduto al vaglio delle Sezioni Unite: resistenza e resilienza del modello della garanzia”, *Contratti*, No. 4, 2019, 373 ff; annotated by Massimo Proto, “Garanzia per vizi della cosa venduta ed onere probatorio”, *I nuovi orientamenti della Cassazione civile* (ed. Carlo Granelli), Giuffrè, Milano 2020, 435 ff. For some commentaries see Riccardo Mazzariol, “L’onere della prova nella garanzia per vizi della vendita il problema irrisolto del riparto probatorio del momento genetico del vizio”, *Rivista di diritto civile*, No. 2, 2020, 442 ff; Fabrizio Piraino, “La garanzia nella vendita: durata e fatti costitutivi delle azioni edilizie”, *Rivista trimestrale*, No. 3, 2020, 1117 ss; Luigi Regazzoni, “Le sezioni unite confermano l’onere probatorio in materia di garanzia per vizi e la distinzione tra garanzia e obbligazione”, *Nuova giurisprudenza civile commentata*, No. 5, I, 2019, 1055 ff; Stefano Pagliantini, *Il diritto privato europeo in trasformazione*, Giappichelli, Torino, 2020; Alfredo Ferrante, “Formanti intrecciati tra consolidazione e dissociazione (Tribunale di Perugia, Sez. II, 11 febbraio 2020, No. 399; Giud. Luca Marzullo; R. S.R.L.– C. S.P.A.)”, *Corti umbre*, No. 1, 2021.

<sup>20</sup> Although obviously also the decisions concerning the CISG of courts in other jurisdictions are important for its persuasive effectiveness. This aspect is also made clear by the Tribunale di Vigevano, cited above, which states that although not binding, foreign case-law must be taken into consideration in order to ensure and promote the uniform application of the UN Convention. In a similar sense, see Trib. Pavia, 29.12.1999, *Corriere Giuridico*, 2000, 932 ss annotated by Franco Ferrari, “Diritto Applicabile alla vendita internazionale, tasso degli interessi sulle somme non pagate e questioni affini”, *Corriere Giuridico*, 2000, 932 ff. On an overview of other decisions in other jurisdictions: M. Djordjevic, op. cit., 83–84.

<sup>21</sup> This topic must also include Hardship, as the CISG Council advisor has determined: CISG-AC Opinion No. 20, Hardship under the CISG, Rapporteur: Prof. Dr. Edgardo Muñoz, Uni-

In this situation, the synchronous interpretation of Arts. 4 and 7.2,<sup>22</sup> as well as the absence of a provision relating to the burden of proof as initially proposed in relation to lack of conformity, is problematic.

In fact, the UNCITRAL Committee rejected the proposal for a specific provision on the burden of proof as it would have been “inappropriate”<sup>23</sup> in the context of an international regulation. This proposal envisaged a burden of proof for the seller to demonstrate that the goods were conforming. Interestingly, it was possible for the buyer to prove the defect even after the term for notification of such defect had expired. Thus, in what was originally intended to be Art. 19, it was provided that:

“(3) The seller has to prove that the goods delivered by him conform to the contract. However, if the buyer wants to rely on a lack of conformity which he discovered after the expiration of the period within which he had to examine the goods under article 22, the buyer has to prove this lack of conformity. The buyer is considered to have discovered the lack of conformity before the expiration of this period if he has given the seller notice of the lack of conformity within a reasonable time after the expiration of this period.”<sup>24</sup>

It should thus be noted that the buyer’s burden of proof was favorable to him; that is to say, it enabled him to obtain certain protections even after the period relating to the inspection of the goods.

Had such a provision been included or such an aspect been regulated, there would probably not have been much of a discussion of the burden of proof in the various comments in the CISG Digest.

Failure to do so, however, combined with the fact that the sole presence of an evidentiary reference is contained in Art. 79 CISG, thus likely paved the way for a split view of the issue, which also brought Arts 4 and 7 CISG into the equation.

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versidad Panamericana, Guadalajara, Mexico. Adopted by the CISG Advisory Council following its 27th meeting, in Puerto Vallarta, Mexico on 2–5 February 2020.

<sup>22</sup> The interrelation between Arts. 4 and 7 was already considered one of the most relevant aspects in relation to the application of the CISG: Harry M. Flechtner, “Selected Issues Relating to the CISG’s Scope of Application”, *The Vindobona Journal of International Commercial Law and Arbitration*, Vol. 13, 2009, 92–94.

<sup>23</sup> Thus, it was considered that “[t]here was little support for this proposal as it was considered inappropriate for the Convention, which relates to the international sale of goods, to deal with matters of evidence or procedure”: Uncitral, *Report of the Committee of the Whole relating to the draft Convention on the International Sale of Goods*, 1977, Annex I, para. 178, id *Uncitral Yearbook*, VIII (1977), A/32/17, 37; J. Honnold, op. cit., 86.

<sup>24</sup> Uncitral, *Report*, cit. Annex I, para. 177, id *Uncitral*, *Yearbook VIII*, cit., 37.

It was argued, on the one hand, that the burden of proof can be understood as a matter of substance (substantive law), and, on the other, as a matter of procedure (procedural law), which led to a debate on how this should be regulated, i.e. whether it should be left to domestic law as a procedural rule, or whether it should be decided in accordance with the principles of the CISG.<sup>25</sup>

Honnold already explained that “clearly the CISG is not intended to be a code of procedure”<sup>26</sup> but also pointed out that “this conclusion is not changed by the fact that particular rules of the Convention address ‘Procedural’ matter”.<sup>27</sup>

#### ART. 7.2: A RULE OF COMPROMISE

It can be argued that the final drafting of Art. 7.2, as compared to the drafting of its precursor, Art. 17 ULIS, also contributed to the debate.

As Honnold has already noted, the formulation of Art. 7.2 was the result of a “compromise” arrangement,<sup>28</sup> thereby acknowledging a problem previously identified at the time of drafting. Thus, the original wording, initially along the same lines as its sister provision in ULIS, came to be modified. In fact, the final version of the second paragraph avoids the univocal interpretation of the application of only the general principles of the Convention, as was the case in Art. 17 ULIS,<sup>29</sup> and is intentionally open – in the absence of such principles – to the application in accordance with the *lex fori* and national law, an approach that is generated by the last part of his sentence.<sup>30</sup>

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<sup>25</sup> On the general principles embodied in the CISG: Pilar Perales Viscasillas, “Article 7” in *UN-Convention on Contracts for the International Sales of Goods (CISG)*, (eds. Stefan Kröll, Loukas Mistelis, Pilar Perales Viscasillas), 2nd ed., Verlag CH Beck OHG and Hart Publishing, 2018, 139 ff; Ingeborg Schwenzer, Pascal Hachem, “Art. 7” in Schlechtriem & Schwenzer, *Commentary on the UN Convention on the International Sale of Goods (CISG)*, 4th ed., edited by I. Schwenzer, Oxford University Press, Oxford, 2016, 134 ff.

<sup>26</sup> J. Honnold, *op. cit.*, 141.

<sup>27</sup> *Ibidem.*

<sup>28</sup> As noted by J. Honnold, *op. cit.*, 137. It is also noted that the issue of gaps was aggregated to a proposal of the delegation of what was then the German Democratic Republic: Alejandro Garro, Alberto Zuppi, *Compraventa Internacional de Mercaderías. La Convención de Viena de 1980*, Abeledo Perrot, Buenos Aires, 2012, 75.

<sup>29</sup> Art. 17 ULIS “Questions concerning matters governed by the present Law which are not expressly settled therein shall be settled in conformity with the general principles on which the present Law is based”.

<sup>30</sup> In accordance with the last sentence of Art. 7.2, “in the absence of such principles, in conformity with the law applicable by virtue of the rules of private international law”.



Thus, the compromise arrangement in Art. 7 CISG has partly contributed to emergence of new interpretative solutions with respect to the wording of Art. 17 ULIS.

The initial rationale of Art. 17 ULIS was based on the realization that in the absence of such a provision, certain degenerations in application could be created and therefore had the function of preventing any abuse by the party seeking to have recourse to national law on the grounds that the provisions of the Convention were unclear.<sup>31</sup>

Yet one must remember that the final drafting of Art. 7 CISG (initially not achieved<sup>32</sup> through the failed attempt to reform Art. 17 ULIS) is what then led to various interpretative problems.

One of the reasons for the amendment was based on the supposed observation that it was perhaps difficult to identify certain general principles,<sup>33</sup> despite part of the doctrine having taken a completely different view in the initial approval phase, noting that this would not create any problems.<sup>34</sup> This doctrine turned out to be correct in hindsight, as it can now be said that in many ways general principles governing the CISG have been identified (*see infra*).

Thus, while in other respects the application or interaction of Arts. 4 and 7 may be clear, the burden of proof is complicated in cases involving the conformity of goods.

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<sup>31</sup> As Tunc points out: André Tunc, *Commentary of the Hague Conventions of 1st July on the International Sale of Goods and on the Formation of Contract of Sale*, Ministerie Van Justitie, The Hague, 1964, 44.

<sup>32</sup> In 1970, the working group “recommended that Art. 17 of ULIS be replaced by provision that the law shall be interpreted with regard “to its international character and the need to promote uniformity”: J. Honnold, *op. cit.*, 138; also Michael Joachim Bonell, “Art. 7”, in *Commentary on the International Sales Law*, (eds. Cesare Massimo Bianca, Michael Joachim Bonell), Giuffrè, Milano, 1987, 67.

<sup>33</sup> J. Honnold, *op. cit.*, 137–138. On the method of interpretation and some consideration also of gap-filling in relation to the UNIDROIT principles: Christoph Brunner; Philipp Wagner, “Art. 7”, in *Commentary on the UN Sales Law (CISG)*, (eds. Christoph Brunner, Benjamin Gottlieb), Wolters Kluwer, The Netherlands, 2020, 85–86; On the general principles embodied in the CISG: P. Perales Viscasillas, *op. cit.*, 42–143.

<sup>34</sup> Thus “The reference to the general principles of the law does not seem to involve any perils”. For the jurist, the absence of danger was illustrated by the fact that clearly it would have been possible to extract the principles from the provisions or through an interpretation of the phases of elaboration of the text: in particular the Draft of 1956 and 1962 and the report of proceedings of 1964 Conference: A. Tunc, *op. cit.*, 44.

It should also be noted that, on the one hand, it could be argued that in case of arbitration this aspect could be excluded by the parties under Art. 6 CISG;<sup>35</sup> on the other hand, part of the doctrine submits that “instead of qualifying an issue as either procedural or substantive, one should answer the question whether the matter is covered by the CISG or not”.<sup>36</sup> In the event it is accepted that the matter is covered by the CISG, there is actually a two-fold possibility to adhere to the general principles of the CISG or to make an analogical application of the provisions contained therein; a two-fold possibility which does not give rise to a mutual incompatibility,<sup>37</sup> but rather to a complimentary methodology as will be illustrated in the next section.

#### THE BUYER’S BURDEN OF PROOF

The *Tribunale di Vigevano* – precisely on the twentieth anniversary of the CISG – in 2000,<sup>38</sup> with a decision also renowned as pioneering for its solid support of foreign judgments relating to the Convention, established that the burden of proof was to be resolved according to criteria internal to the CISG, thus avoiding the application of procedural nature or national law.

This position has been consistently reinforced in the Italian legal system thanks to a similar view expressed in two rulings that “fine tune” this criterion. It is here that, in the passing of time, this criterion has been confirmed, practically at the gates of its thirtieth anniversary, by way of a decision of the *Tribunale di Bolzano*<sup>39</sup> and at the gates of its fortieth anniversary with a decision of the *Tribunale di Trieste*.<sup>40</sup>

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<sup>35</sup> Ulrich G Schroeter “Burden of Proof: governed by the CISG”, *Cost and Burden of Proof under the CISG - A Discussion amongst Experts*, (eds. Stefan Kröll, Larry Di Matteo, Ulrich G Schroeter, Andre Janssen, Camilla Baasch Andersen), *International Trade and Business Law Review*, No. 20, 2017, 189. Similarly C. Brunner, Th. Murmann, M. Stucky, op. cit., 72.

<sup>36</sup> M. Djordjevic, op. cit., 79.

<sup>37</sup> Indeed, since the first comments on the CISG, it has been considered that in the event of lacunae the CISG can operate through two mechanisms which are not mutually exclusive, the analogical application of its specific provisions or on the basis of general principles: M. J. Bonell, “Art. 7”, *Convenzione*, op. cit., 24.

<sup>38</sup> Tribunale di Vigevano, No. 405/2000, cit.

<sup>39</sup> Tribunale Bolzano, 27.1.2009, annotated by Armin Reinstadler, “Brevi note in tema di decadenza, prescrizione ed onere di prova nella Convenzione di Vienna sulla vendita internazionale di merci”, *Giurisprudenza italiana*, Vol. 171, No. 12, 2019, 2426 ff.

<sup>40</sup> Tribunale di Trieste, 17.6.2019, annotated by Armin Reinstadler, “Affidamento ed onere di prova nella Convenzione di Vienna (CISG)”, *Giurisprudenza italiana*, No. 12, Vol. 171, 2019, 2670 ff.

Thus, the burden of proof “not representing an external gap” is a question that must be resolved according to the general principles deriving from the Convention itself, as provided for in Art. 7.2 CISG,<sup>41</sup> and essentially on the principle *ei incumbit probatio qui dicit*. In this sense, considering that the CISG can be interpreted using complementary methods,<sup>42</sup> the Court also expressly considered, in analogical terms, the content of Art. 79 CISG.<sup>43</sup> Both judgments reinforce the findings of the *Tribunale di Vigevano* in 2000, which at the time not only united the majority doctrine,<sup>44</sup> but was also favorably supported by the doctrine which proceeded to comment on the ruling, regarding it as representing a step forward in the correct interpretation and application of the uniform law<sup>45</sup> and as a “very successful result”.<sup>46</sup>

These aspects lead to the concrete affirmation that, with reference to the question of the non-conformity of the goods sold, the above-mentioned general principle certainly leads to the affirmation that it is up to the purchaser to prove the existence of a lack of conformity,<sup>47</sup> an aspect confirmed by the *Tribunale di Bolzano*.<sup>48</sup>

Such view, consistent with the rulings, notes the expression of the general principle of application, in accordance with the Vienna Convention, in relation to the burden of proof in case of conformity of the goods, at least from the perspective of an Italian judge.

The presence of this asset therefore allows us to have a series of judgments that are comparable with the vision of domestic national law. Accordingly, it is necessary to consider what would happen if, instead of adhering to criteria internal to the CISG, Italian national law were applied. One can thus discern what the

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<sup>41</sup> Tribunale di Trieste, 17.6.2019, cit.; Tribunale di Bolzano, 27.1.2009, cit. The Tribunale di Vigevano, 12.07.2000, cit.

<sup>42</sup> M. J. Bonell, “Art. 7”, *Convenzione*, op. cit., 24.

<sup>43</sup> Tribunale di Bolzano, 27.1.2009, cit.

<sup>44</sup> For an overview of the two positions existing at the time of the judgment of the Tribunale di Vigevano, see F. Ferrari, “Problematiche tipiche della Convenzione di Vienna sui contratti di Vendita Internazionale di Beni Mobili risolte in una prospettiva uniforme”, op. cit., 281 ff; currently M. Djordjevic, op. cit., 79, 81 ff. The solution today seems to be more open: cf. Christoph Brunner; Thomas Murmann, Marius Stucky, “Art. 4”, *Commentary on the UN Sales Law (CISG)*, (eds. Christoph Brunner, Benjamin Gottlieb), Wolters Kluwer, The Netherlands, 2020, 72.

<sup>45</sup> A. Veneziano, op. cit. 509 ff.

<sup>46</sup> F. Ferrari, “Problematiche tipiche della Convenzione di Vienna sui contratti di Vendita Internazionale di Beni Mobili risolte in una prospettiva uniforme”, op. cit., 281 ff.

<sup>47</sup> Tribunale di Vigevano, 12.07.2000, cit.

<sup>48</sup> Tribunale di Bolzano, 27.1.2009, cit.

solution would be from the perspective of jurisprudence, as well as if one were to adopt an approach opposite to that of the case law analyzed, and thus understand that aspects relating to the burden of proof are of a procedural and not a substantial nature.

To these effects it must be found that the burden of proof relating to lack of conformity, *mutatis mutandis* rooted in the theory of hidden defects of Arts 1490 ff Italian Civil Code, has given rise to antithetic positions, the discussion of which has apparently been resolved by Supreme Court, Joint Civil Chambers, decision No. 11748/2019, dated 3.5.2019.<sup>49</sup>

In applying the general burden of proof provided for by Art. 2697 of the Italian Civil Code to the specific case of the defects of the goods sold, i.e. the legislation which is closest, *mutatis mutandis*, to the CISG, it is stated that in the matter of the warranty for defects of the item sold referred to in Art. 1490 of the Civil Code, the purchaser who exercises the actions for termination of the contract or reduction of the price referred to in Art. 1492 of the Civil Code has the burden of offering proof of the existence of the defects. Following this judgment, a court of merit has extended this criterion also to the case where only compensation for damages is requested.<sup>50</sup>

The Joint Chambers, when faced with the question of whether the buyer or the seller should be required to prove the defect, opt for the first solution, thereby reaffirming the traditional approach of Italian law<sup>51</sup> and suppressing the somewhat opposite trend that essentially sought to place the burden on the seller by merely requiring the buyer to claim the presence of a defect, a trend that began in 2013.<sup>52</sup>

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<sup>49</sup> Supreme Court, Joint Civil Chambers No. 11748/2019, dated 3.5. 2019, cit.

<sup>50</sup> Tribunale di Perugia, Sez. II, No. 399/2020, dated 11.2.2020, *Corti ombre*, 2021, 1 with comment by A. Ferrante, "Formanti intrecciati tra consolidazione e dissociazione (Tribunale di Perugia, Sez. II, 11 febbraio 2020, No. 399; Giud. Luca Marzullo; R. S.R.L. – C. S.P.A.)", op. cit.

<sup>51</sup> Supreme Court (Civil Branch) No. 1035/1968, dated 4.4.1968, *Rep. Foro it.*, 1968, voce Vendita, No. 82; Supreme Court (Civil Branch) No. 8533/1994, dated 19.10.1994, *Rep. Foro it.*, 1994, voce Vendita, No. 54; Supreme Court (Civil Branch) No. 7986/1991, dated 16.7.1991, *Rep. Foro it.*, 1991, voce Vendita, No. 54; Supreme Court (Civil Branch) No. 8963/1998, dated 10.9.1998, *Rep. Foro it.*, 1998, voce Vendita, No. 58; Supreme Court (Civil Branch) No. 13695/2007, dated 12.6.2007, *Rep. Foro it.*, 2007, voce Vendita, No. 60; Supreme Court (Civil Branch) No. 18125/2013, dated 26.7.2013, *Rep. Foro it.*, 2013, voce Vendita, No. 121.

<sup>52</sup> The trend essentially begins with Supreme Court (Civil Branch) No. 20110/2013, dated 2.9.2013, *Rep. Foro it.*, 2013, entry Sale, No. 50 and is followed by Supreme Court (Civil Branch) No. 24731/2016, dated 2.12.2016, *Arch. giur. circol.*, 2017, 235; Supreme Court (Civil Branch) No. 21927/2017, dated 21.9.2017, *Rep. Foro it.*, 2017, voce Vendita, No. 18.

A first conclusion could be drawn from this. As it stands today, we can see that in Italian law the burden of proof regarding lack of conformity relative to the sale of goods governed by the CISG and that relative to defects of goods sold under the Civil Code essentially coincide, placing the burden of proof on the buyer.

This would lead to a second conclusion. Since the criteria coincide, there is an essential correspondence between what would be the applicable principle under the CISG and what underlies domestic law. In this sense, in the case of Italian law it would be irrelevant in fact in this concrete case whether this aspect is of procedural or substantive nature (or whether it is governed by CISG), as the same conclusions would be reached.

#### COROLLARY RELATING TO PERFORMANCE

What has been discussed thus far could also lead to a further corollary which could lead to the affirmation that in these cases the burden of proof is independent of the subjective or objective conception of performance, and therefore operates according to parameters which are independent of the understanding that the seller's performance is an obligation or a guarantee. Given its complexity, the issue cannot be dealt with exhaustively here, but it is important to outline some considerations. The issue's relevance stems from the fact that remedies under the CISG and the Italian Civil Code are different.

The model set out in the Italian code, at least in its literal form, faithfully follows the traditional Roman approach to warranty claims, which coexists<sup>53</sup> with a remedial system that tends to be based in part on a concept of subjective non-performance and in part on fault,<sup>54</sup> but that sometimes has been considered objective (or a strict liability model).<sup>55</sup> Such approach somewhat contrasts with the objective performance model based on the CISG. This results in the CISG remedial system being based on the concept of the seller's obligation, whereas the

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<sup>53</sup> Without going into the intricacies of these important aspects we can say that in addition to the system of guarantee of proper functioning under Art. 1512 Italian Civil Code and the '*aliud pro alio*'.

<sup>54</sup> For example Cesare Massimo Bianca, *Diritto Civile. 4, L'obbligazione*, updated reprint, Giuffrè, Milan, 2019, 265 ff.

<sup>55</sup> A brilliant comparative overview with the German system can be seen in Stephan Lorenz, "Perspectives on European Contract Law: The Breach of an Obligation", *Civil Law Review*, No. 1, 2013, 93 ff. Here we observe (especially p. 109 ff.) the nuances of the *impossibilità per indempimento* is moving on subjective criteria on the one hand and objective criteria on the other hand.

Italian system is based on a two-pronged approach, namely the concept of obligation (e.g. Art. 1218 Italian Civil Code) and guarantees (Arts. 1490 ff Italian Civil Code).

Against this background, there have been attempts to reinterpret the structure of the Italian Civil Code. For example, to harmonize it with the Vienna model, efforts have been made to conceive the seller's obligation as a duty to deliver in accordance with the law, with the aim of incorporating warranty remedies into the concept of performance,<sup>56</sup> or to unify – through the Supreme Court, Joint Civil Chambers Judgment No. 13533/2001 of 3 October 2001<sup>57</sup> – the rules on the burden of proof for performance, termination and damages.

Having made this premise, it is appropriate to note that the basis for decision No. 11748/2019 by the Supreme Court, Joint Civil Chambers, in considering whether to grant termination due to a defect of the goods, was to take a “purist” approach to warranty relating to the concept of defects associated with warranty claims, essentially in accordance with the Romanist approach, and therefore distinct from a concept of comprehensive and general performance similar to that of the CISG (and which had been the Court's position in 2013, a position ultimately abandoned by the Court in joint chambers).

In light of what has also been considered in the previous section, therefore, it can be observed that both systems, whether based on the seller's obligation (CISG) or on warranty (Italian CC), arrive at the same conclusion in terms of the burden of proof in relation to lack of conformity/defect (placing it on the buyer). If this is the case, one could come to the conclusion set out at the beginning of this section: such burden of proof would seem to be independent of the concept of non-performance and the categorization of obligation and warranty relating to the seller's duty; at least for that obligation associated with objective performance. In this sense, the traditional concept of warranty and obligation would operate according to compatible criteria.

But all conclusions considered till now cannot be considered definitive; they become unstable as they are based on a limited vision. Effectively, only the

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<sup>56</sup> Cf Supreme Court (Civil Branch), No. 20110/2013, cit.

<sup>57</sup> Vicenzo Mariconda, “Inadempimento e onere della prova: le Sezioni Unite compose a contrast and open another”, *Corriere Giuridico*, No. 12, 2001, 1565 ff; Ugo Carnevali, “Inadempimento e onere della prova”, *Contratti*, No. 2, 2002, 113 ff; Bruno Meoli, “Risoluzione per inadempimento ed onere della prova”, *Nuova giurisprudenza civile commentata*, No. 3, I, 2002, 349 ff; Gianroberto Villa, “Onere della prova, inadempimento e criteri di razionalità economica”, *Rivista di diritto civile*, 2002, II, No. 5, 707 ff.

opinions of the Italian Supreme Court and the latest view of the Joint Chambers have been taken into account, and must therefore also be supported by that of the doctrine which has in part proceeded to criticize and clarify certain aspects. Moreover, although the opinion of the Joint Chambers of the Supreme Court performs a nomofilactic function, it is not necessarily applicable to future cases.

#### THE CRITICAL VIEW OF THE APPARENT SYNCHRONIZATION BETWEEN THE NATIONAL SYSTEM AND THE CISG

In identifying the principles underlying the burden of proof in the Convention, and certainly consistent with the principle *ei incumbit probatio qui dicit*, the doctrine has held that “every party has to prove the facts on which its claim, right, or defence is based. Second, that the party relying on an exception must prove this exception”.<sup>58</sup> However, it has been argued that this aspect must be partially corrected by applying a different evidentiary rule, in consideration of equity,<sup>59</sup> “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>60</sup> This would not only apply to the burden of proof in general, but also to the case of the conformity of goods. Here, in this specific case, a less generalized interpretation might be required and thus part of the doctrine has focused on highlighting some interpretative nuances. In the case of conformity of goods, depending on whether the plaintiff<sup>61</sup> is the buyer or seller, the burden could – in application of the aforementioned principle – vary from one subject to another. For this reason, part of the doctrine has proposed a fluctuating burden of proof which is, in some cases, excessively elaborate.<sup>62</sup>

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<sup>58</sup> U. G. Schroeter, *op. cit.*, 185.

<sup>59</sup> U. G. Schroeter, *op. cit.*, 185. Already S. Kröll, *op. cit.*, 171.

<sup>60</sup> U. G. Schroeter, *op. cit.*, 186.

<sup>61</sup> Thus, for example, it has been established that “the party making the claim should be the one which bears the burden of proof: S. Kruisinga, *op. cit.*, 186-187. In this sense: “It would be even more unpredictable to always place the burden of proof on the claimant, since either the buyer or the seller can be the claimant, and the causes of action can vary widely”: Anna L. Linne, “Burden of Proof under Art. 35 CISG”, *Pace International Law Review*, No. 1, Vol. 20, 2008, 43.

<sup>62</sup> Thus, the burden would initially be on the seller, since he has the burden to deliver conforming goods, and then shift to the buyer once the seller establishes a *prima facie* case of conformity and finally back to the seller if the buyer meets its burden of proof: A. Linne, *op. cit.*, 43.

However, there are cases in which the principles relating to the burden of proof are not to be regarded as absolute and therefore swing to one side or the other, depending on the facts of the case. Attempting to resolve this issue, part of the doctrine,<sup>63</sup> also with regard to certain judicial decisions,<sup>64</sup> has begun attaching importance to the principle of the relativity or proximity of proof, analyzing the problem in accordance with the German<sup>65</sup> principle of *Beweisnähe*. In some cases, this has led to an exception<sup>66</sup> to the general rule stating that “gross negligence on the part of the seller would be presumed if the goods deviated obviously from the requirements of the contract and the non-conformity resulted from facts within the seller’s domain”<sup>67</sup> especially in cases where technical testing of goods was not required because it was “economically unreasonable”.<sup>68</sup>

This gives rise to the idea for some that indeed “a border-of-proof issue is beyond the scope of the Convention”<sup>69</sup> and causes part of the doctrine to question whether the general principles of the CISG in relation to the burden of proof are indeed those affirmed and go as far as to argue that “accordingly, the question of whether, and possibly which, evidentiary consequences an actual admission of liability by one party has, is supposedly not governed by the CISG but by domestic law”.<sup>70</sup> Thus, the powerful reasoning employed by that doctrine<sup>71</sup> or jurisprudence, which would provide an expansive force to the principle underlying Art. 79 CISG, is denied precisely due to the contrasting argument claiming that, if

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<sup>63</sup> J. Honnold, op. cit., 87 ff; in the same sense U. G. Schroeter, op. cit., 182 ff, 187 ff. On the problem of the “sphere of control” concerning the burden of proof: vid. Also C. Brunner, Th. Murmann, M. Stucky, “Art. 4”, op. cit., 71–72. On the point I. Schwenzer, “Art. 4”, op. cit., 88.

<sup>64</sup> CLOUT case No. 773 Bundesgerichtshof [German Federal Supreme Court], CISG-online No 847/2004, dated 30.6.2004, *Neue Juristische Wochenschrift*, 2004, 3181, translation in English in <http://cisgw3.law.pace.edu/cases/046030g1.html>.

<sup>65</sup> CLOUT case No. 773, cit.

<sup>66</sup> In relation to Art. 40 CISG, in this sense the provision is considered to be a “buyer’s ‘safety valve’”: Alejandro Garro, “The Buyer’s ‘Safety Valve’ under Article 40: What is the Seller Supposed to Know and When?”, *Journal of Law and Commerce*, Issue 2, Vol. 25, 2005, 253 ff.

<sup>67</sup> CLOUT case No. 773, cit.

<sup>68</sup> CLOUT case No. 773, cit.

<sup>69</sup> J. Honnold, op. cit., 90; in the same sense U. G. Schroeter, op. cit., 190.

<sup>70</sup> U. G. Schroeter, op. cit., 186.

<sup>71</sup> For example F. Ferrari, “Problematiche tipiche della Convenzione di Vienna sui contratti di Vendita Internazionale di Beni Mobili risolte in una prospettiva uniforme”, op. cit., 281 ff; A. Linne, op. cit., 43.



such were true, the provision of Art. 79 would become superfluous.<sup>72</sup> This is why some continue to perceive an openness towards a procedural<sup>73</sup> burden of proof.

In this sense, according to this position, the door would be opened to national law. If one were to stop at this point and accept the position of Italian case law analyzed above, there would be no conflict because one would arrive, as already noted in the previous pages, at the same conclusion. However, further discussion is necessary as otherwise one would only have a narrow view given that even the 2019 opinion of the Supreme Court in Joint Civil Chamber is not free of criticism.

On one hand, it should be noted that even from the standpoint of Italian law, the courts are aware that the principle of proximity of evidence is fundamental in this case. In the present case, this manifests itself as a double-edged sword since it generates contradictory decisions of the Italian Supreme Court. It is precisely the significance of this “*proximity of proof*”, which is used to harmonize the concept of performance,<sup>74</sup> that leads to the conclusion whether it is the buyer<sup>75</sup> or the seller<sup>76</sup> who must prove his case.

On the other hand, the Italian doctrine is divided on the opinion of the Supreme Court, Joint Civil Chambers in judgment no. 11748/2019. Those who embrace<sup>77</sup> it are opposed by those who observe a certain disfavor between the

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<sup>72</sup> Thus it is affirmed that “[a]s 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”: U. G. Schroeter, *op. cit.*, 186.

<sup>73</sup> Thus establishing that “[t]he 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”: L. Di Matteo, *op. cit.*, 191.

<sup>74</sup> Civil Supreme Court, Joint Civil Chambers No. 13533/2001, dated 3.10.2001, *cit.*

<sup>75</sup> Civil Supreme Court, Joint Civil Chambers No. 11748/2019, dated 3.5.2019, *cit.*

<sup>76</sup> As in Supreme Court (Civil Branch) No. 20110/2013, dated 2.9.2013, *cit.*, where it was stated that it is sufficient for the purchaser (creditor) to claim inexact performance or to denounce the presence of defects or flaws that make the thing unsuitable for the use for which it is intended or that substantially diminish its value, it being the responsibility of the seller (debtor), by virtue of the principle of referability or proximity of evidence, to demonstrate, even through presumptions, that he has delivered a thing that conforms to the characteristics of the type ordinarily produced or the regularity of the process of manufacture or realization of the good; where such proof has been provided, it will then be up to the buyer to demonstrate the existence of a defect or an intrinsic defect in the thing, attributable to the seller.

<sup>77</sup> Substantially in favour: T. Dalla Massara, *op. cit.*, 383; R. Mazzariol, *op. cit.*, 452.

“purist” concept of warranty adopted and the conclusions reached as regards evidence.<sup>78</sup> The grounds for criticism also derive from that complex coordination between a concept of performance that can sometimes be seen as subjective or objective depending on the more or less modernizing view when interpreting the provisions of the Italian Civil Code.

Here the obligation/warranty binomial encounters a further stumbling block provided by the possible subjective Italian conception of performance (where sustained), in the face of a warranty claim system which operates under a different prospect since, according to the traditional approach, redhibitory action and warranty action do not require fault.<sup>79</sup> Indeed, it is important to clarify that the problem concerning proof of lack of conformity (or defect) is in itself complex if we consider the aspects relating to the defect or *aliud pro alio* applicable in Italian domestic law.

The probative perspective is additionally significant since it is one thing to prove the existence of a defect and another to establish the moment in which such defect arose. The decision of the Italian Supreme Court in Joint Civil Chambers did not resolve this issue, nor does it appear to take it into consideration.<sup>80</sup> And, in this case, it is not possible to rely on the presumption that applies in the consumer sphere (B2C context, e.g. Directive 1999/44 and Directives 2019/771) which effectively coordinates the two aspects, whereby it is presumed within six months of delivery<sup>81</sup> (which will soon be even greater<sup>82</sup>) and “unless proved otherwise, any lack of conformity which becomes apparent of the goods shall be presumed to have existed at the time of delivery.”

Ultimately there are complicated nuances that need to be considered in attempt to address and coordinate international and domestic law.

Additional support for this assertion is provided by the fact that, for the time being, the decisions of the Italian Supreme Court subsequent to the Supre-

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<sup>78</sup> In this critical sense: F. Piraino, *op. cit.*, 1118; L. Regazzoni, *op. cit.*, 1060. Another part of the doctrine also observes that there are “some incoherent passages”, R. Calvo, *op. cit.*, 1533.

<sup>79</sup> For example Angelo Luminoso, *La vendita, Tratt. dir. civ. comm. Cicu and Messineo*, Giuffrè, Milan, 2014, 490.

<sup>80</sup> R. Mazzariol, *op. cit.*, 442. Accordingly, it is considered that the united sections have lost an important opportunity to clarify the allocation of the genetic moment, which marks, more than any other in this field, the dispute, therefore destined to perpetuate itself (o.u.c. 454). Therefore, it is observed that it remains to be verified who must demonstrate the pre-existence of the sale: M. Proto, *op. cit.*, 458.

<sup>81</sup> Art. 5.3 Directive 1999/44/EC, *cit.*

<sup>82</sup> With the consumer law reform, the period of the presumption will vary from one to two years depending on the country: cf. Art. 11(1) and Art. 11(2) of Directive (EU) 2019/771, *cit.*

me Court, Joint Civil Chambers of 2019, although they do not expressly reject the principle laid down by the latter, do not apply it, finding that the evidentiary question in certain cases is to be interpreted in another sense.

Although the first judgements following that of the Court of Cassation, by making reference to it, express an awareness of the Court's ruling in Joint Chambers, they deem it inapplicable since the case in point does not necessarily concern the rules of attribution of the burden of proof between the parties but rather relates to a different probative issue<sup>83</sup>. Hence, decisions cite the Joint Civil Chambers' ruling but decline to apply it because, although deeming it valid, they hold it is not relevant to the concrete case in terms of determining the burden of proof on the buyer.<sup>84</sup>

In the light of the above, the conclusions outlined in the previous sections cannot be accepted as approximate, although they are a snapshot of the Italian jurisprudential trend of the last period. Therefore, within the context of the Italian legal system and the CISG, the concept of subjective or objective performance, the difference between obligation and warranty continue to play a fundamental role alongside the importance of assessing whether to adopt the general principles of the CISG or the national ones, since we have seen that the interaction of formants does not lead to univocal solutions even in the Italian legal system, i.e. under that law where application by the courts would seem to initially oscillate towards the same evidentiary burden.

For this reason, the question of coordination between national legislation and CISG is much more complex, regardless of the fact that sometimes the results are the same (i.e. despite the synchronism between metronomes stated at the beginning of this article). The problem is further complicated by the various possible interpretations of the burden of proof, since proving a positive fact is not the same as proving a negative one. Therefore, depending on whether what is to be established is the conformity of the goods or, instead, its absence (lack of conformity),<sup>85</sup> or the presence of defects<sup>86</sup> and not the fact that these are hidden

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<sup>83</sup> It is thus emphasized that sometimes "the problem does not relate to the rules of distribution and discharge of the burden of proof between the parties in court, but to the different scope of the assessment of the evidentiary framework adopted in the proceedings": Supreme Court (Civil Branch) No. 22799/2019, dated 12.9.2019, data base *De Jure*. On this point, see A. Ferrante, *Formanti intrecciati*, op. cit.

<sup>84</sup> Supreme Court (Civil Branch) No.16058/2020, dated 28.7.2020, data base *De Jure*.

<sup>85</sup> For example Arts 35 and 36 CISG.

<sup>86</sup> For example Art. 1490 Italian Civil Code.

(hidden defects)<sup>87</sup> the burden of proof will assume totally different nuances, with important consequences.

## CONCLUSIONS

This article aimed to evaluate the interaction – after forty years from the inauguration of the CISG model – between the model adopted by the Italian Civil Code and that of the CISG, with particular reference to the burden of proof relating to lack of conformity.

A “*static dynamism*” of the Italian Civil Code has been noted. Indeed, although unchanging, the regulation of the Civil Code moves in a dynamic manner driven by external formants and factors, in the same way the CISG moves and adapts with eclecticism within the various contexts of countries with more or less different sales and purchase models.

Referring to the initial example of the metronomes posited at the outset, it is noted that the case law of the Italian legal system – which seems to impose itself by virtue of the recent 2019 decision by the Joint Chambers – provides a flexible base on which the two metronomes relating to the sale and purchase of goods of the Italian Civil Code and the CISG rest, thus making it possible for them to be synchronized in terms of probative duties in favor of the seller.

But this is only a “trick” that avoids taking into consideration much more complicated phenomena that lead to a more complex reality that operates through the critical interaction of other doctrinal or even jurisprudential formants. Therefore, in this panorama, by comparing the two models simultaneously, they become pendulums which, although having different conceptions and “lengths”, can cross paths, move in coherence or fluctuate in an antithetical way, as in the second example given at the beginning of these pages.

For this reason, although there are jurisprudential trends that would seem to resolve the problem, the issues surrounding the burden of proof in the event of lack of conformity persists. This is because it is necessary to consider multiple “vibrations” and “impulses” that are constantly given by the internal rules of domestic law and the CISG, as well as their doctrinal and jurisprudential interpretations.

This becomes even more complicated when different conceptions of remedial systems or concepts of non-performance must be taken into consideration, as in the case of Italian law, which in some cases could hardly be compatible with

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<sup>87</sup> If the defects have been concealed by the seller, compensation for damages is envisaged: Art. 1490 Italian Civil Code.

each other. Accordingly, the debate on the questions that have been partially raised remains open, moving between synchronic and asynchronous oscillatory movements between domestic law and the CISG or between subjective and objective performance in connection with the burden of proving lack of conformity.

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TERET DOKAZIVANJA I NEDOSTATAK SAOBRAZNOSTI PREMA  
BEČKOJ KONVENCIJI O MEĐUNARODNOJ PRODAJI ROBE  
IZ PERSPEKTIVE ITALIJANSKOG PRAVA

Rezime

Predmet ovog rada je analiza interakcije između modela kupoprodaje predviđenog Bečkom konvencijom i onog koji predviđa italijanski Građanski zakonik. Rad ima za cilj da utvrdi: a) da li je primenjivost domaćeg zakonodavstva ili opštih načela Bečke konvencije od uticaja na pitanje tereta dokazivanja o nedostatku saobraznosti, a potom i na raspravu o tome da li je reč o pitanju procesno-pravne ili materijalno-pravne prirode; b) da li je pitanje tereta dokazivanja nezavisno od subjektivne ili objektivne koncepcije o ispunjenju ugovora i od toga da li je ispunjenje od strane prodavca povezano sa nekom obavezom ili garancijom.

*Ključne reči:* nedostatak saobraznosti, teret dokazivanja, italijanski Građanski zakonik, Bečka konvencija o međunarodnoj prodaji robe

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