Suspicion of non-conformity amounts to non-conformity: CISG and German speaking courts

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ABSTRACT

After decades of Article 35 of the United Nations Convention on Contracts for the International Sale of Goods of 1980 (CISG) occupying a vast amount of legal discussions among courts and scholars regulating and interpreting the aspect of "non-conformity of the goods", it seems essential to widen these discussions for the purposes of exploring a slightly new important aspect of the non-conformity of the goods under Art. 35, namely, the suspicions of non- conformity of the goods delivered. The present thesis aims to provide an overview on the issue of suspicion, mere suspicion of the non-conformity of the goods to the contract under Article 35 and the German speaking courts.

The analysis will focus on what constitutes the suspicion of non-conformity of the goods, mainly 'food', and whether or not it can actually amount to non- conformity of the goods, after having retracted the two possibilities of establishing suspicions and the relevant case law, I will concentrate on the German speaking courts' interpretation of this issue. The latter courts took two different approaches, the majority sided with the fact that suspicions of non-conformity indeed constitute non-conformity while the rest believes that suspicions will never amount to non-conformity. The evaluation will proceed focusing on the burden of proof and whether the buyer can actually prove the suspicions of non-conformity or cannot prove it under the CISG.

The discussion will then delve into which approach of the German speaking courts is more permissive and convincing. In other words, I will present my own assessment regarding both approaches concluding my analysis with the decision that the suspicion mere suspicion, *per se*, amounts to non-conformity and a breach of contract under Art 35 CISG.

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Introduction

The United Nations Convention on Contracts for the International Sale of Goods of 1980 (CISG)[1] is known to be as a multi-lateral treaty and the convention that contains uniform legal rules for the purposes of governing international sale of goods.[2] Art 35, is one of the most important provisions of the CISG where it has always played a huge role in determining the essence of the relationship between the seller and the buyer once concluding a contract.[3] Under Art 35 CISG the seller has an obligation to deliver goods which are in conformity with the agreed contractual terms from quality, quantity, description to the agreed packaging.[4] The 'conformity' of the goods delivered should in principle be determined not only by their quantity or quality but also in compliance with other standards that will be affecting the usability of the goods [5] in a sales contract.[6]

The key issue is always revolved around the question of performance and the risk which might result in alleging a breach from one of the contracting parties [7] that the other has failed to perform his/her obligations in accordance with Art 35 and/or what was agreed on in the contract.[8] Therefore, it is crucial to have clear legal rules to regulate different transactions between the parties, in particular those that could be applicable on allocating the risk and might give us a clear image of guaranteeing the correspondence

[1] United Nations Convention on Contracts for the International Sale of Goods (adopted 11 April 1980 U.N. Doc. A/CONF. 97/18, Annex I, *reprinted* in 19 I.L.M. 668) [*hereinafter* CISG]. available at < https://www.uncitral.org/pdf/english/texts/sales/cisg/V1056997-CISG-e-book.pdf> Art 35.
[2] UNCITRAL, 'Digest of case law on the United Nations Convention on Contracts for the International Sale of Goods' (United Nations 2016) The Convention as a Whole; Overview of Digest XV.
[3] Villy de Luca, 'The Conformity of the Goods to the Contract in International Sales' (2015), 27 Pace Int'l L. Rev. 163, 174. < https://digitalcommons.pace.edu/cgi/viewcontent.cgi?article=1350&context=pilr> accessed 03 March 2020.
[4] CISG, art 35(1).
[5] CISG Advisory Council, 'Opinion No 19; Standards and Conformity of the Goods under Article 35 CISG' (2018) by Professor Djakhongir Saidov, King's College London 5.
[6] Herbert Bernstein and Joseph Lookofsky, *Understanding the CISG in EUROPE* (Kluwer 1997) 49.
[7] De Luca (n 3).
[8] Bernstein and Lookofsky (n 6).

and conformity between the characteristics agreed on in the contract and the final product delivered.[9]

Art 35 CISG has received vast amount of attention by both courts and Scholars, there are extensive discussions and bibliography analyzing the issue of the conformity of the goods and the seller's obligation under the contract. [10] Contrastingly, a new important issue on whether suspicions of non-conformity amount to non-conformity derives from this provision did not get the same amount of attention from legal discussions and scholars until recently.[11]

The issue of suspicion, mere suspicion of non-conformity has been occupying great attention among many German speaking courts and scholars lately for the sole reason of shifting to handle this issue in a more proper and flexible way.[12] It has been inferred that civil law jurisdictions general approach is to evaluate the non-conformity of the goods as a consequence of the physical features of the goods, i.e. goods do not correspond to the specified measurements in the contract and have defects, food is contaminated and not fit for human health.[13] While, this is an important aspect, non-conformity cannot only be evaluated on the physical features anymore specially in international trade and issues concerning the suspicions of non-conformity "but also on the legal and factual relations of the goods to their surroundings".[14] On the contrary,

[9] Schlechtriem and Schwenzer, 'Commentary of the UN Convention on the International Sale of Goods (CISG)' in Ingeborg Schwenzer (ed) *Chap II Obligation of the seller* ((3rd edn), OXFORD 2016).
[10] Ingeborg Schwenzer and Devid Tebel, 'Suspicions, mere suspicions: non-conformity of the goods?' (2014) 19 Unif. L. Rev. 152- 168 < https://pdfs.semanticscholar.org/b746/ea47218723a5fe49e67fc79aab7118a15738.pdf?_ga=2.59868266.654507962.1585213727-871365991.1580047545> accessed 25 January 2020.
[11] Ibid.
[12] Ibid, 168.
[13] Ingeborg Schwenzer, 'Conformity of the Goods: Physical Features on the Wane?' in Ingeborg Schwenzer and Lisa Spagnolo (eds), *State of Play,* The 3rd Annual MAA Peter Schlechtriem ((11th edn), 2012) 103
[14] Schwenzer and Tebel, (n 10) 155.

common law jurisdictions have a more flexible approach by focusing on the market's reaction.[15] -For example, if buyer's intention is to resell the goods but is unable to resell them for the market price usually paid for these goods. In other words, resale-ability of the goods is restricted due to change in the market's valuation of such goods will render them non-conforming regardless whether it is due to a physical or non-physical feature.[16] Accordingly, the German speaking courts' attention to the issue of suspicions is for the reason of trying to follow the Common law's Choir in determining this issue.

By virtue of the above mentioned, German speaking courts took two different approaches; The majority followed the common law approach arguing that the slightest suspicion of the non- conformity of the food delivered will amount to non-conformity based on the market's reaction.[17] On the contrary, others followed the original approach arguing that not every suspicion leads to non-conformity.[18] Rather, in order to allege the suspicion of non-conformity there must be measures taken into account; a buyer has to examine the goods under Art 38 CISG,[19] as well as give notice of the suspicion within a reasonable time in accordance with Art 39 CISG,[20] more importantly, the buyer is required to base his/her allegations on 'concrete facts'[21] or at least the non-conformity has to be 'obvious' [22] or if there is an instance of enormous health effect.[23] In addition,

[15] Schwenzer and Tebel, (n 10).
[16] Ibid.
[17] Ibid.
[18] Barbara Grunewald, 'Der Verdacht als Mangel' in Barabara Dauner-Lieb (ed), *Festschrift fu¨r Horst Konzen zum siebzigsten Geburtstag* (Mohr Siebeck 2006) 131, 134–5, para 6.
[19] UNCITRAL, 'Digest of case law on the United Nations Convention on Contracts for the International Sale of Goods' (n 2), 156.
[20] CISG, art 39.
[21] Case VIII ZR 176/66 *Argentinean rabbit meat* case [1969] German Supreme Court (BGH), NJW 1969 1171-2 'suspicion has to be based on concrete facts.'
[22]Case 19 U 5/08 *Remote indication device case* [2008] OLG Karlsruhe 'suspicion had to be obvious.' <https://translate.google.co.il/translate?hl=en&sl=de&u=https://dejure.org/dienste/vernetzung/rechtsprechung%3FGericht%3DOLG%2520Karlsruhe%26Datum%3D25.06.2008%26Aktenzeichen%3D7%2520U%252037/07&prev=search >
[23] Case 7 U 4419/93 *Coke case* [1994] OLG München, NJW 1995, 2566.

whether the seller has to comply with certain regulations i.e. local public-law requirements in the (seller's) export or in the (buyer's) import country which is important in the case of transborder commerce.[24]

Simultaneously, this thesis explores one of the vaguest issues, namely, the suspicion of non-conformity of the contract under Art 35. Within this paper, I will extensively discuss goods that are 'food' as the subject matter of the contract and the possibilities of having suspicions about their non-conformity with the contract- for example; meat having a negative feature which raises the suspicion for the buyer that the meat is non-conform, as well as food lacking the level of quality expressly agreed on and not in accordance with the agreed feature in the contract under Art 35(2)(b).[25] Concurrently, as every claim needs to be proved, the issue of who bears the burden of proving these suspicions will be demonstrated as well.

Accordingly, I will be focusing in this paper on the method that German speaking courts are following *vis-à-vis* the issue of suspicions that is from the market's reaction perspective[26] by analyzing this legal issue in two main Chapters; the first would be focusing on the suspicions of non-conformity via presenting legal analysis by the German courts establishing the possibilities of having suspicion and how does it affect and restrict the usability of the goods.[27] While the second will be focused on who bears the burden of proving this suspicion and whether or not the suspicions amount to non-

[24] Peter Schlechtriem, 'Compliance with local law; seller's obligations and liability. Annotation to German Supreme Court decision of 2 March 2005' (2005) PL < http://cisgw3.law.pace.edu/cisg/biblio/schlechtriem7.html#1> accessed 25 February 2020.
[25]CISG, Article 35 (2)(b); "(2) Except where the parties have agreed otherwise, the goods do not conform with the contract unless they: (b) are fit for any particular purpose expressly or impliedly made known to the seller at the time of the conclusion of the contract, except where the circumstances show that the buyer did not rely, or that it was unreasonable for him to rely, on the seller's skill and judgement".
[26] Schwenzer and Tebel, (n 10), (as was stated in the introduction that this issue lacks written material and legal opinion on. Therefore, "it seems fashionable to talk about suspicions as a matter of non-conformity of goods").
[27] Ibid, 153.

conformity by presenting the two different approaches mentioned above in relation to this matter; the first would demonstrate the fact that the buyer can actually prove that the suspicion of non-conformity amounts to non-conformity while at the same time the seller has a duty to dispel these suspicions and prove the conformity of the goods delivered. The Second, repudiates the first by arguing that it is impossible for a buyer to prove that a suspicion could amount to non-conformity. Thus, it is the buyer who needs to cohere to his/her allegations by proving concrete facts and not only mere suspicions. Accordingly, after appraising both approaches siding along with the majority of the German Courts' Choir seems more cogent. Therefore, concluding that the suspicion, mere suspicion amounts to non-conformity and a breach of contract under Art 35 CISG.

Chapter One: Suspicions, mere suspicions: non-conformity of the goods.

It all starts and revolve around important well- known international case law, and since this issue seems to be more common among German speaking courts and scholars and for the purpose of establishing grounds for the suspicions, it seems more accurate to focus on what constitutes non-conformity in order to determine the possibility of establishing non-conformity based on mere suspicions. Accordingly, as a first step I will be analyzing the meaning of the non-conformity of the goods as rightly demonstrated by courts and different scholarly opinions under Art 35 CISG, followed by enhancing the two grounds of suspicions that might lead to non-conformity of the goods.

1.1 The meaning of non-conformity under Article 35 CISG.

Article 35 (1) of the CISG primary rule is the assessment of the conformity of goods.[28] It requires from the seller to deliver goods which meet the qualifications and specifications agreed on in the contract in terms of the quality of the goods, quantity, description and packaging.[29] Otherwise, goods that do not meet the required characteristics stated under the contract will have a discrepancy in quality[30] and any variations from the contractual description of the goods amounts to a breach of contract.[31] It was stated in the *Granulated plastic* case [32] by the German court on the 25th of June 1996 that the goods delivered by seller "Raw Plastic" contained a lower

[28] Rene Franz Henschel, '*The Conformity of Goods in International Sales*'–Analysis of Article 35 in the UN Convention on Contracts for the International Sale of Goods (CISG)' (2005) 147.
[29] UNICITRAL, (n 2) 140 para 01.
[30] Christoph J.H. Brunner and Benjamin Gottlieb, 'Article 35 [Conformity of the Goods]', in Christoph J.H. Brunner and Benjamin Gottlieb (eds), *Commentary on the UN Sales Law (CISG*), (Kluwer 2019) 230.
[31] Peter Huber and Alastair Mullis, 'The CISG A new textbook for students and practitioners' (European law publishers 1980) 132.
[32] Case 7 O 147/94 *Granulated plastic* case [1996] LG Paderborn < http://cisgw3.law.pace.edu/cases/960625g1.html > .

percentage of quality than what was specified in the contract which rendered the produced window blinds not in conformity with the contract, therefore, amounted to a breach of the seller's obligation.[33] Following that, Art 35 (2) states that in order for the goods to be in conformity with the contract, they must be delivered fit for the purposes for which goods of the same description would ordinarily be used.[34] Or fit for their particular purpose expressly or implicitly stated in the contract between the parties.[35]

Applying Art 35 CISG in regard to the suspicions that a buyer might acquire is indeed not easy. *Schwenzer* once laid out that suspicion is a complicated issue,[36] different court decisions with different approaches have established under Art 35 that there are two possible approaches and reference points for a suspicion;[37] there may be the suspicion of a negative feature in the goods similar to the *Argentinean rabbit meat* case[38] which will be explained in more details in the second section, and the second approach could be similar to what was decided in the *biodiesel* case[39] when a known characteristic of the goods can be suspected of having negative features which entails a negative effect.[40] In other words, the suspicion of having certain ingredients in foodstuff that are suspected of causing health problems or certain characteristics of negative features in the goods that will create suspicions of the goods being unsuitable for use. Relatively, this issue plays a huge role also in regard to the question of whether the seller has to comply with local public- law requirements while performing his/her obligation to deliver goods in conformity with the contract under Art. 35 CISG.[41] Is the seller

[33] De Luca (n 3) 163, 174.
[34] Bernstein and Lookofsky, (n 6), Art 35 (2)(a).
[35] See CISG, Art 35(2)(b).
[36] Schwenzer and Tebel (n 10) 154.
[37] Ibid.
[38] *Argentinean rabbit meat* case (n 21).
[39] Case 9 U 165/01 *Biodiesel case* [2002] OLG Karlsruhe.
[40] Schwenzer and Tebel (n 10) 154.
[41] Schlechtriem (n 24) 200.

obligated to observe only his/her own regulations or it is of importance to keep in mind as well the buyer's public law requirements?[42] It has been inferred that in most case law the issue of suspicion is really hard to identify aptly, when will it be established whether the goods actually do possess the suspected features or whether these suspicions will occur in the future. Therefore, in the bellow section I will demonstrate different court decisions mainly German courts and Scholarly opinions dealing with the issue at hand on demonstrating what are the relevant features that might give rise to the suspicion of the goods being not in conformity with the contract.

1.2 Relevant case law and Scholarly opinion

Many cases have been decided by the German Supreme court in regard to the main conflict about whether the mere suspicion of the non- conformity of the goods will hold the seller liable.[43] It has been conferred by many court decisions starting from the famous *Argentinean rabbit meat* case [44] where the court established that the suspicion of non-conformity is a sufficient ground to claim for non-conformity of the goods[45] due to the reason that the Argentinean rabbit meat was contaminated by salmonella and the mere suspicion that the meat had contamination is, *per se*, enough to hold the seller liable.[46] In addition, the famous *Frozen Pork* case[47] that enhanced the fact that suspicion will amount to non-conformity by deciding to destroy all the delivered pork because it

[42] Schlechtriem (n 24) 200.
[43] *Argentinean rabbit meat* case (n 21), NJW 1969, 1171-2; BGH, 14 June 1972, NJW 1972, 1464.
[44] Ibid.
[45] See also Schwenzer & Tebel, (n10) 152 "Specifically, possible future damage to buildings caused by dry rot, the ECJ found that a mere suspicion that pacemakers have a defect renders them "defective without there being any need to establish that product has such a defect" [*Boston Scientific Medizintechnik* cases]".
[45] Ibid
[46] Schwenzer and Tebel (n 10) 154.
[47] Case VIII ZR 67/04 *Frozen Pork* case [2005] Bundesgerichtsh BGH, CISG-online 999 < http://cisgw3.law.pace.edu/cases/050302g1.html> . See also Higher Regional Court (OLG) Oldenburg, 3 March 2020, 272-3, feeding stuff was suspected to contain dioxin.

was suspected of containing dioxin. The German Supreme court has also drew attention towards this issue in regard to drinks; it was decided in 1988 when Austrian winemakers decided to upgrade its wine in order to reach the 'quality wine' by adding glycol to their wines and was decided that the fact that glycol could cause harm to the human health amounts to the non-conformity of the wine.[48]

A lot more cases were rendered that are the concern of different subject matters and not only foodstuff. All of these cases have in common the fact that it is really hard to determine if these goods "food being contaminated, etc." actually have the suspected features or these features will appear in the future.[49] The above mentioned case law render suspicion as a criterion for the non-conformity of the goods. Accordingly, it can be inferred that suspicion of the non-conformity amounts to non-conformity and a breach of contract under Art 35 CISG.[50]

Therefore, The essence and factual basis on the legal debate about suspicions in relation to the conformity of the goods is of utmost importance[51] and will be analyzed in detail within this chapter stating two possibilities where the suspicion will amount to the non-conformity of the goods starting from the Suspicion affecting and impeding the goods' usability (A) And then, discussing the suspicion based on agreed features (B).

A. Suspicion affecting the use-ability of the goods

Non-conformity cannot only be decided upon the physical features of the goods but also on what is surrounding the goods from legal and factual relations to them.[52] For example; whenever the buyer concludes the contract with the seller for the purposes of delivering goods that have an ordinary or particular purpose which could be the buyer

[48] Case VIII ZR 247/87 *Glycol wine* case [1988] Bundesgerichtsh BGH 218-20.
[49] Schwenzer and Tebel (n 10) 153.
[50] Schwenzer, (n 13) 103-12.
[51] Schwenzer and Tebel (n 10) 152.
[52] Ibid.

having the ability to resell the goods but, the goods failed to be resold in the market for the same price that is usually paid. Consequently, the market's reaction to the goods changed, therefore, the suspicions that the use-ability and resale-ability of the goods delivered might be affected and the market's reaction to the goods might change render the goods not in conformity with the contract regardless of whether the reason is due to a physical or non-physical feature.[53]

In addition, goods being sold by the seller needs to have documentation to prove their conformity even when the goods are physically flawless.[54] Hence, whenever new manufacturing guidelines were implemented, and the seller lacks the documentations for manufacturing his goods to prove their conformity to these guidelines this will render the goods non-conform as well.[55]As mentioned above, different court decisions decided differently in regard to the suspicion of non-conformity and whether it renders the goods non-conform, I believe that it is all about the usability of the goods and having the ability to re-sell them. In other words, it depends on the market's reaction and how these suspicions might restrict the goods' usability and resale-ability as well as if the goods were missing guarantees and documentations from the seller proving their conformity, this will confirm the suspicions for the buyer and render the goods not in conformity with the contract under Art 35 due to their usability being confined as well as lacking the assurances of their conformity.

Another aspect is whether the seller has to comply with his/her own public law requirements or the buyer's. This is a complex issue which will lead to a broader conclusion. Therefore, I will briefly summarize it as it is also a crucial point in relation to the suspicion of the non-conformity.

[53] Schwenzer and Tebel (n 10) 155
[54] Schwenzer (n 13).
[55] Ibid.

In 1995 in the *New Zealand mussels'* case, the German Supreme Court decided that the Swiss seller is not in a breach of contract and the goods which contained a cadmium concentration exceeding the limit recommended by the German health authority are in conformity with the contract. [56] In other words, the court decided that unless the parties agreed on specific terms in their contract, it is always the law of the seller's (exporter's) country "Switzerland" to be followed and not the buyer's under the CISG.[57] On the Contrary, an arbitral award was reviewed by the U.S. District Court in the *Medical Marketing* case in which the mammography devices imported from Italy to the United States were only complied with the Italian safety standards and not the USA safety regulations which made the FDA seize the devices.[58] This entails that the US Approach in regards to the suspicion of non-conformity obliged the seller to comply not only with his/her own public law requirements but also with the buyer's (import) country. Accordingly, the US court decided that the goods are not in conformity with the contract, and thus constituted a fundamental breach by the seller.[59]

The *New Zealand Mussels* case got criticized by legal writers and Scholars.[60] Which made the German Courts change their respective former decision to a new decision rendered in the *Frozen Pork* case. [61]

The seller is a wholesale meat trader having its place of business in Belgium, and the buyer is a German Merchant. In April 1999, the seller has sold pork to the merchant whom had to resell the meat to another trader in Germany directly who also had a

[56] Case VIII ZR 159/94 *New Zealand mussels* case [1995] CISG < http://cisgw3.law.pace.edu/cases/950308g3.html >.
[57] Schlechtriem (n 24) 198.
[58] *Medical Marketing Int'l, Inc v. International Medico Scientifica*, S.r.l., 1999 U.S. District Lexis 7380 (E.D.L.A) (1999), at http://cisgw3.law.pace.edu/cases/990517u1.html .
[59] Ibid.
[60] Schlechtriem and Schwenzer (n 9), Art. 25 CISG, 419-20.
[61] *Frozen Pork case* (n 47).

transaction with another buyer in Bosnia-Herzegovina and sent the goods to him directly "final purchaser" on the 4th of June 1999.[62] The meat was shipped in three installments, during the time of shipping to the final destination a new regulation was enacted on the 11th of June 1999 by the Federal Republic of Germany on pork products due to a widespread suspicion that the pork being shipped from Belgium might be contaminated with a highly harmful toxic chemical compound "Dioxin" [63]. After a while, in July 1999, the European Union and the seller's country 'Belgium' issued the same regulation ordering the seizure of this kind of meat. The Regulation was in relation to the Belgian pork that was produced in a certain period as not merchantable due to the enormous suspicion of the meat being poisonous.[64] Bosnia- Herzegovina also enacted the same regulation. Accordingly, this aspect pertains to a similar conclusion where for the meat to be merchantable it needs a certificate to be issued proving that the pork is free from dioxin.[65] The buyer had repeatedly asked the Belgian meat wholesaler to provide a health certificate which proves the conformity of the meat and that it doesn't contain dioxin, the buyer couldn't prove to the authorities the contrary due to the lack of certificates. Accordingly, this led to the destruction of the meat by them.[66]

the suspicion of Belgian pork being contaminated with dioxin urged the German buyer to sue the seller demanding for the remaining purchase price.[67] The Regional court dismissed the Plaintiff's claim requesting the purchase money as well as the Higher Regional court dismissed his appeal.[68] Eventually, the Plaintiff went to the Court of

[62] Schlechtriem (n 24) 199.
[63] Ibid.
[64] *Frozen Pork* case (n 47), para 9.
[65] Schwenzer and Tebel (n 10) 155.
[66] *Frozen Pork* case (n 47), abstract para 4, http://cisgw3.law.pace.edu/cases/050302g1.html
[67] Schlechtriem (n 24) 199.
[68] *Frozen Pork* case (n 47), facts para 5.

Appeals which declared and decided that the pork is not in conformity with the contract besides the fact that at the time of passing the risk it was still merchantable and useable under the Belgian (seller's) law; but it stated that the suspicion of contamination with dioxin which leads to suspicion of nonconformity is in itself enough to render the meat unfit for the ordinary use under Art 35 CISG. Thus, non-conforming.[69] First, the court reversed the decision of the Higher regional Court relying on national precedents stating in its judgment that pursuant to Art 7(1) CISG "it is necessary to interpret the provisions of the CISG autonomously i.e. with reference to its international character and without recourse to principles developed for national laws".[70] Second, the defendant is obligated to reduce the purchase price because of the non-conformity of the delivered pork pursuant to Art 35 and Art 36 of CISG at least regarding the two installments that the non-conformity existed before the passing of risk. Moreover, the Belgium regulation showed that the suspicion of the pork being contaminated with dioxin which affected the meat after the passing of risk doesn't mean that it is in conformity with the contract.[71] On the contrary, the court stated that the fact that suspicion became known and furthermore led in the European Union, Belgium and Germany to administrative measures of precaution only after the passing of risk and weeks later, does not alter the existence of the non-conformity and the suspicion and potential harm for human health at the time of passing of risk.[72] In other words, it is inconsequential if the court focused on whether the meat was actually contaminated by dioxin, what is important is that the mere suspicion that the meat contaminated with dioxin and against the public health rules renders it not in conformity with the contract aside from the one installment that

[69] Ibid, para 9.
[70] CISG, art 7(1).
[71] Belgium, Ministerial Ordinance art.3 (1999).
[72] Ibid.

was made in May 1999 and was proven to be merchantable in accordance with the contract. Thus, the buyer had to pay for it but for the other installments, the seller is entitled to reduce the purchase payment.[73]

What can be understood from what I have argued above is that regardless of the Public law requirement of any country, the crucial point is the usability of the goods. In other words, the merchantability and the resale-ability of the goods, therefore, If the pork was non-merchantable not because of the public law but because of their suspected feature of being contaminated with dioxin, renders the goods unfit for trading, therefore, not in conformity[74] and even if Belgium had never issued nor enacted the regulation standard for the merchantability of the meat, the mere suspicion of dioxin-contamination alone and the hindrance of the meat being resold in Europe, resulting from the suspicion is, *per se*, enough to cause and amount to non-conformity under CISG Art 35(1) and 35(2)(a) and (b).[75] Accordingly, the rule and decision is that the suspicion of ingredients of the goods "food" having the possibility to be harmful to the human health and will also restrict the resale-ability of the goods in itself will constitute non-conformity regardless of the public law requirements.[76] Hence, such a decision from the Supreme Court is peculiar. However, is of great importance since it was not only on the basis of the Public law requirements. On the contrary, it was upon the mere suspicion of the ingredients of the food and the infringement of the merchantability of the suspected goods, therefore, the slightest suspicions will render goods not in conformity with the contract.

[73] *Frozen pork* case (n 47).
[74] Ibid
[75] Schlechtriem (n 24) 199.
[76] Ibid, 200.

B. Suspicions based on agreed features

In the case of suspicions relating to features of goods that have been explicitly agreed on by the parties in the contract, it is well known that otherwise the goods will be non-conform under the CISG.[77] For example, if the contract between parties explicitly provides that the rabbit should come only from Argentina, then the agreed features prevail in the contract as a general rule.[78] Which means, in such situations when buyer gets delivery of rabbit meat other than Argentinean, it will lead to the assumption of and the risk that the goods are not fit for use due to the agreed feature. In other words, it will lead to the suspicion of non-conformity of the rabbit meat agreed on in the contract.[79] At the time of conclusion of the contract when parties agreed on particular goods "rabbits from Argentina", at that time the assumption is that the rabbits are indeed resaleable. However, it is of importance to keep in mind that in some cases there could be a contradiction in the agreed features between the parties in the contract and the usability requirement mentioned in the above section which at the same time does not necessarily mean that this contradiction is created by the parties but can be created by subsequent circumstances, as a result, in these cases the usability of the goods will prevail over the agreed features in the contract in a way of exception.[80] Moreover, the usability risk is attributed to the seller if it suggests the agreed feature while knowing the intended use, on the contrary attributed to the buyer if it the agreed feature can

[77] UNICITRAL, CISG Digest (n 2) 140. See also; Case No. 802 *CLOUT* case [Tribunal Supremo, Spain 2008] [Landgericht Stuttgart, Germany, 2002], English translation available at < www.cisg.law.pace.edu>

[78] Ibid.

[79] Florian Faust, 'Argentinische Hasen, belgische Schweine und o ¨sterreichischer Wein: Der Verdacht als Mangel' in Thomas Lobinger (ed), *Festschrift fu ¨r Eduard Picker zum 70. Geburtstag* (2010) 198 (also pointing to the importance of the seller's obligation to cure preventing the buyer from taking actions of cure itself).

[80] Ibid, 189-190.

merely serve as more of a weak indication.[81] But if the risk costs the change in the goods' usability "being able to resell it" due to an agreed feature, then the buyer has to indicate and attach a specific and important feature, for instance, by mentioning that he/she expressly made sure and expressly insisted on this feature.[82]

Finally and all things considered in the first and second group of cases; the mere suspicion that the buyer might have in regard to the non-conformity of the goods will immediately render the goods not in conformity with the contract and it can be concluded that all these prior conditions, whether the non- conformity of the goods is based on a negative feature similar to the rabbits being contaminated with salmonella or the suspicion of the goods having negative characteristic that were expressly agreed on in the contract- for example; rabbits coming only from Argentina or wine having a specific percentage of alcohol as well as pork having a toxic ingredient in it which will affect the human health. All this automatically will have a direct negative effect on the goods' usability and the market's reaction on the goods. Consequently, once the buyer has the suspicion that the goods' value is affected and its usability is restricted due to these conditions, it will affect the goods' conformity. Therefore, suspicion of non-conformity will amount to non-conformity of the goods.

Having mentioned these relevant features; one can illustrate that this constitute what is called and known to be a buyer having suspicion, mere suspicion of the non-conformity of the goods delivered. It seems about right to further elaborate that under any of the circumstances when the buyer might acquire for the slightest reason that the goods may not be in conformity with the contract for having negative features that might affect the usability of the goods or the goods appeared to be not in conformity with what was

[81] Faust (n 79), 189-190.
[82] Schwenzer and Tebel (n 10) 159.

agreed on in the contract and further worrying about the usability of the goods and the market's reaction to them. This all constitute what is expressed here as a suspicion, mere suspicion of the non-conformity of the goods. Accordingly, once the buyer doubt, or suspect that the goods delivered do not acquire the agreed features or by having these negative features it might reflect negatively on their usability/ resale-ability and the market's reaction. This all constitute suspicions about the goods being in conformity or not with the contract.

After demonstrating what might cause a suspicion for the buyer about the conformity of the goods, it is of importance to illustrate the different court decisions and scholarly opinion on whether these suspicions might amount to non-conformity of the contract or not. There have been two different approaches in regard to this issue which will be further explained in the Second Chapter. Some have expressly stated that the suspicion will amount to non-conformity of the contract while this approach has occupied the majority of the German speaking courts' decisions.[83] Others believe that suspicion of the non-conformity of the contract does not constitute non-conformity.

[83] Ibid.

Chapter two: German Speaking courts: Burden of Proof

Under Art 79 CISG [84] the burden of proof for the conformity of goods under article 35 CISG is a matter governed at least implicitly by the CISG[85]. The issue of the burden of proof calls for judicial interpretation, a number of court decisions have analyzed and discussed which party bears the burden of proving that the goods delivered are not in conformity with the contract under Art 35 CISG.[86] Court decisions adopt different theories, some indicate that it is the buyer who bears the burden of proving the lack of conformity[87] while other courts' decisions have concluded that it is the seller.[88]

As a starting point, it has been widely established in international practice, that the party who is asserting or affirming a fact bears the burden of proving it.[89] In cases decided by different courts in relation to burden of proof, the main principle that is developed according to what was stated by *Franco Ferrari* is that "any party that wants to derive beneficial legal consequences from a legal provision has to prove the existence of the factual prerequisites of that provision" [90] Therefore, once the buyer has taken over the goods and wants to claim non-conformity has to prove the elements which make the goods non-conform to the contractual provisions or what makes the goods not fir for their particular purpose.[91] In regard to suspicions, as was stated earlier that for the buyer to fulfil his allegations has to prove that the goods' usability is affected and restricted

[84] CISG, art 79 "A party is not liable for failure to perform any of his obligations […] at the time of the conclusion of the contract or to have avoided or overcome it, or its consequences".
[85] Franco Ferrari, 'Burden of Proof under the CISG' (2000-2001) Pace Int'l L. Rev <https://www.cisg.law.pace.edu/cisg/biblio/ferrari5.html> accessed February 2020. Also available at Pace *Review of the Convention on Contracts for the International Sale of Goods* (CISG), Kluwer Law International, 2.
[86] UNICITRAL, 'Digest of Article 35 case law' (2012) Pace Int'l L. Rev https://www.cisg.law.pace.edu/cisg/text/digest-2012-35.html#bp; para 17.
[87] *Barbara Berry, S.A. de C.V. v. Ken M. Spooner Farms, Inc*. [2006] WL 1009299 (W.D.Wash).
[88]Case 19 U 11/07 *Paperboard containers case* [2007] Provincial Appellate Court (OLG Köln) http://cisgw3.law.pace.edu/cases/070112g1.html
[89] Ferrari (n 85).
[90] Ibid, 3.
[91] CISG Digest (n2), Art 35 para 17

due to suspicions of negative features. In other words, what is important to keep in mind is that regardless of whether or not the suspicion is founded; all that is required from the buyer to prove is the suspicion's impact on the goods' usability, this does not necessarily address the goods sold only, but also relate to the comparable goods as a supporting factor that can also serve as a proof that the goods' usability is affected.[92]

On another point, In the *Fiberglass composite materials* case,[93] the court stated that "any party asserting a right bears the burden to prove that the conditions for this right are fulfilled; conversely, the other party must prove the facts excluding the claimed right or opposing it".[94] Even if the general principle is that any party asserting a right has the burden to prove that the conditions for this right are fulfilled, the burden of proving the conformity of the goods will shift to the seller if the buyer is able to show a reasonable suspicion that the delivered goods are defective. Which means, that in the circumstances where the buyer has to prove that the usability of the goods is being restricted, the seller has to dispel and discharge these allegations by proving that the goods are in conformity and their usability is not confined.[95]

Moreover, some Courts and Scholars argue that in order for the buyer to prove the non-conformity, the buyer should not be able to dispel the suspicion.[96] Thus, for the goods to be non-conform their use-ability must be affected significantly. Others are not convinced with this argument, the fact that the buyer can dispel the suspicion this does not mean that the goods are in conformity and does not change their initial non-conformity.[97] Hence, this chapter will illustrate the issue of Burden of proof as

[92] Schwenzer and Tebel (n10), 162
[93] Case C1 08 45 *Fiber material case* [2009] Higher Cantonal Court Valais (Tribunal cantonal) http://cisgw3.law.pace.edu/cases/090128s1.html.
[94] Ibid.
[95] Schwenzer and Tebel (n10), 163
[96] *Argentinean rabbit meat* case (n 21) 1171-2; OLG München, 21 April 1994, NJW 1995, 2566; LG Lubeck, [1986].
[97] Faust (n 79) 185, 197-8.

interpreted by courts and tribunals, I will be examining the cases which are related to Art 35 CISG by proposing two contradicting approaches taken by the German Speaking courts in relation to whether the suspicions that the buyer has can amount to non-conformity or not. The majority has argued that the suspicion does amount to non-conformity and thus, a breach of contract. Others, dissent to this opinion by arguing that mere suspicion does not qualify as a base to claim non-conformity. While I will be presenting these two different approaches, it has been emphasized by court decisions that in order to examine these approaches, it shall be done by addressing the burden of proof issue in regards to who bears the burden of proof and whether or not suspicions can be proved in order to constitute this non-conformity. Therefore, the chapter will present first that the buyer can prove the fact that the suspicion does amount to non-conformity while at the same time the seller has to refute these allegations. And second, the opposing opinion which is the impossibility of the buyer to prove the suspicion as a criterion that will lead to non-conformity. Therefore, I will concentrate on which party would benefit from the uncertainty and which party would be burdened by that uncertainty.[98]

2.1 Buyer can prove the non -conformity based on suspicions

As laid out earlier, the issue of burden of proof is a matter governed, at least implicitly, by the CISG.[99] While dealing with the issue of burden of proof, under Art 79 CISG, the burden of proof clearly lies on the party who raises the defense of exemption from liability. For cases that are not governed by Art 79 CISG, the question of who bears the burden of proof should be resolved in accordance with the general principles on which

[98] Anna L. Linne, 'Burden of Proof under Article 35 CISG' (2008) 20 (1) Pace Int'l L. Rev. 31 https://core.ac.uk/download/pdf/46711691.pdf accessed 24 January 2020.
[99] Ferrari (n 85), 1-8.

the CISG is based as provided under Art 7(2).[100] Accordingly, Once the seller made the delivery of the goods and the buyer physically took over the goods, the buyer bears the burden of proving that the goods delivered are not in conformity with the contract.[101] In the case of the buyer having the suspicion of non-conformity, this means that the buyer must prove that the goods' usability is limited as well as restricted due to the suspicions of negative features in the goods delivered. Otherwise, merely proving a suspicion is insufficient.[102] It is extraneous whether or not the suspicion is founded; what is of relevance and important is to prove that this suspicion have an impact on the usability of the goods.[103] Moreover, In allocation of the burden of proof, court decisions have developed two general principles; These are: (1) "Any party which wants to derive beneficial legal consequences from a legal provision has to prove the existence of the factual prerequisites of that provision", (2) "Any party claiming an exception has to prove the existence of the factual prerequisites of that exception"[104] Accordingly, the buyer has to prove that the usability of the goods delivered is being affected due to the suspicion of their non-conformity. -for example; actions directed by the government to seize these particular goods based on the suspicion will affect the goods' usability. Thus, amount to the goods being restricted [105] and since the buyer is the one alleging the suspicion of non-conformity of the goods delivered, therefore, he/she is the one to prove this non-conformity and the restriction on the usability of the goods. Even if the actions taken is not directly to the goods delivered but to comparable goods can also serve as a proof that the goods' usability is affected. In addition and as stated by

[100] UNICITRAL (n 2), CISG Digest, Art 7(2).
[101] *Chicago Prime Packers, Inc v. Northam Food Trading Co* [2005] US Federal Appellate Court (7th Cir) 04-2551, [2005] 408 F.3d 894, Pace Int'l L. Rev, para 53.
[102] Grunewald (n 18) 136-7, 139.
[103] Schlechtriem (n 24) para II.
[104] Ferrari (n 85), 3
[105] Schwenzer and Tebel (n 10), 162

Schwenzer; another way to prove the non-conformity could be that a buyer can always rely on media reports about certain goods that raises the suspicion which may also suffice to satisfy the buyer's burden of proof [106]- for example, in The *Argentinian rabbit* case it was reported that a significant amount of rabbit imports from Argentina were contaminated with a bacterial disease "Salmonella", the government started seizing the goods and prohibiting their sale.[107] Thus, the goods' usability was restricted. Accordingly, the suspicion of the non-conformity of the goods in similar cases results into non-conformity as the usability and re-salability of the goods got affected, therefore, Art 35(1) CISG is breached by the seller in relation to the fact that the seller is *prima facie* obliged to deliver rabbits that are in conformity with the contract under Art 30 and 35 CISG.[108]

As was mentioned above, the burden of proof is on the party who is claiming and alleging the non-conformity of the goods delivered[109] and once the buyer accepted the goods the burden of proof for the non-conformity of the goods relies on him/her;[110] similar to the *Wire and Cable* case[111] that was decided by the Swiss Supreme court which reversed the Court of Appeal's decision in Bern, holding that the seller failed to discharge his burden of proof concerning the amount of goods delivered.[112] However, the Supreme court held that once the buyer has accepted the goods, he/she bears the burden of proving the uncertainty about the non-conformity of the goods delivered.[113]

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[106] Ibid.
[107] *Argentinean rabbit meat* case (n 21).
[108] UNICITRAL (n 2), CISG Digest Art. 30 & 35, 126.
[109] Dr. Stefan Kröll, 'the Burden of Proof for the Non-Conformity of Goods under Art 35 CISG' (2011), no. 3 pp. 162-180 Belgrade Law Review "the one who alleges a fact has to prove it." 162 http://www.cisg.law.pace.edu/cisg/biblio/kroll2.html accessed March 2020
[110] Ibid, 163
[111] Case 304/II/2003/wuda/scch *Wire and cable* case [2004] Appelationshof [Appellate Court] Bern.
[112] Ibid.
[113] Kröll, (n 109) 164.

In few cases handled by the German courts, it was illustrated that in relation to the burden of proof there should be a discharge of suspicion from the seller and by doing that successfully, this entails and will result in the conformity of the goods.[114] Some courts have conferred that the interpretation of this approach would be considered as shifting the burden of proof,[115] on the other hand, the majority stated and established that it is just the duty of the seller to dispel the suspicion as well as it is his/her responsibility to assist the buyer in rendering the goods usable again by dispelling the suspicion[116] –for example; issuing certificates for the goods or make assurances and statements opposing the suspicions and the Seller's failure to dispel the buyer's reasonable suspicion amounts to non-conformity under Art 35 CISG.[117] According to the *Frozen Pork* case, the court has decided that the harmful conditions of the goods alone is a defect which the seller did not refute. [118] Simultaneously, in the *Biodiesel* case, the court decided that the suspicion of the usability of the car since the new vehicle was intended to be fully capable of operating biodiesel, therefore, not having such capability amounted to a defect and since the seller did inform the buyer of the possibility that the vehicle may not be powered by biodiesel, in other words, the seller affirmed the defect,[119] this means that the seller failed to dispel the suspicion of the goods' usability.

Accordingly, delivered goods will be considered defective if there is a reasonable suspicion as to the defect of the goods and their usability proven by the buyer. Moreover, the failure of the seller to dispel the suspicion of the non-conformity will

[114] Hideo Nakamura, 'Conformity of Goods with Regulatory Restrictions: BGH Decisions in the Mussels and the Pork case' (2011), no. 15 Vindobona Journal of International Commercial Law and Arbitration (Vienna) 53,62
[115] *Frozen pork* case (n 47), 2851, 2853; Grunewald (n 18) 138.
[116] Schwenzer and Tebel (n 10) 167
[117] Ibid.
[118] *Frozen pork* case (n 47) 17.
[119] *Biodiesel* case (n 39).

also declare the suspicions to amount to non-conformity of the goods under Art 35 CISG.

2.2. Buyer can never prove the non-conformity based on suspicions

As laid out in the earlier section that suspicion of non-conformity does amount to non-conformity. It seems about right to present the second approach in regard to this issue that suggests that suspicions of non-conformity will never amount to non-conformity.

In accordance with Art 35 CISG, goods are non-conform if they do not conform to the agreed contractual terms or are not fit for the particular purpose expressly or implicitly made known to the seller.[120] *Henschel* stated that in the case of any variations from the agreed quality or nature of the goods, the goods will be rendered as non-conform with the agreed contractual terms under Art 35 (1) CISG.[121] Unlike the first approach it has been rendered by the German supreme court in different decisions in 1969, 1988, 2013[122] and different opinions that not every suspicion leads to non-conformity. Rather, some courts require that suspicion needs to be based upon 'concrete facts' which means the buyer needs to obtain concrete facts of the non-conformity[123] or at least 'obvious' suspicion to allege non-conformity of the goods.[124] Relatively, Art 38 CISG illustrates that once the buyer has taken delivery of the goods; he/she is required to examine the goods and ascertain whether the goods are in conformity or not with the agreed contractual terms.[125] The buyer is obliged to notify the seller and give notice upon

[120] CISG, Art 35 (1) and 2 (b)
[121] Henschel (n 28) 156.
[122] *Argentinean rabbit meat* case (n 21), 1171, 1171–2; BGH, 23 November 1988, NJW 1989, 210, 218; OLG Karlsruhe, 25 June 2008, NJW-RR 2009, 134; OLG Oldenburg, 18 June 2013, RdL 2013, 272
[123] *Argentinean rabbit meat* case (n 21), 1171, 1171–2.
[124] *Remote indication device* case (n 22), OLG Karlsruhe, NJW-RR 2009, 134; *OLG Celle* [2008], NJOZ 2009, 3778, 3779; OLG München [1994], NJW 1995, 2566.
[125] CISG, Art 38

discovery of the non-conformity within a reasonable time.[126] On the contrary, if the buyer failed to examine the goods, it will lead to the consequences that the buyer cannot fulfill his duty under Art 39 CISG to notify the seller of a lack of conformity. Thus, may lose any remedies to which he is entitled to on account of lack of conformity.[127]

Similarly, it was inferred by the German court deciding on the *Pallets* case[128] that "a mere suspicion of a lack of conformity with regard to the country of origin that may have incurred before that time was not regarded as a "discovery" of lack of conformity under Art 39 CISG".[129] In addition, it has been stated that the reasonable time for the buyer's notice does not begin to run until the buyer ought to have acquired knowledge, and not mere suspicion, of the lack of conformity.[130] Moreover, in 2004 in the *CLOUT* case, the court had to come to a decision that the buyer bears the burden of proving the lack of conformity of the hidden defect.[131] However, the buyer's reasonable time for giving notice under Art 39 (1) CISG does not begin to run until the buyer ought to have knowledge about the defects, and not mere suspicion of the lack of conformity.[132]

Accordingly, one can understand by analogy that the buyer has to establish the required knowledge and provide evidence and concrete/ obvious fact as to the non-conformity and not only mere suspicion in order to constitute discovery of the lack of conformity. Thus, there must be a threshold that has to be met when the buyer is alleging the non-conformity of the goods based on suspicions. Moreover, when the buyer has a suspicion

[126] CISG, Art 39
[127] Schwenzer and Tebel (n 10) 158.
[128] Case 8 O 118/02 *Pallets* case [2004] LG Saarbrücken, para 3. http://cisgw3.law.pace.edu/cases/040601g1.html
[129] Ibid.
[130] UNICITRAL (n 2), CISG Digest, Art 39 para 22.
[131] Ibid.
[132] Ibid.

of hidden defects, he/she has to take steps and examine the goods to confirm its suspicion about the non-conformity of the goods.

Over and above, *Schwenzer* and *Tebel* clearly stated from another perspective that one cannot infer a suspicion, without directly being certain that the suspicion will affect and restrict the usability of the goods, therefore, suspicion has to be directly supported and related by the condition of the delivered goods to prove the non-conformity.[133] Consequently, the mere suspicion that the buyer might have and the uncertainty of the non-conformity of the goods will not amount to non-conformity just by having mere doubts whether the goods are conform or not. Rather, these allegations must suffice the thresh-hold of proving how these suspicions did affect the market's reaction on the delivered goods and take further steps. In other words, merely claiming non-conformity based on suspicion of non-conformity will not constitute non-conformity.

2.3. Assessment of German speaking Courts' approaches

The aim of this thesis is to try to shed some light on the issue of suspicion mere suspicion of the non-conformity of the goods delivered, what constitutes the suspicion and the different approaches used to find a solution feasible for international trade. After discussing what constitutes a suspicion, and the two different approaches on whether suspicion constitutes non-conformity. In this section I will emphasize my assessment on both approaches, by first elaborating on why the German courts' first approach is more permissive and convincing, following that my interpretation on why the second approach is unduly and excessive.

According to what I encountered in the chapter above, siding with the first approach as a proponent 'suspicion of non-conformity does constitute non-conformity of the goods'

[133] Schwenzer and Tebel (n 10) 155.

seems about right and Just for the following grounds; it is widely internationally known that it is always the buyer who bears the burden of proof unless peculiar circumstances occur that will shift the burden to the seller.[134] Aside from the fact that I will not be addressing the issue of shifting the burden of proof here, it is important to highlight the fact that this approach which presents the majority of the German courts' decisions focused on two important aspects, first is that under the CISG, it is always the buyer who has to bear the burden of proving his/her allegation.[135] Second, while buyer is proving his/her allegation this does not mean that the seller must not do anything. On the contrary, the seller also bears the burden of discharging these allegations for the buyer[136] in regard to the general fact under any contractual obligation and under Art 30 CISG[137] which illustrates that whenever a contract is concluded between the buyer and the seller, the seller is *defacto* and *prima facie* expected to deliver the goods in conformity to what was agreed on. In other words, the slightest suspicion that the buyer might have in regard to the conformity of the goods delivered, at first the buyer has to assess that by proving how the goods' usability became restricted while at the same time the seller has to dispel these suspicions and prove that the goods' usability is not affected nor restricted. Therefore, a suspicion of non-conformity can be proved according to the fact that it is not the suspicion that has to be proven. Rather, it is how the goods' usability got affected and restricted and it can be proven by different ways that were mentioned in the first section of this chapter. Thus, suspicion of non-conformity can constitute non-conformity and a breach of contract under Art 35 CISG.

[134] Schwenzer and Tebel (n 10) 162,163.
[135] Ferrari (85) 3.
[136] Schwenzer and Tebel (n 10) 167.
[137] See CISG, art 30.

On the other hand, as a critic and an opponent to the second approach is for the sole reason that different authors and courts argue that once the buyer is able to dispel the suspicion of non-conformity, there is no non-conformity.[138] At the same time, it has been also argued that the possibility that the buyer is able to dispel the suspicion and rectify the goods' non conformity does not change the goods' initial non-conformity.[139] Hence, whether or not the threshold is met, where suspicions are proved or not this won't affect the goods' initial nonconformity as argued by different German courts; once the suspicion is alleged, it meets the threshold which identify the goods as non-conform. In addition, even if the suspicion can be easily dispelled, this will also amount to a breach of contract under CISG, might not amount to a fundamental breach provided that the goods' usability is not affected nor restricted anymore, but will amount to a breach of contract.[140]

Ultimately, the buyer has to prove that the goods' usability is affected due to having suspicions that the goods have negative features. The tendency that the buyer has to prove the suspicion of non-conformity based on concrete facts or at least an obvious reason to allege the non-conformity and not only base it on suspicions[141] did not convince the majority of the German speaking courts and authors. Therefore, it won't convince here as well based on the above-mentioned facts. Hence, Suspicion does amount to non-conformity.

[138] *Argentinean rabbit meat* case (n 21), 1171, 1171–2
[139] Faust (n 79)185, 197–8.
[140] Ibid.
[141] Schwenzer and Tebel (n 10) 163.

Conclusion

The United Nation Convention on Contracts for the International Sale of Goods demonstrated in its provisions and interpretations regarding the conformity of the goods to the contract a clear understanding that Art 35 CISG allocates the responsibilities and obligations on both the buyer and the seller as well as regulates the conformity of the goods under the contract.[142] What is more important in relation to the conformity of the goods is the possibility of the buyer having suspicions about the non-conformity of the goods delivered by the seller. In this paper, it has been proven that suspicions have a substantial effect on the goods' usability and in order to balance the responsibilities and the risk between the buyer and the seller, measures must be considered. First, an analysis must be made in regard to what could constitute a suspicion; whether the suspicion is in relation to the agreed features of the goods or the suspicions that the goods delivered will reflect a negative impact on the goods' usability and the market's reaction to the goods. Thus, these conditions will render the goods not in conformity with the contract and will amount to the seller's breach of his/her obligation under Art 35 CISG. Second, the importance of knowing who will bear the risk and the burden of proving the suspicion's impact on the goods' usability and whether it will actually render the goods non-conform.

In this paper I decided to illustrate the two approaches that the German Speaking Court has in regard to the suspicion mere suspicion; First would be that the mere suspicion of the non-conformity which will restrict the usability of the goods in fact amounts to non-conformity of the goods, this opinion and approach respects the buyer's interest and expectations in receiving the goods according to what was agreed on in the contract

[142] De Luca (n 3) 255.

unhindered by any suspicions irrespective of whether these suspicions are true or not.[143] The Second opinion is supporting the impossibility of the buyer to allege non-conformity and prove it while only relying on suspicions. Rather, the buyer needs concrete facts or at least an obvious suspicion to help prove and determine the goods as non-conform. In addition, once the buyer has examined the goods and gave notice within the reasonable time under Art 38 and 39 CISG the seller has a duty to help the buyer dispel the suspicion and render the goods useable again.

Finally, while I support the first approach. The two contradicting approaches align the non-conformity and the burden of proof to one specific point which is the suspicion and its effect on the usability of the goods and since it was demonstrated that it is difficult to properly handle cases of suspicion as it is a complex issue,[144] Art 35 CISG helps in that sense since it reveals what is beyond the goods themselves. In other words – for example: parties concluding a contract for the sale of a car does not only mean that the seller's obligation end at the extent of delivering the car to the buyer. However, the car has to be in accordance to what the buyer is expecting from it and from what was agreed in the contract, (i.e. being able to drive it without acquiring any difficulties or defects in it, or delivering it according to the specified color agreed on in the contract, etc.) in order to be in conformity with the contract.[145] Therefore, the seller is obligated to deliver goods without raising any doubt for the buyer that the goods might have the slightest negative feature that might restrict the usability of the goods or the merchantability of the goods specifically food which by having the slightest doubt in their conformity might affect human health as well as reflect negatively on their resale-ability.[146] Consequently, after assessing both approaches, the tendency that I would take

[143] Schwenzer and Tebel (n 10) 167.
[144] Ibid, 154.
[145] Ulrich Schroeter, Advisory council opinion during a skype interview, 12 March 2020.
[146] Ibid.

is that the mere suspicion that the buyer might have regarding the non- conformity of the goods amounts to non-conformity and a breach of the seller's obligation under the contract in the sense of Art 35 CISG.

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