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National Preconceptions That Endanger Uniformity

Ingeborg Schwenzer

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NATIONAL PRECONCEPTIONS THAT ENDANGER UNIFORMITY*

Ingeborg Schwenzer**

I. The Problem ....................................... 104
II. National Solutions .................................. 104
III. History of Arts. 38, 39 CISG ..................... 107
  1. The Predecessor: Arts. 38, 39 ULIS .............. 107
  2. Drafting History Of Arts. 38, 39 CISG .......... 108
IV. The First Years Of Experience With Arts. 38, 39 CISG .............................................. 109
V. The Invention Of The “Noble Month” And Its Way To The Courts .................................... 111
VI. The Current Situation ................................ 114
  1. German Speaking Countries ..................... 114
  2. Other Continental Countries .................... 117
  3. Anglo-American Courts .......................... 118
  4. Arbitral Tribunals ................................ 119
VII. CISG Advisory Council Opinion No. 2 - Evaluation ........................................ 120
VIII. Conclusion ........................................ 123

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, 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 Art. 39(1) CISG is abundant, especially in German speaking countries. 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 CISG 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.’” 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
the buyer to inspect the goods and give notice of any non-conformity.\textsuperscript{6}

The Germanic legal systems,\textsuperscript{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)\textsuperscript{8} also requires notice of lack of conformity to be given; by way of contrast, English law\textsuperscript{9} 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,\textsuperscript{10} under French law itself and the law of many related legal systems,\textsuperscript{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 \textit{bref délai}.\textsuperscript{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 (\textit{unverzüglich})\textsuperscript{13} or immediately


\textsuperscript{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].

\textsuperscript{8} U.C.C. § 2-607(3)(a) (2003).

\textsuperscript{9} Sec. 35(1) SGA 1979.


\textsuperscript{11} Code Civil [C.Civ.] [Civil Code] art. 1648 (Fr. and Belg.).

\textsuperscript{12} Id. art. 1648.

\textsuperscript{13} HGB §§ 377, 378 (F.R.G. and Austria).
under Anglo-American and Dutch 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.

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. 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. Thus, more often than not, a period of more than one month has been held to be reasonable. It is only in cases of perishables that U.S. courts require notice to be given within a couple of days. Section 2-607(3)(a) UCC 2003 supports this

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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.).

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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.\footnote{JOSEPH M. LOOKOFSKY, UNDERSTANDING THE CISG IN THE USA 81 (Aspen Publishers 2d ed. 2004).}

In France, where before the amendment of Art. 1648 Cc\footnote{CC decision no. 2005-136, Feb. 17, 2005, J.O. 2778.} 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.\footnote{JACQUES GHOSTIN & BERNARD DESCHA, TRAITÉ DES CONTRATS, LA VENTE, para. 737 (L.G.D.J. 1990).} Dutch courts also interpret the duty to give notice in a more or less generous way.\footnote{See Andersen, Reasonable Time in Article 39(1) of the CISG, supra note 5, at III.2.2.}

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).\footnote{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.} 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;\footnote{Id. art. 38(1).} 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.\footnote{Id. art. 39(1).} What was meant by the term “promptly” was defined in Art. 11 ULIS as “within as short a period as possible, in the circumstances.”\footnote{Id. art. 11.}

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\footnote{HGB § 377 (F.R.G.).} and Italy.\footnote{\textit{\textbf{5}}}
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, 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. "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; 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," 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. 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).
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 commented on Arts. 38, 39 CISG were not true comparatists in the first place. They did not know how this ques-


\(^{38}\) 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.\footnote{See Herbert Stumpf, Art. 39: Mängelrüge, in \textit{Kommentar zum Einheitlichen UN-Kaufrecht - CISG} [Commentary on the Uniform UN-Sales Law - CISG] \textit{[in German]} para. 8 (Ernst von Caemmerer & Peter Schlechtriem eds., C. H. Beck 1st ed. 1990); Ulrich Huber, \textit{Der UNCITRAL-Entwurf eines Übereinkommens für internationale Warenkaufverträge}, 43 \textit{Rabels Zeitschrift für ausländisches und internationales Privatrecht} 413, 482 (1979); Burghard Piltz, \textit{Internationales Kaufrecht, Das UN-Kaufrecht (Wiener Übereinkommen von 1980) in Praxisorientierter Darstellung} [The CISG: A practice-oriented presentation] \textit{[in German]} § 5 para. 59 (C. H. Beck 1993) (four to seven working days); Rolf Herber & Beate Czerwenza, \textit{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] \textit{[in German]} Art. 39, para. 9 (C. H. Beck 1991); Gert Reinhart, \textit{UN-Kaufrecht Art. 39}, para. 5 (C. F. Müller 1991) (only a few days); Herbert Asam, \textit{UN-Kaufrechtsübereinkommen im deutsch-italienischen Rechtsverkehr} [UN Sales Convention in German-Italian transactions] \textit{[in German]}, RECHT DER INTERNATIONALEN WIRTSCHAFT 942, 944 (1989) (five days).}

German courts, guided by and dependent on these commentaries, understandably just continued to decide under Arts. 38, 39 ULIS and – both previously and concurrently – under §§ 377, 378 \textit{Handelsgesetzbuch} (HGB – Commercial Code).

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

gherkins.\textsuperscript{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.\textsuperscript{45} As late as 2005, Ulrich Magnus\textsuperscript{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 authors\textsuperscript{47} 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.\textsuperscript{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.\textsuperscript{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


\textsuperscript{46} Ulrich Magnus, Art. 39, in JULIUS VON STAUDINGER’S KOMMENTAR ZUM BÜRGERLICHEN GESETZBUCH MIT EINFÜHRUNGSGESETZ UND NEBENGESETZEN, WIE- NER UN-KAUFRECHT (CISG) para. 4 (Julius von Staudinger ed., Sellier-de Gruyter 13th revised ed. 2005) [hereinafter STAUDINGER].

\textsuperscript{47} Piltz, supra note 41, paras. 142, 145.

\textsuperscript{48} KOMMENTAR ZUM EINHEITLICHEN UN-KAUFRECHT (Peter Schlectriem ed., C. H. Beck 2d ed. 1995).

\textsuperscript{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.\footnote{Id. at VI.3.} 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.\footnote{See Ingeborg Schwenzer, \textit{Art. 39, in KOMMENTAR ZUM EINHEITLICHEN UNKAUFRIGHT}, \textit{supra} note 48, para. 17.}

Only shortly after publication of this opinion, the German \textit{Bundesgerichtshof}, for the first time, referred to the one-month period in the well-known \textit{mussels}-case.\footnote{Bundesgerichtshof [BGH] [Federal Ct. of Justice] Karlsruhe 154 VII ZR 94 Mar. 8, 1995 (F.R.G.), \textit{available at} http://cisgw3.law.pace.edu/cases/950308g3.html.} 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 \textit{Bundesgerichtshof} - one would accept the generous average of one month.\footnote{Id. para. II(2).} Soon thereafter, lower German courts relied on this one-month period.\footnote{Oberlandesgericht Stuttgart [OLG] [Provincial Ct. App.] [Oberlandesgericht], 195 OLGZ 94 Aug. 21, 1995 (F.R.G.), \textit{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.), \textit{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.), \textit{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.), \textit{available at} http://cisgw3.law.pace.edu/cases/970821g1.html.}

In 1999, the \textit{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.\footnote{Bundesgerichtshof [BGH] [Federal Ct. of Justice] [Karlsruhe], 287 VII ZR 98, Nov. 3, 1999 (F.R.G.), \textit{available at} http://cisgw3.law.pace.edu/cases/991103g1.html (grinding machine).} 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 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. 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 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.

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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.\(^6\)\(^1\) 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.\(^6\)\(^2\)

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\(^6\)\(^3\) 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.\(^6\)\(^4\)

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.\(^6\)\(^5\) The Ugandan buyer ordered used shoes from the seller in Germany for Mombassa, Kenya. Upon their arrival at the buyer's location, but three

\(^6\)\(^1\) 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/040630gl.html (irradiated paprika).

\(^6\)\(^2\) Id. para. III.


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.\(^\text{66}\) 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.\(^\text{67}\) 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.\(^\text{68}\) The interaction of the interpretation of the two provisions clearly indicates the considerable bias towards the seller,\(^\text{69}\) and this was precisely what was anticipated during the discussions of the elaboration of the respective articles of the CISG.\(^\text{70}\) 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.\(^\text{71}\)

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; LOOKOFSKY, supra note 22, at 81.

\(^{70}\) See supra text Section III.2: Drafting History of Art. 38, 39 CISG at 4-5.

to fourteen days for examination and one month for notice.\footnote{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)).} It changed its opinion in 1998,\footnote{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").} relying on an Austrian author’s\footnote{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).} review of the German Bundesgerichtshof’s leading case, which criticized the “noble month” period as being too long.\footnote{See supra note 73.} 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.\footnote{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.} Since this first decision in 1998, the Austrian Oberster Gerichtshof has confirmed this position in two further cases.\footnote{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.}

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.\footnote{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.} 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-
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


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

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the timeliness of a notice given by the buyer.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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 period\textsuperscript{90} or at least emphasize that a contractually agreed time frame of one month is not to be overridden.\textsuperscript{91}


\textsuperscript{87} Id.

\textsuperscript{88} Id.


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 Council\(^\text{92}\) released its second opinion on "Examination of the Goods and Notice of Non-Conformity - Articles 38 and 39."\(^\text{93}\) 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.\(^\text{94}\) 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.\(^\text{95}\) Thus, the opinion of the Austrian Oberster Gerichtshof,\(^\text{96}\) 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."\(^\text{97}\) "Among the circumstances to be taken into account are such matters as the nature of the goods, the nature of the


\(^{93}\) Id. para. 4.


\(^{95}\) CISG-AC Opinion No. 2, *supra* note 6, para. 2.

\(^{96}\) See *supra* notes 73 and 77.

defect, the situation of the parties and relevant trade usages."\textsuperscript{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.\textsuperscript{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,\textsuperscript{100} one day in the international flower trade,\textsuperscript{101} or fourteen days according to some local Bavarian usages in the wood trade.\textsuperscript{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.\textsuperscript{103} The same rule applies to seasonal goods, which might "economically perish" within a short time.\textsuperscript{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

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

\textsuperscript{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.

\textsuperscript{100} Oberster Gerichtshof, [OGH] [Sup. Ct.] [Vienna], June 30, 1988, available at http://cisgw3.law.pace.edu/cases/980630a3.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. 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, 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 appropri-
ate if the buyer alleges an intentional breach of contract," 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. 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."

Third, the CISG-AC opinion advocates that "no fixed pe-
period, whether fourteen 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

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105 See Hanns-Christian Salger, Art. 39, in INTERNATIONAL EINHEITLICHES
KAUFRECHT: PRAXTIKER-KOMMEN'TAR UND VERTRAGSGESTALTUNG ZUM CIG
INTER
ATIONAL 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, Ger-

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. 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 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; 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.\textsuperscript{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 above\textsuperscript{115} – 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.

\textsuperscript{114} Id.