

The Buyer's Duty of Notification under the Vienna Convention (CISG) Provisions¹

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Introduction

United Nations Convention on Contracts for the International Sale of Goods (CISG/Vienna Convention) is a convention which establishes rules for drafting international trade sales contracts and sets some rights and obligations of the seller and the buyer under such contracts.

According to article 39 of the CISG, in order to not lose the rights under art. 45, the buyer has to discover the goods that are not in conformity and notify the seller in a reasonable time.²

Requirements of examination and notification caused remarkable difficulty during drafting at the debates in the Vienna Conference.³ As there are significant differences between domestic laws of the member states, this situation affected the interpretation of the provisions of the CISG.⁴ In addition, some developing states argued that traders of their country may not be able to find a technical expertise from the developed state and to identify defects in a time period.⁵ For the article 39, some states argued that the consequences of buyer's failure is too harsh and advised to delete art. 39 (1) entirely.⁶ However, after regulating art. 44 which gives to the buyer certain remedies even if he failed to give notice of lack of conformity, Convention was approved.⁷

¹ This article is adapted from the Master thesis named 'The Buyer's Duty of Notification under the CISG Comparison with SGA 1979' dated July 2017, written by Burçak Çitak in Erasmus University School of Law.

² Peter Huber, Alastair Mullis, *the CISG, A new textbook for students and practitioners* (European Law Publishers, 2007), 149.

³ Peter Huber, Alastair Mullis, *the CISG, A new textbook for students and practitioners* (European Law Publishers, 2007), 147; Ingeborg Schwenzer, 'The Noble Month (Articles 38, 39 CISG) The Story Behind the Scenery' (University of Basel, Switzerland) < www.globalsaleslaw.org/temp/Schwenzer.pdf > accessed 19 April 2017, 356.

⁴ Ingeborg Schwenzer, 'The Noble Month (Articles 38, 39 CISG) The Story Behind the Scenery' (University of Basel, Switzerland) < www.globalsaleslaw.org/temp/Schwenzer.pdf > accessed 19 April 2017, 353; Peter Huber, Alastair Mullis, *the CISG, A new textbook for students and practitioners* (European Law Publishers, 2007), 148.

⁵ Aburima Abdullah Ghith, 'The Legal Remedies of the Buyer under the Vienna Convention on the Contract of International Sale of Goods with Specific Reference to English Law and Libyan Law' (Phd Thesis, Glasgow Caledonian University, UK, 1999) 61; Eric Bergsten, *Examination of the Goods and Notice of Non-Conformity –Articles 38 and 39*, (CISG-AC Opinion no 2, Pace University New York, 7 June 2004.1,2), 164; Ingeborg Schwenzer, 'The Noble Month (Articles 38, 39 CISG) The Story Behind the Scenery' (University of Basel, Switzerland) < www.globalsaleslaw.org/temp/Schwenzer.pdf > accessed 19 April 2017, 355, 356; Peter Huber, Alastair Mullis, *the CISG, A new textbook for students and practitioners* (European Law Publishers, 2007), 148.

⁶ Eric Bergsten, *Examination of the Goods and Notice of Non-Conformity –Articles 38 and 39*, (CISG-AC Opinion no 2, Pace University New York, 7 June 2004.1,2), 165; Peter Huber, Alastair Mullis, *the CISG, A new textbook for students and practitioners* (European Law Publishers, 2007), 148.

⁷ Ingeborg Schwenzer, 'The Noble Month (Articles 38, 39 CISG) The Story Behind the Scenery' (University of Basel, Switzerland) < www.globalsaleslaw.org/temp/Schwenzer.pdf > accessed 19 April 2017, 355, 356; Peter Huber, Alastair

1. Notice of Lack of Conformity

1.1. Content of the Notice

Where the buyer finds any lack of conformity after examining the goods, he has to notify the seller about the defects. The term of conformity is defined in article 35 of the CISG that the goods delivered by the seller must be conformable with the contract in the manner of quantity, quality, and description. The goods should be fit for the ordinary usage or for the particular purpose of usage, which is stated in the contract, or they should have the qualities which the sample -shown by the seller- has, and the package shall be in a usual manner.⁸

In earlier cases, it is held that only refusing payment is not enough to fulfil the duty of notification, an express notification is required.⁹ The nature of the unconformity must be defined clearly in the notice.¹⁰ In addition, the clarification must be sufficient to determine whether there has been a breach or not.¹¹ If there is a breach of contract, the notice shall be sufficient for the seller on deciding what to do about the buyer's claim and to provide remedies for the defects.¹² Also the court held that a significant level of specificity is wanted for a compliant notice, in other words, only a brief statement such as “do not comply with the contract”, “are not working properly”, “poor workmanship and improper fitting” or “bad quality” are not sufficient in order to consider the notification as compliant with the art 39.¹³

Mullis, *the CISG, A new textbook for students and practitioners* (European Law Publishers, 2007), 148; Eric Bergsten, *Examination of the Goods and Notice of Non-Conformity –Articles 38 and 39*, (CISG-AC Opinion no 2, Pace University New York, 7 June 2004.1,2), 165.

⁸ Aburima Abdullah Ghith, 'The Legal Remedies of the Buyer under the Vienna Convention on the Contract of International Sale of Goods with Specific Reference to English Law and Libyan Law' (Phd Thesis, Glasgow Caledonian University, UK, 1999) 31, 43.

⁹ Rechtbank van Koophandel Kortrijk, Belgium, 27 June 1997, UNCITRAL Digest of Case Law on the United Nations Convention on the International Sale of Goods, Part three, Sale of Goods, <www.uncitral.org/pdf/english/clout/digest2008/article039.pdf> accessed 03 May 2017, 124.

¹⁰ (Austrian) Oberster Gerichtshof 27 August 1999, CISG-Online No. 485; (German) Oberlandesgericht Düsseldorf 8 January 1993, Peter Huber, Alastair Mullis, *the CISG, A new textbook for students and practitioners* (European Law Publishers, 2007), 157; UNCITRAL Digest of Case Law on the United Nations Convention on the International Sale of Goods, Part three, Sale of Goods, <www.uncitral.org/pdf/english/clout/digest2008/article039.pdf> accessed 03 May 2017, 125.

¹¹ (German) Bundesgerichtshof 4 December 1996, CISG-Online No. 260; (German) Landgericht Saarbrücken 26 March 1996, (Italian) Tribunale di Vigevano 12 July 2000, Peter Huber, Alastair Mullis, *the CISG, A new textbook for students and practitioners* (European Law Publishers, 2007), 157; UNCITRAL Digest of Case Law on the United Nations Convention on the International Sale of Goods, Part three, Sale of Goods, <www.uncitral.org/pdf/english/clout/digest2008/article039.pdf> accessed 03 May 2017, 125.

¹² Peter Huber, Alastair Mullis, *the CISG, A new textbook for students and practitioners* (European Law Publishers, 2007), 157; UNCITRAL Digest of Case Law on the United Nations Convention on the International Sale of Goods, Part three, Sale of Goods, <www.uncitral.org/pdf/english/clout/digest2008/article039.pdf> accessed 03 May 2017, 125.

¹³ (Swiss) Handelsgericht Zürich 21 September 1998, CISG-Online No. 41, (Swiss) Handelsgericht Zürich 17 February 2000, CISG-Online No. 637, (German) Landgericht München 3 July 1989, CISG-Online No. 4, (Belgian) Rechtbank van Koophandel Kortrijk 16 December 1996, CISG-Online No. 530, Peter Huber, Alastair Mullis, *the CISG, A new textbook for students and practitioners* (European Law Publishers, 2007), 157; UNCITRAL Digest of Case Law on the United Nations Convention on the International Sale of Goods, Part three, Sale of Goods, <www.uncitral.org/pdf/english/clout/digest2008/article039.pdf> accessed 03 May 2017, 125; Henry Gabriel, *Contracts for the Sale of Goods* (Oceana Publications, 2004), 135; Aburima Abdullah Ghith, 'The Legal Remedies of the Buyer under the Vienna Convention on the Contract of International Sale of Goods with Specific Reference to English Law and Libyan Law' (Phd Thesis, Glasgow Caledonian University, UK, 1999) 60; Sonja Krusinga, *(Non-)conformity in the 1980 UN Convention on Contracts for the International Sale of Goods: a uniform concept?* (Intersentia, Antwerp-Oxford-New York, 2004) 89.

However, recent decisions have a more flexible approach and it is suggested that as a more liberal approach, the recent decision shall prevail.¹⁴ According to these decisions, the buyer's duty of giving clear notification shall not be considered as a too heavy burden on the buyer.¹⁵ Where the defects are obvious so that the buyer is able to specify them easily, he is required to state them clearly in the notice, otherwise, the notification will not be compliant.¹⁶ However when the reason of the defects is not obvious, for instance, machinery has a very technical equipment and it is not obvious why the machinery is not working, then only an indication of the symptoms without detail is sufficient.¹⁷

1.2. Form and Transmission

As there is no explicit method of notification, the parties may have an agreement about the form of the notice.¹⁸ When the notice is given in writing, it is usually sufficient.¹⁹ However, it is argued that the orally given notice must be accepted as compliant under art. 39 of the CISG.²⁰ Indeed, oral notice has been held to be sufficient in one case.²¹

According to the art. 27 of the CISG, the buyer does not lose his right to rely on the notice, which is given appropriately in the circumstances, even if there is an error or failure in the transmission. In other words, the buyer can rely on the notice he gave appropriately in the circumstances, even if the notice did not reach to the seller.²² However, Andersen says that the buyer must ensure that the notice reached to the seller.²³ For example, in some cases, when the buyer notified the seller by phone, the notice was considered as sufficient, but in several cases, the buyer failed to prove the notice whom he

¹⁴ Peter Huber, Alastair Mullis, *the CISG, A new textbook for students and practitioners* (European Law Publishers, 2007), 158.

¹⁵ Peter Huber, Alastair Mullis, *the CISG, A new textbook for students and practitioners* (European Law Publishers, 2007), 158; UNCITRAL Digest of Case Law on the United Nations Convention on the International Sale of Goods, Part three, Sale of Goods, <www.uncitral.org/pdf/english/clout/digest2008/article039.pdf> accessed 03 May 2017, 125.

¹⁶ Peter Huber, Alastair Mullis, *the CISG, A new textbook for students and practitioners* (European Law Publishers, 2007), 158.

¹⁷ Peter Huber, Alastair Mullis, *the CISG, A new textbook for students and practitioners* (European Law Publishers, 2007), 158; Sonja Krusinga, *(Non-)conformity in the 1980 UN Convention on Contracts for the International Sale of Goods: a uniform concept?* (Intersentia, Antwerp-Oxford-New York, 2004) 93; UNCITRAL Digest of Case Law on the United Nations Convention on the International Sale of Goods, Part three, Sale of Goods, <www.uncitral.org/pdf/english/clout/digest2008/article039.pdf> accessed 03 May 2017, 125.

¹⁸ Henry Gabriel, *Contracts for the Sale of Goods* (Oceana Publications, 2004), 13; UNCITRAL Digest of Case Law on the United Nations Convention on the International Sale of Goods, Part three, Sale of Goods, <www.uncitral.org/pdf/english/clout/digest2008/article039.pdf> accessed 03 May 2017, 123; Peter Huber, Alastair Mullis, *the CISG, A new textbook for students and practitioners* (European Law Publishers, 2007), 156.

¹⁹ Peter Huber, Alastair Mullis, *the CISG, A new textbook for students and practitioners* (European Law Publishers, 2007), 156.

²⁰ UNCITRAL Digest of Case Law on the United Nations Convention on the International Sale of Goods, Part three, Sale of Goods, <www.uncitral.org/pdf/english/clout/digest2008/article039.pdf> accessed 03 May 2017, 123; Peter Huber, Alastair Mullis, *the CISG, A new textbook for students and practitioners* (European Law Publishers, 2007), 157; Aburima Abdullah Ghith, 'The Legal Remedies of the Buyer under the Vienna Convention on the Contract of International Sale of Goods with Specific Reference to English Law and Libyan Law' (Phd Thesis, Glasgow Caledonian University, UK, 1999) 60.

²¹ (German) Landgericht Frankfurt 9 December 1992, CISG-Online No. 184 (oral notice given over the phone was held to satisfy the notice requirement), Peter Huber, Alastair Mullis, *the CISG, A new textbook for students and practitioners* (European Law Publishers, 2007), 157; Aburima Abdullah Ghith, 'The Legal Remedies of the Buyer under the Vienna Convention on the Contract of International Sale of Goods with Specific Reference to English Law and Libyan Law' (Phd Thesis, Glasgow Caledonian University, UK, 1999) 60.

²² Sonja Krusinga, *(Non-)conformity in the 1980 UN Convention on Contracts for the International Sale of Goods: a uniform concept?* (Intersentia, Antwerp-Oxford-New York, 2004) 95.

²³ Sonja Krusinga, *(Non-)conformity in the 1980 UN Convention on Contracts for the International Sale of Goods: a uniform concept?* (Intersentia, Antwerp-Oxford-New York, 2004) 97.

talked to, what he really stated and exactly at what time he called.²⁴ In one case, the court held that if the buyer cannot reach to the seller by phone, he shall give a written notice.²⁵

1.3. Addressee

According to the art. 39, the notification must be given to the seller, therefore only the notification between the buyer and his own consumer is not enough.²⁶

Where the buyer notices the intermediary about the defects, but the intermediary does not inform the seller, the notification cannot be accepted as appropriate under art. 39, as it does not reach to the seller, and the buyer bears the risk then.²⁷ Also, where the buyer gives the notice to the employee of the seller who is not authorized to receive such notice and he did not transmit the notice to the seller, the notice given to the employee cannot be accepted as sufficient.²⁸ The court stated that even if the notice was given to the seller himself, the buyer must be sure that the seller received it.²⁹ However, it is sufficient where the buyer gives notice to the agent of the seller, but in this case, whether the agent is authorized to receive the notice or not shall be determined under domestic law.³⁰

1.4. Period for Giving Notice of Lack of Conformity (art. 39 (1) CISG)

According to the CISG provisions, the period for giving notice starts from the moment that the buyer has discovered or ought to have discovered the lack of conformity (art. 39(1) CISG). Thus, the time period runs from the earlier of these two points.³¹ The first point is *a reasonable time* after the buyer has discovered the unconformity or ought to have discovered it, and the second one is the period of *two years* from the date on which the goods were actually handed over to the buyer (unless this would be inconsistent with a contractual period of guarantee).

²⁴ Landgericht Frankfurt, Germany, 9 December 1992; Landgericht Marburg, Germany, 12 December 1995, Amtsgericht Kehl, Germany, 6 October 1995 ; Landgericht Stuttgart, Germany, 31 August 1989, Landgericht Frankfurt, Germany, 13 July 1994, UNCITRAL Digest of Case Law on the United Nations Convention on the International Sale of Goods, Part three, Sale of Goods, <www.uncitral.org/pdf/english/clout/digest2008/article039.pdf > accessed 03 May 2017, 124.

²⁵ Landgericht Stuttgart, Germany, 31 August 1989, UNCITRAL Digest of Case Law on the United Nations Convention on the International Sale of Goods, Part three, Sale of Goods, <www.uncitral.org/pdf/english/clout/digest2008/article039.pdf > accessed 03 May 2017, 124.

²⁶ Kantonsgericht Nidwalden, Switzerland, 3 December 1997, UNCITRAL Digest of Case Law on the United Nations Convention on the International Sale of Goods, Part three, Sale of Goods, <www.uncitral.org/pdf/english/clout/digest2008/article039.pdf > accessed 03 May 2017, 124.

²⁷ Landgericht Kassel, Germany, 15 February 1996, UNCITRAL Digest of Case Law on the United Nations Convention on the International Sale of Goods, Part three, Sale of Goods, <www.uncitral.org/pdf/english/clout/digest2008/article039.pdf > accessed 03 May 2017, 124.

²⁸ Landgericht Bochum, Germany, 24 January 1996, UNCITRAL Digest of Case Law on the United Nations Convention on the International Sale of Goods, Part three, Sale of Goods, <www.uncitral.org/pdf/english/clout/digest2008/article039.pdf > accessed 03 May 2017, 124.

²⁹ Landgericht Köln, Germany 30 November 1999, UNCITRAL Digest of Case Law on the United Nations Convention on the International Sale of Goods, Part three, Sale of Goods, <www.uncitral.org/pdf/english/clout/digest2008/article039.pdf > accessed 03 May 2017, 124.

³⁰ Landgericht Köln, Germany 30 November 1999, UNCITRAL Digest of Case Law on the United Nations Convention on the International Sale of Goods, Part three, Sale of Goods, <www.uncitral.org/pdf/english/clout/digest2008/article039.pdf > accessed 03 May 2017, 124.

³¹ Peter Huber, Alastair Mullis, *the CISG, A new textbook for students and practitioners* (European Law Publishers, 2007), 159.

1.4.1. Reasonable Time

The term of *reasonable time* is argued among scholars and courts, but there is no exact interpretation on it. The reason why the drafters used “reasonable time” instead of providing a determined time period, is that they wanted to have a balance between the certain contracts and circumstances of each case.³²

On earlier decisions, courts tended to apply old knowledge of their domestic law which usually provide strict time frames.³³ For example, in Germany, after the CISG came into force, scholars have difficulty in interpreting the reasonable time and instead of the provisions of the CISG; courts continued to apply their old knowledge on art. 38, 39 of ULIS and their domestic experience without noticing the differences between ULIS³⁴ and the CISG.³⁵ The buyer was required to examine the goods and notify the seller without unnecessary delay or immediately.³⁶ Because of this approach, the Landgericht Stuttgart held that the notification, which is given 16 days after the shoes are delivered was not within a reasonable time.³⁷ Briefly, in this case, the buyer from Uganda ordered second-hand shoes from German seller under the FOB condition Kenya.³⁸ 3 weeks after the shoes had arrived in Kenya, the buyer gave notice of lack of conformity and the court held that the notice was not given within a reasonable time and rejected to apply art. 38(3) of the CISG.³⁹ Flechtner thinks that the Court in the *second-hand shoes case* was wrong deciding that the buyer could not examine the goods on time by waiting until they had arrived in Kenya, because, he thinks that the examination has only a secondary importance, the main reason for the examination is to ensure that the seller receives the notice timely.⁴⁰ As late as

³² Camilla Baasch Andersen, *Uniform Application of the International Sales Law, Understanding Uniformity, the Global Jurisconsultorium and Examination and Notification Provisions of the CISG*, (Kluwer Law International, 2007) 163.

³³ Camilla Baasch Andersen, *Uniform Application of the International Sales Law, Understanding Uniformity, the Global Jurisconsultorium and Examination and Notification Provisions of the CISG*, (Kluwer Law International, 2007) 163; Ingeborg Schwenzer, ‘The Noble Month (Articles 38, 39 CISG) The Story Behind the Scenery’ (University of Basel, Switzerland) < www.globalsaleslaw.org/temp/Schwenzer.pdf > accessed 19 April 2017, 353. Peter Huber, Alastair Mullis, *the CISG, A new textbook for students and practitioners* (European Law Publishers, 2007), 161; Eric Bergsten, *Examination of the Goods and Notice of Non-Conformity—Articles 38 and 39*, (CISG-AC Opinion no 2, Pace University New York, 7 June 2004.1,2), 166.

³⁴ Eric Bergsten, *Examination of the Goods and Notice of Non-Conformity—Articles 38 and 39*, (CISG-AC Opinion no 2, Pace University New York, 7 June 2004.1,2), 166; Ingeborg Schwenzer, ‘The Noble Month (Articles 38, 39 CISG) The Story Behind the Scenery’ (University of Basel, Switzerland) < www.globalsaleslaw.org/temp/Schwenzer.pdf > accessed 19 April 2017, 355.

³⁵ the predecessor of the CISG, the Uniform Law on the International Sale of Goods, Camilla Baasch Andersen, ‘The Duty to Examine Goods under the Uniform International Sales Law - An Analysis of Article 38 CISG’ (2007) 18 *European Business Law Review*, Issue 4, 799; Ingeborg Schwenzer, ‘The Noble Month (Articles 38, 39 CISG) The Story Behind the Scenery’ (University of Basel, Switzerland) < www.globalsaleslaw.org/temp/Schwenzer.pdf > accessed 19 April 2017, 355.

³⁶ Sonja Krusinga, *(Non-)conformity in the 1980 UN Convention on Contracts for the International Sale of Goods: a uniform concept?* (Intersentia, Antwerp-Oxford-New York, 2004) 77; Ingeborg Schwenzer, ‘The Noble Month (Articles 38, 39 CISG) The Story Behind the Scenery’ (University of Basel, Switzerland) < www.globalsaleslaw.org/temp/Schwenzer.pdf > accessed 19 April 2017, 354.

³⁷ Ingeborg Schwenzer, ‘The Noble Month (Articles 38, 39 CISG) The Story Behind the Scenery’ (University of Basel, Switzerland) < www.globalsaleslaw.org/temp/Schwenzer.pdf > accessed 19 April 2017, 358.

³⁸ Ingeborg Schwenzer, ‘The Noble Month (Articles 38, 39 CISG) The Story Behind the Scenery’ (University of Basel, Switzerland) < www.globalsaleslaw.org/temp/Schwenzer.pdf > accessed 19 April 2017, 360.

³⁹ Ingeborg Schwenzer, ‘The Noble Month (Articles 38, 39 CISG) The Story Behind the Scenery’ (University of Basel, Switzerland) < www.globalsaleslaw.org/temp/Schwenzer.pdf > accessed 19 April 2017, 360.

⁴⁰ Camilla Baasch Andersen, ‘The Duty to Examine Goods under the Uniform International Sales Law - An Analysis of Article 38 CISG’ (2007) 18 *European Business Law Review*, Issue 4, 802; Therese Wilson, ‘A comparative review of J Honnold and H Flechtner Uniform Law for International Sales under the 1980 United Nations Convention and P Schlechtriem and I Schwenzer Commentary on the UN Convention on the International Sale of Goods’ (2011) *Journal of Private International Law* < https://researchrepository.griffith.edu.au/bitstream/handle/10072/42267/73363_1.pdf;jsessionid=8B85D8956BCE6FD809B0F96BE563A275?sequence=1 > accessed 19 April 2017, 15.

2005, Prof. Dr. Ulrich Magnus supported that for both examination and notification an overall period of 14 days is reasonable if there are no special circumstances that a shorter or a longer period is needed.⁴¹

Other German authors have suggested that for examination, 3 to 4 days and for notification 4 to 6 days; hence an overall period of 7 to 10 days is reasonable.⁴² According to this approach, even if the notification period (art. 39 (1)) and examination period (art. 38) are different from each other, the fact is that the courts could not always distinguish between these periods and therefore the buyer shall not lose his right to rely on the unconformity (under art. 39 (1)) until these two periods have passed.⁴³ In conclusion, even if the buyer is late for the examination, he can catch up with the examination period by giving a speedy notice.⁴⁴

However, this approach of having a combination of two periods is not found appropriate in the opinion of the CISG Advisory Council, which will be explained below.⁴⁵

1.4.1.1. *Time Period to Give Notice in Different Countries*

Usually, courts have the decision that the notice to be given within three to five working days.⁴⁶ But there are different approaches in different countries.

In Germany, in respect of goods of textile or clothes, periods between 25 days and six weeks were not considered as reasonable; but one week for examination and one week for giving notice is considered as reasonable.⁴⁷ For the gherkins, as it is mentioned above, examination upon delivery (7 days after shipment) was not timely.⁴⁸ So it can be said that there is a shorter period for perishable goods.

In American law system, the buyer's duty of notification is interpreted in a buyer-friendly manner, the buyer has to give notice of lack of conformity within a reasonable time or within an appropriate period after the defects are discovered or the possibility to discovering it.⁴⁹ Therefore, the period to give the

⁴¹ Sonja Krusinga, *(Non-)conformity in the 1980 UN Convention on Contracts for the International Sale of Goods: a uniform concept?* (Intersentia, Antwerp-Oxford-New York, 2004) 81; Camilla Baasch Andersen, 'The Duty to Examine Goods under the Uniform International Sales Law - An Analysis of Article 38 CISG' (2007) 18 *European Business Law Review*, Issue 4, 804; Ingeborg Schwenzer, 'The Noble Month (Articles 38, 39 CISG) The Story Behind the Scenery' (University of Basel, Switzerland) < www.globalsaleslaw.org/temp/Schwenzer.pdf > accessed 19 April 2017, 358.

⁴² Ingeborg Schwenzer, 'The Noble Month (Articles 38, 39 CISG) The Story Behind the Scenery' (University of Basel, Switzerland) < www.globalsaleslaw.org/temp/Schwenzer.pdf > accessed 19 April 2017, 358.

⁴³ Peter Huber, Alastair Mullis, *the CISG, A new textbook for students and practitioners* (European Law Publishers, 2007), 160.

⁴⁴ Peter Huber, Alastair Mullis, *the CISG, A new textbook for students and practitioners* (European Law Publishers, 2007), 160.

⁴⁵ See the para. 3.4.1.2.1.

⁴⁶ Ingeborg Schwenzer, 'The Noble Month (Articles 38, 39 CISG) The Story Behind the Scenery' (University of Basel, Switzerland) < www.globalsaleslaw.org/temp/Schwenzer.pdf > accessed 19 April 2017, 354, 355; Eric Bergsten, *Examination of the Goods and Notice of Non-Conformity –Articles 38 and 39*, (CISG-AC Opinion no 2, Pace University New York, 7 June 2004.1.2), 166.

⁴⁷ Ingeborg Schwenzer, 'The Noble Month (Articles 38, 39 CISG) The Story Behind the Scenery' (University of Basel, Switzerland) < www.globalsaleslaw.org/temp/Schwenzer.pdf > accessed 19 April 2017, 358.

⁴⁸ Musselcase, Ingeborg Schwenzer, 'The Noble Month (Articles 38, 39 CISG) The Story Behind the Scenery' (University of Basel, Switzerland) < www.globalsaleslaw.org/temp/Schwenzer.pdf > accessed 19 April 2017, 358; Camilla Baasch Andersen, 'The Duty to Examine Goods under the Uniform International Sales Law - An Analysis of Article 38 CISG' (2007) 18 *European Business Law Review*, Issue 4, 810.

⁴⁹ Ingeborg Schwenzer, 'The Noble Month (Articles 38, 39 CISG) The Story Behind the Scenery' (University of Basel, Switzerland) < www.globalsaleslaw.org/temp/Schwenzer.pdf > accessed 19 April 2017, 354.

notice can reach to one month and still can be considered as given in reasonable time.⁵⁰ However, in order to prevent fraud by the dallying buyer or when the goods are perishable, courts in America requires the notice to be given within a couple of days.⁵¹ So here, the time frame is much flexible.

Under French Law, there is no duty to give notice of non-conformity but the buyer is required to take an action within a short period of time for the lack of conformity.⁵² Courts in France, before the amendment of the section, required the buyer to give the notice up to two to three years, also Dutch Courts, the interpretation of the duty to give notice is made generously.⁵³

1.4.1.2. *Opinion of the CISG Advisory Council*

After having different interpretations/implementations in different countries and influence of domestic law on interpretation on the CISG provisions, The CISG Advisory Council released its opinion on “Examination of the Goods and Notice of Non-Conformity – Articles 38 and 39. This opinion is based on three main considerations.⁵⁴

1.4.1.2.1. Periods of examination and notification duties shall be considered separately

Unless the lack of conformity is apparent and can be discovered without examination, there are two separate periods for notification after the goods are delivered; the period for examination under art. 38 and the period for notification under art. 39.⁵⁵ The CISG keeps these periods separate and they shall be distinguished even when the circumstances of the case allow a combination of two periods into a single period for giving notice.⁵⁶

Therefore the decisions of the courts of Germany and Austria (*Oberster Gerichtshof*), which accepts an overall period of 14 days, is rejected.⁵⁷ Also, in the case of case of grinding device and paper-making machine, which is mentioned below, the court combined the periods of examination and notification

⁵⁰ Ingeborg Schwenzer, ‘The Noble Month (Articles 38, 39 CISG) The Story Behind the Scenery’ (University of Basel, Switzerland) < www.globalsaleslaw.org/temp/Schwenzer.pdf > accessed 19 April 2017, 355.

⁵¹ Ingeborg Schwenzer, ‘The Noble Month (Articles 38, 39 CISG) The Story Behind the Scenery’ (University of Basel, Switzerland) < www.globalsaleslaw.org/temp/Schwenzer.pdf > accessed 19 April 2017, 355.

⁵² Ingeborg Schwenzer, ‘The Noble Month (Articles 38, 39 CISG) The Story Behind the Scenery’ (University of Basel, Switzerland) < www.globalsaleslaw.org/temp/Schwenzer.pdf > accessed 19 April 2017, 354.

⁵³ Ingeborg Schwenzer, ‘The Noble Month (Articles 38, 39 CISG) The Story Behind the Scenery’ (University of Basel, Switzerland) < www.globalsaleslaw.org/temp/Schwenzer.pdf > accessed 19 April 2017, 355.

⁵⁴ Peter Huber, Alastair Mullis, *the CISG, A new textbook for students and practitioners* (European Law Publishers, 2007), 160; Ingeborg Schwenzer, ‘The Noble Month (Articles 38, 39 CISG) The Story Behind the Scenery’ (University of Basel, Switzerland) < www.globalsaleslaw.org/temp/Schwenzer.pdf > accessed 19 April 2017, 363; Eric Bergsten, *Examination of the Goods and Notice of Non-Conformity –Articles 38 and 39*, (CISG-AC Opinion no 2, Pace University New York, 7 June 2004.1,2), 163.

⁵⁵ UNCITRAL Digest of Case Law on the United Nations Convention on the International Sale of Goods, Part three, Sale of Goods, <www.uncitral.org/pdf/english/clout/digest2008/article039.pdf > accessed 03 May 2017, 126; Ingeborg Schwenzer, ‘The Noble Month (Articles 38, 39 CISG) The Story Behind the Scenery’ (University of Basel, Switzerland) < www.globalsaleslaw.org/temp/Schwenzer.pdf > accessed 19 April 2017, 364.

⁵⁶ Ingeborg Schwenzer, ‘The Noble Month (Articles 38, 39 CISG) The Story Behind the Scenery’ (University of Basel, Switzerland) < www.globalsaleslaw.org/temp/Schwenzer.pdf > accessed 19 April 2017, 364.

⁵⁷ Camilla Baasch Andersen, ‘The Duty to Examine Goods under the Uniform International Sales Law - An Analysis of Article 38 CISG’ (2007) 18 European Business Law Review, Issue 4, 804; Ingeborg Schwenzer, ‘The Noble Month (Articles 38, 39 CISG) The Story Behind the Scenery’ (University of Basel, Switzerland) < www.globalsaleslaw.org/temp/Schwenzer.pdf > accessed 19 April 2017, 364; Eric Bergsten, *Examination of the Goods and Notice of Non-Conformity –Articles 38 and 39*, (CISG-AC Opinion no 2, Pace University New York, 7 June 2004.1,2), 166.

and stated that the notification was on time.⁵⁸ However as it is not appropriate to the separate period rule of the CISG on the examination and the notification, this decision of the court is not found appropriate.⁵⁹

1.4.1.2.2. The reasonable time for notification shall be interpreted according to the different circumstance

The reasonable time for notification shall be interpreted according to the different circumstances.⁶⁰ The court shall consider all the circumstances of the particular case and have a flexible approach.⁶¹ Therefore, nature of the goods, the nature of the defect, the situation of the parties and relevant trade usages shall be taken into consideration while deciding whether the notice was given within a reasonable time or not.⁶² If the goods are perishable, for example, for fruit trade, only a couple of hours are appropriate.⁶³ For international flower trade, one day; for wood trade, 14 days of notification period are considered as appropriate.⁶⁴ The goods can be specified as 'economically perished' where the goods are seasonal characteristic, and in this case, the notice shall be given in a short time.⁶⁵ Also, nature of

⁵⁸ Eric Bergsten, *Examination of the Goods and Notice of Non-Conformity –Articles 38 and 39*, (CISG-AC Opinion no 2, Pace University New York, 7 June 2004.1,2), 166; Sonja Krusinga, *(Non-)conformity in the 1980 UN Convention on Contracts for the International Sale of Goods: a uniform concept?* (Intersentia, Antwerp-Oxford-New York, 2004) 73.

⁵⁹ Eric Bergsten, *Examination of the Goods and Notice of Non-Conformity –Articles 38 and 39*, (CISG-AC Opinion no 2, Pace University New York, 7 June 2004.1,2), 167; Sonja Krusinga, *(Non-)conformity in the 1980 UN Convention on Contracts for the International Sale of Goods: a uniform concept?* (Intersentia, Antwerp-Oxford-New York, 2004) 83.

⁶⁰ Henry Gabriel, *Contracts for the Sale of Goods* (Oceana Publications, 2004), 136; Eric Bergsten, *Examination of the Goods and Notice of Non-Conformity –Articles 38 and 39*, (CISG-AC Opinion no 2, Pace University New York, 7 June 2004.1,2), 163; Peter Huber, Alastair Mullis, *the CISG, A new textbook for students and practitioners* (European Law Publishers, 2007), 160; Ingeborg Schwenger, 'The Noble Month (Articles 38, 39 CISG) The Story Behind the Scenery' (University of Basel, Switzerland) < www.globalsaleslaw.org/temp/Schwenger.pdf > accessed 19 April 2017, 364; UNCITRAL Digest of Case Law on the United Nations Convention on the International Sale of Goods, Part three, Sale of Goods, < www.uncitral.org/pdf/english/clout/digest2008/article039.pdf > accessed 03 May 2017, 127.

⁶¹ Daniel Girsberger, 'The Time Limits of Article 39 CISG' *Journal of Law and Commerce* [Vol. 25:241], 242; Eric Bergsten, *Examination of the Goods and Notice of Non-Conformity –Articles 38 and 39*, (CISG-AC Opinion no 2, Pace University New York, 7 June 2004.1,2), 166; Peter Huber, Alastair Mullis, *the CISG, A new textbook for students and practitioners* (European Law Publishers, 2007), 159; UNCITRAL Digest of Case Law on the United Nations Convention on the International Sale of Goods, Part three, Sale of Goods, < www.uncitral.org/pdf/english/clout/digest2008/article039.pdf > accessed 03 May 2017, 126.

⁶² Daniel Girsberger, 'The Time Limits of Article 39 CISG' *Journal of Law and Commerce* [Vol. 25:241], 242; Ingeborg Schwenger, 'The Noble Month (Articles 38, 39 CISG) The Story Behind the Scenery' (University of Basel, Switzerland) < www.globalsaleslaw.org/temp/Schwenger.pdf > accessed 19 April 2017, 364; UNCITRAL Digest of Case Law on the United Nations Convention on the International Sale of Goods, Part three, Sale of Goods, < www.uncitral.org/pdf/english/clout/digest2008/article039.pdf > accessed 03 May 2017, 127.

⁶³ Ingeborg Schwenger, 'The Noble Month (Articles 38, 39 CISG) The Story Behind the Scenery' (University of Basel, Switzerland) < www.globalsaleslaw.org/temp/Schwenger.pdf > accessed 19 April 2017, 364; UNCITRAL Digest of Case Law on the United Nations Convention on the International Sale of Goods, Part three, Sale of Goods, < www.uncitral.org/pdf/english/clout/digest2008/article039.pdf > accessed 03 May 2017, 127.

⁶⁴ Oberlandesgericht Saarbrücken, Germany, no. 290, 3 June 1998, UNCITRAL Digest of Case Law on the United Nations Convention on the International Sale of Goods, Part three, Sale of Goods, < www.uncitral.org/pdf/english/clout/digest2008/article039.pdf > accessed 03 May 2017, 127; Ingeborg Schwenger, 'The Noble Month (Articles 38, 39 CISG) The Story Behind the Scenery' (University of Basel, Switzerland) < www.globalsaleslaw.org/temp/Schwenger.pdf > accessed 19 April 2017, 364; Camilla Baasch Andersen, *Uniform Application of the International Sales Law, Understanding Uniformity, the Global Jurisconsultorium and Examination and Notification Provisions of the CISG*, (Kluwer Law International, 2007) 169, 178; Sonja Krusinga, *(Non-)conformity in the 1980 UN Convention on Contracts for the International Sale of Goods: a uniform concept?* (Intersentia, Antwerp-Oxford-New York, 2004) 79.

⁶⁵ UNCITRAL Digest of Case Law on the United Nations Convention on the International Sale of Goods, Part three, Sale of Goods, < www.uncitral.org/pdf/english/clout/digest2008/article039.pdf > accessed 03 May 2017; Eric Bergsten, *Examination of the Goods and Notice of Non-Conformity –Articles 38 and 39*, (CISG-AC Opinion no 2, Pace University New

the defect is important; here it has to be considered whether mishandling or sheer deterioration of the goods may cause the defect and whether a quick examination by an independent inspector is necessary.⁶⁶

Furthermore, the remedies what the buyer is willing to invoke is another factor for determining the reasonability of the notification period.⁶⁷ Where the buyer wishes to claim for damages or reduction of the price, the period of the notification can be larger as the buyer will remain the goods in that case.⁶⁸ Again, where the buyer wants to use right of avoidance, he has to give a faster notice than the case where there is only a claim for damages; because in the latter case there is an assumption that the buyer keeps the goods.⁶⁹ As these factors will change depending on the individual case, these factors are not exhaustive.⁷⁰

If the contract is breached intentionally, a longer period of time for notification can be regarded as reasonable, even though in this case the buyer is already protected under the art. 40 of the CISG, as the seller cannot allege that the buyer failed to give notice where the defects are related to the fact that the seller knew or could not have been unaware of.⁷¹ Also, where the buyer needs to give a detailed scrutiny to its own customer, he needs more time to do so.⁷²

Schwenzer thinks that the general guideline shall have a buyer-friendly approach as it is needed during the drafting history of the art 38 and 39, and it has to be taken into account that short periods are unacceptable and might lead to hostility towards or even rejection of the CISG as a whole.⁷³

1.4.1.2.3. There is no fixed (presumptive) period of time accepted as reasonable

Some courts and scholars indicated that a presumptive period may serve a reasonable time for the standard type cases.⁷⁴ For example, Swiss scholar Schwenzer has a guideline called the *noble month* and

York, 7 June 2004.1,2), 166; Ingeborg Schwenzer, 'The Noble Month (Articles 38, 39 CISG) The Story Behind the Scenery' (University of Basel, Switzerland) < www.globalsaleslaw.org/temp/Schwenzer.pdf > accessed 19 April 2017, 365.

⁶⁶ Ingeborg Schwenzer, 'The Noble Month (Articles 38, 39 CISG) The Story Behind the Scenery' (University of Basel, Switzerland) < www.globalsaleslaw.org/temp/Schwenzer.pdf > accessed 19 April 2017, 365.

⁶⁷ Peter Huber, Alastair Mullis, *the CISG, A new textbook for students and practitioners* (European Law Publishers, 2007), 160; Ingeborg Schwenzer, 'The Noble Month (Articles 38, 39 CISG) The Story Behind the Scenery' (University of Basel, Switzerland) < www.globalsaleslaw.org/temp/Schwenzer.pdf > accessed 19 April 2017, 365.

⁶⁸ Peter Huber, Alastair Mullis, *the CISG, A new textbook for students and practitioners* (European Law Publishers, 2007), 160; Ingeborg Schwenzer, 'The Noble Month (Articles 38, 39 CISG) The Story Behind the Scenery' (University of Basel, Switzerland) < www.globalsaleslaw.org/temp/Schwenzer.pdf > accessed 19 April 2017, 365.

⁶⁹ Peter Huber, Alastair Mullis, *the CISG, A new textbook for students and practitioners* (European Law Publishers, 2007), 160, 161.

⁷⁰ Peter Huber, Alastair Mullis, *the CISG, A new textbook for students and practitioners* (European Law Publishers, 2007), 161.

⁷¹ Ingeborg Schwenzer, 'The Noble Month (Articles 38, 39 CISG) The Story Behind the Scenery' (University of Basel, Switzerland) < www.globalsaleslaw.org/temp/Schwenzer.pdf > accessed 19 April 2017, 365.

⁷² Ingeborg Schwenzer, 'The Noble Month (Articles 38, 39 CISG) The Story Behind the Scenery' (University of Basel, Switzerland) < www.globalsaleslaw.org/temp/Schwenzer.pdf > accessed 19 April 2017, 365.

⁷³ Ingeborg Schwenzer, 'The Noble Month (Articles 38, 39 CISG) The Story Behind the Scenery' (University of Basel, Switzerland) < www.globalsaleslaw.org/temp/Schwenzer.pdf > accessed 19 April 2017, 365, 366.

⁷⁴ Eric Bergsten, *Examination of the Goods and Notice of Non-Conformity – Articles 38 and 39*, (CISG-AC Opinion no 2, Pace University New York, 7 June 2004.1,2), 166; Ingeborg Schwenzer, 'The Noble Month (Articles 38, 39 CISG) The Story Behind the Scenery' (University of Basel, Switzerland) < www.globalsaleslaw.org/temp/Schwenzer.pdf > accessed 19 April 2017, 354; Peter Huber, Alastair Mullis, *the CISG, A new textbook for students and practitioners* (European Law Publishers, 2007), 161; UNCITRAL Digest of Case Law on the United Nations Convention on the International Sale of Goods, Part three, Sale of Goods, < www.uncitral.org/pdf/english/clout/digest2008/article039.pdf > accessed 03 May 2017, 126.

he suggested that adopting a presumptive period of one month, as a rough average, could be helpful.⁷⁵ This presumptive period shall be applied by adjusting and considering the facts of the particular case.⁷⁶

The Supreme Court in Germany (Bundesgerichtshof) had his first decision regarding the art. 39(1) on the case of mussels' sale from New Zealand to Germany.⁷⁷ The mussels contained more cadmium than permitted by the German rules but the court held that the notice, which was given more than a month after the non-conformity discovered, was not on time.⁷⁸ The court evaluated the *noble month* rule as a method of formulating international frame of notification period.⁷⁹

Later on, Higher District Court of Stuttgart held on the machine sale case that the time frame of the art. 39(1) was approximately one month, so that *noble month* became firmly accepted time frame.⁸⁰ After this decision, the Hungarian Chamber of Commerce held that 32 days were not reasonable which is similar to the guideline of the *noble month* rule.⁸¹ In 1996, noble month guideline was clarified by the Petty Court of Augsburg as 'the time frame shall not exceed one month after discovery' and where the goods are seasonal or perishable, the buyer is required to give notice even sooner.⁸² Also, in 1997 in Germany, Higher District Court Karlsruhe held that the goods were not perishable (sticky films), and the court held that 25 days of notice was given within reasonable time because in this case time frame cannot be determined exactly and therefore the one-month guideline can be applied here.⁸³

However, even if there are other cases which the noble month guideline applied, with the time goes by, this guideline lost his popularity. For example, in a case of ice-cream machine in Hamburg, the court

⁷⁵ Therese Wilson, 'A comparative review of J Honnold and H Flechtner Uniform Law for International Sales under the 1980 United Nations Convention and P Schlechtriem and I Schwenzer Commentary on the UN Convention on the International Sale of Goods' (2011) Journal of Private International Law <https://research-repository.griffith.edu.au/bitstream/handle/10072/42267/73363_1.pdf;jsessionid=8B85D8956BCE6FD809B0F96BE563A27_5?sequence=1> accessed 19 April 2017, 16; Eric Bergsten, *Examination of the Goods and Notice of Non-Conformity –Articles 38 and 39*, (CISG-AC Opinion no 2, Pace University New York, 7 June 2004.1,2), 166.

⁷⁶ Peter Huber, Alastair Mullis, *the CISG, A new textbook for students and practitioners* (European Law Publishers, 2007), 161; Eric Bergsten, *Examination of the Goods and Notice of Non-Conformity –Articles 38 and 39*, (CISG-AC Opinion no 2, Pace University New York, 7 June 2004.1,2), 166; UNCITRAL Digest of Case Law on the United Nations Convention on the International Sale of Goods, Part three, Sale of Goods, <www.uncitral.org/pdf/english/clout/digest2008/article039.pdf> accessed 03 May 2017, 126.

⁷⁷ Bundesgerichtshof 08.03.1995 (VII ZR 159/94), Camilla Baasch Andersen, *Uniform Application of the International Sales Law, Understanding Uniformity, the Global Jurisconsultorium and Examination and Notification Provisions of the CISG*, (Kluwer Law International, 2007) 171.

⁷⁸ Bundesgerichtshof 08.03.1995 (VII ZR 159/94), Camilla Baasch Andersen, *Uniform Application of the International Sales Law, Understanding Uniformity, the Global Jurisconsultorium and Examination and Notification Provisions of the CISG*, (Kluwer Law International, 2007) 171.

⁷⁹ Camilla Baasch Andersen, *Uniform Application of the International Sales Law, Understanding Uniformity, the Global Jurisconsultorium and Examination and Notification Provisions of the CISG*, (Kluwer Law International, 2007) 172.

⁸⁰ Camilla Baasch Andersen, *Uniform Application of the International Sales Law, Understanding Uniformity, the Global Jurisconsultorium and Examination and Notification Provisions of the CISG*, (Kluwer Law International, 2007) 172.

⁸¹ Hungarian Chamber of Commerce and Industry, Court of Arbitration, award of 5 December 1995, VB/94131, Camilla Baasch Andersen, *Uniform Application of the International Sales Law, Understanding Uniformity, the Global Jurisconsultorium and Examination and Notification Provisions of the CISG*, (Kluwer Law International, 2007) 172.

⁸² Amtsgericht Augsburg of 29 January 1996, 11 C 4004/95, Camilla Baasch Andersen, *Uniform Application of the International Sales Law, Understanding Uniformity, the Global Jurisconsultorium and Examination and Notification Provisions of the CISG*, (Kluwer Law International, 2007) 173.

⁸³ Amtsgericht Augsburg of 29 January 1996, 11 C 4004/95, Camilla Baasch Andersen, *Uniform Application of the International Sales Law, Understanding Uniformity, the Global Jurisconsultorium and Examination and Notification Provisions of the CISG*, (Kluwer Law International, 2007) 173.

held that the goods shall be examined and the notification must be given within two weeks after delivery.⁸⁴

Also, Honnold and Flechtner alleged that the idea of a presumptive 'reasonable time' falls outside of the intention of the drafters.⁸⁵ In addition, if the drafters have wanted to have presumption on reasonable time, they would simply regulate it in art. 39., but they avoided from regulating a specific period and chose a flexible time (reasonable time) which can vary with different circumstances.⁸⁶

Also, The CISG Advisory Council rejected the opinion of the presumptive period and stated that there is no fixed period of time accepted as reasonable.⁸⁷ In addition, the guideline of noble month's creator Schwenger also signed the opinion of the CISG Advisory Council.⁸⁸

However, the predictability of judicial or arbitral decisions still demands a chosen a certain starting point in order to be able to reduce or extend the period.⁸⁹ Because it is clear from the case law that the courts and the tribunals are in need of guidelines in deciding whether the period was reasonable or not.⁹⁰

1.4.2. Starting of the Period

As it is indicated in the article 39 of the CISG that the period of notification starts after the buyer has discovered the lack of conformity or he ought to have discovered it. When there is non-conformity which the buyer has discovered by examination, the buyer's time for notification starts from the time when the buyer has discovered the non-conformity.⁹¹ If the examination has not performed yet, notification time will follow the examination time and will commence directly after the examination

⁸⁴ Oberlandesgericht Hamburg [Provincial Appellate Court of Hamburg] Germany, 25 Jan. 2008 <<http://cisgw3.law.pace.edu/cases/080125g1.html>> Camilla Baasch Andersen, *Uniform Application of the International Sales Law, Understanding Uniformity, the Global Jurisconsultorium and Examination and Notification Provisions of the CISG*, (Kluwer Law International, 2007) 177.

⁸⁵ Therese Wilson, 'A comparative review of J Honnold and H Flechtner Uniform Law for International Sales under the 1980 United Nations Convention and P Schlechtriem and I Schwenger Commentary on the UN Convention on the International Sale of Goods' (2011) *Journal of Private International Law* <https://research-repository.griffith.edu.au/bitstream/handle/10072/42267/73363_1.pdf;jsessionid=8B85D8956BCE6FD809B0F96BE563A275?sequence=1> accessed 19 April 2017, 16, 17; Eric Bergsten, *Examination of the Goods and Notice of Non-Conformity – Articles 38 and 39*, (CISG-AC Opinion no 2, Pace University New York, 7 June 2004.1,2), 166.

⁸⁶ Therese Wilson, 'A comparative review of J Honnold and H Flechtner Uniform Law for International Sales under the 1980 United Nations Convention and P Schlechtriem and I Schwenger Commentary on the UN Convention on the International Sale of Goods' (2011) *Journal of Private International Law* <https://research-repository.griffith.edu.au/bitstream/handle/10072/42267/73363_1.pdf;jsessionid=8B85D8956BCE6FD809B0F96BE563A275?sequence=1> accessed 19 April 2017, 16, 17; Eric Bergsten, *Examination of the Goods and Notice of Non-Conformity – Articles 38 and 39*, (CISG-AC Opinion no 2, Pace University New York, 7 June 2004.1,2), 166.

⁸⁷ Ingeborg Schwenger, 'The Noble Month (Articles 38, 39 CISG) The Story Behind the Scenery ' (University of Basel, Switzerland) <www.globalsaleslaw.org/temp/Schwenger.pdf> accessed 19 April 2017, 365.

⁸⁸ Camilla Baasch Andersen, *Uniform Application of the International Sales Law, Understanding Uniformity, the Global Jurisconsultorium and Examination and Notification Provisions of the CISG*, (Kluwer Law International, 2007) 178.

⁸⁹ Ingeborg Schwenger, 'The Noble Month (Articles 38, 39 CISG) The Story Behind the Scenery ' (University of Basel, Switzerland) <www.globalsaleslaw.org/temp/Schwenger.pdf> accessed 19 April 2017, 365.

⁹⁰ Ingeborg Schwenger, 'The Noble Month (Articles 38, 39 CISG) The Story Behind the Scenery ' (University of Basel, Switzerland) <www.globalsaleslaw.org/temp/Schwenger.pdf> accessed 19 April 2017, 365.

⁹¹ Henry Gabriel, *Contracts for the Sale of Goods* (Oceana Publications, 2004), 136; UNCITRAL Digest of Case Law on the United Nations Convention on the International Sale of Goods, Part three, Sale of Goods, <www.uncitral.org/pdf/english/clout/digest2008/article039.pdf> accessed 03 May 2017, 126; Peter Huber, Alastair Mullis, *the CISG, A new textbook for students and practitioners* (European Law Publishers, 2007), 159.

(and discovery) takes place.⁹² Where the consumer of the buyer informs him about the discrepancies, time will start running from the moment the buyer obtain information (knowledge) even if he has not examined the goods himself.⁹³

If the defect is latent or hidden so that it could not have been discovered by an examination required under art. 38 of the CISG, the time for notification is either the time when the buyer should have discovered the existence of the latent/hidden defect (by for example operating the goods) or the time he did discover it.⁹⁴ The Secretariat's Commentary indicates that, if the buyer can prove that the satisfactory examination was not enough to reveal the defect, the time for notification does not start until he discovers the defect, for instance by using the goods.⁹⁵ Similarly, in a Belgian case of cling-film in 2004, even if the defects were not discovered until they were used, and the buyer still was entitled to rely on the defects.⁹⁶ However, these cases are not common, for example, in the case of clothes sale in Germany, the defects of the clothes could be found out by dyeing a sample without waiting to use it.⁹⁷

In the case of *grinding device and paper-making machine* in Germany, nine days after the goods had been delivered, the grinding device gave an error, but the buyer paid no attention thinking that it was caused by the misuse of the personnel.⁹⁸ 3 weeks after the error of the grinding device, a purchaser complained of rust in the paper which was produced by using the grinding device.⁹⁹ Ten days after, the buyer had an expert to find the cause of the rust, and the expert submitted his report stating that the rust was due to the grinding device.¹⁰⁰ The buyer gave notice to the seller 3 days after he had received the report.¹⁰¹ The court (Bundesgerichtshof) held that as the buyer gave the notice after he knew that the failure of the grinding device even though it was given more than nine weeks after delivery and seven weeks after the first signs of trouble appeared.¹⁰² However, the Court of Appeals stated that the buyer ought to have been aware that there was a defect in the device and that the reasonable period

⁹² Peter Huber, Alastair Mullis, *the CISG, A new textbook for students and practitioners* (European Law Publishers, 2007), 159; UNCITRAL Digest of Case Law on the United Nations Convention on the International Sale of Goods, Part three, Sale of Goods, <www.uncitral.org/pdf/english/clout/digest2008/article039.pdf> accessed 03 May 2017, 126.

⁹³ Peter Huber, Alastair Mullis, *the CISG, A new textbook for students and practitioners* (European Law Publishers, 2007), 159; UNCITRAL Digest of Case Law on the United Nations Convention on the International Sale of Goods, Part three, Sale of Goods, <www.uncitral.org/pdf/english/clout/digest2008/article039.pdf> accessed 03 May 2017, 126.

⁹⁴ Peter Huber, Alastair Mullis, *the CISG, A new textbook for students and practitioners* (European Law Publishers, 2007), 159.

⁹⁵ Camilla Baasch Andersen, 'The Duty to Examine Goods under the Uniform International Sales Law - An Analysis of Article 38 CISG' (2007) 18 *European Business Law Review*, Issue 4, 806.

⁹⁶ Camilla Baasch Andersen, 'The Duty to Examine Goods under the Uniform International Sales Law - An Analysis of Article 38 CISG' (2007) 18 *European Business Law Review*, Issue 4, 808.

⁹⁷ Camilla Baasch Andersen, 'The Duty to Examine Goods under the Uniform International Sales Law - An Analysis of Article 38 CISG' (2007) 18 *European Business Law Review*, Issue 4, 806.

⁹⁸ Eric Bergsten, *Examination of the Goods and Notice of Non-Conformity – Articles 38 and 39*, (CISG-AC Opinion no 2, Pace University New York, 7 June 2004.1,2), 166; Sonja Krusinga, *(Non-)conformity in the 1980 UN Convention on Contracts for the International Sale of Goods: a uniform concept?* (Intersentia, Antwerp-Oxford-New York, 2004) 73.

⁹⁹ Eric Bergsten, *Examination of the Goods and Notice of Non-Conformity – Articles 38 and 39*, (CISG-AC Opinion no 2, Pace University New York, 7 June 2004.1,2), 166; Sonja Krusinga, *(Non-)conformity in the 1980 UN Convention on Contracts for the International Sale of Goods: a uniform concept?* (Intersentia, Antwerp-Oxford-New York, 2004) 73.

¹⁰⁰ Sonja Krusinga, *(Non-)conformity in the 1980 UN Convention on Contracts for the International Sale of Goods: a uniform concept?* (Intersentia, Antwerp-Oxford-New York, 2004) 73; Eric Bergsten, *Examination of the Goods and Notice of Non-Conformity – Articles 38 and 39*, (CISG-AC Opinion no 2, Pace University New York, 7 June 2004.1,2), 166.

¹⁰¹ Sonja Krusinga, *(Non-)conformity in the 1980 UN Convention on Contracts for the International Sale of Goods: a uniform concept?* (Intersentia, Antwerp-Oxford-New York, 2004) 73; Eric Bergsten, *Examination of the Goods and Notice of Non-Conformity – Articles 38 and 39*, (CISG-AC Opinion no 2, Pace University New York, 7 June 2004.1,2), 166.

¹⁰² Eric Bergsten, *Examination of the Goods and Notice of Non-Conformity – Articles 38 and 39*, (CISG-AC Opinion no 2, Pace University New York, 7 June 2004.1,2), 166; Sonja Krusinga, *(Non-)conformity in the 1980 UN Convention on Contracts for the International Sale of Goods: a uniform concept?* (Intersentia, Antwerp-Oxford-New York, 2004) 73.

for notice began at the time the device gave an error.¹⁰³ The court (Bundesgerichtshof) disagreed stating that the buyer could not have discovered the lack of conformity instantly whether it was because of the device itself or personnel's misuse.¹⁰⁴ In addition, the court gave (i) one week to the buyer to decide if he is going to commission an expert or not and if so, to commission it; (ii) two weeks of preparing the report.¹⁰⁵ Therefore until to give notice, three weeks could pass. The court gave to the buyer a notice period of four weeks.¹⁰⁶ In conclusion, the notice, which was given seven weeks after the failure of the device, was on time.¹⁰⁷ In my opinion, the Court of Appeals is right stating that the buyer ought to have been aware that there was a defect in the device at the time the device gave an error. Here, I believe that the court's (Bundesgerichtshof) opinion *whether the defect was caused by of the device itself or personnel's misuse could not be determined*, was not enough to say that the notice was on time. Because firstly, it is unusual to have a rust on the paper because of misuse. Secondly, the buyer shall be careful with every sign to determine whether the machine defected or not.

1.5. Time Limits for the Notice

1.5.1. Two-year 'cut off' Period

As it is explained above, according to art. 39(1), the buyer must give the notice of lack of conformity within a reasonable time after he has discovered or ought to have discovered it. However, the reasonable time can exceed to a maximum of two-year period, which starts from the time of actual delivery of the goods to the buyer (art. 39(2)). As the article expressly say that the "actual" delivery is needed, only the delivery of the documents or delivery to the unauthorized person is not enough to start cut-off period.¹⁰⁸

The main reason to insert this provision was protecting the seller against claims which may arise long years after delivery of the goods, especially when the defects are latent.¹⁰⁹ Therefore, two-year period is not only protecting the seller by preventing the claims after two years, but also protecting the buyer who receives the goods with hidden / latent defects. However, if the buyer fails to give the notice within a maximum of two years "cut-off" period, he loses his right to rely on the remedies arising from lack of conformity under art. 45, even if the buyer is still unaware of the lack of conformity because of the impossibility or other reasons preventing buyer to discover it.¹¹⁰

¹⁰³ Eric Bergsten, *Examination of the Goods and Notice of Non-Conformity –Articles 38 and 39*, (CISG-AC Opinion no 2, Pace University New York, 7 June 2004.1,2), 167.

¹⁰⁴ Eric Bergsten, *Examination of the Goods and Notice of Non-Conformity –Articles 38 and 39*, (CISG-AC Opinion no 2, Pace University New York, 7 June 2004.1,2), 167.

¹⁰⁵ Eric Bergsten, *Examination of the Goods and Notice of Non-Conformity –Articles 38 and 39*, (CISG-AC Opinion no 2, Pace University New York, 7 June 2004.1,2), 167.

¹⁰⁶ Eric Bergsten, *Examination of the Goods and Notice of Non-Conformity –Articles 38 and 39*, (CISG-AC Opinion no 2, Pace University New York, 7 June 2004.1,2), 167.

¹⁰⁷ Eric Bergsten, *Examination of the Goods and Notice of Non-Conformity –Articles 38 and 39*, (CISG-AC Opinion no 2, Pace University New York, 7 June 2004.1,2), 167.

¹⁰⁸ Aburima Abdullah Ghith, 'The Legal Remedies of the Buyer under the Vienna Convention on the Contract of International Sale of Goods with Specific Reference to English Law and Libyan Law' (Phd Thesis, Glasgow Caledonian University, UK, 1999) 58.

¹⁰⁹ UNCITRAL Digest of Case Law on the United Nations Convention on the International Sale of Goods, Part three, Sale of Goods, <www.uncitral.org/pdf/english/clout/digest2008/article039.pdf> accessed 03 May 2017, 128; Peter Huber, Alastair Mullis, *the CISG, A new textbook for students and practitioners* (European Law Publishers, 2007), 162.

¹¹⁰ UNCITRAL Digest of Case Law on the United Nations Convention on the International Sale of Goods, Part three, Sale of Goods, <www.uncitral.org/pdf/english/clout/digest2008/article039.pdf> accessed 03 May 2017, 128; Peter Huber,

1.5.2. Guarantee Period

Considering the last part of the art 39 (2), it can be easily stated that when there is a contract of guarantee between the buyer and the seller, the cut-off period of two years is not applied. However there are different interpretations of this provision; according to one argument, if the guarantee contract provides more than two years, it shall be accepted that the two-year period provided in art 39(2) will end after the limit conditioned in the contract of guarantee expires.¹¹¹ So first the guarantee period starts and then the two-year period starts.

In addition, parties may also exclude, modify the rule of art. 39(2) and they can prolong or shorten the “cut off” period on their own agreement.¹¹²

In my opinion, as the CISG does not regulate mandatory rules, they should have a freedom of contract and they shall have a right to exceed the cut-off period by having different provisions. Therefore, I think that the parties may have an agreement that the period of two years will start after the period of guarantee ends; or they can decide that the guarantee period will exceed two year period.

1.5.3. Limitation

It shall be underlined that as the limitation issues are not governed by the CISG, the two-year cut-off period is not a period of limitation.¹¹³ The limitation issues are governed by the applicable domestic law which may, of course, incorporate the UN Convention on the Limitation Period in the International Sale of Goods 1974 (as adapted by the Protocol of 11 April 1980).¹¹⁴ Therefore, it is generally accepted that the time limits regulated in art 39 (2) and other limitation regulations will exercise independently from one another.¹¹⁵ However, when the domestic limitation period is shorter than the cut-off period provided in art. 39(2) or it ends before cut-off period, there are two suggestions.¹¹⁶ One suggestion is that the domestic limitation period should exceed to make it match with the two year period in Art. 39(2) CISG.¹¹⁷ Another suggestion is that the domestic limitation period shall prevail and the right of

Alastair Mullis, *the CISG, A new textbook for students and practitioners* (European Law Publishers, 2007), 162; Aburima Abdullah Ghith, ‘The Legal Remedies of the Buyer under the Vienna Convention on the Contract of International Sale of Goods with Specific Reference to English Law and Libyan Law’ (Phd Thesis, Glasgow Caledonian University, UK, 1999) 61.

¹¹¹ Aburima Abdullah Ghith, ‘The Legal Remedies of the Buyer under the Vienna Convention on the Contract of International Sale of Goods with Specific Reference to English Law and Libyan Law’ (Phd Thesis, Glasgow Caledonian University, UK, 1999) 58; Peter Huber, Alastair Mullis, *the CISG, A new textbook for students and practitioners* (European Law Publishers, 2007), 162.

¹¹² Daniel Girsberger, ‘The Time Limits of Article 39 CISG’ *Journal of Law and Commerce* [Vol. 25:241], 248; Peter Huber, Alastair Mullis, *the CISG, A new textbook for students and practitioners* (European Law Publishers, 2007), 162.

¹¹³ Peter Huber, Alastair Mullis, *the CISG, A new textbook for students and practitioners* (European Law Publishers, 2007), 162.

¹¹⁴ Peter Huber, Alastair Mullis, *the CISG, A new textbook for students and practitioners* (European Law Publishers, 2007), 163.

¹¹⁵ Aburima Abdullah Ghith, ‘The Legal Remedies of the Buyer under the Vienna Convention on the Contract of International Sale of Goods with Specific Reference to English Law and Libyan Law’ (Phd Thesis, Glasgow Caledonian University, UK, 1999) 59; Peter Huber, Alastair Mullis, *the CISG, A new textbook for students and practitioners* (European Law Publishers, 2007), 163.

¹¹⁶ Peter Huber, Alastair Mullis, *the CISG, A new textbook for students and practitioners* (European Law Publishers, 2007), 163.

¹¹⁷ Cour de Justice, Genève, Switzerland, no. 249, 10 October 1997, UNCITRAL Digest of Case Law on the United Nations Convention on the International Sale of Goods, Part three, Sale of Goods, <www.uncitral.org/pdf/english/clout/digest2008/article039.pdf> accessed 03 May 2017, 128; Peter Huber, Alastair Mullis, *the CISG, A new textbook for students and practitioners* (European Law Publishers, 2007), 163.

relying on the lack of conformity shall expire at the end of the domestic limitation period, in other words, without waiting the end of the two-year cut-off period.¹¹⁸

In my opinion, if the domestic law gives priority to the freedom of contract and the parties decided to apply the rules of the CISG, then two year period shall apply. Therefore the intention of the parties matter. But, according to the domestic law, when the rule of limitation is mandatory, then, in this case, the freedom of the contract cannot prevail and therefore, the limitation rule provided in the domestic law shall apply.

1.6. Agreements and trade usage on the Duty of Notification

According to the art. 6, the parties may exclude the application of the CISG or change or derogate from the influence of any of its provisions. Therefore the parties can have their own agreement on the matter of notification, and if the buyer does not comply with the contract provisions, the court may decide that the notice was not sufficient.¹¹⁹

Parties usually choose one month according to the case law.¹²⁰ The agreement must be based on the both parties' decision, therefore where the seller adds a provision into the contract unilaterally and after the preparation of the contract is already concluded, cannot be applied even if the parties decided to derogate from the art. 39 of the CISG.¹²¹ Where the agreement between the parties does not comply with the mentioned requirement, then the art. 39 can be used to fill in the gaps in the agreement of the parties.¹²² However, there are also some decisions which the courts did not apply the contract provisions and it is stated that only if the contract provisions are appropriate with the art. 39, they can be applied.¹²³ I think this court decision is not appropriate, because where the parties required to have a contract compatible with the art. 39, then they can directly decide to apply art. 39, instead of having their own agreement.

¹¹⁸ Peter Huber, Alastair Mullis, *the CISG, A new textbook for students and practitioners* (European Law Publishers, 2007), 163.

¹¹⁹ Oberster Gerichtshof, Austria, 14 January 2002; Canton of Ticino Tribunale d'appello, Switzerland, 8 June 1999; Landgericht Gießen, Germany, 5 July 1994; Landgericht Hannover, Germany, 1 December 1993; Arbitration—International Chamber of Commerce No. 7331 1994; werblichen Wirtschaft—Wien, 15 June 1994; Landgericht Baden-Baden, Germany, 14 August 1991; Oberster Gerichtshof, Austria, 30 June 1998; UNCITRAL Digest of Case Law on the United Nations Convention on the International Sale of Goods, Part three, Sale of Goods, <www.uncitral.org/pdf/english/clout/digest2008/article039.pdf> accessed 03 May 2017, 124.

¹²⁰ Ingeborg Schwenger, 'The Noble Month (Articles 38, 39 CISG) The Story Behind the Scenery ' (University of Basel, Switzerland) <www.globalsaleslaw.org/temp/Schwenger.pdf> accessed 19 April 2017, 363.

¹²¹ Tribunale di Vigevano, Italy, 12 July 2000; UNCITRAL Digest of Case Law on the United Nations Convention on the International Sale of Goods, Part three, Sale of Goods, <www.uncitral.org/pdf/english/clout/digest2008/article039.pdf> accessed 03 May 2017, 124.

¹²² Bundesgerichtshof, Germany, 4 December 1996, UNCITRAL Digest of Case Law on the United Nations Convention on the International Sale of Goods, Part three, Sale of Goods, <www.uncitral.org/pdf/english/clout/digest2008/article039.pdf> accessed 03 May 2017, 124.

¹²³ Oberlandesgericht München Germany 11 March 1998; Oberlandesgericht Saarbrücken, Germany, 13 January 1993; Oberlandesgericht München, Germany, 11 March 1998; Arbitration#International Chamber of Commerce No. 7331 1994; UNCITRAL Digest of Case Law on the United Nations Convention on the International Sale of Goods, Part three, Sale of Goods, <www.uncitral.org/pdf/english/clout/digest2008/article039.pdf> accessed 03 May 2017, 124.

Only the agreement on guarantee does not rule the duty of notification expressly, therefore it is not enough to deem to parties as to be derogated from the art. 39.¹²⁴ But when the parties are deemed as they derogated from the art. 39, the trade usage is binding for them according to the article 9 of the CISG.¹²⁵ In a decision, where the seller has a fixed term for the duty of notification, for example, 8 days from delivery, that the buyer already knew from the previous agreements and the seller refers to that rule in the offer, it is also accepted.¹²⁶

1.7. Consequences of Failure to Give Any or Proper Notice

The failure of giving notice under art. 39 causes the buyer to lose the right of relying on the lack of conformity and remedies provided under art. 45, such as claiming the repair of the goods or to reduce the price, to compensate damages or to avoid the contract.¹²⁷ Consequently, the buyer may be obliged to pay the price which is regulated in the contract even if the goods are completely defective.¹²⁸

1.7.1. Exceptions on requirement to give notice under the CISG

1.7.1.1. Art. 40 of the CISG

According to art. 40 of the CISG, if the seller knows or could not have been unaware of the lack of conformity, and he did not disclose it to the buyer, he cannot rely on the provisions of articles 38 and 39.

Where the seller disclose the non-conformity before the contract is concluded, he will not be liable for the defects under art. 35 of the CISG.¹²⁹ Where the seller disclose the defects after the contract is concluded, the buyer either can accept the goods or reject them and this time the buyer does not need to examine and give a notice to the seller as the seller is already aware of the defects.¹³⁰ The seller's disclose must be express and straightforward.¹³¹ If the seller's disclose is not clear about the details of the defects, the buyer again needs to examine and give notice to the seller.¹³²

¹²⁴ Arbitration Institute of the Stockholm Chamber of Commerce, 5 June 1998; Oberster Gerichtshof, Austria, 17 April 2002, UNCITRAL Digest of Case Law on the United Nations Convention on the International Sale of Goods, Part three, Sale of Goods, <www.uncitral.org/pdf/english/clout/digest2008/article039.pdf> accessed 03 May 2017, 124.

¹²⁵ Oberlandesgericht Saarbrücken, Germany, 13 January 1993, UNCITRAL Digest of Case Law on the United Nations Convention on the International Sale of Goods, Part three, Sale of Goods, <www.uncitral.org/pdf/english/clout/digest2008/article039.pdf> accessed 03 May 2017, 124; Ingeborg Schwenger, 'The Noble Month (Articles 38, 39 CISG) The Story Behind the Scenery' (University of Basel, Switzerland) <www.globalsaleslaw.org/temp/Schwenger.pdf> accessed 19 April 2017, 363.

¹²⁶ Oberster Gerichtshof, Austria, 14 January 2002, UNCITRAL Digest of Case Law on the United Nations Convention on the International Sale of Goods, Part three, Sale of Goods, <www.uncitral.org/pdf/english/clout/digest2008/article039.pdf> accessed 03 May 2017, 124.

¹²⁷ Henry Gabriel, *Contracts for the Sale of Goods* (Oceana Publications, 2004), 137; Peter Huber, Alastair Mullis, *the CISG, A new textbook for students and practitioners* (European Law Publishers, 2007), 156.

¹²⁸ Peter Huber, Alastair Mullis, *the CISG, A new textbook for students and practitioners* (European Law Publishers, 2007), 163.

¹²⁹ Alejandro M. Garro, 'The Buyer's "Safety Valve" under Article 40: What is the Seller Supposed to Know and When?' (2005) *Journal of Law and Commerce* [Vol. 25:253], 255.

¹³⁰ Alejandro M. Garro, 'The Buyer's "Safety Valve" under Article 40: What is the Seller Supposed to Know and When?' (2005) *Journal of Law and Commerce* [Vol. 25:253], 255.

¹³¹ Alejandro M. Garro, 'The Buyer's "Safety Valve" under Article 40: What is the Seller Supposed to Know and When?' (2005) *Journal of Law and Commerce* [Vol. 25:253], 255.

¹³² Alejandro M. Garro, 'The Buyer's "Safety Valve" under Article 40: What is the Seller Supposed to Know and When?' (2005) *Journal of Law and Commerce* [Vol. 25:253], 255.

With the art. 40 of the CISG, “a safety valve” is constituted in order to save the right of the remedy of the buyer for nonconformity when the seller forfeited the right of protection under art. 38, 39.¹³³ Nevertheless, to not cause of loss of effectiveness of the time limits, art. 40 shall be applied only to “special circumstances” and shall not be interpreted broadly.¹³⁴ In addition, the burden of proof, that the seller knew or could not have been unaware of the lack of conformity, will be on the buyer’s shoulder.¹³⁵ However, it is usually very difficult to prove that the seller knew nonconformity and therefore mostly he will try to prove that the seller could not have been unaware of the lack of conformity.¹³⁶ In this case, the seller shall prove that what his knowledge was about the conditions of the goods and this knowledge was not enough to be aware of the lack of conformity so that he could not disclose his knowledge under article 40 or he already gave a disclosure.¹³⁷

Where there is a fraud or other bad faith, art. 40 of the CISG will be applicable, but it is argued what can be considered as gross negligence or whether ordinary negligence is enough or more than gross negligence is required as it is stated in a Stockholm Chamber of Commerce Arbitral Award.¹³⁸ According to the majority of the tribunal, the evidence must be clear that the seller was conscious about nonconformity in order to apply the art. 40 of the CISG.¹³⁹ In my opinion, as a prudent merchant, the seller shall disclose all the conditions of the goods that he knows, and therefore even a simple negligence must be sufficient to apply art. 40.

1.7.1.2. Art. 44 CISG

If the buyer has a reasonable excuse for his failure to give the required notice under art. 39 (1), he is entitled to reduce the price in accordance with article 50 or he can claim for the damages, but he cannot claim for loss of profit (art. 44 of the CISG). This provision is provided in order to mitigate the harshness of the duty of the notification of the buyer.¹⁴⁰ Therefore, even if the buyer fails to give the notice of lack of conformity to the seller under art. 39 (1), if he can prove that there is a reasonable excuse for his failure, he can avail himself of limited remedies under art. 44.¹⁴¹ However, this article of 44 can only be

¹³³ Henry Gabriel, *Contracts for the Sale of Goods* (Oceana Publications, 2004), 137; Alejandro M. Garro, ‘The Buyer’s “Safety Valve” under Article 40: What is the Seller Supposed to Know and When?’ (2005) *Journal of Law and Commerce* [Vol. 25:253], 253; UNCITRAL Digest of Case Law on the United Nations Convention on the International Sale of Goods, Part three, Sale of Goods, <www.uncitral.org/pdf/english/clout/digest2008/article039.pdf> accessed 03 May 2017, 128; Peter Huber, Alastair Mullis, *the CISG, A new textbook for students and practitioners* (European Law Publishers, 2007), 164.

¹³⁴ Peter Huber, Alastair Mullis, *the CISG, A new textbook for students and practitioners* (European Law Publishers, 2007), 164; UNCITRAL Digest of Case Law on the United Nations Convention on the International Sale of Goods, Part three, Sale of Goods, <www.uncitral.org/pdf/english/clout/digest2008/article039.pdf> accessed 03 May 2017, 128.

¹³⁵ Peter Huber, Alastair Mullis, *the CISG, A new textbook for students and practitioners* (European Law Publishers, 2007), 164.

¹³⁶ Alejandro M. Garro, ‘The Buyer’s “Safety Valve” under Article 40: What is the Seller Supposed to Know and When?’ (2005) *Journal of Law and Commerce* [Vol. 25:253], 254; Peter Huber, Alastair Mullis, *the CISG, A new textbook for students and practitioners* (European Law Publishers, 2007), 164.

¹³⁷ Peter Huber, Alastair Mullis, *the CISG, A new textbook for students and practitioners* (European Law Publishers, 2007), 165; Alejandro M. Garro, ‘The Buyer’s “Safety Valve” under Article 40: What is the Seller Supposed to Know and When?’ (2005) *Journal of Law and Commerce* [Vol. 25:253], 254.

¹³⁸ Peter Huber, Alastair Mullis, *the CISG, A new textbook for students and practitioners* (European Law Publishers, 2007), 165.

¹³⁹ “a conscious disregard of facts that meet the eyes and are of evident relevance to the non-conformity” Peter Huber, Alastair Mullis, *the CISG, A new textbook for students and practitioners* (European Law Publishers, 2007), 165.

¹⁴⁰ Henry Gabriel, *Contracts for the Sale of Goods* (Oceana Publications, 2004), 144; Peter Huber, Alastair Mullis, *the CISG, A new textbook for students and practitioners* (European Law Publishers, 2007), 165.

¹⁴¹ Eric Bergsten, *Examination of the Goods and Notice of Non-Conformity –Articles 38 and 39*, (CISG-AC Opinion no 2, Pace University New York, 7 June 2004.1,2), 164; Peter Huber, Alastair Mullis, *the CISG, A new textbook for students and practitioners* (European Law Publishers, 2007), 165.

applied to the art. 39 (1). In other words, in case the buyer fails to give notice within a period of two years under art. 39(2), he cannot rely on the remedies under art. 44 of the CISG.¹⁴² In addition, the art 44 does not refer to the buyer's obligation of examining the goods under art. 38 of the CISG, if the buyer fails to comply his obligation of examination on time, he cannot invoke art. 44, even if he has a reasonable excuse for the failure.¹⁴³ However, as the duty of examination triggers the duty of notification, the art. 44 can be applied to the art. 38 too, indirectly.¹⁴⁴

In this point, interpretation of the "reasonable excuse" is important in order to decide whether the buyer can rely on the art. 44 or not. Courts shall decide by having regard to business type and size of the buyer, and buyer's business experience, particular circumstances or problems faced by the buyer, and also the nature of the goods, the seriousness of the breach and the difficulty of discovering it.¹⁴⁵

Where the parties have agreed on neutral inspector for examining the goods and they both know that the results of this inspection will be given by the inspector to the both parties, there may be no need for the buyer to give notice to the seller, and this could be a strong argument for reasonable excuse under art. 44.¹⁴⁶ However, in practice, buyers are not usually successful about alleging and proving that there was a reasonable excuse under art. 44.¹⁴⁷

1.7.1.3. Waiver by the Seller and the Buyer

On top of the exceptions regulated under art. 40 and 44 of the CISG, there is another way for the buyer to rely on remedies under art. 45 which is the waiver of the seller from his right under art. 38, 39. In other words, the seller may waive his right to allege that the buyer did not give notice at all, or in a proper form, or on time.¹⁴⁸

In a decision of a court, it is stated that where the seller confirms the defects, the seller is deemed as waived his right to rely on the art 38 and 39 even if the buyer's notice of the defects was not on time.¹⁴⁹

¹⁴² Peter Huber, Alastair Mullis, *the CISG, A new textbook for students and practitioners* (European Law Publishers, 2007), 166; Aburima Abdullah Ghith, 'The Legal Remedies of the Buyer under the Vienna Convention on the Contract of International Sale of Goods with Specific Reference to English Law and Libyan Law' (Phd Thesis, Glasgow Caledonian University, UK, 1999) 63.

¹⁴³ Camilla Baasch Andersen, 'The Duty to Examine Goods under the Uniform International Sales Law - An Analysis of Article 38 CISG' (2007) 18 *European Business Law Review*, Issue 4, 810; Peter Huber, Alastair Mullis, *the CISG, A new textbook for students and practitioners* (European Law Publishers, 2007), 166; Aburima Abdullah Ghith, 'The Legal Remedies of the Buyer under the Vienna Convention on the Contract of International Sale of Goods with Specific Reference to English Law and Libyan Law' (Phd Thesis, Glasgow Caledonian University, UK, 1999) 63.

¹⁴⁴ Camilla Baasch Andersen, 'The Duty to Examine Goods under the Uniform International Sales Law - An Analysis of Article 38 CISG' (2007) 18 *European Business Law Review*, Issue 4, 810.

¹⁴⁵ Peter Huber, Alastair Mullis, *the CISG, A new textbook for students and practitioners* (European Law Publishers, 2007), 166; Aburima Abdullah Ghith, 'The Legal Remedies of the Buyer under the Vienna Convention on the Contract of International Sale of Goods with Specific Reference to English Law and Libyan Law' (Phd Thesis, Glasgow Caledonian University, UK, 1999) 63.

¹⁴⁶ Peter Huber, Alastair Mullis, *the CISG, A new textbook for students and practitioners* (European Law Publishers, 2007), 166.

¹⁴⁷ Camilla Baasch Andersen, 'The Duty to Examine Goods under the Uniform International Sales Law - An Analysis of Article 38 CISG' (2007) 18 *European Business Law Review*, Issue 4, 810; Peter Huber, Alastair Mullis, *the CISG, A new textbook for students and practitioners* (European Law Publishers, 2007), 166.

¹⁴⁸ UNCITRAL Digest of Case Law on the United Nations Convention on the International Sale of Goods, Part three, Sale of Goods, <www.uncitral.org/pdf/english/clout/digest2008/article039.pdf> accessed 03 May 2017, 124; Peter Huber, Alastair Mullis, *the CISG, A new textbook for students and practitioners* (European Law Publishers, 2007), 167.

¹⁴⁹ Bundesgerichtshof, Germany, no. 235, 25 June 1997, Oberster Gerichtshof, Austria, no. 542, 17 April 2002, Oberster Gerichtshof, Austria, no. 541, 14 January 2002, UNCITRAL Digest of Case Law on the United Nations Convention on the

In contrast to this decision, another court held that a clear express on the waiver is needed and therefore, if the seller accepts the goods back to examine the defects stated by the buyer, it cannot be accepted as a waiver.¹⁵⁰ Also, only entering into settlement negotiations does not imply that the seller wants to waive his right to object to the notice.¹⁵¹

2. Conclusion

In this article, I have discussed the duty of notification of the buyer under the art. 39 of the CISG. The buyer has to give notice to the seller about the lack of conformity. The notification must be express and the nature of the unconformity must be defined clearly and significantly in the notice. The notice can be oral or in writing but, of course, must reach to the seller. Therefore where the notice is given to the intermediary, agent or the employee, it is important to determine whether they are authorized to receive the notice and if not, the notice cannot be accepted as given appropriately. Because if the seller does not know about the defect, how he can answer the buyer's claims about it?

The period for giving notice starts from the moment that the buyer has discovered or ought to have discovered the lack of conformity and there are two periods of times stated in the CISG. First one is a *reasonable time* after the buyer has discovered the unconformity or ought to have discovered it, and the second time is the period of *two years* from the date on which the goods were actually handed over to the buyer.

The term of *reasonable time* is argued among scholars and courts, but there is no exact interpretation on it. Therefore the CISG Advisory Council released its opinion. According to this opinion, (i) periods of examination and notification duties shall be considered separately; (ii) the reasonable time for notification shall be interpreted according to the different circumstance, therefore nature of the goods (perishable or not), the nature of the defect, the situation of the parties and relevant trade usages, remedies what the buyer is willing to invoke shall be taken into consideration while deciding whether the notice was given within a reasonable time. And (iii) the Council does not accept a fixed (presumptive) period as reasonable because the drafters chose a flexible time which can vary with different circumstances. I think, not only for examination, but also for notification, a flexible time is needed as every sales contract has its own character and needs. Therefore I believe that a presumptive period cannot be invoked to the all cases, and even if judges prefer presumptive periods as such, I see it as they are taking this easy way out on giving decision.

The other limit is two years, a cut-off period which shall be considered by the buyer, even if he is still unaware of the lack of conformity.

There are two exceptions for the requirement to give notice under the CISG; art. 40 and art. 44. According to art. 40 of the CISG, if the seller knows or could not have been unaware of the lack of

International Sale of Goods, Part three, Sale of Goods, <www.uncitral.org/pdf/english/clout/digest2008/article039.pdf> accessed 03 May 2017, 124.

¹⁵⁰ Oberlandesgericht Düsseldorf, Germany, no. 310, 12 March 1993, UNCITRAL Digest of Case Law on the United Nations Convention on the International Sale of Goods, Part three, Sale of Goods, <www.uncitral.org/pdf/english/clout/digest2008/article039.pdf> accessed 03 May 2017, 124; Peter Huber, Alastair Mullis, *the CISG, A new textbook for students and practitioners* (European Law Publishers, 2007), 168.

¹⁵¹ Peter Huber, Alastair Mullis, *the CISG, A new textbook for students and practitioners* (European Law Publishers, 2007), 168

conformity, and he did not disclose it to the buyer, he cannot rely on the provisions of articles 38 and 39. According to the art. 44, if the buyer has a reasonable excuse for his failure to give the required notice under art. 39 (1), he is entitled to reduce the price or he can claim for the damages, but he cannot claim for loss of profit. In addition, where the seller waives his right to allege that the buyer did not give notice at all, or in a proper form, or on time, the buyer still can rely on the lack of conformity.

I believe that the overseas buyer may not be enthusiastic for an international sale of which the contract does not really protect him. I think that the CISG provisions are buyer-friendly and appropriate for the international sales. Especially considering that, in the CISG, the time period for examining and giving notice are not certain but flexible, and the buyer has a maximum of a two-year cut-off period which is more than enough to discover the defects in most cases. In addition, as in the international sales, the buyer usually does not have an opportunity to examine the goods directly at the moment of the sale, the provisions of 38(2) and 38(3) are very overseas-buyer-protective.

Lastly, thinking that there are millions of international sales are made throughout the world, the CISG is very useful having flexible provisions which are adjustable for each case and providing fully freedom and gaps which the parties can fill in their own provisions about the duty of notification.