

# The Noble Month (Articles 38, 39 CISG)

## – The Story Behind the Scenery –

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### A. The Problem

According to Article 39(1) CISG, 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. Case law on how to interpret the question of what period is reasonable in the sense of Article 39(1) CISG is abundant, especially in German speaking countries.<sup>1</sup> 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 15-16 March 2005, the reporter on Article 39 CISG<sup>2</sup> 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’<sup>3</sup>”. This, in return, prompted some common law representatives to react, 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.

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<sup>1</sup> [www.cisg-online.ch](http://www.cisg-online.ch) lists 195 court and arbitral tribunal decisions discussing this question.

<sup>2</sup> See D. Girsberger, *Outline for Discussion – Art. 39, 43 and Statutes of Limitation, 25 Years United Nations Convention on Contracts for the International Sale of Goods (CISG), Vienna, March 15 – 16, 2005*, 25 *Journal of Law and Commerce* 2006 (forthcoming).

<sup>3</sup> This expression goes back to the translation of the author’s term “*Grosszügiger Monat*” by C. Baasch Andersen, *Reasonable Time in Art. 39(1) of the CISG – Is Art. 39(1) Truly a Uniform Provision?*, <http://www.cisg.law.pace.edu/cisg/biblio/andersen.html>.

## B. National Solutions

The problem lying behind the interpretation of Articles 38, 39 CISG is the divergence of domestic sales laws concerning the duty of the buyer to inspect the goods and give notice of any non-conformity.<sup>4</sup>

The Germanic legal systems,<sup>5</sup> 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 UCC<sup>6</sup> also requires notice of lack of conformity to be given; by way of contrast, English law<sup>7</sup> 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,<sup>8</sup> under French law itself and the law of many related legal systems,<sup>9</sup> 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*.

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*)<sup>10</sup> or immediately (*sofort*),<sup>11</sup> under Anglo-American<sup>12</sup> and Dutch<sup>13</sup> law, it is sufficient for it 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 60 days and eight days, respectively.<sup>14</sup>

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 strongest weapon of sellers 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 as short a period as three to five

<sup>4</sup> Cf. CISG-AC Opinion No. 2, Examination of the Goods and Notice of Non-Conformity – Articles 38 and 39, 7 June 2004, Rapporteur: Professor Eric Bergsten, paras. 2.1.-2.4; 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.

<sup>5</sup> Cf. §§ 377, 378 German and Austrian Handelsgesetzbuch (HGB – Commercial Code); Art. 201 Swiss Obligationenrecht (OR – Code of Obligations).

<sup>6</sup> Cf. § 2-607(3)(a) UCC, *see also* § 2-607(3)(a) UCC 2003.

<sup>7</sup> Cf. Sec. 35(1) SGA 1979.

<sup>8</sup> Cf. Italy: Art. 1667(2) Codice civile (Cc – Civil Code); The Netherlands: Art. 7:23.1 Burgerlijk Wetboek (BW – Civil Code); Portugal: Art. 471 Codigo de Comercio (Ccom – Commercial Code); the position is uncertain in Spain.

<sup>9</sup> Cf. France and Belgium: Art. 1648 Code civil (Cc – Civil Code).

<sup>10</sup> Cf. Germany and Austria, *supra* note 5.

<sup>11</sup> Cf. Switzerland, *supra* note 5.

<sup>12</sup> Cf., *supra* notes 6, 7.

<sup>13</sup> Cf., *supra* note 8.

<sup>14</sup> Cf., *supra* note 8.

working days.<sup>15</sup> 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, US courts generally hold the purpose of the duty to give notice to be the prevention of fraud by a dilly-dallying buyer.<sup>16</sup> Thus, more often than not, a period of more than one month has still been held to be reasonable.<sup>17</sup> It is only in cases of perishables that US courts require notice to be given within a couple of days.<sup>18</sup> Section 2-607(3)(a) UCC 2003 supports this 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.<sup>19</sup>

In France, where – before the amendment of Article 1648 Cc<sup>20</sup> – 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.<sup>21</sup> Dutch courts, as well, interpret the duty to give notice in a more or less generous way.<sup>22</sup>

## C. History of Articles 38, 39 CISG

### 1. The Predecessor: Articles 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). Articles 38 and 39 ULIS were heavily influenced by those legal systems whose domestic sales laws stipulated rather rigid notice requirements, especially German law. Thus, Article 38(1) ULIS called for a “prompt” examination of the goods by the buyer; Article 39(1) ULIS

<sup>15</sup> Cf. for Austria §§ 377, 378 Austrian HGB; E.A. Kramer, §§ 377, 378, para. 41, in M. Straube, Kommentar zum HGB (2003); for Germany § 377 German HGB; U. Stuhlfelner, § 377, para. 8, in Heidelberger Kommentar HGB (2002); B. Grunewald, § 377 para. 72 in Münchener Kommentar HGB (2004); for Switzerland Art. 201 Swiss OR; H. Schönle /P. Higi, Art. 201, para. 29a, in Zürcher Kommentar (2005); H. Giger, Art. 201, para. 81, in Berner Kommentar (1979).

<sup>16</sup> Cf. *A.C. Carpenter, Inc. v. Boyer Potato Chips*, U.S. Department of Agriculture, 1969, 1969 WL 10993 (discussed in: J. J. White & R. S. Summers, Uniform Commercial Code (2000) § 11-10 at p. 419); *G. & D. Poultry Farms, Inc. v. Long Island Butter & Egg Co.*, Supreme Court of New York, 3 November 1969, 33 A.D.2d 685, 306 N.Y.S.2d 243.

<sup>17</sup> Cf. *Opp v. Nieuwsma*, Supreme Court of South Dakota, 3 July 1990, 458 N.W.2d 352, 1990 S.D. LEXIS 87 (four months); *Hudson v. Gaines*, Court of Appeals Georgia, 27 February 1991, 199 Ga.App. 70, 1991 Ga. App. LEXIS 378 (eight months); *Sun Hill Industries, Inc. v. Kraftsman Group, Inc.*, Appellate Court Connecticut, 2 June 1992, 27 Conn. App. 688, 1992 Conn. App. LEXIS 220 (two months).

<sup>18</sup> Cf. *A.C. Carpenter, Inc. v. Boyer Potato Chips*, *supra* note 16.

<sup>19</sup> Cf. J. Lookofsky, Understanding the CISG in the USA 81 (2004).

<sup>20</sup> Ord. n 2005-136 of 17 February 2005.

<sup>21</sup> Cf. J. Ghestin & B. Desché, *Traité des Contrats* (1990) paras. 737 *et seq.*

<sup>22</sup> Cf. Baasch Andersen, *supra* note 3, III.2.2.

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. What was meant by the term “promptly” was defined in Article 11 ULIS as “within as short a period as possible, under the circumstances”.

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 Germany<sup>23</sup> and Italy<sup>24</sup>. Case 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 Articles 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,<sup>25</sup> leaving buyers who had not given notice in due time without any remedy for lack of conformity.

## 2. Drafting History of Articles 38, 39 CISG

Already in UNCITRAL, the rather strict examination and notice requirements of Articles 38, 39 ULIS were abandoned.<sup>26</sup> “Promptly” in Article 38(1) ULIS was replaced by “within as short a period as is practicable in the circumstances” in Article 38(1) CISG; Article 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”<sup>27</sup>, 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.<sup>28</sup> 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 until too late”<sup>29</sup>. However, a suggestion to delete Article 39(1) CISG entirely was not successful. Instead, a compromise was reached by introducing Article 44 CISG, a provision that is unknown to any other legal system. According to Article

<sup>23</sup> Cf. *supra* note 5.

<sup>24</sup> Cf. *supra* note 8.

<sup>25</sup> For case law see P. Schlechtriem & U. Magnus, *Internationale Rechtsprechung zu EKG und EAG* 231 *et seq.* (1987).

<sup>26</sup> For details see CISG-AC Opinion No. 2, *supra* note 4, paras. 3.2.-3.4.

<sup>27</sup> Cf. YB III (1972), at 87 nos. 74 *et seq.*, J. O. Honnold, *Documentary History of the Uniform Law for International Sales* 104 (1989); YB IV (1973), at 48 no. 85, Honnold, *ibid.*, at 125.

<sup>28</sup> H. Flechtner, *Buyer’s Obligation to Give Notice of Lack of Conformity (Articles 38, 39, 40 and 44)* in R. A. Brand, F. Ferrari & H. Flechtner (Eds.), *The Draft UNCITRAL Digest and Beyond: Cases, Analysis and Unresolved Issues in the UN Sales Convention* 378 (2004).

<sup>29</sup> Official Records (A/Conf.97/19), Summary Records, First Committee, 16<sup>th</sup> Meeting, para. 32.

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 Article 39 CISG.

All in all, Articles 38 and 39, seen together with Article 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.<sup>30</sup>

## D. The First Years of Experience with Articles 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<sup>31</sup>.

In Germany, where the CISG came into force in 1991, not only one, but quite a few commentaries, text books and doctoral dissertations covered this new field of law, whereas in most other countries, usually one single work had to suffice. However, the German scholars who commentated Articles 38, 39 CISG were not true comparatists in the first place. They did not know how this question was dealt with in other legal systems; instead, they relied on their knowledge of the interpretation of Articles 38, 39 ULIS, as well as their domestic experience, thus also disregarding the fact that considerable changes had taken place between ULIS and CISG<sup>32</sup>. German courts, guided by and dependent on these commentaries, understandably just continued to decide under Articles 38, 39 CISG in the same way as they had done under Articles 38, 39 ULIS and – both previously and concurrently – under §§ 377, 378 *Handelsgesetzbuch* (HGB – Commercial Code).

A few illustrative examples of these early decisions interpreting Articles 38, 39 CISG may be given here.

<sup>30</sup> Cf. CISG-AC Opinion No. 2, *supra* note 4, para 4.4.

<sup>31</sup> Cf. Baasch Andersen, *supra* note 3, V.1.

<sup>32</sup> See H. Stumpf, in E. von Caemmerer & P. Schlechtriem, *Kommentar zum Einheitlichen UN-Kaufrecht – CISG - (1990)*, Art. 39 para 8; U. Huber, *Der UNCITRAL-Entwurf eines Übereinkommens über internationale Warenkaufverträge*, 43 *RabelsZeitschrift* 413, at 482 (1979); B. Piltz, *Internationales Kaufrecht* (1993) § 5 para 59: four to seven working days; R. Herber & B. Czerwenka, *Internationales Kaufrecht*, (1991), Art. 39 para 9; G. Reinhart, *UN-Kaufrecht* (1991), Art. 39 para 5: only a few days; H. Asam, *UN-Kaufrechtsübereinkommen im deutsch-italienischen Rechtsverkehr*, 1989 *Recht der internationalen Wirtschaft* 942 at 944: five days.

In the first German decision concerning Article 39 CISG, the Landgericht Stuttgart<sup>33</sup> 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;<sup>34</sup> seven days was regarded as too long in the case of gherkins<sup>35</sup>. 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<sup>36</sup>. As late as 2005, Ulrich Magnus<sup>37</sup> 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 authors<sup>38</sup> 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.

## E. 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 Articles 35 et seq. in the second edition of Schlechtriem’s *Kommentar zum Einheitlichen UN-Kaufrecht – CISG*-.<sup>39</sup> For a comparatist, the situation in legal systems outside the German speaking world, as well as the drafting history of Articles 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.<sup>40</sup> 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 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.<sup>41</sup> 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

<sup>33</sup> 31 August 1989, CISG-online 11.

<sup>34</sup> Cf. Landgericht Stuttgart, 13 August 1991, CISG-online 33; Landgericht Mönchengladbach, 22 May 1992, CISG-online 56; Oberlandesgericht Düsseldorf, 12 March 1993, CISG-online 82; see also Tribunale civile di Cuneo, 31 January 1996, CISG-online 268 (clothes): 23 days after delivery too long.

<sup>35</sup> Cf. Oberlandesgericht Düsseldorf, 8 January 1993, CISG-online 76.

<sup>36</sup> Cf. Landgericht Mönchengladbach, 22 May 1992, CISG-online 56.

<sup>37</sup> Cf. U. Magnus, *Art. 39 CISG para 49*, in J. v. Staudinger, *Wiener UN-Kaufrecht (CISG)*, (2005).

<sup>38</sup> Cf. Piltz, *supra* note 32, paras. 142, 145.

<sup>39</sup> P. Schlechtriem, *Kommentar zu Einheitlichen UN-Kaufrecht – CISG* – (1995).

<sup>40</sup> Cf. Baasch Andersen, *supra* note 3, III.1.4.3.

<sup>41</sup> Cf. Baasch Andersen, *supra* note 3, VI.3.

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.<sup>42</sup>

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.<sup>43</sup> 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 as being too late, even if – according to the reasoning of the *Bundesgerichtshof* - one would accept the generous average of one month. Soon thereafter, lower German courts relied on this one-month period.<sup>44</sup>

In 1999, the *Bundesgerichtshof*<sup>45</sup> 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. The court described the four-week period for giving notice as “*regelmässig*”, i.e. “regular” or “normal”. 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 Article 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 engage an expert and to actually engage him. The two weeks for the expert to prepare its report were deemed adequate. Thus, the *Bundesgerichtshof* arrived at a three-week period for examination. At this point, the period for giving notice according to Article 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

<sup>42</sup> See I. Schwenzer, *Art. 39 para 7*, in Schlechtriem, *supra* note 39.

<sup>43</sup> Bundesgerichtshof, 8 March 1995, CISG-online 144.

<sup>44</sup> Cf. Oberlandesgericht Stuttgart, 21 August 1995, CISG-online 150; Amtsgericht Kehl, 6 October 1995, CISG-online 162; Amtsgericht Augsburg, 29 January 1996, CISG-online 172; Oberlandesgericht Köln, 21 August 1997, CISG-online 290.

<sup>45</sup> Bundesgerichtshof, 3 November 1999, CISG-online 475 (grinding machine).

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.

## F. The Current Situation

### I. 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 Article 39(1) CISG, the German *Bundesgerichtshof*<sup>46</sup> 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. The case, however, was remanded to the appellate court to determine whether the seller should still be allowed to rely on Article 39(1) CISG because it itself had knowledge of the non-conformity according to Article 40 CISG.

In the meantime, the supreme court of Switzerland, the *Bundesgericht*,<sup>47</sup> has followed this line of interpretation in expressly upholding a finding of the *Obergericht Luzern*<sup>48</sup> that allowed the buyer one week for examination followed by one month for giving notice in the case of a defective second-hand textile cleaning machine.

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.<sup>49</sup> The Uganda buyer ordered used shoes from the seller in Germany fob Mombassa, Kenya. Upon their arrival at the buyer’s location, but three 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. At first the court denied the applicability of Article 38(3) CISG, which would have allowed the buyer to postpone the examination of the goods until their arrival in Uganda. 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 Article 38(3), as well as that of Article 39(1) CISG -, this decision seems highly problematic. The interaction of the interpretation of the two provisions clearly

<sup>46</sup> Cf. Bundesgerichtshof, 30 June 2004, CISG-online 847 (irradiated paprika).

<sup>47</sup> Cf. Bundesgericht, 13 November 2003, CISG-online 840.

<sup>48</sup> Cf. Obergericht Luzern, 12 May 2003, CISG-online 846.

<sup>49</sup> Landgericht Frankfurt am Main, 11 April 2005, CISG-online 1014.



indicates the considerable bias towards the seller,<sup>50</sup> and this precisely was what was anticipated during the discussions of the elaboration of the respective articles of the CISG.<sup>51</sup> 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*.<sup>52</sup>

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 Articles 38 and 39 CISG that is still predominantly influenced by domestic law. Whereas, in 1997, the *Oberster Gerichtshof*<sup>53</sup> seemed to follow the German and the Swiss supreme courts by considering notice after four weeks as having been given in due time – allowing ten to fourteen days for examination and one month for notice –, it changed its opinion in 1998.<sup>54</sup> It relied on an Austrian author’s<sup>55</sup> review of the German *Bundesgerichtshof*’s leading case,<sup>56</sup> which criticized the “noble month” period as being too long. 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 14 days. Since this first decision in 1998, the Austrian *Oberster Gerichtshof* has confirmed this position in two further cases.<sup>57</sup>

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.<sup>58</sup> In contrast, the Austrian *Oberster Gerichtshof*’s overall 14-day period is shared by authors<sup>59</sup> whose approach to this issue is deeply rooted in

<sup>50</sup> Cf. Flechtner *supra* note 28, at 379 and 390; Lookofsky, *supra* note 19, at 81.

<sup>51</sup> See above C.II.

<sup>52</sup> Cf. on the one hand Obergericht Luzern, 8 January 1997, CISG-online 228; on the other hand Kantonsgericht St. Gallen, 27 January 2004, CISG-online 960: overall period for examination and giving notice of two weeks.

<sup>53</sup> Oberster Gerichtshof, 27 May 1997, CISG-AC Opinion No. 2, *supra* note 4, Table of Cases.

<sup>54</sup> Cf. Oberster Gerichtshof, 15 October 1998, CISG-online 380.

<sup>55</sup> M. Karollus, *Anmerkung zu BGH 8.3.1995, VIII ZR 159/94 (UN-Kaufrecht: Vertragswidrigkeit der Ware – Muscheln mit Cadmiumbelastung)*, Juristische Rundschau, (1996), at 27-28.

<sup>56</sup> Bundesgerichtshof, *supra* note 43.

<sup>57</sup> Cf. Oberster Gerichtshof, 27 August 1999, CISG-online 485; Oberster Gerichtshof, 14 January 2002, CISG-online 643.

<sup>58</sup> Cf. Girsberger, *supra* note 2; D. Rüetschi, *Substanziierung der Mängelrüge: Bundesgericht, I. Zivilabteilung, Urteil 4 C.395/2001 vom 28. Mai, recht, (2003), 115, at 120 et seq.*

<sup>59</sup> Cf. M. Karollus, *UN – Kaufrecht: Anwendungsbereich, Holzhandelsusancen, Mängelrüge*, Juristische Blätter 321 (1999); Cf. U. Magnus, *Art. 39 para 49, in Staudinger, supra note 37; U. Magnus, Art. 39 para. 22, in H. Honsell, Kommentar zum UN-Kaufrecht (1997); C. Benicke, Art. 39 CISG para 7, in Münchener Kommentar HGB, supra note 15; D. Schüssler-Langeheine, Art. 39 para 4, in H. Th. Soergel & A. Lüderitz, Übereinkommen der Vereinten Nationen über Verträge über den internationalen Warenkauf (CISG) (2000); E. A. Kramer, *Rechtzeitige Untersuchung und**

the intricacies of traditional German sales law and its acceptance in Austria and Switzerland, who try to interpret uniform law rules as closely as possible to their domestic forerunners.

## II. Other Continental Countries

Apart from the German speaking countries, most other countries have considerably fewer cases dealing with Articles 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 Article 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.<sup>60</sup> Throughout the non-German speaking continental countries, there are hardly any cases that deny the reasonableness of notice given within one month.<sup>61</sup> Instead, there is ample case law holding that a period for giving notice of more than one month is still reasonable;<sup>62</sup> 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.<sup>63</sup> 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<sup>64</sup>.

## III. Anglo-American Courts

Up until now, there has only been little Anglo-American case law interpreting Articles 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 used to automatically raising the objection of a failure to give notice by the buyer, as such tactics rarely succeed under domestic law.

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*Mängelanzeige bei Sachmängeln nach Art. 38 und 39 UN-Kaufrecht – Eine Zwischenbilanz, in E. A. Kramer (Ed.), Beiträge zum Unternehmensrecht, Festschrift Hans-Georg Köppensteiner 617, at 628 (2001).*

<sup>60</sup> Cf. Cour d'appel d' Aix-en-Provence, 1 July 2005, CISG-online 1096 (over two months); Hof van Beroep Gent, 4 October 2004, CISG-online 985 (nine months); Rechtbank van Koophandel Veurne, 15 January 2003, CISG-online 1056 (one and a half years); Hof van Beroep Gent, 2 December 2002, CISG-online 1054 (almost three months); Tribunale di Rimini, 26 November 2002, CISG-online 737 (six months); Audiencia Provincial de La Coruña, 21 June 2002, CISG-online 1049 (two and a half months); Rechtbank van Koophandel Hasselt, 6 March 2002, CISG-online 623 (two months); Søg og Handelsretten, 31 January 2002, CISG-online 868 (seven months); Gerechtshof Arnhem, 27 April 1999, CISG-online 741 (two years).

<sup>61</sup> Exception: Gerechtshof 's-Hertogenbosch, 15 December 1997, CISG-online 552 (three weeks).

<sup>62</sup> Cf. Cour de Cassation, 26 May 1999, CISG-online 487 (5 weeks); Cour d'appel de Versailles, 29 January 1998, CISG-online 337 (six / eleven months); Cour d'appel de Colmar, 24 October 2000, CISG-online 578 (two months).

<sup>63</sup> Cf. Spain: Audiencia Provincial de Pontevedra, 3 October 2002, CISG-online 1108.

<sup>64</sup> Cf. Rb Mechelen, 18 January 2002, CISG-AC Opinion No. 2, fn. 4, Table of Cases; Hof van Beroep Antwerpen, 4 November 1998, 1995/AR/1558, CISG-AC Opinion No. 2, fn. 4, Table of Cases.

With respect to equipment designed to produce plastic gardening pots, a US District Court<sup>65</sup> 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”. However, another US District Court<sup>66</sup> recently appeared to apply a much stricter standard in defining the timeliness of a notice given by the buyer. 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, it reached the conclusion that the buyer did not comply with its duty to examine the goods in time. 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 Article 38 CISG with that in Article 39(1) CISG.

#### **IV. 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 14-day guideline enunciated by the Austrian *Oberster Gerichtshof*.<sup>67</sup> 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 period<sup>68</sup> or at least emphasize that a contractually agreed time frame of one month is not to be overridden.<sup>69</sup>

#### **G. 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 Council<sup>70</sup> released its second opinion on “Examination of the Goods and Notice

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<sup>65</sup> *Shuttle Packaging Systems, L.L.C. v. Jacob Tsonakis, INA S.A., et al.*, U.S. District Court, W.D. Michigan, Southern Division, 17 December 2001, CISG-online 773.

<sup>66</sup> *Chicaco Prime Packers, Inc. v. Northam Food Trading Co.*, U.S. District Court, N.D. Illinois, Eastern Division, 21 May 2004, CISG-online 851 (frozen pork loin back ribs).

<sup>67</sup> *Cf.* ICC Int’l Court of Arbitration, August 1999, 9083, CISG-online 706 (books).

<sup>68</sup> *Cf.* ICC Int’l Court of Arbitration, September 1997, 8962, UNILEX (glass commodities).

<sup>69</sup> *Cf.* ICC Int’l Court of Arbitration, January 1994, 7331, CISG-online 106 (cowhides); ICA Russian Federation Arbitration, 4 June 1997, 256/1996, <http://www.cisg.law.pace.edu/cisg/wais/db/cases2/970604r1.html>.

<sup>70</sup> *Cf. supra* note 4.

of Non-Conformity – Articles 38 and 39”.<sup>71</sup> 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.<sup>72</sup> 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.<sup>73</sup> Thus, the opinion of the Austrian *Oberster Gerichtshof*, as well as the one of the prevailing German language discourse, which advocates an overall period of 14 days, is clearly rejected. This approach receives full support; this interpretation follows from the plain wording of Articles 38 and 39 CISG, that provides for the examination period in Article 38(1) CISG, on the one hand, and the reasonable time to give notice in Article 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.<sup>74</sup> Among the circumstances to be taken into account are such matters as the nature of the goods, the nature of the defect, the situation of the parties and relevant trade usages.<sup>75</sup> 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.<sup>76</sup> 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,<sup>77</sup> one day in the international flower trade,<sup>78</sup> or 14 days according to some local Bavarian usages in the wood trade.<sup>79</sup> 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 least within a few days.<sup>80</sup> The same rule applies to seasonal

<sup>71</sup> CISG-AC Opinion No. 2, *supra* note 4.

<sup>72</sup> Cf. I. Schwenzer, *Art. 39 para 15*, in P. Schlechtriem, & I. Schwenzer, *Commentary on the UN Convention on the International Sale of Goods (CISG)* (2005).

<sup>73</sup> CISG-AC Opinion No. 2, *supra* note 4, Art. 39 para. 2.

<sup>74</sup> Cf. also I. Schwenzer, *Art. 39 para 16*, in Schlechtriem & Schwenzer, *supra* note 72; J. O. Honnold, *Uniform Law for International Sales* (1999), para. 257.

<sup>75</sup> CISG-AC Opinion No. 2, *supra* note 4, Art. 39 para. 3; Cf. also Baasch Andersen, *supra* note 3, V.3; U. Magnus, *Art. 39 paras. 43 et seq.*, in Staudinger, *supra* note 37.

<sup>76</sup> 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.

<sup>77</sup> *Oberster Gerichtshof*, 30 June 1998, CISG-online 410.

<sup>78</sup> *Oberlandesgericht Saarbrücken*, 3 June 1998, CISG-online 354.

<sup>79</sup> *Oberster Gerichtshof*, 21 March 2000, CISG-online 641.

<sup>80</sup> Cf. *Arrondissementsrechtbank Roermond*, 19 December 1991, CISG-online 29; Sø og

goods, which might “economically perish” within a short time.<sup>81</sup> 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 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.<sup>82</sup> 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,<sup>83</sup> 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,<sup>84</sup> although usually in this case, the buyer is already protected under Article 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. 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.<sup>85</sup>

Third, the CISG-AC opinion<sup>86</sup> advocates that no fixed period, whether 14 days, one month or otherwise, should be considered as reasonable in theory alone. 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 demands that one choose a certain starting-point, from which one can either argue for a reduction or an extension of the period.<sup>87</sup> 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 history<sup>88</sup> of Articles 38 and 39 CISG, which clearly indicates a more buyer-friendly view than it is favored by some courts and authors, especially from German speaking

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Handelsretten, 31 January 2002, CISG-online 868; Arrondissementsrechtbank Zwolle, 5 March 1997, CISG-online 545.

<sup>81</sup> Cf. Amtsgericht Augsburg, 29 January 1996, CISG-online 172.

<sup>82</sup> Cf. also H-Ch. Salger, *Art. 39 para. 6*, in W. Witz, H-Ch. Salger & M. Lorenz, *International einheitliches Kaufrecht: Praktiker-Kommentar und Vertragsgestaltung zum CISG* (2000).

<sup>83</sup> Cf. CISG-AC Opinion No. 5, The buyer’s right to avoid the contract in case of non-conforming goods or documents, 7 May 2005, Rapporteur: Professor Ingeborg Schwenzer, para. 4.4.

<sup>84</sup> Cf. Schwenzer, *supra* note 72, Art. 39 para 16.

<sup>85</sup> Cf. Schwenzer, *supra* note 72, Art. 39 para 16.

<sup>86</sup> CISG-AC Opinion No. 2, *supra* note 4, Art. 39 para 3.

<sup>87</sup> Cf. Baasch Andersen, *supra* note 3, V.2.

<sup>88</sup> Cf. above III.2.; Cf. also CISG-AC Opinion No. 2, *supra* note 4, Comments, paras 3.1. *et seq.*

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 booby 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;<sup>89</sup> nevertheless, strong emphasis must be placed on the fact that primary consideration is to be given to the respective circumstances of each individual case.

## H. 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 Article 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 handled flexibly enough to cover all the specificities of an individual case<sup>90</sup>.

This uniform interpretation of the “reasonable time” in Article 39(1) CISG can, however, not be achieved 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 above<sup>91</sup> – lead to confusing results. Instead, a joint endeavor by legal scholars from different countries seems to be indispensable, abandoning national vanities in the quest for securing uniformity and reliability of international sales law.

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<sup>89</sup> Cf. also Baasch Andersen, *supra* note 3, VI.2.

<sup>90</sup> Cf. Baasch Andersen, *supra* note 3, VI.2.

<sup>91</sup> Cf. *supra* note 54.