

## BURDEN OF PROOF, STANDARD OF PROOF, AND EVIDENCE ISSUES UNDER THE CISG

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### I. INTRODUCTORY REMARKS

Rules of evidence are fundamental to determining a party's rights in dispute resolution. On the one hand, they determine what evidence is needed to show whether a party has rights and the circumstances under which those rights might be granted. On the other hand, the rules help predict the strength of the evidence in the eyes of the decision-maker. Moreover, the many problems regarding whether the rules of evidence are to be qualified either as procedural or substantive law are precisely related to this role of the means of evidence.

The Italian model helps demonstrate these issues. The decision of the Italian legislature of 1942 to include the evidence provisions in the Civil Code, is both consequential and coherent, developing under different (but complementary) profiles. In that context, in fact, the evidence assumes importance, in general, as a “means” or “tool” granted to anyone to assert or, depending on the case, to defend their rights outside of the courtroom and prior to the judgment.

In fact, the “evidence” and the “virtual security” of obtaining rights' recognition, by virtue of the evidence eventually available, constitute a “condition already normally sufficient in itself” to impose the respect of such rights, even regardless of their possible judicial protection, ensuring the “calm enjoyment,” as well as the full “security” of the negotiations concerning them. At the base there is a substantive conception qualifying the evidence as a condition of the prior defense of the “security of private negotiations, or as means of protection of the rights, also outside and before the judgement.”<sup>1</sup>

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<sup>1</sup> LUIGI PAOLO COMOGLIO, *LE PROVE CIVILI* 30 (3d ed. 2010).

It follows, that the rules of evidence—which tend to regulate, as far as possible, their “preconstitution” *ante judicium*, as well as the conditions of their admissibility and “legal” effectiveness—find their logical place in the system of the Italian Civil Code (C.c.), even before that of the rules regarding proper judicial protection. The Code of Civil Procedure (C.p.c) and the rules of procedure, on the other hand, are subject to the technical discipline of the methods and forms by which the evidence can be acquired or adduced in the course of a judgment.<sup>2</sup>

The evident practical effects of the above-mentioned approach are to be found in the consolidated principle, typical of the Italian legal system, according to which the rules on the burden of proof and on the admissibility and relevance of evidence belong to the substantive law, and therefore are considered to be “two-faced,” as evidenced in the Ministerial Report to the Code.

In reality, it must be borne in mind that the distinction between substantive law and procedural law is based on clear premises of historical and political relativity. The classification of certain groups of rules, sometimes regarded as substantive or alternatively as procedural, is likely to vary over time because of factors which do not relate to their specific nature, but which take into account the practical consequences of their application in certain areas of experience or the different judicial policy objectives. In reality, it is necessary to underline the fundamental teleological element, which unites the rules of evidence in a single qualification of instrumental nature, linking both the distribution of the burden of proof and the configuration and discipline of the various tests, to the primary forecast of their natural effectiveness in the process and for the process.

However, the tendency of a reform in Italy is today in favor of the inclusion of the entire discipline of evidence in the Code of Civil Procedure, giving it a uniform procedural qualification.<sup>3</sup>

The proposed framework does not respond to simple classification or systematic needs, but it is in line with the tendency of the public sector to prevail over the private one in the regulation of procedural activities,

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<sup>2</sup> MICHELE TARUFFO, LA PROVA NEL PROCESSO CIVILE, IN TRATTATO DI DIRITTO CIVILE E COMMERCIALE 31 (2012).

<sup>3</sup> COMOGLIO, *supra* note 1, at 33–34.

facilitating the creation of a renewed balance of power between the initiative of the parties and the *ex officio* powers of the judge.<sup>4</sup>

This, moreover, is not just an Italian problem but rather one which is widely debated, and the question of whether evidence should be governed by the *lex fori* or the *lex causae* becomes extremely relevant for the resolution of conflicts of law issues in international disputes.

## II. CLASSIFICATION OF RULES OF EVIDENCE AND ITS IMPACT ON THE APPLICATION OF CONVENTIONS OF UNIFORM LAW

The problem cannot be underestimated in any way, because if the instruments of uniform law have given excellent results, starting for example with the CISG, there is the risk that the efforts for the harmonisation of international sales law can be compromised by the inevitable differences still present in the various countries in relation to matters of procedural law.

The law of evidence in the CISG has been affected, for a long time, by the unresolved issue of whether evidence is to be subjected to substantive law or solely to procedural law. In this sense, the law of evidence has been the topic of endless, and for the most part unresolved, debates concerning its substantive or procedural nature.

The question of whether evidence should be governed by the *lex fori* or the *lex causae* becomes relevant for the resolution of conflicts of law issues in international disputes since, in most countries, the rules of evidence are classified as substantive, not as procedural rules.

From a practical point of view, it is sometimes very hard for courts to interpret the content of foreign laws, also considering that the nature of such rules is still the topic of animated debates among the legal scholars in the specific domestic systems.

If the solution to this issue was uniform, the issue itself would be obviously solved: indeed, if the rules of evidence were to be considered rules of substantive law, they would automatically be interpreted in the light of the Convention to the extent that they were subject to the Convention; on the contrary, if the rules of evidence were to be considered rules of procedural law, then the *lex fori* would be the law to be looked at.

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<sup>4</sup> ERNESTO FABIANI, I POTERI ISTRUTTORI DEL GIUDICE CIVILE 37 (Edizioni scientifiche italiane 2008).

There is no doubt that the second option would be the most dangerous one. Indeed, the fear, among legal practitioners, that the “well-recognized goal of promoting uniformity in international trade and the great efforts made to achieve an independent set of substantive rules would be nullified by the application of arcane or outdated domestic procedural rules,” is certainly justified.<sup>5</sup>

Anticipating the conclusions discussed later in this Article, it is important to highlight, from this very moment on, the fact that any issue concerning evidence in relation to the Convention—would not be solved even with a clear answer to the question above, because such issues would need to be addressed on a case by case basis, starting from common principles.

We are, indeed, all aware that it is impossible to list of every potential conflict that may arise between the substantive law governing the contract and the procedural rules applicable to the dispute. Hence, for the purpose of our discussion, we can only say that there is a need to resolve these conflicts in accordance with the Convention’s well-documented goal of uniformity.<sup>6</sup>

“It is one thing to say that domestic procedural law should govern the conflict at all times; it is quite another to seek a solution in accordance with the general principles of the CISG.”<sup>7</sup> Resorting “to the domestic procedural law must be the exception, not the rule.”<sup>8</sup> “In such cases, the risk of making statements devoid of practical meaning, based exclusively on theoretical reasoning,” is very concrete.<sup>9</sup>

Therefore, instead of wondering whether an issue has to be categorized as either procedural or substantive, we simply have to decide if the subject is regulated by the CISG.<sup>10</sup>

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<sup>5</sup> Chiara Giovannucci Orlandi, *Procedural Law Issues and Uniform Law Conventions*, 5 UNIF. L. REV. 23, 26 (2000).

<sup>6</sup> Ulrich Magnus, *Opting In and Opting Out: Can There be Uniform Interpretation or Does Variatio Delectat Govern?*, 38 U. PITT. J.L. & COM. 360 (2019–2020).

<sup>7</sup> Orlandi, *supra* note 5, at 29.

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> See Milena Djordjevic, *Article 4*, in UN-CONVENTION ON THE INTERNATIONAL SALE OF GOODS (CISG) 31 (Stefan M. Kröll, Lucas A. Mistelis & Pilar Perales Viscasillas eds., 2018); Ingeborg Schwenzer, *Article 4*, in COMMENTARY 5 (Peter Schlechtriem & Ingeborg Schwenzer eds., 2016).

### III. BURDEN OF PROOF

Deciding whether an issue is covered by the CISG is important in relation to the burden of proof and its allocation.

It has long been discussed whether the burden of proof has to be considered an issue going beyond the CISG's scope of application and consequently governed by the non-harmonized national law.<sup>11</sup>

As of today, however, the opinion according to which the burden of proof is a matter governed by the CISG in the sense of Article 7(2), seems to prevail among scholars, and is widely recognized in a majority of court decisions as well as arbitral awards.<sup>12</sup>

It has been highlighted, however, how the CISG is not an exhaustive body of rules. In this regard, a distinction needs to be made between the "external gaps," or "*lacunae praeter legem*," and the "internal gaps," or "*lacunae intra legem*," and the way these gaps are dealt with.<sup>13</sup> The first ones are issues excluded from the CISG's sphere of application and, since they are not covered by the Convention, they need to be addressed by resorting to the law applicable by virtue of the rules of private international law of the forum. On the contrary, the latter ones are issues governed by the CISG but not expressly included in it. In this case, the issues are to be settled in conformity with the general principles on which the Convention is based, as per Article 7(2), and only where this cannot be achieved, recourse to the law applicable by virtue of the *lex fori* may be had.

The principle of "*onus probandi incumbit ei qui dicit, non qui negat*" has been recognized by the majority of countries. For instance, it is regulated

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<sup>11</sup> See Stefan M. Kröll, *The Burden of Proof for the Non-Conformity of Goods under Art. 35 CISG*, 3 BELGRADE L. REV. 162, 168 (2011); Harry Flechtner, *Addressing Parol Evidence Issues in Contracts Governed by the CISG*, in DRAFTING CONTRACTS UNDER THE CISG 330 (Harry Flechtner, Ronald Brand & Mark Walter eds., 2007).

<sup>12</sup> Schwenger, *supra* note 10, at 85–86.

<sup>13</sup> For the use of this expression, see, e.g., Jürgen Basedow, *Uniform Law Conventions and the UNIDROIT Principles of International Commercial Contracts*, 5 UNIF. L. REV. 129, 135 (2000); ALDO FRIGNANI & MARCO TORSSELLO, IL CONTRATTO INTERNAZIONALE 444 (Cedam: Milan 2d ed. 2010); Franco Ferrari, *The CISG's Interpretative Goals, Its Interpretative Method and Its General Principles in Case Law*, INTERNATIONALES HANDELSRECHT, Aug. 4, 2013, at 188; Djordjevic, *supra* note 10, at 46. See also FRANCO FERRARI & MARCO TORSSELLO, INTERNATIONAL SALES LAW—CISG IN A NUTSHELL (West Academic Publishing 2d ed. 2018) (making interesting remarks about how to fill internal and external gaps).

in Italy by Article 2697 of the Civil Code, which assigns the burden to one party instead of the other, based on the distinction between facts giving rise or modifying a right or obligations and facts that extinguish or prevent a right or obligation. Therefore, the party which invokes its right to assert a claim is required to prove the facts supporting the claim, while the objections or defenses to such claim are to be proven by the party raising them. This principle establishes, in general, that each party has to prove the existence of the factual prerequisites contained in the legal provision upon which such party wants to rely on for its claims or defenses.<sup>14</sup>

This does not depend only on the fact that this principle is considered a matter of substantive law (as it is often considered), but because there are direct and indirect clues within the CISG, entailing its inclusion in the CISG's basic principles.

As a consequence, even though the CISG does not contain an express rule on the allocation of the burden of proof, a rule on the burden of proof is expressly included in Article 79 of the CISG and this has been considered enough to rebut the argument that the CISG does not cover the issue at hand.

Article 79(1) of the CISG states that the non-performing party must prove the circumstances exempting it from liability for its failure to perform, thereby implicitly confirming that it is up to the other party to prove the fact of the failure to perform as such.<sup>15</sup> Therefore, it is up to the buyer proving the existence of a lack of conformity and the damage arising from it.

Moreover, along with this express mention, there are several other rules in which, at least implicitly, actual references to the distribution of the burden of proof are made, both as to the general principle mentioned above or as to more specific rules in which there is a shift of the burden between the parties. I am referring in particular, but without the pretense of being exhaustive, to Articles 35, 74 (see also, *e.g.* Articles 2, 25, 36, 39 . . . etc.).

It is important to keep in mind that the rule on the burden of proof is also essential to allow a judge to decide the case. It is indeed defined as a rule of judgment enabling the judge to issue, in any case, a decision, against the party that did not fulfill the burden of proof prescribed by law (the so-called

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<sup>14</sup> See Stefan M. Kröll, *Article 35*, in UN-CONVENTION ON THE INTERNATIONAL SALE OF GOODS (CISG) 528 (Stefan M. Kröll, Lucas A. Mistelis & Pilar Perales Viscasillas eds., 2018).

<sup>15</sup> U.N. Comm'n on Int'l Trade Law, United Nations Convention on Contracts for the International Sale of Goods, art. 7(2) Apr. 11, 1980, 1489 U.N.T.S. 3 [hereinafter CISG].

“burden of persuasion” or “the risk of non-persuasion”). “In subjective terms, the party having the burden of proof bears the burden of factual substantiation: burden of proof in its objective sense means the risk of a party bearing the burden of facts not being sufficiently established.”<sup>16</sup>

This is particularly true and essential in the countries where gathering the evidence is on the parties and not on the judge (the burden of adducing evidence). Indeed, the content of the notion is also influenced by the nature of the system in which it is used, whether it is an adversarial system or whether it is an inquisitorial one.

The definition of burden of proof is only apparently simple and clear. In reality, as the practical operators are well aware, it entails countless complications in its application. It is to be understood as a reference to the substantive facts underlying the claims and presented by the parties, and most of the time, as a connection to the procedural position held by each party (but this is not always true, and that is why it would be wrong to use the expression “*onus probandi incumbit actori*”).

Sometimes the legislator intervenes directly on the allocation of the burden of proof through presumptions. However, in general, it is misleading to think that the substantive rule always confers a certain binding effect to the allocation of the risk of proof. There are many other elements that can influence such allocation, and, in any case, the situations considered by the legislator are always simplifications of real cases.

The determination of the burden of proof thus ends up being carried out by the judge based on criteria completing and qualifying the legal case by adaptation to the specific case, such as, for example, the appearance, interest, normality, and the negative nature of the fact to be proven.

As to this point, it would also be important to verify how to regulate the *thema probandum*. For instance, in many legal systems, the facts not contested no longer need to be proven.

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<sup>16</sup> Kröll, *supra* note 11, at 167 (citing Appellationshof Bern (Appellate Court, Bern Switzerland) 11 Feb. 2004 (wire and cable), *IHR* (2006), 149 (150), CISG-Online 1191 at para. 3 (Pace)).

## IV. THE PROOF OF PROXIMITY

At this point, the proof of proximity criteria enters into play.<sup>17</sup> This principle, that has lately received increased attention in scholarly writings and case law, aims to mitigate the potential negative consequences of an abstract allocation of the burden of proof. Considerations of equity based on the notion that each party has to prove the facts originating from its sphere support or somehow modify the general rule.<sup>18</sup>

For example, proof by the debtor that he has performed his obligation(s) is sometimes easier than proving the negative fact of the non-performance by the creditor. The need to simplify the defense's exercise of rights requires, therefore, that the party close to the evidence bears the burden of producing the elements necessary for the decision in court, and therefore the party which bears the risk of lack of proof.

It does not seem necessary to question whether the basis for this proof of proximity principle is present within the CISG, because, even if it is considered a principle of national law, the results do not change. It is clear that these considerations are usually applied by the courts of civil law jurisdictions, where the principle is stated in their national law and there is a lack of wide reaching discovery opportunities (on the contrary, this principle of proof proximity is not widely considered in common law jurisdictions, such as the U.S. one, where the parties have wider discovery rights, allowing them to get hold of evidence from the sphere of the other party).<sup>19</sup>

In Italy, for instance, the proof of proximity principle went from being occasionally cited to being a fundamental principle of the system, following a decision by the Joint Chambers of the Supreme Court on a domestic sale contract issue.<sup>20</sup>

Starting with the facts, the Supreme Court stated that it is easier for the debtor to prove the performance of its obligations than for the creditor to prove the negative fact of the non-performance, according to the rule "*negativa non sunt probanda*."

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<sup>17</sup> See Schwenger, *supra* note 10, at 86; Chiara Besso, *La vicinanza della prova*, in *PROBLEMI RELATIVI ALLA PROVA NEL PROCESSO CIVILE* 45 (Bononia Univ. Press 2016).

<sup>18</sup> Kröll, *supra* note 11, at 171.

<sup>19</sup> *Id.*

<sup>20</sup> Besso, *supra* note 17.



The trend of weakening the burden of proof principle seems to be the result of how the proceedings can be seen under a different light.<sup>21</sup> The positive attitude towards the proof of proximity principle, indeed, highlights the fact that, in the Italian system, a new regime of proof is arising, based on the principle of collaboration between the parties and the judge, already existing in other civil law systems such as France and Brazil.

#### V. THE STANDARD OF PROOF

Another issue related to the burden of proof is the standard of proof. Different opinions exist even on this issue. Numerous commentators and courts consider the standard of proof an issue of procedural law and, therefore, to be regulated by the *lex fori*, even if they believe that the burden of proof issue falls within the scope of application of the Convention.

Only recently, the trend has started to change. Indeed, many notable scholars consider the standard of proof to be inferred from the Convention. Using the term “inferring” raises the question of whether the issue is to be considered regulated by the Convention or whether it is, instead, extracted by its general principles as per Article 7(2).<sup>22</sup>

However, in reality, as far as the standard of proof is concerned, I believe it is useless to determine if it is a matter of substantive or procedural law. We need to find, instead, the solution that best fits the scope of the Convention.

From this point of view, it seems clear that allowing the standard of proof to be evaluated in light with domestic law would put in danger the uniform interpretation and applicability of the very same Convention.

The question of which one is the actual standard to be sought is easy to answer. It is logical to identify it within the Convention itself. The prevalent opinion holds that the reasonableness criteria should be the reference point to start from. Not only the terms “reasonable” and “reasonableness” are often used in the Conventions, but case law, for instance in Italy, is based on the concept of the “preponderance of the evidence” which seems to resemble the reasonableness criteria.

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

<sup>22</sup> CISG, art. 7(2).

Also, in the ALI/UNIDROIT Principles of Transnational Civil Procedure, Article 21.2 states that, “[f]acts are considered proven when the court is reasonably convinced of their truth.”<sup>23</sup> “The standard of ‘reasonably convinced’ is in substance that applied in most legal systems. The standard in the United States and some other countries is ‘preponderance of the evidence’ but functionally that is essentially the same.”<sup>24</sup>

## VI. FREEDOM OF EVIDENCE

Lastly, a brief analysis of the questions of evidence within the Vienna Convention in relation to the informality set forth in its Article 11 is needed. Article 11 states that “A contract of sale need not be concluded in or evidenced by writing and is not subject to any other requirement as to form. It may be proved by any means, including witnesses.”<sup>25</sup>

It is worth mentioning that not all of the delegations agreed to take this principle from the Hague Convention and insert it into the Vienna Convention.<sup>26</sup> In the end, this approach was accepted with a compromise and the inclusion of Articles 12 and 96 in the text of the convention was agreed upon.

Article 11, with its freedom of proof and its freedom of form, may in fact be excluded where one of the Contracting States, within which one of the parties has its place of business, has signed the reservation contained in Article 96. Therefore, the non-applicability of Article 11 derives from the provisions of Article 12, the only provision of the Convention, which does not allow exceptions.<sup>27</sup> This Article expressly provides for the non-applicability, in the presence of a declaration of reservation pursuant to Article 96, of the provisions allowing for the manner in which consent is given for the conclusion, modification or termination of sales contracts, to be in a form other than writing.

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<sup>23</sup> Unidroit, *ALI/UNIDROIT Principles of Transnational Civil Procedure*, 4 UNIF. L. REV. 758, 796 (2004).

<sup>24</sup> *Id.*

<sup>25</sup> CISG, art. 11.

<sup>26</sup> See Schmidt-Kessel, *Article 11*, in COMMENTARY 210 (Peter Schlechtriem & Ingeborg Schwenzer eds., 2016).

<sup>27</sup> Luigi Paolo Comoglio, *Libertà di forma e libertà di prova nella compravendita internazionale di merci*, RIV. TRIM. DIR. E PROC. CIV. 793 (1990).

Except for this limited case, Article 11 sets forth, clearly, two fundamental rules: it establishes, on one side, a substantive rule according to which no form requirement is needed for a sale contract to be valid, and, on the other side, a procedural rule according to which no form requirement is needed to prove the contract itself. It further specifies that the contract can be proven with any means of evidence, even with testimony. The fundamental principle of informality (or form freedom) translates into the other fundamental principle of freedom of evidence.

The same principle is expressly included in the third paragraph of Article 8 of the CISG, relating to the contract.<sup>28</sup> Having said that, the analysis of this principle would require much more attention than I can devote to on this occasion, hence, at this time, I will simply try to present a few general considerations to be used on a case by case basis.

In one of my previous writings, I commented on the 1998 decision *MCC-Marble Ceramic Ctr., Inc. v Ceramica Nuova d'Agostino, S.p.A.*, 144 F.3d 1384, 1389 (11th Cir. 1998); where, for the first time, the Federal Court of Appeals succeeded in overriding a well-established domestic principle of law: the parol evidence rule.<sup>29</sup> Even though we all know this case, as it still is the leading case on this issue, I would like to briefly refer to the Court's reasoning.

In its reasoning, the Court did not confine itself to the mere exclusion of the application of the parol evidence rule, but it went further by creating an important precedent as to the future enforcement of the parol evidence rule.<sup>30</sup> Contrary to its name, this rule was considered by the Court as a substantive rule of law, since it did not purport to exclude a particular type of evidence as an untrustworthy or undesirable way of proving a fact, but it prevented litigants from demonstrating that fact.<sup>31</sup> As such, it was the Court's belief that the rule should not have been automatically applied by federal courts as any other procedural matter.

Consequently, under the Convention, and especially in the light of its Articles 8 and 11, the parties' intent, regardless of the form of their

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<sup>28</sup> Alberto Zuppi, *Article 8*, in UN-CONVENTION ON THE INTERNATIONAL SALE OF GOODS (CISG) 152 (Stefan M. Kröll, Lucas A. Mistelis & Pilar Perales Viscasillas eds., 2018).

<sup>29</sup> Orlandi, *supra* note 5, at 34–35.

<sup>30</sup> Zuppi, *supra* note 28.

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

statements, must prevail, if unambiguous, even against written documents. “In international trade usage, merchants who have developed the habit of concluding their contracts orally and following them up with written confirmation often prefer this principle of informality.”<sup>32</sup>

I believe that it would be interesting to update the opinion I therein expressed relating to the possible consequences on the uniform application of the CISG, taking into consideration also arbitral awards, but all I can add is that the Italian approach, has not really changed. It is worth mentioning the applicability even to judicial proceedings (Article 25 *bis* C.p.c.) of using written testimony similar to the common law affidavits, already available in arbitral proceedings (Article 819 *ter* C.p.c.).

In conclusion, as I mentioned, the goal of uniform application of the Convention can only be achieved through the widest possible admission of probative methods, at least in regard to the conclusion of the contract. In my view, the only serious limitations to the free admissibility of evidence can derive from domestic public policy aimed at safeguarding well-established fundamental principles of law. I consider that this should be the rule for every kind of process, since the free evaluation of the judge as a tool of final control should be sufficient (with the addition of a wide motivation).

## VII. CONCLUSION

The issue of evidence in the Convention is, without a doubt, interesting not only for those who study the procedural aspects of a case, but also for whomever needs to verify his or her own rights within a judicial proceeding.

A good level of uniformity in substantive law is, unfortunately, still colliding with a series of potential differences that, at the judicial level, show their most problematic aspects. The tendency to ignore the theoretical classification of rules as substantive or procedural, simply referring to what is within the Convention or not, has helped, too, in the resolution of various issues, starting with the one on the burden of proof. However, this tendency is not enough to guarantee a completely uniform applicability.

Personally, I still believe that the ideal situation would be to reach, if not uniformity, a harmonization of the rules on evidence to be utilized in international cases.

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<sup>32</sup> Orlandi, *supra* note 5, at 34–35.

Unfortunately, as of today, projects to establish a set of procedures that transcends national jurisdictional rules and facilitates the resolution of disputes arising from transnational commercial transactions do not catch a lot of attention. Consider, for instance, the Principles of Transnational Civil Procedure prepared by a joint American Law Institute/UNIDROIT Study Group and adopted in 2004 by the Governing Council of UNIDROIT. This looked towards the reconciliation of differences among various national rules of civil procedure, by taking into account the peculiarities of transnational disputes as compared to purely domestic ones (today shared with the ELI (l'European Law Institute); but also to the Draft of Uniform European Code of Civil Procedure, presented by Storme Commission many years ago (1994)).<sup>33</sup>

It is true that they might be considered overly ambitious projects and it might be better to settle for uniform solutions concerning discovery and the rules of evidence. Indeed, in this limited area of law, the need has always been considered essential and it has reached positive results, results that are a better fit for the resolution of disputes relating to international transactions outside judicial proceedings. I am, obviously, referring to arbitration where party autonomy led to the search of the best solutions, thanks to a uniform collaborative effort. The big impact that the rules of evidence might have in an international proceeding make clear the need to allow and to prefer the coexistence of customary law principles set forth in different jurisdictions.

In light of this, two aspects have gained particular attention: on one side, the need for predictability, and, on the other side, the strict respect of fundamental due process principles. To achieve this, the best arbitration practices have started looking, in depth, to the conflict and the possible compatibility between principles and rules set forth by different jurisdictions. In addition, it went further by materializing this approach into means of soft law. Consider, for instance, the UNCITRAL Notes on Organizing Arbitral Proceedings (1996)<sup>34</sup> or the IBA rules on the Taking of Evidence (2010).<sup>35</sup>

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<sup>33</sup> Marcel Storme, *A Single Civil Procedure for Europe: A Cathedral Builder's Dream*, 22 R. L. R. 87, 88 (2005).

<sup>34</sup> *Notes on Organizing Arbitral Proceedings*, UNCITRAL.ORG, <https://www.uncitral.org/pdf/english/texts/arbitration/arb-notes/arb-notes-2016-e.pdf> (Oct. 2016).

<sup>35</sup> IBA Rules on the Taking of Evidence in International Arbitration, IBANET.ORG, [https://www.google.com/url?sa=t&rcct=j&q=&esrc=s&source=web&cd=1&ved=2ahUKEwj74YiKkM\\_nAhUdmHIEHVJcCIEQFjAAegQIBRAB&url=https%3A%2F%2Fwww.ibanet.org%2FDocument%2F](https://www.google.com/url?sa=t&rcct=j&q=&esrc=s&source=web&cd=1&ved=2ahUKEwj74YiKkM_nAhUdmHIEHVJcCIEQFjAAegQIBRAB&url=https%3A%2F%2Fwww.ibanet.org%2FDocument%2F)

It is not a coincidence that substantive law issues originating from uniform law, as the Convention, have been more and more presented to arbitrators to the point of increasing the number of awards, in such matters, that have been regularly cited next to judicial case law.<sup>36</sup>

It is obvious that in a civil proceeding party autonomy is paramount and that the influence of the State on its own rules is not present in arbitration. However, as we have seen before, the power of the party to achieve (directly or indirectly) changes to the rules of evidence that were once impossible to even imagine, is constantly growing due to the increased necessity of a collaboration between the parties and the judge.

The goal is to reach the best solution to safeguard citizens and to safeguard international business and the related transactions. However, it has to be kept in mind that there are rules that cannot be changed in the judicial proceedings, proceedings that are of a public nature. The same rigidity does not exist in arbitration proceedings that are, by nature, left to the party autonomy. Hence, for instance, the parties in an arbitral proceeding can, freely and by mutual agreement, refer to the IBA rules. This is not possible in a judicial proceeding.

In conclusion, we have to remember that a judge's freedom needs to be limited by the due process principle, which requires him to clarify to the parties which facts need to be proven, which party needs to prove such fact, and what the means are to prove such facts (or, if that is the case, which means of evidence are not permitted), until the moment in which the parties cannot change or integrate their defenses any longer, in order to avoid unforeseen outcomes for the parties as a result of the unexpected evaluation of the evidence by the judge.

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<sup>36</sup> Thanks also to Vis Moot, see Ronald Brand, *The CISG: Applicable Law and Applicable Forums*, 38 U. PITT. J.L. & COM. 143 (2019–2020).