



PACE INTERNATIONAL LAW REVIEW

NATIONAL PRECONCEPTIONS THAT ENDANGER UNIFORMITY

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One of Professor E. Allan Farnsworth’s great endeavors was to bring different legal systems together, to reconcile their differences and to ultimately achieve appropriate uniform results. Uniformity, however, is constantly threatened by lawyers relying upon their national preconceptions due to their lack of training in comparative law. This article, in honor of E. Allan Farnsworth, focuses on a problem in a core area of the uniform law on international sales in which ensuring uniform interpretation has proven challenging.

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I. THE PROBLEM

According to Art. 39(1) CISG,¹ the buyer loses the right to rely on a lack of conformity of the goods if it does not give notice to the seller specifying the nature of the lack of conformity within a reasonable time after it has discovered it or ought to have discovered it.² Case law on how to interpret the question of what period is reasonable in the sense of Art. 39(1) CISG is abundant, especially in German speaking countries.³ As can be expected, divergent interpretations are endangering the uniform application of the CISG. However, at the Conference, “25 Years United Nations Convention on Contracts for the International Sale of Goods (CISG),” held in Vienna on March 15-16, 2005, the reporter on Art. 39 CISG⁴ came to the conclusion that the analysis of case law regarding the period within which the buyer has to give notice of any non-conformity of the goods shows “a cautious convergence in the direction of the ‘noble month.’”⁵ This, in return, prompted a reaction from some Common Law representatives, for whom such a pre-determined period seemed utterly unacceptable.

This article will outline the background to the “noble month” period and try to offer solutions which both civil law and Common Law lawyers will find agreeable.

II. NATIONAL SOLUTIONS

The problem behind the interpretation of Arts. 38, 39 CISG is the divergence of domestic sales laws concerning the duty of

¹ United Nations Convention on Contracts for the International Sale of Goods, Apr. 11, 1980, 1489 U.N.T.S. 3, 19 I.L.M. 671, available at <http://www.cisg.law.pace.edu/cisg/text/treaty.html> [hereinafter CISG].

² *Id.* art. 39(1).

³ CISG-online.ch: Cases, Materials, Legal Texts, <http://www.cisg-online.ch> (listing 247 court and arbitral tribunal decisions discussing this question).

⁴ See Daniel Girsberger, *The Time Limits of Article 39 CISG*, 25 J.L. & COM. 241, 245 (2005).

⁵ See Camilla Baasch Andersen, *Reasonable Time in Art. 39(1) of the CISG – Is Art. 39(1) Truly a Uniform Provision?*, PACE REV. OF THE CONVENTION ON CONTRACTS FOR THE INT'L SALE OF GOODS (CISG) 63-176 (1998), available at <http://www.cisg.law.pace.edu/cisg/biblio/andersen.html> [hereinafter Andersen, *Reasonable Time in Article 39(1) of the CISG*]. This expression goes back to the translation of the author's term “Grosszügiger Monat.” *Id.*

the buyer to inspect the goods and give notice of any non-conformity.⁶

The Germanic legal systems,⁷ in particular, are familiar with an express duty on the buyer to examine the goods and to give notice of lack of conformity, although in German and Austrian law that duty is restricted to commercial sales where both parties are merchants. The American Uniform Commercial Code (UCC)⁸ also requires notice of lack of conformity to be given; by way of contrast, English law⁹ only requires the buyer to give notice of lack of conformity if it wishes to avoid the contract. Although some of the systems belonging to the French legal tradition expressly provide for a duty to give notice of lack of conformity,¹⁰ under French law itself and the law of many related legal systems,¹¹ there is no such duty; the only requirement is that an action for lack of conformity be brought within a short period of time, a so-called *bref délai*.¹²

Even amongst those countries that provide for a duty to examine the goods and to give notice of any defects, the period within which such notice must be given is determined quite differently. While Germanic legal systems require notice to be given without undue delay (*unverzüglich*)¹³ or immediately

⁶ See CISG-AC Opinion No. 2, Examination of the Goods and Notice of Non-Conformity: Articles 38 and 39 (2004). Rapporteur: Professor Eric E. Bergsten, Emeritus, Pace University School of Law, New York, USA., available at <http://cisgw3.law.pace.edu/cisg/CISG-AC-op2.html> [hereinafter CISG-AC Opinion No. 2]. The CISG Advisory Council is a private initiative in place to support understanding of the CISG and the promotion and assistance in the uniform interpretation of the CISG.

⁷ Handelsgesetzbuch [HGB] [Commercial Code] §§ 377, 378 (F.R.G. and Austria) [hereinafter HGB]; Obligationenrecht [OR] / Code des obligations [CO] / Codice delle obbligazioni [CO] [Code of Obligations] art. 201 (Switz.) [hereinafter OR].

⁸ U.C.C. § 2-607(3)(a) (2003).

⁹ Sec. 35(1) SGA 1979.

¹⁰ Codice civile [C.c.] [Civil Code] art. 1667(2) (Italy) [hereinafter C.c.]; Burgerlijk Wetboek [BW] [Civil Code] Art. 7:23.1 (Neth.) [hereinafter BW]; Código de Comercio [C.Com.] [Commercial Code] art. 471 (Port.) [hereinafter C.Com.]. The position is uncertain in Spain.

¹¹ Code Civil [C.Civ.] [Civil Code] art. 1648 (Fr. and Belg.).

¹² *Id.* art. 1648.

¹³ HGB §§ 377, 378 (F.R.G. and Austria).

(*sofort*),¹⁴ under Anglo-American¹⁵ and Dutch¹⁶ law, it is sufficient for notice to be given within a reasonable time or within an appropriate period after the actual discovery or possibility of discovering the defect. Only Italian and Portuguese law lay down a precise period of time for giving notice, namely sixty days and eight days, respectively.¹⁷

In practice, the outcomes of the differing interpretations of the period to give notice vary considerably. Under the domestic laws in German speaking countries, the duty to give notice is apparently the seller's strongest weapon to defeat any claims by the buyer based on a lack of conformity of the goods. Courts usually require notice to be given by the buyer within a period as short as three to five working days.¹⁸ In most cases of an alleged non-conformity of the goods, the seller raises the defense of failure to give adequate notice, which prevails in many cases.

In contrast, U.S. courts generally hold that the purpose of the duty to give notice is the prevention of fraud by a dilly-dallying buyer.¹⁹ Thus, more often than not, a period of more than one month has been held to be reasonable.²⁰ It is only in cases of perishables that U.S. courts require notice to be given within a couple of days.²¹ Section 2-607(3)(a) UCC 2003 supports this

¹⁴ OR art. 201 (Switz.).

¹⁵ U.C.C. § 2-607(3)(a); Sec. 35(1) SGA 1979.

¹⁶ See BW art. 7:23.1 (Neth.).

¹⁷ See C.c. art. 1667(2) (Italy); C.Com. art. 471 (Port.).

¹⁸ HGB §§ 377, 378 (Austria); cf. Ernst A. Kramer, §§ 377, 378, in KOMMENTAR ZUM HANDELSGESETZBUCH MIT EINSCHLÄGIGEN RECHTSVORSCHRIFTEN para. 41 (Manfred Straube ed., Manzsche Verlags – und Universitätsbuchhandlung 2003); HGB § 377 (F.R.G.); cf. Ulrich Stuhlfelner, §377, in HEIDELBERGER KOMMENTAR HGB para. 8 (C.F. Müller 2002) and Barbara Grunewald § 377, in MÜNCHENER KOMMENTAR HGB para. 72 (C.H. Beck 2004); OR art. 201 (Switz.); cf. Herbert Schönle and Peter Higi, Art. 201, in ZÜRCHER KOMMENTAR para. 29(a) (Schulthess 2005) and Hans Giger, Art. 201, in BERNER KOMMENTAR para. 81 (Stämpfli 1979).

¹⁹ See *A.C. Carpenter, Inc. v. Boyer Potato Chips*, 1969 WL 10993, 7 UCC Rep. Serv. 493 (U.S. Dept. Agric. 1969) (discussed in: JAMES J. WHITE & ROBERT S. SUMMERS, UNIFORM COMMERCIAL CODE §§ 11-12, at 419 (West Group 5th ed. 2000)); *G. & D. Poultry Farms, Inc. v. Long Island Butter & Egg Co.*, 306 N.Y.S.2d 243 (App. Div. 1969).

²⁰ *Opp v. Nieuwsma*, 458 N.W.2d 352 (S.D. 1990); *Hudson v. Gaines*, 403 S.E.2d 852 (Ga. Ct. App. 1991) (eight months); *Sun Hill Indus., Inc. v. Kraftsman Group, Inc.*, 610 A.2d 684 (Conn. App. Ct. 1992) (two months).

²¹ *A.C. Carpenter, Inc.*, 1969 WL 10993.

trend by an even more buyer-friendly wording of this provision, whereby the buyer is only barred from a remedy to the extent that the seller is prejudiced by the failure of the buyer to give timely notice.²²

In France, where before the amendment of Art. 1648 Cc²³ under domestic law the only prerequisite was to initiate court proceedings “within a short time,” courts have often allowed the buyer up to two to three years to give timely notice of non-conformity of the goods.²⁴ Dutch courts also interpret the duty to give notice in a more or less generous way.²⁵

III. HISTORY OF ARTS. 38, 39 CISG

1. *The Predecessor: Arts. 38, 39 ULIS*

The duty to examine the goods and to give notice of any lack of conformity could already be found in the predecessor of the CISG, the Uniform Law on the International Sale of Goods (ULIS).²⁶ Arts. 38 and 39 ULIS were heavily influenced by those legal systems whose domestic sales laws stipulated rather rigid notice requirements, especially German law. Thus, Art. 38(1) ULIS called for a “prompt” examination of the goods by the buyer;²⁷ Art. 39(1) ULIS likewise required the buyer to “promptly” give notice of the lack of conformity after having discovered it or having had the possibility to discover it.²⁸ What was meant by the term “promptly” was defined in Art. 11 ULIS as “within as short a period as possible, in the circumstances.”²⁹

ULIS was implemented by only a few states, but among them, again, those with very strict notice requirements under their domestic sales laws, such as Germany³⁰ and Italy.³¹ Case

²² JOSEPH M. LOOKOFSKY, *UNDERSTANDING THE CISG IN THE USA* 81 (Aspen Publishers 2d ed. 2004).

²³ CC decision no. 2005-136, Feb. 17, 2005, J.O. 2778.

²⁴ JACQUES GHESTIN & BERNARD DESCHÉ, *TRAITÉ DES CONTRATS, LA VENTE*, para. 737 (L.G.D.J. 1990).

²⁵ See Andersen, *Reasonable Time in Article 39(1) of the CISG*, *supra* note 5, at III.2.2.

²⁶ Convention Relating to a Uniform Law on the International Sale of Goods, adopted July 1, 1964, 834 U.N.T.S. 107, 3 I.L.M. 854 (1972), available at <http://www.cisg.law.pace.edu/cisg/text/ulis.html>.

²⁷ *Id.* art. 38(1).

²⁸ *Id.* art. 39(1).

²⁹ *Id.* art. 11.

³⁰ HGB § 377 (F.R.G.).

law dealing with ULIS was primarily concerned with sales contracts of parties having their places of business in Germany, Italy and the Netherlands. Thus, it should not come as a surprise that Arts. 38, 39 ULIS were interpreted in very much the same way as their domestic counterparts. "Promptly" often meant a period not longer than three to five working days,³² leaving buyers who had not given notice in due time without any remedy for lack of conformity.

2. *Drafting History of Arts. 38, 39 CISG*

Already in UNCITRAL, the rather strict examination and notice requirements of Arts. 38, 39 ULIS were abandoned.³³ "Promptly" in Art. 38(1) ULIS was replaced by "within as short a period as is practicable in the circumstances" in Art. 38(1) CISG;³⁴ Art. 39(1) CISG likewise discarded the "promptness" requirement and instead was amended to provide that notice of lack of conformity must be given "within a reasonable time,"³⁵ leaving the definition of the term "reasonable" to the circumstances of the individual case.

At the Diplomatic Conference, the consequences of the buyer's failure to give notice was one of the most controversial issues. First of all, representatives from so-called developing countries stressed the unacceptable consequences of a rigid notice regime for buyers from such countries.³⁶ But they did not stand alone; they were joined by representatives from countries whose legal systems did not provide for any notice requirement. They also feared that their "traders . . . might be unduly penalized, since they were unlikely to be aware of the requirements

³¹ C.c. art. 1667(2) (Italy).

³² See PETER SCHLECHTRIEM & ULRICH MAGNUS, INTERNATIONALE RECHTSPRECHUNG ZU EKG UND EAG [INTERNATIONAL CASE LAW ON ULIS AND ULF] [*in German*] 231 et seq. (Nomos Verlagsgesellschaft 1987).

³³ For details, see CISG-AC Opinion No. 2, *supra* note 6, paras. 3.2-3.4.

³⁴ CISG, *supra* note 1, art. 38(1).

³⁵ See JOHN O. HONNOLD, DOCUMENTARY HISTORY OF THE UNIFORM LAW FOR INTERNATIONAL SALES 104, 125 (Kluwer 1989); John O. Honnold, Working Group Section 3, 1972 Y.B. III 87; Honnold, SGR, *Obligations of Seller*, 1973 Y.B. IV 48.

³⁶ Harry Flechtner, *Buyer's Obligation to Give Notice of Lack of Conformity (Articles 38, 39, 40 and 44)*, in THE DRAFT UNCITRAL DIGEST AND BEYOND: CASES, ANALYSIS AND UNRESOLVED ISSUES IN THE U.N. SALES CONVENTION 378 (Franco Ferrari et al. eds., Sellier 2004) [hereinafter *The Draft*].

until too late."³⁷ However, a suggestion to delete Art. 39(1) CISG entirely was not successful. Instead, a compromise was reached by introducing Art. 44 CISG, a provision that is unknown to any other legal system. According to Art. 44 CISG, the buyer, having failed to give timely notice, may still reduce the price or claim damages, except for loss of profit, if it has a reasonable excuse for its failure to conform with the requirements of Art. 39 CISG.³⁸

All in all, Arts. 38 and 39, seen together with Art. 44 CISG, may be fairly characterized as being closer to those legal systems that provide for a duty to give notice within a reasonable time in their domestic laws than to those that do not stipulate any notice requirement at all, or to those with very strict notice periods.³⁹

IV. THE FIRST YEARS OF EXPERIENCE WITH ARTS. 38, 39 CISG

As could be expected, during the first years after the CISG came into force, most of the case law emanated from those countries that had already implemented the forerunner of the CISG, the Uniform Law on the International Sale of Goods (ULIS). In these countries, parties and courts were already familiar with such uniform rules, whereas in other countries, it was not only the parties who initially tried to exclude the application of this unknown Sales Convention, but in many cases, it is more than likely that the CISG was simply not pleaded in the courts or tribunals as the applicable law, due to the sheer ignorance of the parties and the courts or arbitral tribunals.⁴⁰

In Germany, where the CISG came into force in 1991, quite a few commentaries, text books, and doctoral dissertations covered this new field of law, whereas in most other countries, usually a single work had to suffice. However, the German scholars who commentated on Arts. 38, 39 CISG were not true comparatists in the first place. They did not know how this ques-

³⁷ Conference on Contracts for the International Sale of Goods, U.N. Doc A/CONF.97/19 (1981), para. 32.

³⁸ CISG, *supra* note 1, art. 44.

³⁹ CISG-AC Opinion No. 2, *supra* note 6, para. 4.4.

⁴⁰ Andersen, *Reasonable Time in Article 39(1) of the CISG*, *supra* note 5, at V.1.

tion was dealt with in other legal systems; instead, they relied on their knowledge of the interpretation of Arts. 38, 39 ULIS, as well as their domestic experience, thus also disregarding the fact that considerable changes had taken place between ULIS and CISG.⁴¹ German courts, guided by and dependent on these commentaries, understandably just continued to decide under Arts. 38, 39 CISG in the same way as they had done under Arts. 38, 39 ULIS and – both previously and concurrently – under §§ 377, 378 *Handelsgesetzbuch* (HGB – Commercial Code).

A few illustrative examples of these early decisions interpreting Arts. 38, 39 CISG are given here.

In the first German decision concerning Art. 39 CISG, the Landgericht Stuttgart⁴² held that giving notice of a defect concerning shoes 16 days after delivery was not within a reasonable time. Similarly, periods between 25 days and six weeks were not regarded as reasonable in cases concerning clothes and textiles;⁴³ seven days was regarded as too long in the case of

⁴¹ See Herbert Stumpf, *Art. 39: Mängelrüge*, in KOMMENTAR ZUM EINHEITLICHEN UN-KAUFRECHT - CISG [COMMENTARY ON THE UNIFORM UN-SALES LAW - CISG] [*in German*] para. 8 (Ernst von Caemmerer & Peter Schlechtriem eds., C. H. Beck 1st ed. 1990); Ulrich Huber, *Der UNCITRAL-Entwurf eines Übereinkommens für internationale Warenkaufverträge*, 43 RABELS ZEITSCHRIFT FÜR AUSLÄNDISCHES UND INTERNATIONALES PRIVATRECHT 413, 482 (1979); Burghard Piltz, *Internationales Kaufrecht, Das UN-Kaufrecht (Wiener Übereinkommen von 1980) in PRAXISORIENTIERTER DARSTELLUNG* [The CISG: A practice-oriented presentation] [*in German*] § 5 para. 59 (C. H. Beck 1993) (four to seven working days); ROLF HERBER & BEATE CZERWENKA, INTERNATIONALES KAUFRECHT, KOMMENTAR ZU DEM ÜBEREINKOMMEN DER VEREINTEN NATIONEN VOM 11. APRIL 1980 ÜBER VERTRÄGE ÜBER DEN INTERNATIONALEN WARENKAUF [INTERNATIONAL SALES LAW, COMMENTARY ON THE UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS] [*in German*] Art. 39, para. 9 (C. H. Beck 1991); GERT REINHART, UN-KAUFRECHT Art. 39, para. 5 (C. F. Müller 1991) (only a few days); Herbert Asam, *UN-Kaufrechtsübereinkommen im deutsch-italienischen Rechtsverkehr* [UN Sales Convention in German-Italian transactions] [*in German*], RECHT DER INTERNATIONALEN WIRTSCHAFT 942, 944 (1989) (five days).

⁴² See Landgericht Stuttgart, [LG] [Trial Ct.] [Stuttgart], 3 KfH O 97/89 Aug. 31, 1989, available at <http://www.cisg-online.ch/cisg/urteile/11.htm>. The English version is also available at <http://cisgw3.law.pace.edu/cases/890831y1.html>.

⁴³ See Landgericht Stuttgart, [LG] [Trial Ct.] [Stuttgart], 16 S 40/91 Aug. 13, 1991, available at <http://www.cisg-online.ch/cisg/urteile/33.htm>; Landgericht Mönchengladbach, [LG] [Trial Ct.] [Mönchengladbach], 7 O 80/91 May 22, 1992, available at <http://www.cisg-online.ch/cisg/urteile/56.htm>; Oberlandesgericht Düsseldorf, [OLG] [Provincial Ct. App.] [Düsseldorf], 17 U 136/92 Mar. 12, 1993, available at <http://www.cisg-online.ch/cisg/urteile/82.htm>; Sport d'Hiver di Genevieve Culet v. Ets. Louys et Fils, Tribunale civile di Cuneo, [T. Civ.] [Dist. Ct.] [Cuneo],

gherkins.⁴⁴ One court expressly stated that, in the case of textiles, it would consider one week for examination and one week for giving notice as reasonable.⁴⁵ As late as 2005, *Ulrich Magnus*⁴⁶ advocated an overall period of 14 days for both examination and giving notice if there are no special circumstances that might lead either to an even shorter or to a longer period. Other German authors⁴⁷ have suggested three to four days for examination and four to six days for giving notice; thus, an overall period of seven to ten days.

V. THE INVENTION OF THE "NOBLE MONTH" AND ITS WAY TO THE COURTS

This was the prevailing factual and legal situation when the author of this article was asked to take over the commentary of Arts. 35 et seq. in the second edition of *Schlechtriem's Kommentar zum Einheitlichen UN-Kaufrecht – CISG*.⁴⁸ For a comparatist, the situation in legal systems outside the German speaking world, as well as the drafting history of Arts. 38, 39 CISG, was obvious. Furthermore, it was also clear that if nothing was done to lead the German courts away from their Germanic path of interpretation, the hard-won uniformity would soon be jeopardized.⁴⁹ The task was to convince the German courts to abandon their rigid time limits and slowly move towards the other legal systems that had not previously stipulated any notice requirements. This could not be done by just

45/96 Jan. 31, 1996, available at <http://www.cisg.law.pace.edu/cases/96013113.html> (twenty-three days after delivery too long).

⁴⁴ See Oberlandesgericht Düsseldorf [OLG] [Provincial Ct. App.] [Düsseldorf], 17 U 82/92 Jan. 1, 1993, available at <http://www.cisg-online.ch/cisg/urteile/76.htm>. The English version is also available at <http://cisgw3.law.pace.edu/cisg/wais/db/cases2/930108g1.html>.

⁴⁵ See Landgericht Mönchengladbach, [LG] [Dist. Ct.] [Mönchengladbach], 7 O 80/91 May 22, 1992, available at <http://cisgw3.law.pace.edu/cases/920522g1.html>.

⁴⁶ Ulrich Magnus, *Art. 39*, in JULIUS VON STAUDINGERS KOMMENTAR ZUM BÜRGERLICHEN GESETZBUCH MIT EINFÜHRUNGSGESETZ UND NEBENGESETZEN, WIENER UN-KAUFRECHT (CISG) para. 4 (Julius von Staudinger ed., Sellier-de Gruyter 13th revised ed. 2005) [hereinafter STAUDINGER].

⁴⁷ Piltz, *supra* note 41, paras. 142, 145.

⁴⁸ KOMMENTAR ZUM EINHEITLICHEN UN-KAUFRECHT (Peter Schlechtriem ed., C. H. Beck 2d ed. 1995).

⁴⁹ Andersen, *Reasonable Time in Art. 39(1) of the CISG*, *supra* note 5, at III.1.4.3.

telling them, for example, that from now on the notice requirement should be construed as only to prevent fraud. Instead, it seemed indispensable to offer a concrete solution, another period of time that was longer than the one hitherto applied, but also not too long, so that the German courts could still stomach it.⁵⁰ Thus, after having emphasized that first of all, in determining the period to give notice, due consideration is to be given to all relevant circumstances of the individual case, such as the nature of the goods, the remedies that are envisaged, the nature of the breach etc., it was suggested that, for durable goods, in the absence of any special circumstances, one should accept at least one month as a rough average period for timely notice.⁵¹

Only shortly after publication of this opinion, the German *Bundesgerichtshof*, for the first time, referred to the one-month period in the well-known *mussels*-case.⁵² In this case, the buyer had given notice six weeks after the non-conformity of the goods had been or should have been discovered. This was considered to be too late, even if – according to the reasoning of the *Bundesgerichtshof* – one would accept the generous average of one month.⁵³ Soon thereafter, lower German courts relied on this one-month period.⁵⁴

In 1999, the *Bundesgerichtshof* explicitly ruled in favor of a four-week period starting at the time the buyer knew or ought to have been aware of the lack of conformity of the goods.⁵⁵ The court described the four-week period for giving notice as

⁵⁰ *Id.* at VI.3.

⁵¹ See Ingeborg Schwenzer, *Art. 39, in KOMMENTAR ZUM EINHEITLICHEN UNKAUFRECHT*, *supra* note 48, para. 17.

⁵² Bundesgerichtshof [BGH] [Federal Ct. of Justice] Karlsruhe 154 VII ZR 94 Mar. 8, 1995 (F.R.G.), *available at* <http://cisgw3.law.pace.edu/cases/950308g3.html>.

⁵³ *Id.* para. II(2).

⁵⁴ Oberlandesgericht Stuttgart [OLG] [Provincial Ct. App.] [Oberlandesgericht], 195 OLGZ 94 Aug. 21, 1995 (F.R.G.), *available at* <http://cisgw3.law.pace.edu/cases/950821g1.html>; Amtsgericht Kehl [AG] [Petty Ct.] [Amtsgericht], 3 C 925/93 Oct. 6, 1995 (F.R.G.), *available at* <http://cisgw3.law.pace.edu/cases/951006g1.html>; Amtsgericht Augsburg [AG] [Petty Ct.] [Amtsgericht], 11 C 4004/95 Jan. 26, 1996 (F.R.G.), *available at* <http://cisgw3.law.pace.edu/cases/960129g1.html>; Oberlandesgericht Köln [OLG] [Provincial Ct. App.] [Oberlandesgericht], 18 U 121/97 Aug. 21, 1997 (F.R.G.), *available at* <http://cisgw3.law.pace.edu/cases/970821g1.html>.

⁵⁵ Bundesgerichtshof [BGH] [Federal Ct. of Justice] [Karlsruhe], 287 VII ZR 98, Nov. 3, 1999 (F.R.G.), *available at* <http://cisgw3.law.pace.edu/cases/991103g1.html> (grinding machine).

“*regelmässig*,” i.e., “regular” or “normal.”⁵⁶ The facts of the case were as follows: the buyer had purchased a grinding device and attached it to a paper-making machine. Nine days later, the grinding device suffered a total failure. The buyer thought that the breakdown of the device had been caused by its own personnel and therefore appeared to have taken no action in regard to the device itself. Three weeks after the failure of the grinding device, a purchaser of paper that was produced during the time the device had been in use complained of rust in the paper. Ten days later, the original buyer commissioned an expert to determine the cause of the rust. After another two weeks, the expert reported that the rust was due to the grinding device. Three days after receiving the expert’s report, the buyer notified the seller of the lack of conformity. Compared to the rigid notice requirements at the beginning of the 1990s, it is striking that the court held that the notice was given in due time, although more than nine weeks had passed since delivery and seven weeks since the first signs of non-conformity. The *Bundesgerichtshof* agreed with the Court of Appeals that, on the failure of the device, the buyer ought to have been aware of the latent defect. At that time, the period for examination under Art. 38 CISG started to run. The court calculated the amount of time available for examination by assuming that the buyer should have had one week to decide whether to select and commission an expert.⁵⁷ The two weeks for the expert to prepare its report were deemed adequate.⁵⁸ Thus, the *Bundesgerichtshof* arrived at a three-week period for examination.⁵⁹ At this point, the period for giving notice according to Art. 39 CISG started to run. As the court assumed a four-week period for giving notice, that was added to the three weeks for examination, the buyer’s notice was still before expiration of the total seven-week examination-notice period. By actually giving notice just three days after becoming aware of the lack of conformity, the buyer was able to compensate for the delay in examination.⁶⁰

⁵⁶ *Id.* para. II(2)(b)(bb).

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *See id.*

⁶⁰ *Id.* para. II(3).

VI. THE CURRENT SITUATION

1. *German Speaking Countries*

Since then, the “noble month” has become a firmly established principle in decisions of the German Supreme Court. In its latest decision concerning Art. 39(1) CISG, the German *Bundesgerichtshof* rejected the appellate court’s finding that the buyer should have given notice within two weeks after having discovered the non-conformity, maintaining that only where notice was not given until after two months would it cease to be reasonable.⁶¹ The case, however, was remanded to the appellate court to determine whether the seller should still be allowed to rely on Art. 39(1) CISG because it itself had knowledge of the non-conformity according to Art. 40 CISG.⁶²

In the meantime, the Supreme Court of Switzerland, the *Bundesgericht*, has followed this line of interpretation in expressly upholding a finding of the *Obergericht Luzern*⁶³ that allowed the buyer one week for examination followed by one month to give notice in the case of a defective second-hand textile cleaning machine.⁶⁴

However, both in Germany and in Switzerland, the decisions of the respective supreme courts are yet to be unanimously followed by the lower courts. More often than not, it becomes a question of which commentary is used and cited by the court. An illustrative example is a decision of the *Landgericht Frankfurt a.M.* – a German court of first instance – handed down as recently as April 2005.⁶⁵ The Ugandan buyer ordered used shoes from the seller in Germany for Mombassa, Kenya. Upon their arrival at the buyer’s location, but three

⁶¹ Bundesgerichtshof [BGH] [Federal Ct. of Justice] [Karlsruhe], 321 VII ZR 03, June 30, 2004 (F.R.G.), available at <http://cisgw3.law.pace.edu/cases/040630g1.html> (irradiated paprika).

⁶² *Id.* para. III.

⁶³ Obergericht Luzern [OG] [App. Ct.] [Obergericht], 11 01 73, May 12, 2003 (Switz.), available at <http://cisgw3.law.pace.edu/cases/020512s1.html>, *aff’d*, Bundesgericht [BGer] [Federal Ct.] 4C. 198/2003/grl, Nov. 13, 2003 (Switz.), available at <http://cisgw3.law.pace.edu/cases/031113s1.html>.

⁶⁴ Bundesgericht [BGer] [Federal Ct.], 4C. 198/2003/grl, Nov. 13, 2003 (Switz.), available at <http://cisgw3.law.pace.edu/cases/031113s1.html> (affirming 2d Instance Court).

⁶⁵ Landgericht Frankfurt am Main [LG] [Dist. Ct.] [Frankfurt], 12/26 O 264/04, Apr. 11, 2005 (F.R.G.), available at <http://cisgw3.law.pace.edu/cases/050411g1.html>.

weeks after having been at the buyer's disposal in Kenya, the buyer immediately informed the seller that the goods were totally unusable, which was not disputed by the seller. The court, however, found the buyer to be precluded from relying on the lack of conformity because it did not give notice within a reasonable time.⁶⁶ At first the court denied the applicability of Art. 38(3) CISG, which would have allowed the buyer to postpone the examination of the goods until their arrival in Uganda.⁶⁷ It then concluded that notice was not given until three weeks after the non-conformity of the goods should have been detected by the buyer, and these three weeks were regarded as no longer being a reasonable period. On both issues – the interpretation of Art. 38(3), as well as that of Art. 39(1) CISG, this decision seems highly problematic.⁶⁸ The interaction of the interpretation of the two provisions clearly indicates the considerable bias towards the seller,⁶⁹ and this was precisely what was anticipated during the discussions of the elaboration of the respective articles of the CISG.⁷⁰ Furthermore, the court does not even mention the “noble month” period that is now consistently quoted by the *Bundesgerichtshof*, but instead confuses the question of the period for examination and that for giving notice. In Switzerland, lower courts are also divided in interpreting the length of the period to give notice, despite the clear statement of the *Bundesgericht*.⁷¹

Very much in line with these lower court decisions in Germany and Switzerland, the Supreme Court in Austria still stubbornly adheres to a strict interpretation of Arts. 38 and 39 CISG that is still predominantly influenced by domestic law. Whereas, in 1997, the *Oberster Gerichtshof* seemed to follow the German and the Swiss supreme courts by considering notice after four weeks as having being given in due time, allowing ten

⁶⁶ *Id.* para. 2(b).

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ See *The Draft*, *supra* note 36, at 379, 390; LOOKOFKY, *supra* note 22, at 81.

⁷⁰ See *supra* text Section III.2: Drafting History of Art. 38, 39 CISG at 4-5.

⁷¹ Cf. Obergericht Luzern [OGER] [App. Ct.] [Obergericht], Jan. 8, 1997, available at <http://www.cisg.law.pace.edu/cases/970108s1.html>, with Kantonsgericht St. Gallen [KG] [Dist. Ct.] [Katonsgericht], Jan. 27, 2004, available at <http://www.cisg.law.pace.edu/case/040127s1.html> (overall period for examination and giving notice of two weeks).

to fourteen days for examination and one month for notice.⁷² It changed its opinion in 1998,⁷³ relying on an Austrian author's⁷⁴ review of the German *Bundesgerichtshof's* leading case, which criticized the "noble month" period as being too long.⁷⁵ The *Oberster Gerichtshof* instead followed the seller-friendly interpretation that is still advocated by a number of German speaking scholars, who are not comparatists at all, advocating an overall period for examination and giving notice of fourteen days.⁷⁶ Since this first decision in 1998, the Austrian *Oberster Gerichtshof* has confirmed this position in two further cases.⁷⁷

Thus, there is a real split within the German speaking countries, not only with respect to the holdings of the respective supreme courts, but also with respect to scholarly writing. The "noble month," which is favored by the German *Bundesgerichtshof* as well as the Swiss *Bundesgericht*, is backed by scholars who are comparatists and who are particularly acquainted with the Anglo-American legal mentality.⁷⁸ In contrast, the Austrian *Oberster Gerichtshof's* overall fourteen day period is shared by authors whose approach to this issue is deeply rooted in the intricacies of traditional German sales law and its accept-

⁷² See CISG-AC Opinion No. 2, *supra* note 6, Annex: Case Law for Articles 38 & 39 (comparing Austrian cases (Oberster Gerichtshof) in section 3 entitled, *Notification of non-conformity, Within "Reasonable Time": Article 39(1)*).

⁷³ Oberster Gerichtshof [OGH] [Sup. Ct.] [Vienna], 2 Ob 191/98 Oct. 15, 1998, available at <http://www.cisg-online.ch/cisg/urteile/380.html>; English version available at <http://cisgw3.law.pace.edu/case/981015a3.html> (holding "a time limit of fourteen days for examination and notice of defect is ample if no special circumstances warrant limitation or prolongation of that period").

⁷⁴ Martin Karollus, *Anmerkung zu BGH 8.3.1995, VIII ZR 159/94 (UN-Kaufrecht: Vertragswidrigkeit der Ware - Muscheln mit Cadmiumbelastung)*, JURISTISCHE RUNDSCHAU 27-28 (1996).

⁷⁵ See Bundesgerichtshof [BGH] [Federal Ct. of Justice] [Karlsruhe], 154 VII ZR 94 Mar. 8, 1995 (F.R.G), available at <http://cisgw3.law.pace.edu/cases/950308g3.html>.

⁷⁶ See *supra* note 73.

⁷⁷ Oberster Gerichtshof [OGH] [Sup. Ct.] [Vienna], 1 Ob 223/99x Aug. 27, 1999, available at http://www.cisg.at/1_22399x.htm; Oberster Gerichtshof [OGH] [Sup. Ct.] [Vienna], 7 Ob 301/01t Jan. 14, 2002, available at <http://www.cisg-online.ch/cisg/urteile/643.htm>.

⁷⁸ See Girsberger, *supra* note 4, at 243; David Rüetschi, *Substanziierung der Mängelrüge: Bundesgericht, I. Zivilabteilung, Urteil 4 C.395/2001 vom 28.*, RECHT, Mai 2003, at 115 et seq., 120 et seq.

ance in Austria and Switzerland, who try to interpret uniform law rules as closely as possible to their domestic forerunners.⁷⁹

2. Other Continental Countries

Apart from the German speaking countries, most other countries have considerably fewer cases dealing with Arts. 38 and 39 CISG. Still, a common interpretation can easily be discerned. The court decisions that found the buyer to be excluded from any remedies for non-conformity according to Art. 39(1) CISG usually concerned cases in which notice was given for at least one month, extending up to several months and even two years.⁸⁰ Throughout the non-German speaking continental countries, there are hardly any cases that deny the reasonableness of notice given within one month.⁸¹ Instead, there is ample

⁷⁹ Cf. Martin Karollus, *UN – Kaufrecht: Anwendungsbereich, Holzhandelsusancen, Mängelrüge*, JURISTISCHE BLÄTTER 321 (1999); Magnus, *Art. 39*, in STAUDINGER, *supra* note 46, para. 49; Ulrich Magnus, *Art. 39*, in KOMMENTAR ZUM UN-KAUFRECHT para. 22 (Heinrich Honsell ed., Springer 1997); Christoph Benicke, *Art. 39 CISG*, in MÜNCHENER KOMMENTAR HGB *supra* note 18, para. 7; Dirk Schüssler-Langeheine, *Art. 39*, in ÜBEREINKOMMEN DER VEREINTEN NATIONEN ÜBER VERTRÄGE ÜBER DEN INTERNATIONALEN WARENKAUF (CISG) para. 4 (Hans Th. Soergel & Alexander Lüderitz eds., Kohlhammer 13th ed. 2000); Ernst A. Kramer, *Rechtzeitige Untersuchung und Mängelanzeige bei Sachmängeln nach Art. 38 und 39 UN-Kaufrecht – Eine Zwischenbilanz*, in BEITRÄGE ZUM UNTERNEHMENSRECHT, FESTSCHRIFT HANS-GEORG KOPPENSTEINER 617, 628 (Ernst A. Kramer ed., Orac 2001).

⁸⁰ Cour d'appel [CA] [Regional Ct. of App.] [d' Aix-en-Provence], Jul. 1, 2005, no. 2005/377 Role no. 03/05302v (Fr.), *available at* <http://www.cisg.law.pace.edu/cases/050701f1.html> (over two months); Hof van Beroep Gent [App. Ct.] [Gent], Oct. 4, 2004, 2003/AR/2763, *available at* <http://www.cisg.law.pace.edu/cases/04100461.html> (nine months); Rechtbank van Koophandel Veurne [KH] [Dist. Ct.] [Veurne], Jan. 15, 2003, A/02/00430, *available at* <http://www.cisg.law.pace.edu/cases/03011561.html> (one and a half years); Hof van Beroep [App. Ct.] [Gent], Dec. 2, 2002, 1997/AR/384, *available at* <http://www.cisg.law.pace.edu/cases/02120261.html> (almost three months); Tribunale di Rimini, [TR] [Dist. Ct.] [Rimini], Nov. 26, 2002, n.3095, *available at* <http://www.cisg.law.pace.edu/cases/021126i3.html> (six months); Audiencia Provincial de La Coruña, [App. Ct.] [Coruña], Jun. 21, 2002, no. 201/2001 (Spain), *available at* <http://www.cisg.law.pace.edu/cases/020621s4.html> (two and a half months); Rechtbank van Koophandel Hasselt [KH] [Dist. Ct.] [Hasselt], Mar. 6, 2002, CISG-online 623 (two months); Søg og Handelsretten [SHD] [Mar. Commercial. Ct.] [Copenhagen], Jan. 31, 2002, H-0126-98, *available at* <http://www.cisg.law.pace.edu/cases/020131d1.html> (seven months); Gerechtshof Arnhem [HOF] [Dist. Ct. App.] [Arnhem], Apr. 27, 1999, 98/046, *available at* <http://www.cisg.law.pace.edu/cases/990427n1.html> (two years).

⁸¹ Gerechtshof 's-Hertogenbosch [HOF] [Dist. Ct. App.] [Hertogenbosch], Dec. 15, 1997, C9700046/4E (Neth.), *available at* <http://www.cisg.law.pace.edu/cases/971215n1.html> (offering the notable exception of three weeks).

case law holding that a period for giving notice of more than one month is still reasonable;⁸² the longest period currently accepted by the courts was two months after discovery of the non-conformity and three months after delivery of frozen fish.⁸³ Additionally, there are quite a few Belgian cases that have accepted a longer period for giving notice than the parties had expressly provided for in their contract.⁸⁴

3. *Anglo-American Courts*

Up until now, there has been little Anglo-American case law interpreting Arts. 38 and 39 CISG. This phenomenon might be connected to the fact that – in contrast to their Germanic colleagues – Anglo-American sellers are not yet accustomed to automatically raising the objection of a failure to give notice by the buyer, as such tactics rarely succeed under domestic law.

With respect to equipment designed to produce plastic gardening pots, a U.S. District Court observed that “the wording of the [CISG] reveals an intent that buyers examine goods promptly and give notice of defects to sellers promptly. However, it is also clear from the statute that on occasion it will not be practicable to require notification in a matter of a few weeks.”⁸⁵ On the other hand, another U.S. District Court recently appeared to apply a much stricter standard in defining

⁸² Cour de Cassation [CASS] [Sup. Ct.] [Paris], May 26, 1999, D. 994, *available at* <http://www.cisg.law.pace.edu/cases/990526f1.html> (5 weeks); Cour d'appel de Versailles [CA] [Ct. App.] [Versailles], Jan. 29, 1998, CISG-online 337 (six / eleven months); Cour d'appel de Colmar [CA] [Appeals Ct.] [Colmar], Oct. 24, 2000, CISG-online 578 (two months).

⁸³ Audiencia Provincial de Pontevedra [HP] [Ct. App.] [Pontevedra], Oct. 3, 2002, *available at* <http://www.cisgw3.law.pace.edu/cases/02100354.html>.

⁸⁴ Rechtbank van Koophandel Veurne [KH] [Dist. Ct.] [Mechelen], Jan. 18, 2002, *available at* <http://www.cisgw3.law.pace.edu/cases/020118b1.html>; CISG-AC Opinion No. 2, *supra* note 4, Annex: Case Law for Articles 38 & 39 (under *Notification of non-conformity, Within “Reasonable Time”: Article 39(1)*); Hof van Beroep [Ct. App.] [Antwerpen], 1995/AR/1558, Nov. 4, 1998, *available at* <http://www.cisgw3.law.pace.edu/cases/981104b1.html>.

⁸⁵ *Shuttle Packaging Sys. v. Tsonakis*, 2001 WL 34046276, 2001 U.S. Dist. LEXIS 21630, para. III(A) (D. Mich. 2001), *available at* <http://www.cisgw3.law.pace.edu/cases/011217u1.html>; *cf.* *TeeVee Toons, Inc. v. Gerhard Schubert GmbH*, 2006 WL 2463537, para. II.(C)(2) (S.D.N.Y. 2006), *available at* <http://cisgw3.law.pace.edu/cases/060823u1.html> (overall period of more than two months reasonable).

the timeliness of a notice given by the buyer.⁸⁶ However, special circumstances were arguably present in that case. The goods involved were frozen pork loin back ribs. The buyer itself did not examine the goods; it only gave notice after being informed by the sub-buyer that the meat was apparently rotten. The court only discussed the issue of timely examination, remarkably, on a much broader comparative basis than any Continental courts have done so in the past. Mostly by relying on early German case law from courts of first instance, the court reached the conclusion that the buyer did not comply with its duty to examine the goods in time.⁸⁷ Without any further considerations, the court concluded that, because there was no timely examination, notice was also not given within a reasonable time, thus simply equating the period in Art. 38 CISG with that in Art. 39(1) CISG.⁸⁸

4. *Arbitral Tribunals*

The case law handed down by arbitral tribunals widely reflects the position taken by national courts. Reflecting this, there is one decision expressly confirming the fourteen day guideline enunciated by the Austrian *Oberster Gerichtshof*.⁸⁹ Most of the arbitral tribunals, however, are not as restrictive, and there are quite a number of decisions that explicitly refer to the one-month period⁹⁰ or at least emphasize that a contractually agreed time frame of one month is not to be overridden.⁹¹

⁸⁶ Chi. Prime Packers, Inc. v. Northam Food Trading Co., 320 F. Supp. 2d 702 (D. Ill. 2004), available at <http://www.cisgw3.law.pace.edu/cases/050523u1.html>. (frozen pork loin back ribs).

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ ICC Int'l Commercial Arb. Award No. 9083/1999, available at <http://www.cisgw3.law.pace.edu/cases/999083i1.html> (books).

⁹⁰ ICC Int'l Commercial Arb. Award No. 8962/1997, available at <http://www.cisgw3.law.pace.edu/cases/978962i1.html> (glass commodities).

⁹¹ ICC Int'l Commercial Arb. Award No. 7331/1994, available at <http://www.cisgw3.law.pace.edu/cases/947331i1.html> (cowhides); Int'l Comm. Arb. Award No. 256 (Russ.-Nor. 1997) (Trib. of Int'l Commercial Arb. At Russ. Fed'n Chamber of Commerce and Indus.), available at <http://www.cisgw3.law.pace.edu/cases/970604r1.html>.

VII. CISG ADVISORY COUNCIL OPINION NO. 2 - EVALUATION

Against this background, which gave rise to severe doubts about the uniform interpretation of some of the core provisions of the CISG, the CISG Advisory Council⁹² released its second opinion on "Examination of the Goods and Notice of Non-Conformity – Articles 38 and 39."⁹³ There are three main considerations that the opinion stresses.

First, unless the lack of conformity was evident without examination of the goods, the total amount of time available to give notice after delivery of the goods consists of two separate periods: the period for examination of the goods under Article 38, and the period for giving notice under Article 39.⁹⁴ The Convention requires these two periods to be distinguished and kept separate, even when the facts of the case would permit them to be combined into a single period for giving notice.⁹⁵ Thus, the opinion of the Austrian *Oberster Gerichtshof*,⁹⁶ as well as the one of the prevailing German language discourse, which advocates an overall period of fourteen days, is clearly rejected. This approach receives full support; this interpretation follows from the plain wording of Arts. 38 and 39 CISG, that provides for the examination period in Art.38(1) CISG, on the one hand, and the reasonable time to give notice in Art. 39(1) CISG, beginning at the moment the buyer has discovered or ought to have discovered the lack of conformity, on the other hand.

Second, the opinion stresses that "the reasonable time for giving notice after the buyer discovered or ought to have discovered the lack of conformity varies depending on the circumstances."⁹⁷ "Among the circumstances to be taken into account are such matters as the nature of the goods, the nature of the

⁹² See CISG-AC Opinion No. 2, *supra* note 6.

⁹³ *Id.* para. 4.

⁹⁴ See Ingeborg Schwenzer, *Article 39*, in COMMENTARY ON THE UN CONVENTION ON THE INTERNATIONAL SALE OF GOODS (CISG) para. 15 (Peter Schlechtriem & Ingeborg Schwenzer eds., Geoffrey Thomas trans., Oxford Univ. Press 2d ed. 2005).

⁹⁵ CISG-AC Opinion No. 2, *supra* note 6, para. 2.

⁹⁶ See *supra* notes 73 and 77.

⁹⁷ CISG-AC Opinion No. 2, *supra* note 6, art. 39(3); Schwenzer, *Article 39*, *supra* note 94, para. 16; JOHN O. HONNOLD, UNIFORM LAW FOR INTERNATIONAL SALES UNDER THE 1980 UNITED NATIONS CONVENTION para. 257 (Kluwer Law Int'l 3d ed. 1999).

defect, the situation of the parties and relevant trade usages.”⁹⁸ In the first place, as in all other areas of the CISG, it is up to the parties to provide in their contract for a specific period within which the buyer has to give notice. Case law shows that parties often choose a period of one month, a clause that has been approved by a number of courts and tribunals.⁹⁹ Furthermore, there may be trade usages that apply to the specific case. Again, case law gives many examples. As little as several hours are deemed appropriate in the fruit trade,¹⁰⁰ one day in the international flower trade,¹⁰¹ or fourteen days according to some local Bavarian usages in the wood trade.¹⁰² If such specific requirements do not exist, the determination of the reasonable period, first and foremost, should depend upon the nature of the goods involved. In the case of perishables, notice of non-conformity should possibly be given within a couple of hours, or at most within a few days.¹⁰³ The same rule applies to seasonal goods, which might “economically perish” within a short time.¹⁰⁴ In the case of durable goods, the period to give notice should be determined more liberally. Regard is also to be had to the nature of the defect. If the defect concerned could also have been caused by mishandling or sheer deterioration of the goods, or if a rapid examination of the goods by an independent expert

⁹⁸ See CISG-AC Opinion No. 2, *supra* note 6, art. 39(3); Andersen, *Reasonable Time in Art. 39(1) of the CISG*, *supra* note 5, at V.3; Magnus, *supra* note 46, at para. 43.

⁹⁹ It has to be noted, however, that the validity of such a clause is not subject to the CISG, but – according to Art. 4(a) CISG – has to be dealt with under the applicable domestic law.

¹⁰⁰ Oberster Gerichtshof, [OGH] [Sup. Ct.] [Vienna], June 30, 1988, *available at* <http://cisgw3.law.pace.edu/cases/980630a3.html>.

¹⁰¹ Oberlandesgericht Saarbrücken, [OLG] [Provincial Ct. App.] [Saarbrücken], June 3, 1998, *available at* <http://cisgw3.law.pace.edu/cases/980603g1.html>.

¹⁰² Oberster Gerichtshof, [OGH] [Sup. Ct.] [Vienna], Mar. 21, 2000, *available at* <http://cisgw3.law.pace.edu/cases/000321a3.html>.

¹⁰³ Arrondissementsrechtbank Roermond, [RB] [Dist. Ct.] [Roermond], Dec. 19, 1999, *available at* <http://cisgw3.law.pace.edu/cases/911219n1.html>; Sø og Handelsretten [SHD] [Mar. and Commercial Ct.] [Copenhagen], Jan. 31, 2002, *available at* <http://cisgw3.law.pace.edu/cases/020131d1.html>; Arrondissementsrechtbank Zwolle [RB] [Dist. Ct.] [Zwolle], *available at* <http://cisgw3.law.pace.edu/cases/970305n1.html>; Oberlandesgericht Köln [OLG] [Provincial Ct. App.] [Köln], June 19, 2006, *available at* <http://cisgw3.law.pace.edu/cases/060817g1.html>.

¹⁰⁴ Amtsgericht Augsburg, [AG] [Petty Dist. Ct.] [Augsburg], Jan. 29, 1996, *available at* <http://cisgw3.law.pace.edu/cases/960129g1.html>.

is required, a swifter reaction is required than in the case of a design defect that can still be identified after a long period of time. When determining the period, regard must also be had to the remedies that the buyer is invoking.¹⁰⁵ If it wishes to retain the goods and merely claim damages or a price reduction, the period can be calculated more generously than if it wishes to avoid the contract and return the goods. In the latter case, not only must a rapid notice of the lack of conformity give the seller the opportunity to remedy the defect and, thus, prevent the non-conformity amounting to a fundamental breach in the first place,¹⁰⁶ but the seller must also be placed in a position to make the necessary arrangements for the eventual return transport or a redirection of the goods. "A longer period may be appropriate if the buyer alleges an intentional breach of contract,"¹⁰⁷ although usually in this case, the buyer is already protected under Art. 40 CISG, according to which the seller cannot invoke the buyer's failure to give notice if the lack of conformity relates to facts which the seller knew or could not have been unaware of.¹⁰⁸ The calculation of the period should also reflect whether the buyer requires time in order to give detailed scrutiny to its own customers' complaints. "Account must finally be taken of the time the buyer needs in order to clarify the possibility of asserting its rights abroad."¹⁰⁹

Third, the CISG-AC opinion advocates that "no fixed period, whether fourteen days, one month or otherwise, should be considered as reasonable" in theory alone.¹¹⁰ However, although it seems undisputable that, first and foremost, all the above mentioned criteria are to be taken into primary account, the necessary predictability of judicial or arbitral decisions still

¹⁰⁵ See Hanns-Christian Salger, *Art. 39*, in *INTERNATIONAL EINHEITLICHES KAUFRECHT: PRAKTIKER-KOMMENTAR UND VERTRAGSGESTALTUNG ZUM CISG* [INTERNATIONAL UNIFORM SALES LAW: PRACTITIONER'S COMMENTARY ON AND DRAFTING OF CONTRACTS UNDER THE CISG] [*in German*] para. 6 (Wolfgang Witz et al. eds., *Recht & Wirtschaft* 2000).

¹⁰⁶ CISG-AC Opinion No. 5, para. 4.4, *The Buyer's Right to Avoid the Contract in Case of Non-Conforming Goods or Documents* (2005). Rapporteur: Professor Dr. Ingeborg Schwenzer, L.L.M., Professor of Private Law, University of Basel, Germany, available at <http://cisgw3.law.pace.edu/cisg/CISG-AC-op5.html>.

¹⁰⁷ Schwenzer, *Article 39*, *supra* note 94, para. 16.

¹⁰⁸ CISG, *supra* note 1, art. 40.

¹⁰⁹ Schwenzer, *Art. 39*, *supra* note 94, para. 16.

¹¹⁰ CISG-AC Opinion No. 2, *supra* note 6, art. 39(3).

demands that one choose a certain starting-point, from which one can either argue for a reduction or an extension of the period.¹¹¹ An abundance of case law shows that courts and tribunals are desperately looking for guidelines, and refusing this request only adds to uncertainty, which, in the long run, undermines the hard-won uniformity. In the author's view, there can be no doubt that the general guideline has to reflect not only the drafting history¹¹² of Arts. 38 and 39 CISG, which clearly indicates a more buyer-friendly view than is favored by some courts and authors, especially those from German speaking countries; but also has to take into account that, for many courts and legal scholars whose domestic legal system does not stipulate any requirement to give notice in case of non-conforming goods, overly short periods are simply unacceptable and might lead to hostility towards or even rejection of the CISG as a whole. Last but not least, merchants from such countries might otherwise find themselves caught in a trap that they had never previously had reason to fear or even to consider. All in all, there are plenty of reasons to reinforce the noble month as a rough guideline;¹¹³ nevertheless, strong emphasis must be placed on the fact that primary consideration is to be given to the respective circumstances of each individual case.

VIII. CONCLUSION

As in more than half of the litigated cases, non-conformity of the goods is alleged by the buyer and, hence, the question arises of whether the buyer has given notice within a reasonable time and is thus allowed to rely on the lack of conformity at all. Differences in interpreting the meaning of "reasonable time" in Art. 39(1) CISG endanger uniformity of international sales law in a core area. Given the clash of fundamentally different domestic legal backgrounds, proposing a viable compromise and convincing both sides to come closer to each other and finally converge has proven to be a difficult task. The "noble month", still opposed by exponents from both sides, might become acceptable in the long run. At the same time, it can be

¹¹¹ Andersen, *Reasonable Time in Art. 39(1) of the CISG*, *supra* note 5, at V.2.

¹¹² *Id.* at III.2; *see also* CISG-AC Opinion No. 2, *supra* note 6, Cmts., paras. 3.1 et seq.

¹¹³ Andersen, *Reasonable Time in Art. 39(1) of the CISG*, *supra* note 5, at VI.2.

handled flexibly enough to cover all the specificities of an individual case.¹¹⁴

This uniform interpretation of the “reasonable time” in Art. 39(1) CISG can not be achieved, however, by merely making recommendations to courts and arbitral tribunals that case law from other CISG jurisdictions should be considered. This can at best – as has been shown above¹¹⁵ – lead to confusing results. Instead, a joint endeavor by legal scholars from different countries – as was always masterly advocated and practiced by E. Allan Farnsworth - seems to be indispensable, abandoning national vanities in the quest for securing uniformity and reliability of international sales law.

¹¹⁴ *Id.*

¹¹⁵ Oberster Gerichtshof, [OGH] [Sup. Ct.] [Vienna], Oct. 15, 1998, *available at* <http://www.cisg-online.ch/cisg/urteile/380.htm>.