§ 5. Delivery of goods and documents

I. Introduction

Art. 30 CISG provides that: "The seller must deliver the goods, hand over any documents relating to them and transfer the property in the goods, as required by the contract and the Convention."

In addition to setting out the basic elements of due performance under the Convention, Art. 30 CISG also makes explicit the importance of the terms of the contract in determining the content of those obligations. "The scope and substance of those obligations are determined chiefly by the terms of the contract":[360] only where the contract is silent will recourse to the provisions of the Convention be necessary. Since Art. 6 CISG permits the parties to exclude the application of the Convention or to derogate from or vary the effect of any of its provisions, it follows that in cases of conflict between the contract and provisions of the Convention, the seller must fulfil his obligations as required by the contract.[361]

The "seller's primary obligation is to deliver the goods".[362] The delivery obligations with respect to the goods are found in Art. 31 et seq. CISG. According to Art. 31 CISG, delivery consists of dispatch of the goods to the buyer or in the seller placing the goods at the buyer's disposal. The primary rule in Art. 31 CISG is supplemented by Art. 32 and 33 CISG which lay down rules relating to notice of dispatch, conclusion of the contract of carriage, insurance (Art. 32 CISG) and the time of delivery (Art. 33 CISG). Art. 34 CISG governs the handing over of documents.

In practice, the parties will more often than not specifically agree that the above matters are to be governed by standard delivery terms, such as CIF, FOB or ex ship. Such terms are "shorthand descriptions of particular delivery

360 *U. Huber/Widmer*, in: Schlechtriem/Schwenzer, Commentary, Art. 30 para. 1.

361 *Secretariat Commentary*, Art. 28. See also (German) Oberlandesgericht München 3 December 1999, CISG-Online No. 585.

362 *Secretariat Commentary*, Art. 29 para. 1.

obligations."[363] Where the parties contract on such terms, the seller's delivery obligations will as a general rule be determined by the terms of the contract and not by the provisions of the Convention.[364]

II. The obligation to deliver the goods

1. General overview

Three provisions of the Convention deal with the seller's obligation to deliver the goods. The substance of the delivery obligation and the closely related issue of the place of delivery are dealt with in Art. 31 CISG. Art. 32 CISG provides a number of supplementary rules relating to the giving of notice, the conclusion of a contract of carriage and transportation arrangements. Finally, Art. 33 CISG sets out rules relating to the time of delivery.

2. The meaning of "delivery"

The Convention does not expressly define the concept of "delivery". However, a number of points can be made about what the concept involves. First, "delivery" refers only to the steps that the seller must take in order to ensure that the buyer obtains possession of the goods. Thus, as a general rule, the delivery obligation can be performed unilaterally by the seller without the need for the buyer's cooperation.[365] Secondly, the delivery obligation may be performed notwithstanding that actual possession has not been given or any transportation been made to the buyer. By way of example, under Art. 31 CISG, the seller may perform his delivery obligation either by handing the goods over to the first carrier or by placing them at the disposal of the buyer.

Unlike under ULIS, where delivery depended upon the handing over of "*conforming* goods", there is no requirement in the CISG that performance of the delivery obligation depends upon delivery of "conforming" goods.[366] Delivery of non-conforming goods will, therefore, generally constitute a delivery under the CISG; the seller will, however, be liable for the breach of his obligations under Art. 35 CISG.

363 *Bridge*, The Sale of Goods, p. 230.

364 See e.g., Cour d'Appel Paris 4 March 1998, CISG-Online No. 535; (German) Oberlandesgericht Oldenburg 22 September 1998, CISG-Online No. 1306.

365 See *U. Huber/Widmer*, in: Schlechtriem/Schwenzer, Commentary, Art. 31 para. 4.

366 See, e.g., *Lando*, in: Bianca/Bonell, Commentary, Art. 31 para. 2.7; *Honnold*, para. 210.

3. The consequences of "delivery"

a) Delivery and payment

The parties are free to make whatever arrangements they wish as to the relative times at which payment and delivery are to be made. But, in the absence of any such agreement, Art. 58(1) CISG provides that "[the buyer] must pay [the price] when the seller places either the goods or documents controlling their disposition at the buyer's disposal in accordance with the contract and this Convention." The effect of the provision is, therefore, that unless the parties agree otherwise, payment of the price is due as soon as the goods or documents representing the goods are placed at the buyer's disposal. Thus, unless the sale involves carriage of the goods, the general rule is that the buyer must pay in exchange for "delivery" of the goods or documents. Where the sale involves carriage of goods, the seller performs his delivery obligation by handing the goods over to the first carrier for transmission to the buyer (Art. 31 lit. (a) CISG). The price is not, however, payable until the seller has tendered the goods to the buyer at their place of destination. It should be noted, however, that where a sale involves carriage of goods, the seller can dispatch the goods "on terms whereby the goods, or documents controlling their disposition, will not be handed over to the buyer except against payment of the price" (Art. 58(2) CISG).

b) Delivery and "taking delivery"

The seller's obligation of "delivery" and the buyer's obligation of "taking delivery" (Art. 53, 60 CISG) are closely linked to each other. There are two elements of the buyer's obligation to take delivery. First, the buyer must do all the acts which can reasonably be expected of him in order to enable the seller to make delivery (Art. 60 lit. (a) CISG). This obligation emphasises that the buyer has to co-operate with the seller. The buyer must act reasonably to enable the seller to deliver and to that extent the two obligations are linked. Such an obligation will often be imposed by contract, such as the obligation that may be placed on an FOB buyer to arrange for the carriage of the goods and nominate an effective ship to the seller. Until the buyer performs this part of his obligation to take delivery, the seller is unable to deliver. Secondly, the buyer must take over the goods (Art. 60 lit. (b) CISG). This part of the obligation does not arise until the seller has delivered the goods.

c) Delivery and risk

Unlike the position under ULIS, delivery is no longer the decisive factor for the passage of risk. Indeed the idea of linking the passage of risk to the delivery of the goods did not find favour during the preliminary work on the CISG and was dropped.[367] Nevertheless, the requirements for the passage of risk (Art. 67 et seq. CISG) and the requirements for delivery are very similar so that the risk will often pass at the same time as the seller performs his delivery obligation.[368]

d) Liability for expenses

The Convention does not contain rules relating to the expenses of delivery. Frequently, however, this will be the subject of express provisions in the contract[369] or may be ascertained by reference to previous course of dealings or trade usage (Art. 9 CISG). If no agreement has been reached, then the gap in the Convention should, by virtue of Art. 7(2) CISG, be filled by recourse to general principles on which the Convention is based; there should be no need to have recourse to the applicable domestic law. The underlying general principle is that each party must bear the costs of his own performance.[370] Thus, unless otherwise agreed, the seller must bear all the costs of, and incidental to, the transportation of the goods to the place of delivery.[371] This may for instance include the costs of loading the goods on board[372] and, where the place of delivery is in the buyer's country, their discharge at the port of destination.[373]

4. Place of delivery

Art. 31 CISG provides rules on the place of delivery. Primarily, it is the parties' agreement on the place of delivery that is relevant (see (a) below). In the absence of such an agreement, several situations have to be distinguished. Where the contract of sale involves carriage of the goods, Art. 31 lit. (a) CISG will apply (see (b) below). In other cases, one should first refer to Art. 31 lit. (b) CISG before resorting to the residual rule in Art. 31 lit. (c) CISG (see (c) and (d) below).

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367 Yearbook 1 (1968-70) at 175, No 141, see also the Report of the General Secretary Yearbook III (1972), Art. 31-41 = *Honnold*, Documentary History of the Uniform Law for International Sales, p. 73 – 83.

368 For a fuller discussion of risk under the Convention, see below p. 314 et seq.

369 The Incoterms contain provisions dealing with the division of costs (clauses A6 and B6).

370 See *U. Huber/Widmer*, in: Schlechtriem/Schwenzer, Commentary, Art. 31 para. 83.

371 See for more detail *U. Huber/Widmer*, in: Schlechtriem/Schwenzer, Commentary, Art. 31 para. 83.

372 As in contracts concluded on CIF and FOB terms.

373 As in contracts concluded on ex quay, d.d.u. and d.d.p. terms.

a) Seller bound to deliver at particular place

The provisions in Art. 31 CISG relating to the place of delivery apply only "if the seller is *not* bound to deliver the goods at any other particular place."[374] Where, therefore, the parties have agreed expressly or impliedly that the goods are to be delivered at a particular place (for instance the buyer's place of business or the seller's place of business), the place of delivery is determined by that agreement[375] and recourse to the provisions in Art. 31 CISG is unnecessary.[376]

Where the parties contract by reference to a particular delivery term (such as one of the Incoterms), the substance of the delivery obligation and the place of delivery must be determined in accordance with the express terms of the contract. Thus, for example, if the parties contract on CIF Incoterms, the seller must "deliver the goods on board the vessel at the port of shipment on the date or within the period stipulated."[377] In relation to some delivery terms, the Incoterms produce the same place of delivery and delivery obligation as Art. 31 CISG.[378] Regardless, however, of whether the contractual delivery term produces the same effect as that produced by Art. 31 CISG, the substance of the delivery obligation and the place of delivery are to be determined in accordance with the provisions of the contract (e.g., the delivery term) and not with the "fall-back" provisions contained in Art. 31 CISG.

b) Contract of sale involving carriage of the goods (Art. 31 lit. (a) CISG)

Where the contract of sale involves the carriage of goods, and the seller is not bound to deliver the goods at any particular place, the seller performs his delivery obligation by handing the goods over to the first carrier for transmission to the buyer (Art. 31 lit. (a) CISG).

aa) Carriage of goods

Interpreted literally, a contract of sale involving carriage of goods could refer to all contracts where the goods will be moved from one place to another.

374 Art. 31 first sentence CISG (emphasis added).

375 For the consequences of delivery at the wrong place see *U. Huber/Widmer*, in: Schlechtriem/Schwenzer, Commentary, Art. 31 para. 78.

376 (Italian) Corte Suprema di Cassazione 19 June 2000, CISG-Online No. 1317; (German) Oberlandesgericht München 3 December 1999, CISG-Online No. 585.

377 Clause A4 Incoterms 2000.

378 See e.g., the ex works term: (German) Oberlandesgericht Köln 8 January 1997, CISG-Online No. 217.

Such a definition would include almost all international sales contracts.[379] It is clear, however, from the language of the provision that this is not the meaning intended by the draftsmen of the Convention. A contract of sale involving carriage of the goods within the meaning of the Convention refers only to contracts of sale where the seller is to arrange for the carriage of goods to the buyer[380] by an independent carrier[381].

Thus, where under the contract the goods are to be transported to the buyer by the seller using his own vessels, or by an employee of the seller, this does not involve a carriage of the goods within the meaning of Art. 31 lit. (a) CISG; it is rather a case where the seller is "bound to deliver at another place" (see (a) above).

A difficult question is raised by whether a contract of sale under which the transportation of the goods is to be carried out or arranged by the *buyer* involves carriage of goods within the meaning of the provision. Literally, such a contract does involve carriage of goods and there would be nothing wrong with a rule stating that the delivery obligation is only performed when the seller hands the goods over to the buyer or an independent carrier contracted for by the buyer.[382] However, it must be remembered that the Convention seeks to define delivery in such a way that the seller's delivery obligation can generally be performed without the co-operation of the buyer. To include contracts of sale where the carriage of goods is to be carried out, or arranged, by the buyer Art. 31 lit. (a) CISG has the effect that delivery can only be accomplished with the co-operation of the buyer. This runs counter to the policy adopted by the Convention's provisions on delivery. The better view, therefore, is that sales where the carriage is carried out, or arranged, by the buyer should be treated as sales not involving the carriage of goods and, therefore, they fall within either Art. 31 lit. (b) or (c) CISG.[383]

bb) Handing the goods over for transmission to the buyer

Under Art. 31 lit. (a) CISG, the seller's obligation to deliver consists in handing the goods over to the first carrier for transmission to the buyer. The handing over of the goods to the carrier is complete when the carrier obtains

379 See Nicholas, The Vienna Convention on International Sales Law, Law Quarterly Review (L.Q.R) 1989, 208, 238.

380 Whether by sea, road, rail, air or other means of transportation.

381 *Lando*, in: Bianca/Bonell, Commentary, Art. 31 para. 2.4; *UNCITRAL Digest*, Art. 31 para. 5.

382 See *Feltham*, CIF and FOB Contracts and the Vienna Convention on Contracts for the International. Sale of Goods Journal of Business Law (J.B.L) 1991, 413.

383 *U. Huber/Widmer*, in: Schlechtriem/Schwenzer, Commentary, Art. 31 para. 15.

physical possession of the goods for the purpose of carriage to the buyer.[384] The goods must actually be handed over to the carrier or to his employees.[385] Thus, the seller does not perform his delivery obligation by handing over a document of title to the goods to the carrier enabling him to collect the goods from a third party.[386] Nor is delivery effected when the seller merely makes the goods ready for collection by the carrier, or puts them in one of his own vehicles for transportation to the carrier.

Delivery to the carrier must be made for the purpose of transmission of the goods to the buyer. This requires that the seller must have entered into a carriage contract with the carrier under which the carrier undertakes to transport the goods to the buyer.[387] However, it is not necessary that immediately on receipt of the goods, the carrier commences the carriage.

cc) To the first carrier

The seller performs his delivery obligation when he hands the goods over to a carrier. Where the carriage is to be completed in stages, involving perhaps different modes of transportation, the seller performs his obligation by handing the goods over to the *first* carrier.[388] The first carrier need not, for the purposes of the seller's performance of his delivery obligation, be the carrier responsible for finally delivering the goods to the buyer. Nor is the length of the first transportation stage relevant.[389]

As mentioned above, "carrier", within Art. 31 lit. (a) CISG, must be understood as referring to an *independent* carrier; that is a (legal) person who

384 *U. Huber/Widmer*, in: Schlechtriem/Schwenzer, Commentary, Art. 31 para. 29.

385 (Spanish) Audiencia Provincial Cordoba 31 October 1997, CISG-Online No. 502.

386 *Secretariat Commentary*, Art. 29 para. 9; *U. Huber/Widmer*, in: Schlechtriem/Schwenzer, Commentary, Art. 31 para. 29.

387 *U. Huber/Widmer*, in: Schlechtriem/Schwenzer, Commentary, Art. 31 para. 30.

388 See *U. Huber/Widmer*, in: Schlechtriem/Schwenzer, Commentary, Art. 31 para. 20; (Swiss) Handelsgericht Zürich 10 February 1999, CISG-Online No. 488.

389 See *U. Huber/Widmer*, in: Schlechtriem/Schwenzer, Commentary, Art. 31 para. 20; (Swiss) Handelsgericht Zürich 10 February 1999, CISG-Online No. 488. If, for example, goods are to be transported in two stages with carrier A contracted to take delivery of the goods at the seller's place of business and transport them two miles to the port of shipment, X, where they are to be delivered to carrier B who is contracted to take delivery and transport them 3,000 miles to the final port of destination, Y, delivery is effected when the goods are handed over to carrier A.

is not an employee or a mere department of the seller or buyer.[390] This results from the following considerations. Until the goods are *handed over* to a carrier, there can be no delivery. As long as the seller retains control of the goods or as long as they remain in his sphere of control, there can have been no handing over within the meaning of Art. 31 lit. (a) CISG. Thus, where the first stage of the transport is made by the seller's employees, delivery will only be made when they hand the goods over to the first independent carrier. Similarly, where the goods are handed over to the buyer, or to an agent or employee of the buyer, there is no handing over to a carrier for *transmission to the buyer*. In such a case, the delivery is to the buyer (delivery to the buyer's agent or employee being treated as delivery to the buyer) and not to a carrier.

The meaning of "carrier" certainly includes any person who in a contract of carriage undertakes to carry by road, rail, sea, air, inland waterways or by a combination of such modes.[391] It is not necessary that the person who undertakes responsibility for the operation actually carry the goods himself. By way of contrast, the handing over of goods to some other type of bailee, such as a warehouse owner or independent packing house would not constitute delivery within Art. 31 lit. (a) CISG. In such a case, the warehouse owner does not undertake to carry or to procure the performance of a contract of carriage.

Whether delivery may be effected under Art. 31 lit. (a) CISG when the goods are handed over to a freight forwarder has been the subject of controversy. That controversy arises from the fact that, while a freight forwarder may act merely as an agent of the seller, he may also act as principal undertaking at least some, or indeed all, of the responsibility for the movement of the goods. Three different types of freight forwarding contracts need to be considered: First, the seller may simply engage a freight forwarder to act as a forwarding agent.[392] Assuming, in such a case that the freight forwarder himself never takes delivery of the goods but only instructs a carrier to take delivery of the

390 See *U. Huber/Widmer*, in: Schlechtriem/Schwenzer, Commentary, Art. 31 para. 23.

391 See Incoterms 2000, preamble to FCA contract.

392 In Jones v European Express ((1921) 90 L.J. 159) Rowlatt J. described forwarding agents as persons: "willing to forward goods for you … to the uttermost ends of the world. They do not undertake to carry you, and they are not undertaking to do it either themselves or by their agent. They are simply undertaking to get somebody to do the work, and as long as they exercise reasonable care in choosing the person to do the work they have performed their contract."

goods and transport them to the buyer, the seller performs his delivery obligation by handing the goods over to that carrier.[393]

Secondly, a freight forwarder may agree to act as both a carrier and forwarding agent such that, at least for the stage of the transport operation during which he acts as carrier, he assumes the liability of one. Handing over to such a freight forwarder[394], whether or not he would be classified as a carrier under the applicable law, constitutes delivery within Art. 31 lit. (a) CISG, provided of course that he is the "first" carrier.[395]

The third type of freight forwarding contracts concerns the situation where a seller transports the goods to a freight forwarder and hands them over to him with instructions to arrange for onward transportation. In such a case, the freight forwarder may not undertake responsibility as principal for any movement of the goods, though he may undertake responsibility with regard to their storage and to procure a contract of carriage on behalf of (as agent for) the seller.[396] Under the definition proposed above, the freight forwarder in that scenario is not a carrier because he has not undertaken to arrange the procurement of the contract of carriage as principal. But, it might be argued to the contrary, that a seller who hands the goods over to such an independent undertaking for transmission to the buyer, has done what is required of him in order for the goods to reach the buyer.[397] However, while such a solution has the merit of avoiding the necessity of drawing subtle distinctions based on the law of carriage of goods, it must be admitted that a definition of carrier that includes a person who undertakes to procure, as agent for the seller, a contract of carriage for transmission of the goods to the buyer would be much wider than definitions of carrier found in other conventions[398] and

393 See *U. Huber/Widmer*, *in:* Schlechtriem/Schwenzer, Commentary, Art. 31 para. 26.

394 Or to an independent carrier acting on his instructions.

395 See *U. Huber/Widmer*, in: Schlechtriem/Schwenzer, Commentary, Art. 31 para. 27.

396 See for more detail *Ramberg*, Unification of the Law of International Freight Forwarding, Uniform Law Review (ULR) 1998, 5.

397 See *U. Huber/Widmer*, in: Schlechtriem/Schwenzer, Commentary, Art. 31 para. 28.

398 The United Nations Convention on the Carriage of Goods by Sea, 1978 (The Hamburg Rules) defines carrier as "any person by whom or in whose name a contract of carriage of goods has been concluded with a shipper." (Art 1.1). This definition is wider than the one found in the Hague Visby Rules which is limited to the charterer or shipowner.

in the Incoterms.[399] In the author's view, therefore, the better view remains that delivery to a freight forwarder only constitutes a delivery to a first carrier if the freight forwarder undertakes responsibility as a carrier for the voyage.

dd) Consequences

Once the seller has handed the goods over to the "first carrier" for transmission to the buyer, the seller has performed his delivery obligation.[400] What is more, pursuant to Art. 67(1) first sentence CISG, any loss of, or damage to, the goods after that moment is at the risk of the buyer.[401] Thus, if as a result of a breach of the carriage contract, the goods are lost or damaged while in transit, the buyer's remedy (if any) is against the carrier and not the seller. The seller, however, remains liable for any defect in the goods which existed at the time of handing over, even if that defect only becomes apparent at a later time.

c) Delivery by placing the goods at the buyer's disposal (Art. 31 lit. (b), (c) CISG)

If the seller is not bound to deliver the goods at any other particular place and the contract of sale does not involve carriage, the place of delivery is determined by reference either to Art. 31 lit. (b) or (c) CISG. Art. 31 lit. (b) CISG will be applicable under certain specified conditions (see (aa) below); if these conditions are not met, the residual rule in Art. 31 lit. (c) CISG will apply (see (bb) below). In both cases, the seller performs his delivery obligation by placing the goods at the buyer's disposal and it is therefore for the buyer to collect the goods.

aa) Place of delivery under Art. 31 lit. (b) CISG

Art. 31 lit. (b) CISG applies to the following categories of goods.[402] First, it applies to specific goods that the parties knew, at the time of the contract,

399 Preamble to Incoterms FCA defines carrier as "any person who, in a contract of carriage undertakes to perform or to procure the performance of carriage by rail, road, sea, air, inland waterway or by a combination of such modes." The introduction to Incoterms makes clear, however, that a person undertaking to perform or to procure the performance of the carriage is a carrier only if such enterprise undertakes liability as carrier (i.e., principal) for the carriage.

400 As for the complicated issues that can arise if the goods are dispatched to the wrong place see *U. Huber/Widmer*, in: Schlechtriem/Schwenzer, Commentary, Art. 31 para. 39 et seq., 78.

401 *U. Huber/Widmer*, in: Schlechtriem/Schwenzer, Commentary, Art. 31 para. 32.

402 See *U. Huber/Widmer*, in: Schlechtriem/Schwenzer, Commentary, Art. 31 para. 46.

were at a particular place.[403] Where the contract relates to specific goods that the parties knew were at a particular place, the seller performs his delivery obligation by placing the goods at the buyer's disposal at that place. Secondly, it applies to unidentified goods to be drawn from a specific stock; if the parties knew at the time of the conclusion of the contract where the specific stock was situated, that place is the place of delivery. The third category of goods consists of those to be manufactured or produced; provided that the parties knew, at the time of conclusion of the contract, that the goods were to be manufactured at a particular place, that place is the place of delivery.

In respect of each category of goods, the parties must have known at the time the contract was made that the goods were situated at a particular place. The parties must have actual knowledge: it does not suffice if one or the other party ought to have had such knowledge but did not.[404] If the knowledge requirement is not met, Art. 31 lit. (b) CISG will not be applicable. The place of delivery will then result from Art. 31 lit. (c) CISG.

bb) Place of delivery under Art. 31 lit. (c) CISG

Art. 31 lit. (c) CISG fulfils a fall back or "residuary" role.[405] It applies where the contract does not require the goods to be delivered at any particular place (Art. 31 first sentence CISG), the contract of sale does not involve the carriage of goods (Art. 31 lit. (a) CISG) and the specific provisions of Art. 31 lit. (b) CISG are not satisfied (e.g. lack of knowledge). In such a case, the seller's obligation to deliver consists "in placing the goods at the buyer's disposal at the place where the seller had his place of business[406] at the time of conclusion of the contract."

cc) Placing the goods at the buyer's disposal

Under both Art. 31 lit. (b) and (c) CISG, the seller performs his delivery obligation by "placing the goods at the buyer's disposal" at the indicated place of delivery. In accordance with the Secretariat Commentary, it is submitted that a seller places the goods at the buyer's disposal where he "has done that

403 "Specific goods" are nowhere defined in the Convention. However, it appears from the language of Art. 31 lit. (b) CISG that in order to be specific, the goods must be agreed upon and identified at the time the contract was made: Specific goods are distinguished in Art. 31 lit. (b) CISG from "unidentified goods to be drawn from a specific stock" and goods that are "to be manufactured or produced".

404 *Secretariat Commentary*, Art. 29 para. 13; *U. Huber/Widmer*, in: Schlechtriem/Schwenzer, Commentary, Art. 31 para. 48.

405 *Secretariat Commentary*, Art. 29 para. 15.

406 For more detail on the concept of "place of business" see Art. 10 CISG.

which is necessary for the buyer to be able to take possession."[407] The seller's obligation to place the goods at the buyer's disposal does not require that he hand them over to the buyer. It is for the buyer to take possession of the goods and not for the seller to hand over possession.[408] Thus, under Art. 31 lit. (b) and (c) CISG, the loading of the goods onto the buyer's trucks is not, in the absence of a provision to the contrary, part of the seller's delivery obligations.

Where goods are stored, to the knowledge of both parties, with a third party, such as an independent warehouse keeper, the seller places the goods at the buyer's disposal when he enables the buyer to collect the goods from the warehouse. It is not part of the seller's delivery obligation to cause the goods to be handed over to the buyer by the warehouse keeper; the seller need only put the buyer in a position that he can take delivery of the goods from the warehouse keeper.[409]

Unless by the contract of sale, as a result of previous course of dealings or trade usage, the seller is obliged to hand over specific documents, the seller performs his delivery obligation by handing over to the buyer any document that enables the buyer to take delivery of the goods from the third party. Thus, the handing over to the buyer of a properly endorsed document of title (such as an order bill of lading or other document of title) will usually enable the buyer to take delivery of the goods from the warehouse keeper. Similarly, delivery to the buyer of some other document, such as a delivery order, or other instruction to the warehouse keeper may also have that effect, provided that it enables the buyer to take delivery of goods.

However, the seller does not perform his delivery obligation, if the warehouse keeper refuses to deliver the goods to the buyer. In such a case, the seller has not placed the goods at the buyer's disposal. If the warehouse keeper is willing to make delivery, but makes payment of storage costs (which under the contract of sale the buyer is not obliged to pay) a condition of taking delivery, it is disputed whether the seller has performed his delivery obligations.[410] It is submitted that this will be the case, but that he will be liable for breach

407 *Secretariat Commentary*, Art. 29 para. 16. See also (German) Oberlandesgericht Hamm 23 June 1998, CISG-Online No. 434.

408 (German) Oberlandesgericht Hamm 23 June 1998, CISG-Online No. 434.

409 See *U. Huber/Widmer*, in: Schlechtriem/Schwenzer, Commentary, Art. 31 para. 58.

410 See *U. Huber/Widmer*, in: Schlechtriem/Schwenzer, Commentary, Art. 31 para. 60 with further references.

of Art. 41 CISG because he has not delivered goods "free from any right or claim of a third party."

Art. 32(1) CISG does not by its terms apply to cases falling within Art. 31 lit. (b) and (c) CISG. Nevertheless, there may be circumstances in which a seller has to give a notice to inform the buyer that the goods are at his disposal.[411] Without such a notice, the buyer will have insufficient information to enable him to take delivery of the goods.[412] Provided such a notice has been sent in accordance with the requirements in Art. 27 CISG, the seller has performed his delivery obligation and this is the case even if notice does not arrive. However, under the relevant risk provisions (Art. 69 CISG, in particular Art. 69(2) CISG) the risk of loss of the goods as a rule only passes to the buyer when he is *aware* that the goods are placed at his disposal. Thus, if the notice to the buyer is lost in the post, the risk of loss of the goods remains on the seller.[413]

d) Sale of goods in transit

In international trade, it is not uncommon for goods to be sold while they are in transit. Such contracts fall into one of two categories. First, goods may be sold in transit on particular delivery terms such as CIF or ex ship. In these cases the substance of the delivery obligation and the place of delivery are determined by the terms of the contract so that there is no need for the residual rules in Art. 31 CISG to apply.[414] The second category consists of contracts for the sale of goods already afloat either on a named or an unnamed ship, but without any provision as to the place of delivery.[415]

It is submitted that in relation to sales of goods in transit, the provisions of Art. 31 CISG are not directly applicable as such contracts – in the words of Huber and Widmer – "constitute a special agreement as to the place of delivery and the content of the delivery obligation which excludes the application of Art. 31".[416] It is possible, however, to derive from Art. 31 lit. (b) and (c) CISG a general principle (Art. 7 CISG) to the effect that delivery is made when the seller places the goods at the buyer's disposal.[417]

411 *U. Huber/Widmer*, in: Schlechtriem/Schwenzer, Commentary, Art. 31 para. 51; *Secretariat Commentary*, Art. 29 para. 16; *Lando*, in: Bianca/Bonell, Art. 31 para. 2.7.

412 In the *Secretariat Commentary*, Art. 29 para. 16, it was said that goods would normally only be placed at the buyer's disposal where, inter alia, the seller had given 'such notification to the buyer as would be necessary to enable him to take possession.'

413 See *U. Huber/Widmer*, in: Schlechtriem/Schwenzer, Commentary, Art. 31 para. 51.

414 Above p. 106.

415 A sale of goods afloat on a *named* ship is now a "rare phenomenon"; Eurico SpA v Phillip Brothers (The Epaphus) [1986] 2 Lloyd's Rep 387, at 387, [1987] 2 Lloyd's Rep 215, at 222, *per* Croom Johnson LJ.

5. Associated duties

a) Duty to give notice to the buyer of the consignment

Art. 32(1) CISG provides that where delivery is made by handing the goods over to the carrier and where the goods are not clearly identified to the contract[418], the seller must give the buyer notice of the consignment specifying the goods. The purpose of the rule is to prevent the seller appropriating goods that he knows to have been lost or damaged to the contract and to enable the buyer to take the necessary steps to be ready to receive the goods.[419]

Art. 32(1) CISG only applies to cases where delivery is made by handing the goods over to a carrier, i.e. cases which fall under Art. 31 lit. (a) CISG or where there is a contractual agreement to that effect. The provision does not include contracts that fall within Art. 31 lit. (b) or (c) CISG (because under neither provision does the seller perform his delivery obligation by delivering the goods to a carrier). Nor, does it apply to those contracts under which the seller is obliged to deliver to the buyer at another place (Art. 31 first sentence CISG).[420]

In order to comply with Art. 32(1) CISG, the seller must give the buyer a notice of the consignment specifying the goods. This does not require that the seller send a separate communication to the buyer specifying the goods; the obligation could, for example, be performed if the seller sent to the buyer a transport document naming the buyer as consignee[421]. However, a simple

416 *U. Huber/Widmer*, in: Schlechtriem/Schwenzer, Commentary, Art. 31 para. 79. But see for a different view *Secretariat Commentary*, Art. 29 para. 12.

417 *U. Huber/Widmer*, in: Schlechtriem/Schwenzer, Commentary, Art. 31 para. 79; *Lando*, in: Bianca/Bonell, Commentary, Art. 31 para. 2.6.2.

418 As to the question if the goods are sufficiently identified see *U. Huber/Widmer*, in: Schlechtriem/Schwenzer, Commentary, Art. 32 para. 3 et seq.

419 See *U. Huber/Widmer*, in: Schlechtriem/Schwenzer, Commentary, Art. 32 para. 1.

420 *U. Huber/Widmer*, in: Schlechtriem/Schwenzer, Commentary, Art. 32 para. 1 et seq.

421 *Honnold*, para. 213.

communication to the effect that the buyer's goods are to be found on a particular ship may also be sufficient to satisfy the obligation.[422]

A failure by the seller to give notice to the buyer identifying the goods to the contract will prevent the passing of risk under Art. 67(2) CISG. Further, the seller will also thereby commit a breach of contract which entitles the buyer to the remedies under Art. 45 et seq. CISG (if their requirements are met). The buyer may in particular be entitled to damages to compensate him for any losses he sustains as a result. For example, a failure to give such a notice may mean that the buyer is unable to make the necessary arrangements to take delivery of the goods.[423]

b) Conclusion of contract of carriage

According to Art. 32(2) CISG, when the seller is bound to arrange for carriage of the goods[424], he must make such contracts as are necessary for carriage to the place fixed by means of transportation appropriate in the circumstances and according to the usual terms for such transportation.

The means of transportation contracted for should be "appropriate in the circumstances".[425] In particular, the seller must ensure that the type of transportation contracted for is appropriate to carry the contract goods. Thus, for example, if the contract goods are such that they require to be refrigerated during transit, the seller must make a contract for carriage by means of transportation that possesses refrigeration facilities. Similarly, where goods are likely to deteriorate if carried on deck, the seller must make a contract for carriage under deck.

422 See in more detail U. *Huber/Widmer*, in: Schlechtriem/Schwenzer, Commentary, Art. 31 para. 5 et seq.

423 U. *Huber/Widmer*, in: Schlechtriem/Schwenzer, Commentary, Art. 31 para. 11; *Honnold*, para. 213. A notice of nomination may be important in, for example, the oil business, to enable the buyer to make the necessary berthing and discharging arrangements, see *Benjamin's* Sale of Goods, para. 19-017.

424 A contract under which the seller is to arrange for the carriage of goods includes not only those under which the seller merely agrees to arrange transportation and hand the goods over to a carrier (e.g., those contracts that fall within Art. 31 lit. (a) CISG), but also those under which the seller is to arrange for the carriage of goods from a particular place; U. *Huber/Widmer*, in: Schlechtriem/Schwenzer, Commentary, Art. 31 para. 15. That the seller contracts, in addition to arranging the carriage contract, to pay the cost of carriage is immaterial. Thus, contracts made on CIF, CPT and CFR terms should fall within the provision.

425 See for instance (Swiss) Bezirksgericht Saane 20 February 1997, CISG-Online No. 426.

The contract concluded must be on the usual terms for such transportation. What are the usual terms has to be assessed by reference to, inter alia, the type of goods carried, the means of transportation employed and any applicable trade usages or practices. Thus, terms usual for the carriage of cereals may be different to those usual in respect of the carriage of oil. It is suggested that the English cases on CIF contracts[426] may provide a useful indication as to what matters may be relevant to the question whether the seller has concluded a contract on the usual terms. Thus, the seller's obligation to contract on the usual terms is likely to require consideration of issues such as the route to be followed[427], the liability[428] of the carrier, the price of the carriage, whether transhipment is permitted and whether deviation is permitted.[429]

c) Insurance of the goods:

According to Art. 32(3) CISG where the seller is not bound to effect insurance in respect of the carriage, the seller is obliged to provide the buyer with such information as he needs to enable him to effect insurance. The sort of information that is likely to be required may include: details of the goods shipped; the date of shipment; the name of the vessel or means of transportation by which they were shipped; and, the name of the carrier. The obligation only arises in respect of contracts of sale under which the seller does not have an obligation to insure. Further, the seller is only obliged to give the necessary information if requested to do so by the buyer. If no such request is made, the seller need not provide any information. Where the buyer has all the necessary information to enable him to effect insurance, it is suggested

426 Under a CIF contract, it is for the seller to arrange transportation for the benefit of the buyer. The English courts have in a series of cases clarified what, in the absence of express provisions in the contract, the seller's obligations are in respect to the type of contract that must be concluded (see *Benjamin's* Sale of Goods, 19-024–19-039). As the essential obligation imposed in English law is to arrange a contract on terms usual in the trade, the decisions of the English courts on that question may be helpful to courts addressing what is essentially the same question under the Convention.

427 In the absence of an express provision the seller must conclude a contract for the carriage by the *usual route*, which need not be the most direct one. See Tsakiroglou & Co. v Noblee Thorl GmbH [1962] A.C. 93.

428 The seller must also arrange a contract of carriage under which one or more carriers undertake responsibility for the whole of the carriage. See Hansson v Hamel & Horley Ltd. [1922] A.C. 36.

429 See U. *Huber/Widmer*, in: Schlechtriem/Schwenzer, Commentary, Art. 32 para. 19.

that the seller would not be in breach of Art. 32(3) CISG if he failed to respond to a request for such information.[430]

Because of the importance of information requested and the consequences that may arise if goods are uninsured, it is important for the seller to respond quickly. Thus, where the buyer makes the necessary request, the seller must, if he has the information, respond without delay.[431]

A failure by the buyer to respond to a request for information or to give sufficient information amounts to a breach of contract for which the seller is liable under Art. 45 et seq. CISG.[432]

6. Time of delivery

According to Art. 33 CISG the seller must deliver the goods:
- if a date is fixed by or determinable from the contract, on that date;
- if a period of time is fixed by or determinable from the contract, at any time within that period unless circumstances indicate that the buyer is to choose a date; or
- in any other case, within a reasonable time after the conclusion of the contract.

a) Date for delivery fixed by or determinable from the contract (Art. 33 lit. (a) CISG)

Art. 33 lit. (a) CISG simply repeats what would result from the principle of party autonomy anyway. The date may be *fixed* by reference to a calendar date (e.g., 1 January 2006). However, that is not necessary. Thus, a date is fixed if it can be determined by reference to the occurrence of an event that is certain to happen (e.g., 10 days after Easter 2006[433]). A date is *determinable* from the contract if the language used by the parties makes it possible to determine a date by recourse to external evidence. Thus, a provision requiring delivery to be made 10 days after completion of a specified stage in the construction of the goods, would make the date determinable. Similarly, a date of delivery fixed by reference to when a named ship reaches a named port would be determinable, notwithstanding the fact that the ship might never reach the port.[434] However, provisions requiring that the seller should deliver, "as soon as possible" or "promptly", would not fall within Art. 33 lit. (a) CISG because it is impossible to determine a date with any certainty from the contract.[435]

If a date has been fixed by the contract or is determinable from it, delivery must be made precisely on that date.[436] The buyer is not obliged to take delivery of goods delivered before the date on which delivery is due (Art. 52 CISG).

b) Period of time fixed or determinable from the contract (Art. 33 lit. (b) CISG)

According to Art. 33 lit. (b) CISG, if the contract provides that the seller must deliver within a period of time fixed by or determinable from the contract, the seller can deliver at any time within that period unless the circumstances indicate that the buyer is to choose a date. In principle therefore, it is for the seller to choose when during the period he wishes to deliver.[437] Thus, if the seller delivered all the goods on the first or last day of a delivery period the buyer could not refuse to take delivery.

Art. 33 lit. (b) CISG, however, also states that the circumstances may indicate that the buyer is to choose a date;[438] where that is the case, the buyer may require the seller to deliver on any date during the specified period. However, such a conclusion should not be lightly drawn. In the author's opinion, in the

430 See the English case of Wimble, Sons & Co. v Rosenberg & Sons [1913] 3 K.B. 743.

431 See *U. Huber/Widmer*, in: Schlechtriem/Schwenzer, Commentary, Art. 32 para. 31.

432 *U. Huber/Widmer*, in: Schlechtriem/Schwenzer, Commentary, Art. 31 para. 30; *Lando*, in: Bianca/Bonell, Commentary, Art. 32 para. 2.4.

433 cf. *U. Huber/Widmer*, in: Schlechtriem/Schwenzer, Commentary, Art. 33, para. 7, who argue that, "in case of doubt [such a provision should be understood] as meaning not that delivery must be made *precisely* on the tenth day but *at the latest* by the tenth day; it is not a 'date' falling within Art. 33 lit. (a) CISG, but a 'period of time' falling under Art. 33 lit. (b) CISG."

434 A provision that the date of delivery is to be fixed by a third party would make the date determinable; as would a provision that delivery is to be made when the seller chooses or when the buyer requests delivery.

435 *U. Huber/Widmer*, in: Schlechtriem/Schwenzer, Commentary, Art. 33 para. 7.

436 (Italian) Corte di Apello Milano 20 March 1998, CISG-Online No. 348. See also the *Secretariat Commentary*, Art. 31 para. 3.

437 *U. Huber/Widmer*, in: Schlechtriem/Schwenzer, Commentary, Art. 33 para. 9. See also Arbitral Award, ICC 9117, CISG-Online No. 777. Note, however, (German) Amtsgericht Oldenburg 24 April 1990, CISG-Online No. 20 in which it was held that provision for delivery "July, August, September + -" meant that one third of the shipment was to be delivered during each of the aforementioned months.

438 For an example of a case where this was the position, see (German) Oberlandesgericht Hamm 23 June 1998, CISG-Online No. 434.

absence of an express term giving the buyer the right to choose the date of delivery[439], it will be rare that the circumstances will indicate that the buyer has the right to choose.[440] If the buyer wants to have the option to choose a date for delivery during a specified period, he should stipulate for it and if he fails to do so, a court should not readily treat the general rule as having been displaced. The mere fact that delivery is effected by placing the goods at the buyer's disposal (e.g., under Art. 31 lit. (b) and (c) CISG) so that it is for the buyer to collect the goods, is not, of itself, enough to indicate that the buyer has the right to choose a date. For example, if S agrees to sell a machine, delivery period August/September, the fact that it is for the buyer to collect the machine does not mean that the seller cannot deliver the goods on 30 September and that the buyer can insist that the seller delivers the goods on 1 August. Such an interpretation would wholly defeat the purpose of specifying a delivery period.

Where the contract provides a period during which delivery is to be made but the buyer is to choose the delivery date, the seller will normally need notice of that date in time to prepare the goods for shipment and, if he is obliged by the contract to do so, to make the necessary contract of carriage. In many contracts, there will be an express provision requiring the buyer to give the seller a specified number of days notice.[441] In the absence of an express provision to that effect,[442] the buyer must give the seller a reasonable period of time.[443]

439 Where the parties have contracted by reference to certain trade terms, the right to choose the date of delivery may be placed on the buyer: E.g., clause B7 of FOB Incoterms provides that the buyer must "give the seller sufficient notice of the vessel name, loading port and *required delivery time*". See also contracts concluded on Incoterms FCA and f.a.s. terms (clause B7). It is not invariably the case in these types of contract that the buyer has the choice as to the date of delivery; the contract may expressly or by implication give the seller the right to choose at what point in the shipment period the goods are to be shipped. See, for example, the English case of Harlow and Jones Ltd. v Panex (International) Ltd. [1967] 2 Lloyd's Rep. 509. In that case a contract for the sale of 10,000 tons of iron on FOB terms provided for shipment "during August/September 1966, at the ... suppliers' option". So too, the buyer's option as to the date of delivery may be qualified in the sense that it is subject to the approval of some third party.

440 *UNCITRAL Digest*, Art. 33 para. 6, and *U. Huber/Widmer*, in: Schlechtriem/Schwenzer, Commentary, Art. 31 para. 10 also take a restrictive view.

441 "Buyer shall give at least 15 days pre-advice of readiness of steamer."

c) No time fixed for delivery (Art. 33 lit. (c) CISG)

Art. 33 lit. (c) CISG requires the seller, "*in any other case*" to deliver within a reasonable period of time after the conclusion of the contract. Notwithstanding the words "in any other case", there may be circumstances where a provision in the contract as to the time of delivery does not fall within Art. 33 lit. (a) or (b) CISG, yet also does not fall within Art. 33 lit. (c) CISG. For example, provisions requiring the seller to deliver "promptly", "as soon as possible" or "immediately" probably do not fall within either Art. 33 lit. (a) or (b) CISG[444] as they express an intention that delivery should be made sooner than within a reasonable period of time after conclusion of the contract. Such terms should, it is argued, be treated as derogating from the provisions of Art. 33 CISG and should be interpreted in such a way as to give effect to the parties' intentions.

The seller must deliver "within a reasonable time after the conclusion of the contract." What is a reasonable period of time is a question of fact to be determined by taking account of all the relevant circumstances of the case and by weighing the interests of both parties without giving preference to the seller's interests.[445] The following circumstances may be relevant to the issue of what is a reasonable period of time: the nature of the goods sold; whether the goods are to be manufactured or are already in stock; the purpose for

442 Note that the contract may require the seller to have the goods ready for collection throughout the shipment period; Compagnie Comerciale Sucres et Denrees v C.Czarnikow Ltd. (The Naxos) [1990] 1 W.L.R. 1337, noted by Trietel [1991] L.M.C.L.Q. 147. The case involved an FOB contract for the sale of sugar under which the time of shipment was at the buyer's option. The contract required the buyers to give 14 days notice of the ship's expected readiness to load. It further entitled the buyers on giving such notice to call for delivery of the sugar "between the first and last days inclusive of the contract period" and required the sellers to have the "sugar ready *at any time*" within the contract period. The House of Lords held that the combined effect of these provisions was that the seller was obliged to have the goods ready immediately on the ship presenting it for loading.

443 See *U. Huber/Widmer*, in: Schlechtriem/Schwenzer, Commentary, Art. 33 para. 10.

444 In none of the cases is it possible to ascertain a definite date on which delivery must be made.

445 See *U. Huber/Widmer*, in: Schlechtriem/Schwenzer, Commentary, Art. 33 para. 16.

which the buyer requires the goods; whether the seller has to acquire the goods from his supplier.[446]

Where Art. 33 lit. (c) CISG applies, the seller is not usually bound to deliver on any specific date; he performs the obligation of timely delivery, if he delivers at any time after the conclusion of the contract but before the expiration of a reasonable period of time. In other words, in the usual case Art. 33 lit. (c) CISG allows the seller a period of time within which he may deliver and still comply with the obligation of timely delivery.[447]

III. The seller's obligation to hand over documents

1. General rules

Contracts for the international sale of goods frequently make provision for the tender of documents.[448] The tender of such documents is often a condition of obtaining payment.[449] Thus, for example, where the parties contract on CIF Incoterms, the seller must hand over to the buyer, usually as a condition of obtaining payment, an insurance policy or other evidence of insurance cover,[450] the usual transport document (e.g., a negotiable bill of lading),[451] and an invoice.[452]

Where an obligation to tender documents arises it generally constitutes an independent obligation separate from the seller's obligation to deliver the goods.[453] If the seller is not to be in breach of contract, he must perform both

446 For examples of cases where courts have considered what amounts to a reasonable time see (Swiss) Tribunal Cantonal Valais 28 October 1997, CISG-Online No. 328; (Spanish) Audiencia Provincial Barcelona 20 June 1997, CISG-Online No. 338; (German) Oberlandesgericht Naumburg 27 April 1999, CISG-Online No. 512.

447 See *U. Huber/Widmer*, in: Schlechtriem/Schwenzer, Commentary, Art. 33 para. 18.

448 See, for example, CIF and CFR Incoterms 2000.

449 Art. 58(1) CISG allows the seller to make the payment of the price a condition for handing over the "goods or *documents*".

450 Clause A3(b).

451 Clause A8.

452 Clause A1.

453 Art. 30 CISG requires the seller to "deliver the goods [and] hand over any documents relating to them." The Convention thus recognises that the contract may impose separate obligations in relation to the documents and the goods on the seller. The *Secretariat Commentary*, Art. 32 para. 34 makes this clear; "Art. 32 CISG deals with the *second* obligation of the seller described in Art. 28 (30), i.e., to hand over to the buyer any documents relating to the goods." (emphasis added).

documentary obligations and the "physical" obligations in relation to the goods.

The first sentence of Art. 34 CISG states that which would in any event be the position namely, that if the seller is obliged to hand over documents relating to the goods, he must do so "at the time and place and in the form required by the contract." Unlike the position with respect to the goods, the Convention lays down no "fall back" provisions relating to the time, place and form of delivery. Further, not only does it not define "documents relating to the goods", it does not list which documents the seller must, in the absence of any provision to the contrary, hand over to the buyer. Thus, to determine the seller's documentary obligations, a court must look to the contract,[454] previous course of dealings or trade usages (Art. 9 CISG).

Because Art. 34 CISG merely states, in essence, that the seller must perform such documentary obligations as he undertook, there is no practical need to precisely define the meaning of the phrase "documents relating to the goods" which Art. 34 CISG uses.[455] Distinguishing such documents from documents that the seller must tender but which do not relate to the goods becomes unnecessary because with respect to both types of documents the seller must comply with such obligations as he undertook. No additional obligations are imposed by Art. 34 CISG with respect to documents which relate to the goods that are not imposed with respect to documents that do not relate to the goods.

Examples of documents that the seller may have to tender under the contract are: bills of lading or other documents which by law or trade usage give the possessor of the document a right to have the goods delivered to him; notices or declarations of appropriation or shipment[456]; certificates and policies of insurance; commercial and consular invoices; certificates of origin, quality, quantity, weight and phyto-sanitary health; export and import licenses.

454 Interpreted in accordance with Art. 8 CISG. See also Arbitral Award ICC 7645, CISG-Online No. 844.

455 See also *U. Huber/Widmer*, in: *Schlechtriem/Schwenzer*, Commentary, Art. 34 para. 1.

456 These will usually be made the subject of a separate obligation by the contract and will usually be tendered before the "shipping" documents must be tendered.

However, as was stated above, what must be delivered in any particular case depends upon the terms of the contract, previous course of dealings and trade usage.[457]

2. Details

a) Time

The time at which any documents relating to the goods must be handed over is frequently made the subject of an express provision in the contract. What is more, an obligation to deliver by a particular time may be implied from the circumstances, for instance from the payment terms.[458] Similarly, if the seller's obligation to deliver consists in placing the goods at the buyer's disposal on a particular date, the necessary documents should be tendered in sufficient time to enable the buyer to take delivery of the goods on that date.[459]

Where neither the contract nor such circumstances indicate the time by which the documents must be handed over, it is submitted that the seller must take steps to hand them over "as soon as possible"[460] after the goods have been shipped, or (in the case of goods sold afloat) after the seller has "destined the cargo to the particular vendee or consignee."[461]

b) Place

Where there is an express provision as to the place of handing over of the documents, the seller must hand the documents over at that place. If there

457 Note that even where parties contract by reference to one of the Incoterms which requires tender of documents, they may agree that additional documents are required. Where this is the case a failure to tender the additional documents amounts to a breach of contract. See Arbitral Award, ICC 7645, CISG-Online No. 844.

458 Where for instance there is a term requiring payment against documents on a particular date that day may be the day on which the documents must be tendered; see for English law Toepfer v Lenersan Poortman N.V. [1980] 1 Lloyd's Rep. 143. See also *U. Huber/Widmer*, in: Schlechtriem/Schwenzer, Commentary, Art. 34 para. 2.

459 *U. Huber/Widmer*, in: Schlechtriem/Schwenzer, Commentary, Art. 34 para. 2.

460 This is the position under both English law (C. Sharpe & Co. Ltd. v Nosawa [1917] 2 K.B. 814) and under the Uniform Commercial Code (UCC s.2-320(2)(e) requires that documents be tendered with "commercial promptness"). Comment 11 says that this phrase "expresses a more urgent need for action than that suggested by the phrase 'reasonable time'."

461 Sanders Bros. v Mclean Co. (1883) 11 Q.B.D. 327.

has been no specific agreement on a place of delivery, it may nevertheless be possible to identify one from the circumstances, for instance by reference to the contractually agreed method of payment.[462] Thus, if payment is to be made by documentary credit through a bank in the seller's country, the place of handing over is likely to be the premises of the bank.

It is submitted that as a residual rule the seller should be obliged to send the documents to the buyer at his own (the seller's) cost and risk, irrespective of where the corresponding obligation in regard of the goods has to be performed. Although, presumptively, it is for the buyer to collect the goods and not for the seller to dispatch them it is likely to be rare that a court would hold that the buyer must collect the documents from the seller's place of business. In the usual case, therefore, the place of delivery of the documents will be the buyer's place of business.

c) Cure

If the seller has handed over documents before the relevant time, he may, up to that time cure any lack of conformity in the documents, if the exercise of this right does not cause the buyer unreasonable inconvenience or unreasonable expense (Art. 34 second sentence CISG). The buyer retains, however, any right to claim damages as provided for in the Convention (Art. 34 third sentence CISG).

IV. Transfer of property

According to Art. 30 CISG the seller has to transfer the property in the goods to the buyer. It should be noted, however, that the question whether that transfer has actually been made, is not governed by the CISG. Art. 4 lit. (b) CISG states that the Convention is not concerned with the effect the contract may have on the property in the goods sold. Thus, issues concerned with the transfer of property in the goods or the possibility of acquiring property notwithstanding that the seller is not the owner of the goods are governed by the law applicable pursuant to the private international law of the forum (in many cases therefore by the "lex situs").[463]

462 *U. Huber/Widmer*, in: Schlechtriem/Schwenzer, Commentary, Art. 34 para. 3.

463 See *U. Huber/Widmer*, in: Schlechtriem/Schwenzer, Commentary, Art. 30 para. 7; *Lando*, in: Bianca/Bonell, Commentary, Art. 30 para. 2.2.

§ 6. Conformity of the goods

I. General outline

Art. 35-37 CISG provide that the seller must deliver goods which are in conformity with the contract. The first paragraph of Art. 35 CISG emphasises that it is conformity with the *contractual* provisions as to quantity, quality and description that is required.[464] However, Art. 35(2) CISG sets a series of graduated obligations, that apply unless otherwise agreed, with which the goods must comply if they are to be conforming. Art. 36 CISG sets out the time at which the goods must conform and also provides rules for dealing with the distinction between a lack of conformity of the goods for which the seller is liable and losses or deterioration as risks which fall on the buyer. Art. 37 CISG gives the seller who has delivered goods before the date for delivery the right to cure a non-conformity unless this would cause the buyer unreasonable inconvenience or expense.

If the seller breaches his obligation to deliver conforming goods under Art. 35 et seq. CISG, the buyer will be entitled to resort to the ordinary system of remedies as provided for in Art. 45 et seq. CISG; there is no specific set of remedies which would only apply to cases of non-conformity. There are, however, certain particularities which will only apply if the seller's breach is that he delivered non-conforming goods. Of these the most important points are, first, that a buyer who wishes to bring a claim must comply with the examination and notice requirements as provided for in Art. 38-40 and 44 CISG. Secondly, a buyer may be precluded from relying on any non-conformity by virtue of Art. 35(3) CISG if at the time of the conclusion of the contract he knew or could not have been unaware of the non-conformity. Thirdly, there are certain remedies in Art. 45 et seq. CISG which are only available to the buyer in cases of non-conformity (e.g. Art. 46(2),(3), Art. 50 CISG).

II. Contractual conformity requirements (Art. 35(1) CISG)

The seller's essential obligation under Art. 35(1) CISG is to deliver goods that conform to the *contract* with respect to quantity, quality, description and

[464] *Secretariat Commentary*, Art. 33 para. 35.

packaging. In ascertaining, for the purposes of Art. 35(1) CISG, what the contract – expressly or impliedly[465] – requires so far as the particular quantity, quality, description, or packaging is concerned, one must refer to the general rules for determining the content of the parties' agreement (Art. 8 and 9 CISG).[466] What is more, trade usages will have to be taken into account.[467]

1. Contractual quantity

The seller must deliver to the buyer the exact quantity of goods stipulated in the contract of sale. A failure to deliver the exact quantity, whether more or less than the stipulated amount, constitutes a breach of contract under Art. 35(1) CISG.[468]

Parties to international sales frequently state the quantity of goods to be delivered as an approximate amount, leaving a margin as to the exact quantity to be delivered by using words such as "more or less", "not less than" or "about". By such a stipulation, the seller gains some latitude as to the amount he can deliver and still fulfil his obligation under Art. 35 CISG.[469] For example, if the parties agreed that the seller should deliver 1000 tonnes of wheat

[465] Note that in (German) Bundesgerichtshof 8 March 1995, CISG-Online No. 144, the German Supreme Court found on the facts that the seller had not impliedly agreed to comply with recommended (but not legally mandatory) domestic standards for cadmium in shellfish existing in the buyer's country. The court reasoned that the mere fact the seller was to deliver the shellfish to a storage facility located in the buyer's country did not constitute an implied agreement under Art. 35(1) CISG to meet the standards for resaleability in the buyer's country or to comply with public law provisions of the buyer's country governing resaleability.

[466] See (Swiss) Bundesgericht 22 December 2000, CISG-Online No. 628.

[467] See (Austrian) Oberster Gerichtshof 27 February 2003, Internationales Handelsrecht (IHR) 2004, 25 = CISG-Online No. 794 where it was held that where there is a trade usage concerning certain qualities of the goods, this is the minimum requirement under Art. 35 CISG; see also infra (III).

[468] See e.g. (German) Oberlandesgericht Koblenz 31 January 1997, CISG-Online No. 256.

[469] It should be noted that in certain trades, variations in quantity would be considered normal within certain limits. Provided the seller does not deliver more or less than those tolerances, he will not be in breach of contract. In English law, the courts have refused to allow buyers to take advantage of a merely "de minimis" variation which is "not capable of influencing the mind of the buyer". Whether the position would be the same under the Convention is open to doubt. Unless there is a contractual term, previous course of dealing or trade usage allowing

"10 percent more or less", the buyer would be obliged to take delivery of any delivery between 900 and 1100 tonnes. However, in the event that the seller delivers 800 tonnes or 1200 tonnes, the buyer is entitled to resort to the remedies available to him in the case of, respectively, insufficient or excessive[470] delivery.

2. Contractual quality

So far as the seller's obligation with regard to the quality of goods is concerned, he is required to ensure that any contractual provisions relating to the quality of the goods are complied with. It is submitted that the term "quality" should be given a wide interpretation which is not restricted to the physical characteristics of the goods.[471] Thus, the fact that the delivered goods did not come from the agreed country of origin may amount to a defect in the quality of the goods.[472] That the goods delivered are of a similar but different quality or even that they are of a higher quality does not mean that there is not a breach of contract;[473] it will be a different matter, of course, whether this breach is fundamental in the sense of Art. 25 CISG thus enabling the buyer to avoid the contract under Art. 49(1) lit. (a) CISG or to claim substitute delivery under Art. 46(2) CISG.

3. Contractual description

Under Art. 35(1) CISG, any deviation from the contractual description of the goods amounts to a breach of contract There has been some debate on how to treat the delivery of a so-called "aliud", i.e. of goods which are totally different from the contractual description. The classic examples are taken from sales of specific goods. Examples of this would include cases where the buyer purchases a specific item, for example, a specified painting by Picasso, a specified used machine or the whole load of one particular ship, and the seller does not deliver the chosen object but another one, i.e. another painting by Picasso, another machine or the load of another vessel.[474] Where the contract is one for the sale of unascertained or generic goods a similar situation arises when the seller delivers a wholly different category of good, for example, if the seller contracts to sell peas and delivers beans.

variation, it is suggested that any variation including those which are merely "de minimis" amounts to a breach of contract.

470 See in particular Art. 52(2) CISG.

471 *Schwenzer*, in: Schlechtriem/Schwenzer, Commentary, Art. 35 para. 9.

472 See (German) Bundesgerichtshof 3 April 1996, CISG-Online No. 135.

473 See for instance (German) Bundesgerichtshof 8 March 1995, CISG-Online No. 144; (German) Landgericht Paderborn 25 June 1996, CISG-Online No. 226. But see also (Swiss) Handelsgericht Zürich 30 November 1998, CISG-Online No. 415.

At first sight, it may be conceivable to argue that these cases should not be treated as the delivery of non-conforming goods but as the delivery of something completely different ("aliud") and should, as a consequence, be regarded as a breach of the obligation to deliver under Art. 30 CISG[475], the result being inter alia, that the notice requirement in Art. 38 et seq. CISG would not apply. The prevailing opinion, however, regards these situations as cases of "non-conformity".[476] It is submitted that this is correct because the wording Art. 35 CISG ("description") also covers the delivery of an "aliud". Such a view has the advantage that it makes drawing the, somewhat arbitrary, distinction between merely defective goods and delivery of wholly different goods unnecessary.[477] Further, there is little injustice in imposing on the buyer the obligation to give notice of delivery of obviously different goods and to give notice of avoidance. What is more, where a seller delivers totally different goods, that delivery will almost invariably amount to a fundamental breach of contract. Thus, the remedies available for the buyer if delivery of totally different goods is treated as a "delivery" are almost the same as those available where the seller fails or refuses to deliver.

474 In principle one can also think of "aliud"-cases in sales of generic goods: The seller delivers stones instead of salt etc. However the exact line may be difficult to draw: What, for example, would be the position if the seller delivered grade C oil instead of the contractually required grade B?

475 See in that direction *Bianca*, in: Bianca/Bonell, Commentary, Art. 35 para. 2.4. It should be noted that in the author's opinion the decision of (German) Oberlandesgericht Düsseldorf 10 February 1994, CISG-Online No. 115, which is sometimes mentioned as supporting that view is not clear on that point.

476 (German) Bundesgerichtshof 3 April 1996, CISG-Online No. 135; *Schwenzer*, in: Schlechtriem/Schwenzer, Commentary, Art. 35 para. 10; *Müller-Chen*, in: Schlechtriem/Schwenzer, Commentary, Art. 46 para. 20; *Will*, in: Bianca/Bonell, Commentary, Art. 46 para. 2.1.1.1; *P. Huber*, in: Münchener Kommentar zum Bürgerlichen Gesetzbuch, Art. 46 para. 7.

477 By way of example, would the delivery of carrot or beetroot seed in performance of a contract for the sale of cabbage seed merely amount to a delivery of non-conforming goods or a complete non-delivery? (see *Atiyah*, The Sale of Goods, p. 55).

4. Packaging as required by the contract

The goods will not conform, and there will therefore be a breach under Art. 35(1) CISG, if the goods are not packaged as required by the contract. Packaging does not conform merely because it suffices to keep the goods safe: if the contract specifies a particular type of packaging, and that type is not used, there is a breach of contract.

III. Conformity with the standards set out in Art. 35(2) CISG

Art. 35(2) CISG provides that:

> "Except where the parties have agreed otherwise, the goods do not conform with the contract unless they:
> (a) are fit for the purposes for which goods of the same description would ordinarily be used;
> (b) are fit for any particular purpose expressly or impliedly made known to the seller at the time of the conclusion of the contract, except where the circumstances show that the buyer did not rely, or that it was unreasonable for him to rely, on the seller's skill and judgement;
> (c) possess the qualities of goods which the seller has held out to the buyer as a sample or model;
> (d) are contained or packaged in the manner usual for such goods or, where there is no such manner, in a manner adequate to preserve and protect the goods."

Art. 35(2) CISG thus sets out a series of obligations, similar to those found in the law of several jurisdictions[478] that apply to all sales governed by the CISG unless they are – expressly or impliedly – excluded by the contract. The provision will primarily be relevant in so far as there is no contractual conformity requirement under Art. 35(1) CISG. It is submitted that in the case of a conflict between an express contractual requirement under Art. 35(1) CISG on the one hand and one of the requirements of Art. 35(2) CISG on the other hand the former will prevail as the wording of Art. 35(2) CISG makes clear ("Except where the parties have agreed otherwise (...)").

[478] See, for example, of the Sale of Goods Act 1979 (England and Wales), sections 13, 14 and 15; Uniform Commercial Code, Section 2 – 314 (United States); Bürgerliches Gesetzbuch/BGB (Germany), § 434.

1. Fitness for ordinary purpose (Art. 35(2) lit. (a) CISG)

Under Art. 35(2) lit. (a) CISG, goods delivered under the contract are not conforming unless they are fit for the purposes for which goods of the same description would ordinarily be used. Whether or not the goods are fit for the purpose or purposes for which goods of such description are ordinarily used must be answered by reference to what a reasonable person in the same trade as the seller and buyer would think.[479]

a) Relationship to Art. 35(2) lit. (b) CISG

It is submitted that Art. 35(2) lit. (b) CISG should take priority over lit. (a) in the sense that if any specific purpose was made known to the seller under lit. (b), goods that do not meet this standard will not be in conformity of the contract even if they are fit for ordinary purposes under lit. (a). It may therefore be sensible for the court to address lit. (b) before dealing with lit. (a).

b) Average quality or reasonable quality?

There has been some disagreement[480] among scholars as to whether the fitness for the usual purposes requirement means that the goods must be of average quality.[481] The better view, it is suggested, is that goods need not necessarily be of average quality to be fit for their usual purpose(s). What "quality" is required to meet the "fitness for usual purpose(s)" standard cannot be answered in the abstract and depends in every case on a commercial judgment as to what quality a reasonable person in the position of the buyer would be entitled to expect.[482] Where goods are sold by a relatively broad description that would encompass within it several different grades or "qualities", it is submitted that, unless the buyer and seller specifically agree that the average quality is required, the seller will perform his obligation if he delivers goods of the lowest grade that are still fit for the purposes for which goods of that description are normally used.

[479] *Schwenzer*, in: Schlechtriem/Schwenzer, Commentary, Art. 35 para. 14.

[480] See *Schwenzer*, in: Schlechtriem/Schwenzer, Commentary, Art. 35 para. 15. For a detailed discussion see Arbitral Award, Netherlands Arbitration Institute, Internationales Handelsrecht (IHR) 2003, 283 = CISG-Online No. 780, para. 62 et seq.

[481] For an average quality requirement (German) Landgericht Berlin 15 September 1994, CISG-Online No. 399; *Magnus*, in: Staudinger Kommentar zum Bürgerlichen Gesetzbuch, Art. 35 para. 19; *Brunner*, Art 35 para. 8; *Herber/Czerwenka*, Art. 35 para. 4. The question whether fitness for usual purposes requirement means that the goods must be of "average" quality was left open by the (German) Bundesgerichtshof, 8 March 1995, CISG-Online No. 144.

[482] Arbitral Award, Netherlands Arbitration Institute, Internationales Handelsrecht (IHR) 2003, 283 = CISG-Online No. 780, para. 108.

The Austrian Supreme Court has held that where there is a trade usage concerning certain qualities of the goods, this is the minimum requirement under Art. 35 CISG.[483] It is submitted that this is correct, but that this will usually become relevant already under Art. 35(1) CISG as part of the contractual requirements (Art. 9 CISG) so that the issue will usually not be dealt with under the heading of Art. 35(2) lit. (a) CISG.[484]

c) Relevant standards: seller's state or buyer's state?

In several cases, the courts have made clear that goods may be fit for the purpose of resale even if they do not comply with public law standards in the buyer's country.[485] Thus, in one of the leading cases on the subject[486], the German Bundesgerichtshof held that a delivery of mussels that contained cadmium levels higher than that recommended by the buyer's country's health regulations did not breach either Art. 35(2) lit. (a) or Art. 35(1) CISG. In so concluding the court stated that:

> "a foreign seller can simply not be required to know the not easily determinable public law provisions and/or administrative practices of the country to which he exports, and … the purchaser, therefore, cannot rationally rely upon such knowledge of the seller, but rather, the buyer can be expected to have such expert knowledge of the conditions in his own country or in the place of destination, as determined by him, and, therefore, he can be expected to inform the seller accordingly."[487]

The court did note however that the standards in the importing jurisdiction would have applied if the same standards existed in the seller's jurisdiction,[488] or if the buyer had pointed out the standards to the seller and relied on the seller's expertise.[489] The court raised but did not determine the question whether the seller would be responsible for complying with public law provisions of the importing country if the seller knew or should have known of those provisions because of "special circumstances"[490] – e.g., if the seller maintained a branch in the importing country, had a long-standing business connection with the buyer, often exported into the buyer's country, or promoted its products in the importing country.[491]

It is submitted that the position of the Bundesgerichtshof is correct. The issue will, however, have to be decided on a case-by-case basis, taking into account the specific circumstances at hand. Priority should be given to the parties' intentions, either under Art. 35(1) CISG (contractual agreement) or under Art. 35(2) lit. (b) CISG (specific purpose made known to the seller).[492] If neither of these provisions is applicable, one should have reference to the surrounding circumstances.[493] The upshot of these considerations is that, unless there are specific indications to the contrary, the goods will often be compliant with Art. 35(2) lit. (a) CISG if they are fit for the ordinary use in the buyer's country *or* for the ordinary use in the seller's country. In practice it will therefore often be advisable for the buyer to make the relevant standards in his country (or in the country of use) known to the seller under lit. (b) rather than to rely on the ordinary purpose standard in lit. (a).

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483 (Austrian) Oberster Gerichtshof 27 February 2003, Internationales Handelsrecht (IHR) 2004, 25 = CISG-Online No. 794.

484 See *P. Huber*, Praxis des Internationalen Privat- und Verfahrensrechts (IPRax) 2004, 359.

485 (German) Bundesgerichtshof 8 March 1995, CISG-Online No. 144; (Austrian) Oberster Gerichtshof 13 April 2000, CISG-Online No. 576; (Austrian) Oberster Gerichtshof 27 February 2003, CISG-Online No. 794; (Austrian) Oberster Gerichtshof 25 January 2006, Internationales Handelsrecht (IHR) 2006, 110 = CISG-Online No. 1223. See for a detailed discussion *Schwenzer*, in: Schlechtriem/Schwenzer, Commentary, Art. 35 para. 17.

486 (German) Bundesgerichtshof 8 March 1995, CISG-Online No. 144.

487 Translation taken from Pace Database: http://cisgw3.law.pace.edu/cases/950308g3.html.

488 In a later case the (German) Bundesgerichtshof 2 March 2005, CISG-Online No. 999 found that products that violated standards existing in both, the seller's and the buyer's country were not in conformity with Art 35(2) lit. (a) CISG.

489 In the latter case, this would of course amount to a breach of Art. 35(2) lit. (b).

490 In a later case, an American court upheld an arbitral award finding a seller in violation of Art. 35(2) lit. (a) because it delivered medical devices that failed to meet safety regulations of the buyer's jurisdiction. The court concluded that the arbitration panel acted properly in finding that the seller should have been aware of and was bound by the buyer's country's regulations because of "special circumstances" within the meaning of the opinion of the court that rendered the aforementioned decision: U.S. District Court Louisiana 17 May 1999, CISG-Online No. 387. (Medical Marketing International v Internazionale Medico Scientifica). See also (French) Cour d'appel Grenoble 13 September 1995, CISG-Online No. 157.

491 (German) Bundesgerichtshof 8 March 1995, CISG-Online No. 144.

492 See in more detail *Schwenzer*, in: Schlechtriem/Schwenzer, Commentary, Art. 35 para. 16 et seq.

493 Where, for example, it is well known in international trade that standards in the buyer's state are very much higher than anywhere else in the world, it may be that a court should conclude that goods will not be fit for usual purpose unless they would be fit in the buyer's country.

2. Fitness for particular purpose made known to the seller

Art. 35(2) lit. (b) CISG imposes an additional requirement, applicable in narrower circumstances than Art. 35(2) lit. (a) CISG, that the goods must be fit for any particular purpose that the buyer made known to the seller at the time of the conclusion of the contract. Although there is considerable overlap between this provision and lit. (a), Art. 35(2) lit. (b) CISG provides the buyer with additional protection over and above that provided by lit. (a) where the buyer makes known to the seller the purpose for which he intends to use the goods and relies upon the seller to select goods for him that are appropriate for that purpose.[494] By way of example, if the buyer breeds especially rare and delicate birds and he informs the seller, an expert in animal feed, that he needs feed for these birds, the seller will be in breach of Art. 35(2) lit. (b) CISG if the feed harms these birds even if such feed would not have been harmful to most birds. The point is that the buyer, by making known his specific purpose (feeding rare and delicate birds), has made it clear to the seller that he is relying on him to select appropriate feed. In the circumstances he is entitled to rely on the seller's skill and judgment and the seller will be liable for the feed which harms the birds.

Two particular elements of this provision deserve further discussion. First, the provision only applies where the buyer makes known to the seller a particular purpose for which he intends to use the goods. "Particular" in this context means only "specified" and the specification can be either broad or narrow. However, the more specifically the purpose is stated the more the seller will have to do to ensure that the goods are fit for that particular purpose. It is submitted that the concept of "making known" does not require that there was an actual agreement on that particular purpose.[495] The particular purpose must of course be made known sufficiently clearly so that the seller has an opportunity to decide whether or not he wishes to take on the responsibility of selecting goods that are appropriate for the purpose for which the buyer intends to use them. As the wording of the provision indicates, this can be done either expressly or impliedly.[496] Where it is alleged that a particular purpose has been impliedly made known, it is enough that a reasonable person

494 For the relationship between the two provisions see above (1.a).

495 See *Schwenzer*, in: Schlechtriem/Schwenzer, Commentary, Art. 35 para. 20 with further references, also to the Drafting History which points in that direction.

496 A proposal by the Federal Republic of Germany to the effect that a particular purpose should only be recognised if it had been made the subject matter of the contract did not receive any support – Official Records, p. 316, No. 57 et seq.

in the position of the seller would have recognised the purpose for which the buyer intended to use the goods.[497]

The second key element to Art. 35(2) lit. (b) CISG is that of "reliance". Even where the buyer has made known a particular purpose to the seller, there will be no breach of lit. (b) if the buyer did not rely on the seller's skill and judgment to select goods fit for that purpose or it was unreasonable for him to do so. It is for the buyer to prove that he made known a particular purpose to the seller but once he has done so the seller will be liable unless he shows that the buyer did not rely or it was unreasonable for him to rely on the seller's skill and judgment.[498] Where the seller is an expert in relation to the goods which are the subject of the contract, it will be a rare case when the seller will be able to prove that the buyer either did not rely or it was unreasonable for him to rely.[499]

3. Correspondence with sample or model

Where the subject matter of the contract was agreed by reference to a sample or model, there will be a breach of Art. 35(2) lit. (c) CISG where the goods delivered do not possess the qualities that were present in that sample or model.[500] The purpose of the sample or model in such a case is to identify and describe the subject matter of the contract. Thus instead of using words to describe the goods and their qualities, such a task is performed by the sample or model.

Where the goods delivered do not possess qualities inherent in the sample that would have been apparent on a reasonable examination of a sample, there will be a breach of lit. (c).[501] More difficult, however, is the case where the goods delivered do possess qualities that would have been apparent on

497 *Schwenzer*, in: Schlechtriem/Schwenzer, Commentary, Art. 35 para. 21. Note however that under the *Secretariat Commentary* (Art. 33 para. 8) it would appear that it is the seller's actual awareness which is relevant.

498 See *Schwenzer*, in: Schlechtriem/Schwenzer, Commentary, Art. 35 para. 50; *Honnold*, para. 226.

499 *Schwenzer*, in: Schlechtriem/Schwenzer, Commentary, Art. 35 para. 23. This issue will however have to be decided on a case by case basis.

500 See for example (German) Oberlandesgericht Frankfurt 18 January 1994, CISG-Online No. 123; U.S. Court of Appeals 2nd Circuit 6 December 1995, CISG-Online No. 140 (Delchi Carrier v Rotorex).

501 See, e. g., U.S. Court of Appeals 2nd Circuit 6 December 1995, CISG-Online No. 140 (Delchi Carrier v Rotorex).

a reasonable examination of the sample but not those that could only be identified with a much more detailed examination. Though the position is not without doubt, it is suggested that in the latter case there is a breach of lit. (c) notwithstanding that the buyer may not have been aware of these hidden qualities at the time he entered into the contract. There is nothing in the CISG to suggest that the protection was intended to be limited to qualities that would only have been apparent on a reasonable examination of the sample and even where qualities were not readily apparent in the sample, the seller should be required to guarantee that the goods delivered possess in all respects the qualities of the sample whether apparent or hidden.[502]

Art. 35(2) lit. (c) CISG requires that the sample or model has been presented by the seller. Where the sample or model has been provided by the buyer rather than the seller, it has been suggested that the provision could be applied by analogy. An alternative approach, which would in most cases reach the same conclusion, would be to regard the case as one of an implicit agreement under Art. 35(1) CISG.[503]

A difficult question arises if the goods correspond with the qualities of the sample (lit. (c)) but are not fit for their ordinary use under lit. (a). The majority view is probably that lit. (c) should normally take priority over lit. (a) as lit. (c) can be regarded as some sort of parties' agreement which is generally regarded as more important than the purely objective standard in lit. (a).[504] It is suggested however that there is little justification for such an approach. Instead, in any case where the goods correspond with the sample, but are not fit for one or more usual purposes (Art. 35(2) lit. (a) CISG) it should be treated as a matter of interpretation of the contract whether the reference to the sample was meant to supersede the fitness for usual purpose requirement.[505] One of the relevant criteria for deciding the issue is whether the quality in question was easily apparent from the sample (which is an argument for superseding the contractual agreement) or not.[506] Only if it is clear that the parties understood that compliance with the model or sample inevitably meant that goods would not be fit for their usual purpose would the seller not be liable in the event that the goods were not so fit.

[502] That the qualities not present in the goods delivered were hidden or not apparent from the sample might be a relevant factor to take into account in deciding whether the breach was a fundamental one.

[503] See *Schwenzer*, in: Schlechtriem/Schwenzer, Commentary, Art. 35 para. 27; (Austrian) Oberlandesgericht Graz 9 November 1995, CISG-Online No. 308.

[504] See in that direction *Schwenzer*, in: Schlechtriem/Schwenzer, Commentary, Art. 35 para. 25; *Magnus*, in: Staudinger Kommentar zum Bürgerlichen Gesetzbuch, Art. 35 para. 37; *Bianca*, in: Bianca/Bonell, Commentary, Art. 35 para. 2.6.1.

[505] *Schwenzer*, in: Schlechtriem/Schwenzer, Commentary, Art. 35 para. 25; *Gruber*, in: Münchener Kommentar zum Bürgerlichen Gesetzbuch, Art. 35 para. 28.

4. Packaging

Art. 35(2) lit. (d) CISG reinforces the obligation placed on the seller in Art. 35(1) to contain or package the goods as required by the contract. Lit. (d) applies where the contract is silent as to the manner of packaging required and provides that the goods must be packaged or contained in the usual manner or if there is no such manner, in such manner as is adequate to preserve and protect the goods. Where goods shipped from the seller to the buyer arrive in damaged condition notwithstanding that they were shipped in apparent good order and condition, the seller may be liable for such damage even where the contract places the risk of loss or damage on the buyer during transportation. While the relevant time for assessing conformity is the time when risk passes (Art. 36(1)), and thus "prima facie" any damage arising after that point of time is for the buyer, if the damage that occurred during transport was due to inadequate packaging by the seller, this will be treated as a non-conformity which was already present when risk passed so that the requirements of Art. 36(1) CISG are met.[507] The seller will as a result be liable under Art. 35(2) lit. (d) CISG.

In determining what constitutes "usual" packaging, regard should be had to the understanding of a reasonable trader in the same trade or business as well as to any relevant trade usages.[508] When considering whether the packaging is "adequate" regard should be had to the type of goods, the means and length of any transportation, the climatic conditions likely to be encountered both during and after the transit[509] and the contractually required "shelf-life" of

[506] See *Gruber*, in: Münchener Kommentar zum Bürgerlichen Gesetzbuch, Art. 35 para. 28.

[507] See *Schwenzer*, in: Schlechtriem/Schwenzer, Commentary, Art. 35 para. 4 (with references to a differing opinion which would like to deal with these cases under Art. 36(2) CISG); *Gruber*, in: Münchener Kommentar zum Bürgerlichen Gesetzbuch, Art. 36 para. 7.

[508] See *Schwenzer*, in: Schlechtriem/Schwenzer, Commentary, Art. 35 para. 29; *Honnold*, para. 259. Regard should be had to any trade usages or practices that the parties have established between themselves – see Art. 9(2) CISG.

[509] *Schwenzer*, in: Schlechtriem/Schwenzer, Commentary, Art. 35 para. 31. See also (French) Cour de Cassation 24 September 2003 CISG-Online No. 791.

the goods. In one Mexican case before Compromex[510], it was held that a seller of canned fruit had violated Art. 35 CISG where the containers were not adequate to prevent the contents from deteriorating after shipment. The tribunal stated that, in the absence of specifications as to the quality of the goods, the seller is required under Art. 35 and 36 CISG to ship the goods with adequate canning and packaging in order to store and protect them during carriage. Without addressing the question of means and standard of proof, Compromex found that the damage suffered by the canned fruit was due to the fact that the boxes, packaging, and shipping of the cans were unsuitable to withstand maritime transportation.

IV. Exclusion of liability (Art. 35(3) CISG)

Under Art. 35(3) CISG, the seller is not liable under paragraphs (a) – (d) of Art. 35 (2) CISG "for any lack of conformity if at the time of conclusion of the contract the buyer knew or could not have been unaware of such lack of conformity." "Could not have been unaware" denotes more than mere negligence or even "gross" negligence[511] and requires something much closer to "blind eye" recklessness. [512]

The wording of the provision makes clear that it only applies to non-conformities arising under Art. 35(2) CISG, but not to those arising under Art. 35(1) CISG. There is some debate however whether Art. 35(3) CISG should be applied by analogy to non-conformities under Art. 35(1) CISG. It is submitted that this should not be done.[513] If the buyer has positive knowledge of the non-conformity when he concludes the contract, it will rather be a matter of interpretation of the contract whether the relevant qualities have been agreed upon under Art. 35(1) CISG or not.[514]

510 Arbitral Award, Compromex (Comisión pare la Protección del Comercio Exterior de Mexico), CISG-Online No. 350.

511 *Gruber*, in: Münchener Kommentar zum Bürgerlichen Gesetzbuch, Art. 35 para. 36; *Magnus*, in: Staudinger Kommentar zum Bürgerlichen Gesetzbuch, Art. 35 para. 47; *Schlechtriem*, Internationales UN-Kaufrecht, para. 143.

512 See *Honnold* para. 229; *Schwenzer*, in: Schlechtriem/Schwenzer, Commentary, Art. 35 para. 34.

513 *Schwenzer*, in: Schlechtriem/Schwenzer, Commentary, Art. 35 para. 38 (referring to the Drafting History); *Gruber*, in: Münchener Kommentar zum Bürgerlichen Gesetzbuch, Art. 35 para. 35. But see for the contrary view *Herber/Czerwenka*, Kommentar, Art. 35 para. 11.

514 *Schwenzer*, in: Schlechtriem/Schwenzer, Commentary, Art. 35 para. 38.

In terms of the way in which the buyer is likely to acquire knowledge of any lack of conformity, the buyer will either discover this from any examination of the goods he carries out before the contract is concluded or alternatively as a result of something that the seller says to him. So far as the first of these is concerned, the Convention does not impose any obligation on the buyer to examine the goods before entering into a contract.[515] However, if he does so, he will lose his right to rely on a lack of conformity in respect of any defect which he discovered or which he could not have been unaware of as a result of the inspection.[516] Thus, in one case,[517] a Swiss court held that a buyer who had tested a bulldozer before purchasing it and who had discovered a number of defects could not later complain when the bulldozer did not work. In this case, the court stated that a buyer who elects to purchase goods despite an obvious lack of conformity must accept the goods 'as is'.

Where it is alleged that the buyer is aware of defects in the goods as a result of something brought to his attention by the seller, it is suggested that the seller will bear a heavy burden of proof in proving that the buyer either knew or could not have been unaware of the defect.[518] In order to do so, it is suggested that the seller will have to show that he made known the precise nature of the defect to the seller: merely indicating that the goods have defects without specifying their detailed nature is, it is suggested, insufficient. It should be noted that in at least one case it has been held that where the seller fraudulently misrepresents the quality of the goods to be better than they are or deliberately conceals a defect, the seller may have to bear responsibility for the lack of conformity even if the buyer could not have been unaware of the non-conformity. As the court made clear: "Even a grossly negligent unknowing buyer appears to be more protection-worthy than a seller acting fraudulently. Consequently, when there is fraudulent conduct of the seller,

515 *Schwenzer*, in: Schlechtriem/Schwenzer, Commentary, Art. 35 para. 35.

516 Art. 35(3) CISG does not excuse the seller in respect of defects which a hypothetical reasonable examination would have revealed if that is not the examination that the buyer made. The buyer is only unable to rely on the lack of conformity if the examination that he carried out either revealed the defect to him or, alternatively, he could not have been unaware of the defect as a result of the examination he carried out.

517 (Swiss) Tribunal Cantonal du Valais 28 October 1997, CISG-Online No. 167.

518 The burden of proving this actual or imputed knowledge is on the seller: *Schwenzer*, in: Schlechtriem/Schwenzer, Commentary, Art. 35 para. 52; *Audit*, Vente Internationale, para. 101.

the inapplicability of Art. 35(3) CISG follows from Art. 40 in connection with Art. 7(1) CISG."[519]

V. Relevant time

1. The general rule (Art. 36(1) CISG)

Under Art. 36(1) CISG, the goods must conform, for the purposes of Art. 35 CISG, at the time when risk passes from the seller to the buyer. The time at which risk passes is either dealt with expressly by the contract, by trade usage or alternatively by Art. 66 – 70 CISG.[520] If the goods are not in conformity at that time the buyer is entitled to exercise the remedies available to him under Art. 45 CISG. However, if the goods were conforming at the time when the risk passed to him, the buyer is obliged to pay for the goods even if they subsequently deteriorate. For example, where a contract for the sale of dried mushrooms included a "C & F" clause, and the mushrooms deteriorated during shipment, one court found that the lack of conformity occurred after risk of loss had passed and the seller was therefore not responsible for it under Art. 36(1) CISG.[521]

Although it is the case that the time at which the goods must conform is the time when risk passes to the buyer, it does not follow from this that goods which only disclose their lack of conformity after this time will be treated as conforming. Indeed, Art. 36(1) CISG makes clear that the seller will be liable for a lack of conformity that existed at the time the risk passed to the buyer even where that only becomes apparent later.[522]

519 (German) Oberlandesgericht Köln 21 May 1996, CISG-Online No. 254 (translation taken from Pace Database: www.cisg.law.pace.edu).

520 *Schwenzer*, in: Schlechtriem/Schwenzer, Commentary, Art. 36 para. 3.

521 (Argentinean) Cámara Nacional de los Apelaciones en lo Comercial 31 October 1995, CISG-Online No. 299.

522 See (Swiss) Tribunale d'appello Ticino 15 January 1998, CISG-Online No. 417. See also (French) Cour d'appel Grenoble 15 May 1996, CISG-Online No. 219. For an interesting but, it is argued, wrong decision, see (Dutch) Gerechtshof Arnhem 9 February 1999, CISG-Online No. 1338, in which the court held, inter alia, that the buyer of a painting said to be by a specific artist could not recover against the seller when it was discovered that the painting could not in fact be attributed to that artist. The court stated that the seller was not liable because, under Art. 36(1) CISG, the seller was only responsible for non-conformities existing at the time risk of loss passed to the buyer, and there was no indication at that time that the artist indicated was not the painter. With due respect to the court, that there was no indication at the time of the sale that the artist indicated was not the painter is surely irrelevant. The question for the court was surely whether the painting was in fact by the artist. If it was not then the seller was in breach at the time when risk passed even if neither party was aware of the fact that the painting was not by whom they thought it was.

2. Lack of conformity after the risk has passed (Art. 36(2) CISG)

Under Art. 36(2) CISG the seller is liable for a lack of conformity which occurs after the time indicated in paragraph (1) where that lack of conformity is due to a breach of the seller's obligations including a breach of guarantee that the goods will remain conforming.

The provision is intended to deal with cases where the seller's breach which occurs prior to the passing of risk does not cause a lack of conformity to the goods at that time but instead causes a lack of conformity to arise only after the risk has passed. By way of example, if the seller is required by the terms of the sales contract to conclude a contract of carriage and he does so with an obviously incompetent carrier, damage caused to the goods by the carrier after risk has passed would appear to be the responsibility of the seller. Such a situation would not fall within Art. 36(1) CISG because no lack of conformity of the goods existed at the time risk passed to the buyer.[523] However, the seller would, as a result of Art 36(2) be liable. As mentioned above (III.4), the situation will be different where the damage to the goods that arose after risk had passed was due to the seller's breach of the packaging requirement under Art. 35(2) lit. (d) CISG: In that case it is submitted that there was already a non-conformity at the time of the passing of risk so that Art. 36(1) CISG applies.

Art. 36(2) CISG should also be applied if the seller breaches the contract after risk has passed thereby damaging the goods. By way of example if risk is stated in the contract to pass to the buyer on shipment but the seller has undertaken to unload the goods from the ship at the port of destination[524] or to recollect the containers then he would be liable under Art. 36(2) CISG for any breach in performing that obligation which causes damages to the goods.[525] Finally, under Art. 36(2) CISG the seller is also liable for a lack of conformity appearing after the passing of risk where the lack of conformity is due to the breach of a guarantee that, for a period of time, the goods will remain fit for their ordinary purpose or for some particular purpose or will retain specified qualities or characteristics. Whether this adds anything to

523 *Schwenzer*, in: Schlechtriem/Schwenzer, Commentary, Art. 36 para. 5.

524 An admittedly unlikely scenario!

525 See *Schwenzer*, in: Schlechtriem/Schwenzer, Commentary, Art. 36 para. 5.

Art. 36(1) CISG must be doubtful. By virtue of Art. 35(2) lit. (a), (b) CISG the seller is liable to ensure the fitness of the goods for a reasonable period of time.[526] Where it becomes apparent after the time when risk has passed that the goods do not satisfy the condition of durability, there will be a breach for which the seller is liable under Art. 35 and 36(1) CISG. In most cases therefore Art. 36(2) CISG will add little to Art. 36(1) CISG save perhaps in the, highly unusual, situation where the seller undertakes to indemnify the buyer against inappropriate use of the goods by the buyer or another third party.[527]

VI. Seller's right to cure before delivery date (Art. 37 CISG)

Pursuant to Art. 37 CISG, if the seller has delivered the goods before the dates for delivery, he may cure any non-conformity, provided that this does not cause the buyer unreasonable inconvenience[528] or unreasonable expense[529]. The buyer retains however any right to claim damages under the Convention; thus, the buyer can claim compensation for those losses which would not be removed by the cure, such as damage already done to other property of the buyer or the expenses which the buyer has had as a result of the cure.[530]

The provision only applies before the date for delivery. After that moment, any right to cure will have to comply with the requirements of Art. 45 et seq. CISG, in particular Art. 48 CISG.

526 *Schwenzer*, in: Schlechtriem/Schwenzer, Commentary, Art. 36 para. 7.

527 *Schwenzer*, in: Schlechtriem/Schwenzer, Commentary, Art. 36 para. 7.

528 Example: substantial interference with the buyer's business operations; *Gruber*, in: Münchener Kommentar zum Bürgerlichen Gesetzbuch, Art. 37 para. 14.

529 Example: buyer would have to make substantial advances on the costs for cure without the seller's offering adequate security for subsequent reimbursement; *Gruber*, in: Münchener Kommentar zum Bürgerlichen Gesetzbuch, Art. 37 para. 15.

530 *Schwenzer*, in: Schlechtriem/Schwenzer, Commentary, Art. 37 para. 16.

§ 7. Examination and notice requirements concerning the conformity of the goods

I. Introduction

The provisions of the Convention dealing with the requirements to examine the goods (Art. 38 CISG) and to give notice of any lack of conformity (Art. 39 CISG) caused considerable difficulty during drafting and at the debates in the Vienna Conference.[531] They have subsequently been among the most litigated provisions in the Convention.

Notwithstanding this, the provisions are relatively clear in intent. The buyer is required to examine the goods within as short a period as is practicable[532] and, in the event that the goods are non-conforming or are subject to a third party right or claim, must give notice within a reasonable period of time of discovering such lack of conformity or right or claim.[533] A failure to give such notice means that the buyer cannot rely on the lack of conformity[534] and that he therefore loses any claim he would have had, save that, under Art. 40 CISG a seller cannot rely on the provisions of Art. 39(1) CISG if he knew or could not have been unaware of the lack of conformity and did not inform the buyer of this. So too, under Art. 44 CISG, a buyer can, if he had a reasonable excuse for his failure to give notice, claim reduction of the price and damages, except for loss of profit.

531 See *Garro*, Reconciliation of Legal Traditions in the U.N. Convention on Contracts for the International Sale of Goods, (23) International Lawyer (1989), 443 (available online at http://www.cisg.law.pace.edu/cisg/text/garro11,12.html); *Schlechtriem*, Uniform Sales Law in the Decisions of the Bundesgerichtshof, in: 50 Years of the Bundesgerichtshof (available online at http://www.cisg.law.pace.edu/cisg/biblio/schlechtriem3.html); *Andersen*, Reasonable Time in Art. 39(1) CISG of the CISG – Is Art. 39(1) CISG Truly a Uniform Provision? (available online at http://www.cisg.law.pace.edu/cisg/biblio/andersen.html); *Witz*, ICC International Court of Arbitration Bulletin, Vol. 11/No. 2 (2000), 15; *Reitz*, 36 American Journal of Comparative Law (1988) 437 and (1989) 249.

532 Art. 38 CISG.

533 Art. 39 and 43 CISG.

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532 Art. 38 CISG.

533 Art. 39 and 43 CISG.

534 Art. 39 and 43 CISG.

What then was the cause of the differences of opinion at Vienna? Two main issues divided the delegates. First, significant differences exist in the domestic sales law of the participants as to both the strictness of any requirement to give notice of lack of conformity and also the effect of a failure to give notice.[535] Some states have imposed strict requirements as to both the contents and timing of the notice with any failure to comply leading to the loss of a right to complain. At the other end of the scale there are jurisdictions in which few formal requirements exist as to the giving of notice and a failure to give such notice leads only to a loss of a right to reject and not to claim damages. These differences not only affected the terms of the debates about the provisions but have also subsequently influenced the way in which courts have interpreted the provisions.[536] The second concern was raised by representatives of the developing states who felt that traders from their states might lack the technical expertise of traders from the developed world and as a result be unable to identify defects in a timely fashion.[537] These conflicts came to a head in the discussions about Art. 39 CISG with various amendments being proposed to reduce the adverse consequences for the buyer who failed to give adequate notice of non-conformity of the goods in time, including a suggestion to delete Art. 39(1) CISG entirely. Agreement was eventually reached when a new provision, Art. 44 CISG, was adopted which preserves the buyer certain remedies (price reduction and – with certain restrictions – damages) even if he failed to give notice under Art. 39(1) CISG. This, at least on its face, mitigates the harshness of the notice provisions in Art. 39 CISG and on this basis the Convention was approved. However, judging by the number of reported cases that raise issues under these provisions it is clear that they continue to cause difficulty in practice.

Art. 38 CISG and 39 CISG apply to all cases of lack of conformity under Art. 35 and also to non-conformities under contractual provisions that derogate from Art. 35.[538] Although the Convention does not by express wording impose an obligation on the buyer to examine any documents tendered by

[535] See the overview in CISG-AC Opinion No. 2 (Bergsten), Internationales Handelsrecht (IHR) 2004, 163 et seq., Comment 2. See also *Schwenzer*, in: Schlechtriem/Schwenzer, Commentary, Art 38 para. 4, Art. 39 para. 6.

[536] See CISG-AC Opinion No. 2 (*Bergsten*) Internationales Handelsrecht (IHR) 2004, 163, para. 2.

[537] See the detailed discussion in CISG-AC Opinion No. 2 (*Bergsten*) Internationales Handelsrecht (IHR) 2004, 163, para. 3.

[538] Arbitral Award, Stockholm Chamber of Commerce, CISG-Online No. 379.

the seller, it is submitted that the provisions contained in Art. 38 and Art. 39 CISG should be applied to such a situation by analogy.[539]

II. Examination of the goods (Art. 38 CISG)

1. Introduction: interrelation between examination and notice requirement

Although Art. 38(1) CISG places an obligation on the buyer to examine the goods, a failure by the buyer to examine the goods does not constitute a breach of contract or Convention giving rise to liability in damages.[540] Instead, the "obligation" to examine is relevant to the time at which the notice period in Art. 39(1) CISG begins to run: the buyer "ought to have discovered" a lack of conformity of the goods for the purposes of Art. 39 CISG when an examination under Art. 38 CISG would have revealed the non-conformity.[541] A failure to examine the goods may therefore have the serious consequence that the buyer does not discover the lack of conformity when he ought to have done so, and as a result he fails to give notice of lack of conformity thereby potentially losing all his rights relating to the lack of conformity.[542]

It follows from the above that in analysing the main purpose of Art. 38 CISG, the provision must be read together with Art. 39 CISG. Taken together, these provisions seek to enable the parties rapidly to clarify whether a delivery is in conformity with the contractual obligations. If the goods are claimed by the buyer not to be in conformity, then the notice gives the seller an opportunity either to put the defect right[543] or to prepare for any dispute

[539] *Schwenzer*, in: Schlechtriem/Schwenzer, Commentary, Art. 38 para. 7; *Honnold*, para. 256; *Magnus*, in: Staudinger Kommentar zum Bürgerlichen Gesetzbuch, Art. 34 para. 18. But see for a differing view *Gruber*, in: Münchener Kommentar zum Bürgerlichen Gesetzbuch, Art. 38 para. 14.

[540] "Although a buyer must examine the goods, or cause them to be examined, within as short a period as is practicable in the circumstances, there is no independent sanction for failure to do so". CISG-AC Opinion No 2 (Bergsten) Internationales Handelsrecht (IHR) 2004, 163, para 1.

[541] See *Schwenzer*, in: Schlechtriem/Schwenzer, Commentary, Art. 38 para. 3; *Secretariat Commentary*, Art. 36 para. 1 et seq.; *UNCITRAL Digest*, Art. 38 para 2.

[542] See, e.g., (German) Landgericht Stuttgart 31 August 1989, CISG-Online No. 11; (Swiss) Pretore della giurisdizione Locarno Campagna 27 April 1992, CISG-Online No. 68.

[543] E.g. by exercising his right to cure under Art. 48 CISG.

or negotiation with the buyer by for example collecting evidence or preparing a claim against his own supplier.[544]

2. Method of examination

By stating that the buyer "must examine the goods or *cause them to be examined*", the drafters of the Convention intended to make clear that the buyer need not himself examine the goods but he may instead procure someone else to do the examination. Thus, although the buyer may himself examine the goods, he may also engage an independent third party[545] or leave it to his customer (to whom he has resold the goods) to carry out the examination.[546] However, it seems clear that the buyer bears ultimate responsibility under Art. 38 for examinations by whomsoever they are carried out.[547] Thus if an independent third party appointed by the buyer is negligent in his examination of the goods and as a result fails to find a defect that should have been obvious to him then, as between seller and buyer, the buyer bears the responsibility for the defective examination albeit that the buyer may have a claim against the inspector.

It is quite frequent to find provisions in contracts setting out the method by which the goods shall be examined. Thus, commodity contracts typically contain detailed provisions relating to the method of examination that must be used by an independent surveyor of the goods.[548] So too, it would not be uncommon to find detailed rules relating to testing in a contract for the sale

[544] See (Austrian) Oberster Gerichtshof 27 August 1999, CISG-Online No. 485; *Schwenzer*, in Schlechtriem/Schwenzer, Commentary, Art. 38 para. 4; *Gruber*, in: Münchener Kommentar zum Bürgerlichen Gesetzbuch, Art. 38 para. 2; *Sono*, in: Bianca/Bonell, Commentary, Art. 39 para. 2.4.

[545] See, e.g., (German) Bundesgerichtshof 3 November 1999, CISG-Online No. 47 (expert appointed by buyer to examine the goods).

[546] See, e.g., (German) Oberlandesgericht Köln 22 February 1994, CISG-Online No. 127 (examination by buyer's customer, to whom the goods had been transshipped, was timely and proper); (German) Oberlandesgericht München 8 February 1995, CISG-Online No. 142 (buyer's customer should have examined goods and discovered defect sooner than it did); *Bianca*, in: Bianca/Bonell, Commentary, Art. 38 para. 2.2.

[547] (German) Oberlandesgericht München 8 February 1995, CISG-Online No. 142; *Schwenzer*, in: Schlechtriem/Schwenzer, Commentary, Art. 38 para. 10; *UNCITRAL Digest*, Art. 38 para. 9. But see for the possibility of an excuse under Art. 44 CISG below (III.6.b).

[548] See, for example, Grain and Feed Trade Association Rules, form No. 124.

of complex machinery. Where the contract contains provisions relating to examination, the method set out should be followed.

In the absence of any express provision in the contract, it may be possible to identify the appropriate method of examination by reference to trade usage or previous course of dealings.[549] Where, however, the contract is silent and there is no trade usage or previous course of dealings to fall back on, it is suggested that the examination undertaken need only be a reasonable one in all the circumstances, that is to say the examination must be one that is both "thorough and professional" but need not be either "costly or expensive".[550] What amounts to a "reasonable" examination will depend upon the circumstances of each case though it is likely that matters such as the type and nature of the goods, the quantity of the goods,[551] the relevant place of examination,[552] and any packaging in which the goods are contained[553] will be relevant to determine the type of examination that is reasonable. Where large quantities of goods are delivered in accordance with the contract, it is not always necessary that the buyer examine all the goods and a representative sampling may suffice.[554] If the goods are meant to be used in the buyer's production process, such representative sampling should include test runs.[555] However, there may be circumstances in which, notwithstanding that a very large quantity of goods has been delivered, a reasonable examination will require examination of all the delivered goods. Thus, in two cases where the

[549] See (Austrian) Oberster Gerichtshof 27 August 1999, CISG-Online No. 485; *Schwenzer*, in: Schlechtriem/Schwenzer, Commentary, Art. 38 para. 11; *UNCITRAL Digest*, Art. 38 para. 10; *Gruber*, in: Münchener Kommentar zum Bürgerlichen Gesetzbuch, Art. 38 para. 21.

[550] (Austrian) Oberster Gerichtshof 27 August 1999, CISG-Online No. 485; (German) Landgericht Paderborn, 25 June 1996, CISG-Online No. 262.

[551] It has been said in at least one case that where the size of the contract is a very large one, "experts" may be required meaning that at the very least the inspection must be carried out by someone skilled in the trade in question: (Austrian) Oberster Gerichtshof 27 August 1999, CISG-Online No. 485.

[552] Where there are no specialized inspection facilities at the contractual place of examination, this may be taken into account in determining whether any examination carried out was reasonable.

[553] *Bianca*, in: Bianca/Bonell, Commentary, Art. 38 para. 2.3.

[554] See, e.g., (German) Oberlandesgericht Koblenz 11 September 1998, CISG-Online No. 505 (buyer should have conducted a test by processing a sample of delivered plastic using its machinery). See also (German) Oberlandesgericht Saarbrücken 13 January 1993, CISG-Online No. 83. See also, (Swiss) Obergericht Luzern 8 January 1997, CISG-Online No. 228.

[555] *Schwenzer*, in: Schlechtriem/Schwenzer, Commentary, Art. 38 para. 14.

buyer had discovered a defect in an earlier shipment it was held that examination by sample was not sufficient and a reasonable examination required an examination of all the goods.[556]

3. Time period for examination

So far as the time period allowed for examination is concerned, Art. 38(1) CISG provides that the buyer must examine the goods "within as short a period as is practicable in the circumstances." It is clear from the use of these words that the drafters of the Convention intended that the buyer should act quickly. Indeed courts have stressed that the purpose of such a short period for examination is to permit prompt clarification of whether the buyer accepts the goods as conforming[557] and also to ensure that the examination is complete before the condition of the goods so changes that the opportunity to determine if the seller is responsible for a lack of conformity is lost.[558] However, even if it is accepted that the time period allowed for examination is short, two important questions arise: first, from when does the time period for examination of the goods begin to run; secondly, how long is "as short a period as is practicable in the circumstances"?

a) Starting point

So far as the first of these questions is concerned, the general rule is that the time period for examination runs from the time of delivery.[559] By way

556 (Dutch) Arrondissementsrechtbank Zwolle 5 March 1997, CISG-Online No. 545 (examination of delivery of fish by sample would not be sufficient where the buyer had ready opportunity to examine entire shipment when it was processed and buyer had discovered lack of conformity in another shipment by the seller); (German) Landgericht Stuttgart 31 August 1989, CISG-Online No. 11 (spot checking of delivery of shoes held not to have been sufficient where defects had been discovered in an earlier delivery).

557 (German) Oberlandesgericht Karlsruhe 25 June 1997, CISG-Online No. 263.

558 (German) Oberlandesgericht Köln 21 August 1997, CISG-Online No. 290 (immediate examination of chemicals required where the chemicals were going to be mixed with other substances soon after delivery); (Dutch) Arrondissementsrechtbank Zwolle 5 March 1997, CISG-Online No. 545 (examination was due quickly where shipment of fish was to be processed by the buyer, making it impossible to ascertain whether the fish were defective when sold).

559 (German) Oberlandesgericht Düsseldorf 8 January 1993, CISG-Online No. 76; (German) Oberlandesgericht Düsseldorf 10 February 1994, CISG-Online No. 116 (asserting that the period for examining the goods under Art. 38 CISG and giving notice under Art. 39 CISG begins upon delivery to the buyer); (Italian) Tribunale

of exception however, this may be delayed in the circumstances set out in Art. 38(2) and (3) CISG.

Under Art. 38(2) CISG, if the contract involves carriage of the goods, examination may be deferred until after the goods have arrived at their destination. This rule represents a sensible recognition of the fact that many international sales contracts require the seller to deliver the goods to a carrier in the seller's country for onward transmission to the buyer. In such a case, it may be impossible or at the least inconvenient for the buyer to examine the goods at the time when the seller hands the goods over to the carrier and in these circumstances Art. 38(2) CISG allows for the examination to be postponed until the goods have arrived at their destination.[560] Thus, in a CIF or FOB contract, examination will often be postponed until the goods actually arrive at their place of destination and consequently the time period for examination will not begin to run until then. It should be noted, however, that Art. 38(2) CISG is subject to the contrary agreement of the parties. Thus where a contract between a seller and a buyer provided that the goods were to be delivered "free on refrigerated truck Turkish loading berth (Torbali)" and from there to be shipped on to the buyer's country by carrier, the court found that the parties' agreement had excluded Art. 38(2) and the buyer was required to conduct the Art. 38 examination in Turkey rather than at the place of arrival, because the contract contemplated that a representative of the buyer would inspect the goods at the Turkish loading dock and the buyer was responsible for making arrangements for transporting the goods to his country.[561]

The time period for the examination of the goods may also run from a time different than the time of delivery where the goods are redirected in transit or redispatched by the buyer without an opportunity for examination by him (Art. 38(3) CISG).[562] As with the case of a contract involving carriage of goods, this provision is subject to contrary intention. The provision will also

Vigevano 12 July 2000, CISG-Online No. 493 (buyer's time for examining goods begins to run upon delivery or shortly thereafter, except where the defect can only be discovered when the goods are processed); (Swiss) Pretore della giurisdizione Locarno Campagna 27 April 1992, CISG-Online No. 68 (buyer must examine goods upon delivery).

560 This may be either the port of destination or another place of final arrival.

561 (German) Oberlandesgericht Düsseldorf 8 January 1993, CISG-Online No. 76.

562 For an example of a case in which Art. 38(3) CISG was held to postpone the beginning of the examination period see (German) Oberlandesgericht Köln 22 February 1994, CISG-Online No. 127; (German) Oberlandesgericht Stuttgart, 12 March 2001, CISG-Online 841.

not apply unless the seller, at the time of the conclusion of the contract, knew or ought to have known of the possibility of such redirection or redispatch. Where the buyer's business is as an intermediary or middleman, the seller will be presumed to know of the possibility of redirection or redispatch,[563] but every buyer intending to resell or redirect the goods would, as a general rule, be well advised to inform the seller of this fact.

b) Duration

So far as the meaning of, "as short a period as is practicable in the circumstances" is concerned, a number of points are clear. First, the standard is a flexible one and the period for examination will vary with the facts of each case.[564] This is clear from the language of the provision which states that the examination must be made within as short a period as is practicable "in the circumstances". So far as the relevant factors are concerned, the Austrian Supreme Court stated in one case that the following may be relevant: "the size of the buyer's company, the type of the goods to be examined, their complexity or perishability or their character as seasonal goods, the type of the amount in question, the efforts necessary for an examination (...)".[565] Thus, where the goods are perishable or seasonal it is likely that the buyer will be required to act especially quickly.[566] If the buyer intends to resell the goods

563 *Schwenzer*, in: Schlechtriem/Schwenzer, Commentary, Art. 38 para. 24; *Bianca*, in: Bianca/Bonell, Commentary, Art 38 para. 2.9.2; *Enderlein/Maskow*, Art 38 para. 8.

564 (Austrian) Oberster Gerichtshof 27 August 1999, CISG-Online No. 485; (Swiss) Obergericht Luzern 8 January 1997, CISG-Online No. 228; (Italian) Tribunale civile di Cuneo 31 January 1996, CISG-Online No. 268; *Schwenzer*, in: Schlechtriem/Schwenzer, Commentary, Art. 38 para. 15; *UNCITRAL Digest*, Art. 38 para. 13; *Gruber*, in: Münchener Kommentar zum Bürgerlichen Gesetzbuch, Art. 38 para. 57. It should be noted that some courts have set a presumptive period. Thus, German courts have stated that a week will usually be enough (see, e.g., (German) Oberlandesgericht Koblenz 11 September 1998, CISG-Online No. 505). While such an approach is understandable, particularly from courts in states which have a very strict time limit within which to give notice, it is suggested that such an approach is not justified by the language of the Convention, which requires an individual decision to be taken in every case, and should be rejected. See further CISG-AC Opinion No. 2 (Bergsten) Internationales Handelsrecht (IHR) 2004, 163, para. 5.

565 (Austrian) Oberster Gerichtshof 27 August 1999, CISG-Online No. 485 (translation taken from Pace Database: www.cisg.law.pace.edu).

566 (German) Oberlandesgericht Saarbrücken 3 June 1998, CISG-Online No. 354 (the court stated that, where international trade in flowers is involved, the buyer can be expected to act immediately on the day of the delivery); see also (Dutch) Arrondissementsrechtbank Zwolle 5 March 1997, CISG-Online No. 545; *Schwenzer*, in: Schlechtriem/Schwenzer, Commentary, Art. 39 para. 16.

or combine them with other goods the examination should be complete before the resale and/or combination.[567] Where the goods are particularly complex[568] or for some reason it is difficult to carry out an examination at the time or place of delivery,[569] it is suggested that a longer period will be allowed to the buyer. Also relevant may be the fact that there were defects in previous deliveries, in which case a more thorough and speedy examination may be necessary,[570] and the obviousness of the lack of conformity.[571]

In addition to factors relating to the goods, courts have also had regard to the buyer's personal and business situation.[572] It is submitted that this is correct at least so far as the seller was aware or should have been aware of this.[573] Thus, knowledge on the part of the seller that the buyer intended to resell the goods immediately would clearly be relevant to the period of examination, as would knowledge of the expertise of the buyer or his access to experts as well as any specific knowledge about the suitability of the place of examination.

567 (German) Oberlandesgericht Köln 21 August 1997, CISG-Online No. 290 (immediate examination of chemicals required where the chemicals were going to be mixed with other substances soon after delivery); see also (Dutch) Arrondissementsrechtbank Zwolle 5 March 1997, CISG-Online No. 545.

568 (German) Landgericht Düsseldorf 23 June 1994, CISG-Online No. 179.

569 (French) Cour de Cassation 26 May 1999, CISG-Online No. 487 (time for examination took into account the difficulty of handling the metal sheets involved in the sale); (Belgian) Rechtbank van Koophandel Kortrijk 6 October 1997, CISG-Online No. 532 (buyer of crude yarn did not have to examine goods until they were processed; it would be unreasonable to expect buyer to unroll the yard in order to examine it before processing).

570 (Dutch) Arrondissementsrechtbank Zwolle 5 March 1997, CISG-Online No. 545 (buyer should have examined fish before processing and selling them to his customers given that buyer had already discovered lack of conformity in a previous shipment by the seller).

571 The more obvious the lack of conformity the less time may be allowed for the examination. See, for example, (Italian) Tribunale civile di Cuneo 31 January 1996, CISG-Online No. 268 ("Where defects are easily recognizable, the time for notice will be reduced").

572 (Austrian) Oberster Gerichtshof 27 August 1999, CISG-Online No. 485.

573 See *Schwenzer*, in: Schlechtriem/Schwenzer, Commentary, Art. 38 para. 18; *Gruber*, in: Münchener Kommentar zum Bürgerlichen Gesetzbuch, Art. 38 para. 64.

III. Notice of lack of conformity (Art. 39 CISG)

1. Introduction

Art. 39 CISG names two situations in which the buyer loses his right to rely on a lack of conformity of the goods (i.e. his right to make use of the remedies provided for in Art. 45 et seq. CISG in that respect, see below 5): first, where the buyer does not give notice to the seller of the conformity within a reasonable time after he has or ought to have discovered it, Art. 39(1) CISG (see below 3); secondly, where he does not give notice at the latest within a period of two years from the date when the goods were actually handed over to the buyer (unless this would be inconsistent with a contractual period of guarantee, Art. 39(2) CISG (see below 4). There are however certain exceptions to these rules (see below 6).

Both notice requirements exist independently from one another so that the buyer will lose his right to rely on the non-conformity once one of them has not been complied with. To put it differently, the maximum period that the buyer may have for giving notice of any non-conformity is the two year-period in Art. 39(2) CISG but he may, and frequently will, have lost his rights well before then as a result of the application of Art. 39(1) CISG.

2. Requirements concerning the notice

Art. 39 CISG does not specify that a particular form of notice is required though it is of course open to the parties to reach agreement on this.[574] Notice in writing has been held to suffice and the content of a series of letters has been combined in order to satisfy the Art. 39 CISG requirement.[575] It is suggested that there is no good reason why an otherwise compliant notice of

[574] See, e.g., U.S. Court of Appeals [11th Circuit] 29 June 1998, MCC-Marble Ceramic Center v Ceramica Nuova D'Agostino, CISG-Online No. 342 (contractual clause required complaints of defects in the goods to be in writing and made by certified letter); *Gruber*, in: Münchener Kommentar zum Bürgerlichen Gesetzbuch, Art. 39 para. 21; *Schwenzer*, in: Schlechtriem/Schwenzer, Commentary, Art. 39 para. 11 et seq. Where a writing requirement has been agreed, Art. 13 CISG will apply.

[575] (French) Cour d'appel Versailles 29 January 1998, CISG-Online No. 337. See also *Flechtner*, in: Ferrari/Flechtner/Brand, The Draft UNCITRAL Digest and Beyond, p. 380. It is submitted that as a rule the use of fax and email suffices, too. For communications in electronic form see *Schwenzer*, in: Schlechtriem/Schwenzer, Commentary, Art. 39 para. 11; CISG-AC Opinion No. 1 (*Ramberg*), Internationales Handelsrecht (IHR) 2003, 244, para. 39.1.

lack of conformity should not be given orally and indeed in at least one case an oral notice has been held to be sufficient.[576]

So far as the contents of the notice are concerned, the courts have required that the nature of the lack of conformity must be specified clearly. Although courts have identified a number of reasons for this requirement, it is suggested that the central purposes are to enable prompt clarification of whether there has been a breach[577] and, if so, to give the seller the information needed to determine how to proceed in general with respect to the buyer's claim,[578] and more specifically to facilitate the seller's cure of defects.[579] Reflecting these purposes, the courts have held that a substantial degree of specificity is required for the notice to be compliant. Thus, it has been held insufficient to state only that the goods "do not comply with the contract",[580] "are not working properly",[581] suffer from "poor workmanship and improper fitting"[582] or that they are of "bad quality".[583] In none of these cases was the buyer's no-

[576] (German) Landgericht Frankfurt 9 December 1992, CISG-Online No. 184 (oral notice given over the phone was held to satisfy the notice requirement). In Tribunale Vigevano, Italy 12 July 2000, CISG-Online No. 493, the court stated that, "It is worth mentioning at this point that notice of lack of conformity is not required to be in a particular form and thus can be given verbally or by telephone". It should be noted however that in several cases while courts recognised that in principle there is no objection to the giving of an oral notice, on the facts it was found that the buyer had failed to prove with sufficient certainty that a compliant notice had been given. See, e.g., (German) Landgericht Frankfurt 13 July 1994, CISG-Online No. 118; (German) Landgericht Stuttgart 31 August 1989, CISG-Online No. 11.

[577] (Austrian) Oberster Gerichtshof 27 August 1999, CISG-Online No. 485; (German) Oberlandesgericht Düsseldorf 8 January 1993, CISG-Online No. 76. See also *Schwenzer*, in: Schlechtriem/Schwenzer, Commentary, Art. 39 para. 6; *Sono*, in: Bianca/Bonell, Commentary, Art. 39 para. 2.3.

[578] (German) Bundesgerichtshof 4 December 1996, CISG-Online No. 260; (German) Landgericht Saarbrücken 26 March 1996, CISG-Online No. 391; (Italian) Tribunale di Vigevano 12 July 2000, CISG-Online No. 493.

[579] (Italian) Tribunale di Vigevano 12 July 2000, CISG-Online No. 493; (German) Landgericht Erfurt 29 July 1998, CISG-Online No. 561.

[580] (Swiss) Handelsgericht Zürich 21 September 1998, CISG-Online No. 416.

[581] (Swiss) Handelsgericht Zürich 17 February 2000, CISG-Online No. 637.

[582] (German) Landgericht München 3 July 1989, CISG-Online No. 4.

[583] (Belgian) Rechtbank van Koophandel Kortrijk 16 December 1996, CISG-Online No. 530.

tice specific enough to allow the seller to comprehend the buyer's claim and to take appropriate steps in response.[584]

While it is true that the buyer must provide a sufficiently detailed notice of lack of conformity, care should be taken not to impose too heavy a burden on the buyer so far as the content of the notice is concerned.[585] Where the defects are obvious they should be stated and a failure to state them will mean that the notice is non-conforming[586] but where the goods delivered do not work and the reason for this is not obvious, it is sufficient that the buyer give an indication of the symptoms without having to provide details as to the cause.[587] In this regard, some of the early case law, particularly decisions from German courts,[588] on the degree of precision required by Art. 39 CISG, should be regarded as suspect.[589] More recent decisions have applied a less strict approach[590] and it is suggested that this more liberal approach should now prevail.[591]

584 (German) Bundesgerichtshof 4 December 1996, CISG-Online No. 260; (German) Bundesgerichtshof 3 November 1999, CISG-Online No. 475. See also *Schwenzer*, in: Schlechtriem/Schwenzer, Commentary, Art. 39 para. 7.

585 *Schwenzer*, in: Schlechtriem/Schwenzer, Commentary, Art. 39 para. 6 („... the requirements for specifying a lack of conformity should not be exaggerated."); *Flechtner*, in: Ferrari/Flechtner/Brand, The Draft UNCITRAL Digest and Beyond, p. 386.

586 Thus, in the case of a short or late delivery a failure to state, respectively, that the delivery was insufficient or was late would mean that the notice was non-compliant. See, e.g., (German) Landgericht Köln 30 November 1999, CISG-Online No. 1313.

587 (German) Bundesgerichtshof 3 November 1999, CISG-Online No. 475; (Italian) Tribunale di Busto Arsizio 13 December 2001, CISG-Online No. 1323.

588 These decisions were probably influenced by the requirement in domestic German law to give precise details.

589 *Schwenzer*, in: Schlechtriem/Schwenzer, Commentary, Art. 39 para. 6. See, e.g., (German) Landgericht Stuttgart 31 August 1989, CISG-Online No. 11; (German) Oberlandesgericht Frankfurt 18 January 1994, CISG-Online No. 123; (German) Landgericht Marburg 12 December 1995, CISG-Online No. 148.

590 (German) Bundesgerichthof 3 November 1999, CISG-Online No. 475; (Italian) Tribunale di Busto Arsizio 13 December 2001, CISG-Online No. 1323; (Swiss) Bundesgericht 28 May 2002, CISG-Online No. 676.

591 See *Schwenzer*, in: Schlechtriem/Schwenzer, Commentary, Art. 39 para. 6.

3. Time limit for notice under Art. 39(1) CISG

The period for giving notice under Art. 39(1) CISG commences from the moment that the buyer has discovered or ought to have discovered the lack of conformity. Thus, the time period runs from the earlier of these two points in time.

a) Starting point for the time limit

Knowledge of the existence of a lack of conformity may exist even if the buyer has not examined the goods (for example, the buyer may have been told of discrepancies by his customer) and in such case time will begin to run from the moment he acquires knowledge even though he has not examined the goods.[592]

The question of when the buyer ought to have discovered the lack of conformity is, as was discussed earlier, closely linked with the time under Art. 38 CISG within which the buyer should have examined the goods. In the case of non-conformity that ought reasonably to have been discovered by examination, the time period for giving notice commences from that time. Where an examination has actually been carried out, time will begin to run from this moment provided that the examination was carried out as soon as practicable after delivery. Where an examination was performed later than that or not at all, the time of giving notice will follow on from the time period within which the examination should have been carried out.Where the defect is a latent or hidden one which could not have been discovered by an examination as described in Art. 38 CISG, the time for giving notice of lack of conformity is the earlier of the time when the buyer should have discovered the existence of that latent defect (by for example operating the goods)[593] or the time he did discover such lack of conformity.

b) Duration of the "reasonable time"

In determining what is a "reasonable time" within which notice must be given all the circumstances of the particular case must be taken into account.[594]

592 (Spanish) Audienca Provincia Barcelona 20 June 1997, CISG-Online No. 338; See also *Schwenzer*, in: Schlechtriem/Schwenzer, Commentary, Art. 39 para. 19.

593 See, for example, (Italian) Tribunale di Vigevano 12 July 2000, CISG-Online No. 493.

594 See, for example, (German) Oberlandesgericht Düsseldorf 10 February 1994, CISG-Online No. 116; (Italian) Tribunale civile di Cuneo 31 January 1996, CISG-Online No. 268; CISG-AC Opinion 2 (Bergsten), Internationales Handelsrecht (IHR) 2004, 163, para. 3; *Schwenzer*, in: Schlechtriem/Schwenzer, Commentary, Art. 39 para. 15.

The notice period under Art. 39(1) CISG is of course separate from and additional to that contained in Art. 38 CISG.[595] However, as a practical matter, the buyer will not lose his right to rely on any lack of conformity (under Art. 39(1)) until both periods have expired. As a consequence the buyer will often be able to make up for delays in his examination process by giving speedy notice.[596]

While it is the case that the two periods are separate and consecutive, it is also true that the courts have not always clearly distinguished between these two periods so that the relevant decisions should be analysed with great care in order to discern whether the period regarded as "reasonable" actually referred to the notice period as such or to the combined examination and notice periods.

Courts and scholars have identified a number of different factors that will be treated as relevant to this question: One of these factors is whether the goods are perishable[597] or seasonal.[598] It has also been held that the buyer's plans to process the goods[599] or otherwise handle them in a fashion that might make it difficult to determine if the seller was responsible for a lack of conformity[600] are relevant factors in determining what constitutes a reasonable time, as is knowledge by the buyer that the seller is operating under a deadline.[601] It has also been suggested that regard should be had to which remedy the buyer wishes to exercise (an avoidance necessitating a faster notice than

595 *Schwenzer*, in: Schlechtriem/Schwenzer, Commentary, Art. 39 para. 15; CISG-AC Opinion No. 2 (*Bergsten*), Internationales Handelsrecht (IHR) 2004, 163, para. 3.

596 *Schwenzer*, in. Schlechtriem/Schwenzer, Commentary, Art. 39 para. 20; *Magnus*, in: Staudinger Kommentar zum Bürgerlichen Gesetzbuch, Art. 39 para. 30.

597 See, e.g., (Belgian) Arrondissementsrechtbank Roermond 19 December 1991, CISG-Online No. 29; (Dutch) Arrondissementsrechtbank Zwolle 5 March 1997, CISG-Online No. 545.

598 (German) Amtsgericht Augsburg 29 January 1996, CISG-Online No. 172 ("According to Art. 39 CISG, a buyer loses the right to rely on a lack of conformity, if the buyer does not give notice of the lack of conformity within a reasonable time. For seasonal goods, a rapid reproof is very important." Translation taken from: www.cisg.law.pace.edu)

599 (Dutch) Gerechtshof Hertogenbosch 15 December 1997, CISG-Online No. 552; (Dutch) Arrondissementsrechtbank Zwolle 5 March 1997,CISG-Online No. 545.

600 (German) Oberlandesgericht Köln 21 August 1997, CISG-Online No. 290.

601 (German) Landgericht Köln 11 November 1993, CISG-Online No. 200 (Court stated that time frame to send notice of lack of conformity was shorter than usual because the buyer knew that the seller had a deadline to comply with which would necessitate a speedier examination and notification).

simple claims for damages based on the assumption that the buyer keeps the goods).[602] As however the matter will always have to be decided on the facts of each individual case, this list of factors is not exhaustive.

Given the wide range of factors that may be taken into account by a court in determining what constitutes a reasonable time, it is perhaps not surprising that in applying the standard courts have identified different periods as appropriate to the particular facts.[603] This is surely to be expected and is not a particular cause for concern provided that in determining what constitutes a reasonable time courts and tribunals pay attention to decisions of other courts interpreting the Convention and not to principles applied in their domestic sales law.

Some courts and scholars have indicated presumptive periods that may serve as a starting point for standard type cases but may of course be adjusted to reflect the facts of the particular case.[604] Thus there have been suggestions of a standard period of one month which may serve as a rough guideline for the notice period.[605] Again this is not objectionable[606] provided that the presumptive periods are not applied automatically and careful consideration is given to the facts of each case to determine what is a reasonable time.

602 *Schwenzer*, in: Schlechtriem/Schwenzer, Commentary, Art. 39 para. 16; *Sono*, in: Bianca/Bonell, Commentary, Art. 39 para. 2.4; *Honnold*, para. 257.

603 On the facts of particular cases, notices given at the following times have been found to be within the reasonable time mandated by Art. 39(1) CISG: one day after the goods were handed over to the buyer; (German) Bundesgerichtshof 4 December 1996, CISG-Online No. 260; eight days after an expert's report identified defects in the goods, Arbitral Award, ICC 5713, CISG-Online No. 3; and, one month after delivery, (French) Cour d'appel Grenoble 13 September 1995, CISG-Online No. 157. Notices given: nine months after delivery ((Belgian) Tribunal commercial Bruxelles 5 October 1994, CISG-Online No. 447); almost two weeks after delivery ((German) Oberlandesgericht Köln 21 August 1997, CISG-Online No. 290); and, any time beyond the day of delivery ((German) Oberlandesgericht Saarbrücken 3 June 1998, CISG-Online No. 354), were however all held, on the facts, to be too late.

604 (German) Bundesgerichthof 3 November 1996, CISG-Online No. 475 ("regular one month period").

605 See (German) Bundesgerichtshof 3 November 1999, CISG-Online No. 475; *Schwenzer*, in. Schlechtriem/Schwenzer, Commentary, Art. 39 para. 17 (referring however also to the still differing approaches of the national courts); *Gruber*, in: Münchener Kommentar zum Bürgerlichen Gesetzbuch, Art. 39 para. 34.

606 But see for a more critical view CISG-AC Opinion 2 (Bergsten), Internationales Handelsrecht (IHR) 2003, 163.

4. Time limit for notice under Art. 39(2) CISG

Art. 39(1) CISG, as we have seen, requires that notice of lack of conformity must be given within a reasonable time after the lack of conformity was discovered or it ought to have been discovered. By Art. 39(2) CISG, this is subject to an overriding time limit of two years within which notice of lack of conformity must, at the latest, be given. The two year period commences when the goods are actually (i.e. physically[607]) handed over to the buyer. Failure to give notice of lack of conformity within this two year "cut-off" period means that the buyer loses his right to rely on the lack of conformity even if he was still not aware of the lack of conformity or it was impossible for him to discover it.[608] This provision, which was highly contentious at the Vienna Conference, was introduced for the purpose of protecting sellers against claims which arise long after the goods have been delivered while at the same time seeking to protect buyers in cases where the defects are latent.[609]

As the wording of the provision indicates, the two year limit does not apply where it is inconsistent with a contractual period of guarantee. Whether this is the case will always depend on an interpretation of the contractual guarantee provision in question.[610] As a general rule there will be a strong argument that a contractual guarantee which is longer than the two year period in Art. 39(2) CISG will be inconsistent so that the time limit in Art. 39(2) CISG should be regarded as ending only when the stipulated guarantee period expires. What is more, the parties are obviously entitled to exclude or modify the rule in Art. 39(2) CISG, for instance by agreeing on shorter "cut-off" periods.[611]

It should be noted that the two year "cut-off" period in Art. 39(2) CISG is not a "limitation" period. In fact, limitation issues are not governed by the CISG, but by the applicable domestic law [612] which may of course incorporate the UN Convention on the Limitation Period in the International Sale

607 This requirement aims at avoiding transit time eating into the two year period. It is irrelevant whether risk or property passed at an earlier date. See *Schwenzer*, in: Schlechtriem/Schwenzer, Commentary, Art. 39 para. 24; *Honnold*, para. 258.

608 See *Schwenzer*, in: Schlechtriem/Schwenzer, Commentary, Art. 39 para. 22.

609 *Schwenzer*, in: Schlechtriem/Schwenzer, Commentary, Art. 39 para. 22.

610 *Secretariat Commentary*, Art. 37 para. 7; *Schwenzer*, in: Schlechtriem/Schwenzer, Commentary, Art. 39 para. 26.

611 See *Schwenzer*, in: Schlechtriem/Schwenzer, Commentary, Art. 39 para. 34 et seq.; Arbitral Award, ICC 7660, CISG-Online No. 129.

612 See above p. 29 et seq..

of Goods 1974 (as adapted by the Protocol of 11 April 1980). The general rule therefore is that the time limits provided for in Art. 39 CISG and in the applicable limitation provisions will run independently from one another.[613] Problems may arise where the applicable (domestic) limitation period is shorter than (or ends before) the "cut-off" period in Art. 39(2) CISG. It has been suggested that in this case the domestic limitation period should be extended so as to coincide with the two year period in Art. 39(2) CISG.[614] However, the better view is that the (shorter) domestic limitation period will prevail and the right to claim may therefore be lost before the expiry of the two year period.[615]

5. Dispatch of the notice

Art. 27 CISG applies to the notice under Art. 39 CISG.[616] As a result, if the notice is made (i.e. dispatched[617]) by means appropriate in the circumstances, the risk of delay, failure to arrive or errors in transmission has to be borne by the seller.[618]

6. Consequences of failure to give notice

If the buyer fails to give notice under Art. 39(1) or (2) CISG he loses his right to rely on the lack of conformity. Subject to the exceptions dealt with below (7), the buyer loses all the remedies he would have been entitled to

613 See for more detail *Schwenzer*, in: Schlechtriem/Schwenzer, Commentary, Art. 39 para. 28.

614 See in that direction (Swiss) Cour de Justice de Genève 10 October 1997, CISG-Online No. 295. For a more detailed analysis see *Schwenzer*, in: Schlechtriem/Schwenzer, Commentary, Art. 39 para. 29.

615 (Swiss) Handelsgericht des Kantons Bern 30 October 2001, CISG-Online No. 725.

616 *Schwenzer*, in: Schlechtriem/Schwenzer, Commentary, Art. 39 para. 11 et seq.; *Gruber*, in: Münchener Kommentar zum Bürgerlichen Gesetzbuch, Art. 39 para. 17 et seq.

617 *Schlechtriem*, in: Schlechtriem/Schwenzer, Commentary, Art. 27 para. 9; *Gruber*, in: Münchener Kommentar zum Bürgerlichen Gesetzbuch, Art. 39 para. 18.

618 See *Schwenzer*, in: Schlechtriem/Schwenzer, Commentary, Art. 39 para. 1 for more detail.

under Art. 45.[619] Thus he will for example be obliged to pay for the goods received at the contract price even if they are seriously defective.

7. Exceptions to the requirement to give notice

a) Art. 40 CISG

Under Art. 40 CISG the seller is not entitled to rely on the provisions of Art. 38, 39 CISG if the non-conformity relates to facts of which he knew or could not have been unaware and which he did not disclose to the buyer.[620] Art. 40 CISG constitutes "a safety valve" for preserving the buyer's remedies for non-conformity in cases where the seller has himself forfeited the right of protection.[621] Because of its dramatic effect, it has been suggested that Art. 40 CISG should be restricted to "special circumstances" so that the protections offered by time limits for claims do not become "illusory".[622]

For Art. 40 CISG to apply, the buyer must prove that the seller either knew or could not have been unaware of the lack of conformity. In the absence of an admission by the seller, proving actual knowledge of lack of conformity will be extremely difficult, and in most cases, the buyer will seek to show that the seller could not have been unaware of the lack of conformity.[623] While it is generally accepted that fraud and similar cases of bad faith will make Art. 40 CISG applicable,[624] more debate exists as to whether what can be described as gross negligence or even ordinary negligence suffices or whether slightly more than gross negligence is required. As a Stockholm Chamber of Commerce Arbitral Award has explained, "[S]ome authors are of the opinion that also what can be described as gross negligence[625] or even ordinary negligence[626] suffices, while others indicate that slightly more than gross negligence (approaching deliberate negligence) is required."[627] A majority of the tribunal in that case concluded, correctly it is suggested, that the level of seller awareness of non-conformities that is required to trigger Art. 40 CISG is "a conscious disregard of facts that meet the eyes and are of evident relevance to the non-conformity".[628] Mere negligence does not therefore suffice. Whether this formula requires slightly more than gross negligence, is probably a rather academic question.

The application of Art. 40 CISG is also conditional upon the seller not having disclosed the lack of conformity to the buyer. It is submitted that this requirement will have little practical importance. There is of course no general obligation on the seller to examine the goods and to disclose the results to the buyer of any such examination.[629] If the seller informed the buyer before the conclusion of the contract, the buyer will already be precluded from relying on the non-conformity by Art. 35(3) CISG. What appears to be envisaged by Art. 40 CISG is that a seller who was aware of defects in the goods may still rely on Art. 38 and 39 CISG where he can show that he had properly informed the buyer of the lack of conformity (after the conclusion of the contract).[630]

b) Art. 44 CISG

Art. 44 CISG provides that if the buyer has a reasonable excuse for his failure to give the required notice then he "may reduce the price in accordance with Art. 50 or claim damages, except for loss of profit." As has been discussed above, Art. 44 CISG was introduced late in the diplomatic proceedings and was intended to soften the perceived harshness of the notice regime contained in Art. 39 CISG.[631] The effect of Art. 44 CISG when the buyer proves[632] that he has a reasonable excuse for his failure to give notice under Art. 39(1) CISG is therefore to allow the buyer at least a limited set of remedies.

619 *Schwenzer*, in: Schlechtriem/Schwenzer, Commentary, Art. 39 para. 30; *Sono*, in: Bianca/Bonell, Commentary, Art. 39 para. 2.2.

620 See, e.g., Arbitral Award, ICC 5713, CISG-Online No. 3; Arbitral Award, Stockholm Chamber of Commerce, CISG-Online No. 379; (German) Landgericht Trier 12 October 1995, CISG-Online No. 160.

621 Arbitral Award, Stockholm Chamber of Commerce, CISG-Online No. 379.

622 Arbitral Award, Stockholm Chamber of Commerce, CISG-Online No. 379.

623 But see (German) Landgericht Landshut 5 April 1995, CISG-Online No. 193.

624 Arbitral Award, Stockholm Chamber of Commerce, CISG-Online No. 379.

625 See *Schlechtriem*, Internationales UN-Kaufrecht, 3rd edition, para. 156; *Magnus*, in: Staudinger Kommentar zum Bürgerlichen Gesetzbuch, Art. 40 para. 5; (German) Oberlandesgericht München 11 March 1998, CISG-Online No. 310.

626 See *Enderlein/Maskow*, Commentary, Art. 40 para. 3.

627 Arbitral Award, Stockholm Chamber of Commerce, CISG-Online No. 379, reproduced at www.cisg.law.pace.edu. See also *Schwenzer*, in: Schlechtriem/Schwenzer, Commentary, Art. 40 para. 4 et seq. (with further references).

628 A dissenting arbitrator agreed with the standard, although he believed that it required a higher degree of "subjective blameworthiness" on the seller's part than had been proven in the case.

629 *Schwenzer*, in: Schlechtriem/Schwenzer, Commentary, Art. 40 para. 7.

630 See in that direction (German) Oberlandesgericht Rostock 25 September 2002, CISG-Online No. 672. But see also *Schwenzer*, in: Schlechtriem/Schwenzer, Commentary, Art. 40 para. 7.

631 See *Sono*, in: Bianca/Bonell, Commentary, Art. 44 para. 2.2.

632 Arbitral Award, ICC 9187, CISG-Online No. 705; *U. Huber/Schwenzer*, in: Schlechtriem/Schwenzer, Commentary, Art. 44 para. 19.

As the wording of the provision makes clear Art. 44 CISG does not grant a buyer relief from the two year cut-off of notice of lack of conformity imposed by Art. 39(2) CISG. Thus, a buyer that has failed to meet the notice deadline imposed by Art. 39(2) CISG cannot apply Art. 44 CISG to escape the consequences, even if the buyer has a "reasonable excuse" for the failure.[633]

It should also be noted that at least one court has found that, because Art. 44 CISG does not refer to the buyer's obligation to examine goods under Art. 38 CISG, a buyer cannot invoke Art. 44 CISG if the reason he failed to comply with the notice requirements of Art. 39(1) CISG is because he did not examine the goods in a timely fashion, even if the buyer has a reasonable excuse for the tardy examination.[634]

The key to understanding Art. 44 CISG lies in the meaning of the phrase "reasonable excuse". Given the above-mentioned purpose of the provision, it is clear that an "individualised" approach be taken to the meaning of "reasonable excuse".[635] In assessing whether the excuse offered is reasonable, therefore, regard must be had to particular circumstances or problems faced by the buyer.[636] Thus, courts have had regard to such matters as the type of business engaged in by the buyer,[637] the size of the buyer's business,[638] the nature of the

633 *U. Huber/Schwenzer*, in: Schlechtriem/Schwenzer, Commentary, Art. 44 para. 1.

634 (German) Oberlandesgericht Karlsruhe 25 June 1997, CISG-Online No. 263. But see for a differing view *U. Huber/Schwenzer*, in: Schlechtriem/Schwenzer, Commentary, Art. 44 para. 5a.

635 See *Honnold*, para. 261; *U. Huber/Schwenzer*, in: Schlechtriem/Schwenzer, Commentary, Art. 44 para. 3, 5; *UNCITRAL Digest*, Art. 44 para. 3. See also (German) Oberlandesgericht Koblenz 11 September 1998, CISG-Online No. 505; (German) Oberlandesgericht München 8 February 1995, CISG-Online No. 142.

636 See *U. Huber/Schwenzer*, in: Schlechtriem/Schwenzer, Commentary, Art. 44 para. 7 et seq.

637 In one decision it was said an individual engaged in business (an independent trader, artisan or professional) is more likely to have a reasonable excuse for failing to give required notice than is a business entity engaged in a fast-paced business requiring quick decisions and prompt actions: (German) Oberlandesgericht München 8 February 1995, CISG-Online No. 142 (on the facts it was held that Art. 44 CISG did not excuse the buyer).

638 The court in (Swiss) Obergericht Luzern 8 January 1997, CISG-Online No. 228 implied that the small size of the buyer's operation, which did not permit him to spare an employee full time to examine the goods, might form the basis for a reasonable excuse for delayed notice but on the facts held that it did not excuse the buyer.

goods,[639] the seriousness of the breach and the difficulty of discovering it, and the buyer's business experience. Further criteria are, for example, the extent of the violation of the seller's duty, the importance of the loss of seller's legal remedies and the buyer's interest in prompt and exact information.[640] If both parties have agreed on an inspection of the goods by a neutral inspection body and if the buyer has relied on the results of that inspection this will be a strong argument that he was reasonably excused under Art. 44 CISG.[641] In general, it should be noted however that attempted reliance on Art. 44 CISG has only rarely been successful and that the number of cases in which a reasonable excuse was held to exist is small.[642]

If the buyer is excused under Art. 44 CISG, he "may reduce the price in accordance with Art. 50 or claim damages, except for loss of profit." So far as any claim to damages is concerned, the buyer can recover damages for any loss sustained save for loss of profit. By way of example, a buyer who purchases a profit earning chattel expected to produce 10,000 widgits each hour and which only produces 5,000 widgits each hour can recover as damages the difference in value between these two machines. He cannot however recover any ongoing loss of profits suffered as a result of having to accept a machine capable producing only 5,000 widgits each hour.[643]

c) Waiver

In addition to the "exceptions" provided under Art. 40 and 44 CISG, the seller may waive his right to object to the fact that notice of lack of confor-

639 The more perishable the goods the less likely it is that an excuse for not giving notice will be found to be reasonable – see *U. Huber/Schwenzer*, in: Schlechtriem/Schwenzer, Commentary, Art. 44 para. 8.

640 See Arbitral Award, ICC 9187, CISG-Online No. 705.

641 See Arbitral Award, ICC 9187, CISG-Online No. 705.

642 See as examples of cases where it was held that buyer had a reasonable excuse: Arbitral Award, ICC 9187, CISG-Online No. 705; Arbitral Award, Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, Internationales Handelsrecht (IHR) 2006, 114 = CISG-Online No. 1042.

643 For a very interesting problem concerning the question in how far the seller may – in cases where the buyer is excused under Art. 44 CISG – rely on Art. 77 CISG in order to reduce the amount of damages see *U. Huber/Schwenzer*, in: Schlechtriem/Schwenzer, Commentary, Art. 44 para. 11 et seq.

mity was not given either at all, in a proper form, or in a timely manner.[644] Waiver can be express or implied but it must be clear that the seller intends to waive his rights to object to the non-conforming notice. The mere fact that a seller enters into settlement negotiations does not necessarily imply that he is waiving his right to object to any defect in the notice.[645]

644 See, e.g., (German) Bundesgerichtshof 25 June 1997, CISG-Online No. 277; *Schwenzer*, in: Schlechtriem/Schwenzer, Commentary, Art. 39 para. 33; *Gruber*, in: Münchener Kommentar zum Bürgerlichen Gesetzbuch, Art. 39 para. 44 et seq.

645 (German) Bundesgerichtshof 25 November 1998, CISG-Online No. 353; (German) Oberlandesgericht Oldenburg 5 December 2000, CISG-Online No. 618; *Schwenzer*, in: Schlechtriem/Schwenzer, Commentary, Art. 39 para. 33.

§ 8. Third party rights

I. Introduction

The CISG contains no rules relating to the transfer of property[646] or to the circumstances in which third parties may acquire security rights over goods belonging to another. These matters are governed by the applicable domestic law. What the Convention does do, however, is to make clear that the seller is under an obligation to transfer ownership and a right to enjoy quiet possession.

The Convention's provisions with respect to third party claims are set out in Art. 41 to 44 CISG. Art. 41(1) CISG imposes an unqualified obligation requiring the seller to deliver goods free from any right or claim of a third party unless the buyer agrees to take the goods subject to that right or claim. However, the second sentence of Art. 41 CISG makes clear that this unqualified obligation does not apply where the right or claim is based on industrial or other intellectual property. In respect of such rights and claims Art. 42 CISG applies.

The seller's liability under Art. 42 CISG is considerably more restricted than his liability under Art. 41 CISG in that his liability depends upon two preconditions being established. First, the seller must have had actual or imputed knowledge at the time of the conclusion of the contract of the existence of a relevant right or claim. Secondly, there are certain territorial restrictions concerning the industrial or intellectual property rights that may be taken into account. Further, the seller's obligation does not extend to cases where the buyer knew or could not have been unaware of such a claim or to cases where the right or claim results from "the seller's compliance with technical drawings, designs, formulae or other such specifications furnished by the buyer."

Art. 43 CISG imposes a notice requirement on the buyer and prevents a buyer who fails to give notice from relying on the third party right or claim.

646 Art. 4 lit. (b) CISG.

However, a buyer who fails to give such a notice may be excused under Art. 44 CISG and thus still be entitled to price reduction or damages (except for loss of profit).

If the seller breaches his obligations under Art. 41 or 42 CISG and if the buyer is not precluded from relying on that breach by Art. 43 CISG, the buyer's remedies will be governed by Art. 45 et seq. CISG.

II. Third party rights other than industrial and intellectual property rights (Art. 41 CISG)

Art. 41 CISG imposes an obligation on the seller to deliver goods free of any third party rights or claims unless the buyer agrees to take the goods subject to that right or claim.

1. Rights

First, there is a breach of Art. 41 CISG if the seller breaches his obligations to transfer property (Art. 31 CISG), e.g. because he is not the owner of the goods and he cannot compel the owner[647] to transfer property in the goods to the buyer.[648] This will be so whether or not the owner actually makes a claim against the buyer. However, in addition to rights and claims based on ownership, Art. 41 CISG is also intended to protect the buyer against other third party rights and claims whether there are rights "in rem" or rights "in personam". The decisive question in any case is whether a third party can prevent, or claims to be able to prevent, the buyer from having quiet enjoyment of the goods and being able to use, resell or otherwise dispose of the goods.[649] By way of example, a creditor of the seller may, under the applicable domestic law, have rights "in rem" as a consequence of holding a security interest in the goods sold. Where this is the case there will be a breach of Art. 41 CISG.

647 If the seller can compel the owner to transfer property there will, it is suggested, be no breach of Art. 41.

648 *Schwenzer*, in: Schlechtriem/Schwenzer, Commentary, Art. 41 para. 3; *Gruber*, in: Münchener Kommentar zum Bürgerlichen Gesetzbuch, Art. 41 para. 4.

649 "Decisive is whether or not, on the basis of his right, the third party can influence control over goods or restrict the buyer in some other way in his use, realisation or disposal of them." *Schwenzer*, in: Schlechtriem/Schwenzer, Commentary, Art. 41 para. 4.

Although the third party rights and claims referred to in Art. 41 CISG include rights and claims beyond those which relate to property in the goods themselves, the provision probably does not include claims by public authorities that the goods violate health or safety regulations and that they may not, therefore, be used or distributed. Such claims would fall to be considered instead under Art. 35 CISG on the ground that such prohibition amounts to a defect in the quality, or fitness for purpose, of the goods rather than one of title.[650] Nor should the provision extend to government interference by export or import prohibition. Thus, where an export prohibition prevents shipment, the seller will be liable to pay damages for non-delivery unless he can claim to be excused under Art. 79 CISG.

2. Claims

Art. 41 CISG also covers "claims" that third parties may have against the buyer. This part of the provision aims at relieving the buyer from having to defend such claims.[651] Thus, if a person claiming to be the owner makes a claim against the buyer, there will be a breach of Art. 41 CISG.[652] Further, a contractual obligation binding on the seller as to use that any goods can be put, while not giving the third party a right in regard to the goods, may lead

650 *Gruber*, in: Münchener Kommentar zum Bürgerlichen Gesetzbuch, Art. 41 para. 12 et seq.; *Schwenzer*, in: Schlechtriem/Schwenzer, Commentary, Art. 41 para. 5 et seq. (with certain modifications). See also (German) Bundesgerichtshof 8 March 1995, CISG-Online No. 144, where public restrictions concerning the usability of food for consumption were dealt with under Art. 35 CISG.

651 *Gruber*, in: Münchener Kommentar zum Bürgerlichen Gesetzbuch, Art. 41 para. 6; see also *Schwenzer*, in: Schlechtriem/Schwenzer, Commentary, Art. 41 para. 9; *Secretariat Commentary*, Art. 39 para. 3.

652 "The seller has breached his obligation not only if the third party's claim is valid, i.e., if the third party has *right* in or to the goods; the seller has also breached his obligation if a third party makes a *claim* in respect to the goods. The reason for this rule is that once a third party has made a claim in respect of the goods, until the claim is resolved the buyer will face the possibility of litigation with and potential liability to the third party. This is true even though the seller can assert that the third-party claim is not valid or a good faith purchaser can assert that, under the appropriate law applicable to his purchase, he buys free of valid third-party claims, i.e., that "possession vaut titre". In either case the third party may commence litigation that will be time-consuming and expensive for the buyer and which may have the consequence of delaying the buyer's use or resale of the goods. It is the seller's responsibility to remove this burden from the buyer." *Secretariat Commentary* to the then Art. 39 (now Art. 41), para. 3.

to liability under Art. 41 CISG if the third party brings a claim against the buyer under that earlier contract.[653]

How likely the claim is to succeed is not, it is argued, a matter that should be taken into account in considering whether there has been a breach of Art. 41. Indeed, it matters not that the claim is wholly unfounded; the fact is that a buyer should not have to deal with any claim against the goods and Art. 41 recognises this.[654] Some authors have put forward the view that Art. 41 CISG should not apply where the third party claim is clearly frivolous.[655] However, such a position is, in the author's opinion, untenable as it requires the drawing of what inevitably will be a fine distinction between claims that are and those that are not frivolous. It is the author's position that once a claim is asserted against the goods there is a breach of Art. 41 CISG and the buyer is entitled to resort to his remedies under Art. 45 CISG. Of course if the claim is a frivolous one that the seller can easily defeat, it would be very unlikely that a court would conclude that the breach was fundamental.[656] However it is for the seller to defeat the claim and not for the buyer to do so. Moreover, if a buyer incurs expenses or other costs as a result of any such claim these would be recoverable from the seller.[657]

653 *Schwenzer*, in: Schlechtriem/Schwenzer, Commentary, Art. 41 para. 4. See, for example, (Austrian) Oberster Gerichtshof 6 February 1996, CISG-Online No. 224, in which it was stated that a seller would violate Art. 41 if it delivered goods subject to a restriction, imposed by the seller's own supplier, on the countries in which the buyer could resell the goods, unless the buyer had previously consented to the restriction.

654 Note that the *Secretariat Commentary* (Art. 39 para. 4) states, "This article does not mean that the seller is liable for breach of his contract with the buyer every time a third person makes a frivolous claim in respect of his goods. However, it is the seller who must carry the burden of demonstrating to the satisfaction of the buyer that the claim is frivolous. If the buyer is not satisfied that the third-party claim is frivolous, the seller must take appropriate action to free the goods from the claim or the buyer can exercise his rights as set out in Art. 45."

655 *Herber/Czerwenka*, Commentary, Art. 41 para. 6; *Neumayer/Ming*, Commentary, Art. 41 para. 3.

656 *Honnold*, para. 266; *Schwenzer*, in: Schlechtriem/Schwenzer, Commentary, Art. 41 para. 10.

657 *Schwenzer*, in: Schlechtriem/Schwenzer, Commentary, Art. 41 para. 10.

3. Specific issues

Unlike Art. 36 CISG (cases of non-conformity), Art. 41 CISG does not provide an explicit rule as to the time at which the goods must be free from third party rights or claims. The provision does however expressly oblige the seller to *deliver* goods free of third party rights or claims. It is submitted, therefore, that the relevant test is whether the circumstances which gave rise to the third party right or claim occurred before or after delivery.[658] Only if the circumstances giving rise to the claim arose *before* delivery will a claim lie for breach of Art. 41.

As the wording of the provision indicates, the obligation to deliver goods which are free from third party rights or claims is subject to two limitations. First, no liability under Art. 41 CISG can exist where the buyer agrees to take the goods subject to a known third party right or claim. For liability to be excluded, not only must the buyer be aware of the third party right, but he must also consent to take the goods subject to that right or claim. Such an agreement will often be expressed, but it may also be implied from the facts of the case.[659] Secondly, third party rights based on industrial or other intellectual property are expressly excluded from the ambit of Art. 41 CISG being governed instead by Art. 42 CISG.

III. Industrial or intellectual property rights (Art. 42 CISG)

Art. 42 CISG states the seller's duty to deliver goods free of intellectual property rights or claims of a third party. Under this provision a seller is liable if he delivers goods in respect of which a third party has a right or asserts a claim[660] based on intellectual property. Liability under Art. 42 CISG is however subject to the following limitations. First, the seller is only liable if he knew of, or could not have been unaware of, the intellectual property right at the time of the conclusion of the contract (Art. 42(1) CISG). Secondly, the seller is only liable if the third party's right or claim is based on the law of the state designated by Art. 41(1) lit. (a) or (b) CISG, whichever alternative is applicable. Thirdly, the seller is not liable if at the time of the conclusion of the contract the buyer knew or could not have been unaware of the third

658 See *Schwenzer*, in: Schlechtriem/Schwenzer, Commentary, Art. 41 para. 15; *Gruber*, in: Münchener Kommentar zum Bürgerlichen Gesetzbuch, Art 41 para. 16.

659 *Secretariat Commentary* to what was then Art. 39 (now Art. 41), para. 2.

660 It is submitted that with regard to third party claims the same considerations as under Art. 41 CISG should apply, see above (II.2).

party right or claim or if the right or claim results from the seller's compliance with technical requirements that the buyer himself supplied to the seller (Art. 42(2) CISG).

1. Industrial or intellectual property

For a definition of the notion of "industrial or intellectual property" it is submitted that one should refer to the definition in the 1967 Convention establishing the World Intellectual Property Organization (WIPO).[661] This definition is a broad one encompassing as it does essentially "all (...) rights resulting from intellectual activity in the industrial, scientific, literary, or artistic fields."[662] It follows that, e.g., any rights relating to patents, copyrights, industrial design, trade marks, commercial names and trade secrets would fall within the definition. The prevailing opinion applies Art. 42 CISG by analogy to third party rights to personality or the right to a name.[663]

661 *Schwenzer*, in: Schlechtriem/Schwenzer, Commentary, Art. 42 para. 4; *Shinn*, Liabilities under Art. 42 of the United Nations Convention on International Sales, 2 Minnesota Journal of Global Trade (1993) 115, 122, available online at http://www.cisg.law.pace.edu/cisg/biblio/shinn.html.

662 Art. 2(viii) of the 1967 Convention states that it includes rights relating to: literary, artistic and scientific works; performances of performing artists, sound recordings, and broadcasts; inventions in all fields of human endeavor; scientific discoveries; industrial designs; trademarks, service marks, and commercial names and designations; protection against unfair competition; and, all other rights resulting from intellectual activity in the industrial, scientific, literary or artistic fields. This final phrase ("all other rights resulting from intellectual activity in the industrial, scientific, literary or artistic fields") makes it clear that "intellectual property" is a broad concept, and can include productions and matters not forming part of the existing categories of intellectual property, provided they result "from intellectual activity in the industrial, scientific, literary or artistic fields." (The above passage is taken from http://www.wipo.int/tk/en/glossary/index.html).

663 See *Schwenzer*, in: Schlechtriem/Schwenzer, Commentary, Art. 42 para. 5; *Gruber*, in: Münchener Kommentar zum Bürgerlichen Gesetzbuch, Art. 42 para. 7. But see for a differing view *Rauda/Etier*, Warranty for Intellectual Property Rights in the International Sale of Goods, 4 Vindobona Journal of International Commercial Law and Arbitration (2000) 30, 35 (available online at http://www.cisg.law.pace.edu/cisg/biblio/raudaetier2.html).

2. Territorial limitations

Art. 42 CISG places limits on the states in which the seller will be liable in respect of third party rights or claims based on intellectual property rights affecting the goods. It is the case that the law of most states requires that the seller deliver the goods free of intellectual property rights or claims. Such a rule is probably appropriate in the case of domestic sales: a seller should be aware of, and responsible for, any infringement of intellectual property rights in the country in which he is trading. The situation is however different in international sales where the goods may eventually be brought to a variety of states and where it is considerably more difficult to get information about the potential existence of such rights and about the legal regime applied to them.[664] In the light of this, a decision was taken by the drafters of the Convention to hold sellers liable for third party rights based on intellectual property only where these affect the goods in a limited group of states.

Under Art. 42(1) lit. (a) CISG a seller may be liable where the right or claim is based on intellectual or industrial property under the law of the State where the goods will be resold or otherwise used. While there need not be an express agreement as to the state in which the goods will be resold or used, it is for the buyer to prove that it was contemplated by the parties at the time of the conclusion of the contract that the goods would be resold or otherwise used in that State.[665] In the event that the buyer cannot prove that the parties at the time of conclusion of the contract contemplated any particular state or states as the place in which the goods would be used or resold, the seller must deliver goods free from any right or claim based on industrial or intellectual property under the law of the state where the buyer has his place of business[666] (Art. 42(1) lit. (b) CISG).[667]

664 See, e.g., *Secretariat Commentary*, Art. 40 para. 4; *Schwenzer*, in: Schlechtriem/Schwenzer, Commentary, Art. 42 para. 1.

665 *Schwenzer*, in: Schlechtriem/Schwenzer, Commentary, Art. 42 para. 29.

666 Where the buyer has more than one place of business, the relevant place of business will be determined by reference to Art. 10 CISG.

667 It should be noted that while the existence of a right or claim based on intellectual property under the law of the seller's country will not as such give rise to liability, it may prevent the seller from being able to deliver the goods thereby amounting to a breach of Art. 30 CISG.

3. Seller's actual or "imputed" knowledge

Under Art. 42(1) CISG, a seller is only liable if at the time of the conclusion of the contract, he knew or could not have been unaware of the existence of a relevant third party claim or right based on intellectual property. The meaning of "could not have been unaware" in this context has been a matter of some debate. On one view,[668] the phrase "could not have been unaware" in Art. 42(1) places an affirmative obligation on the seller to research such intellectual property registries as exist in the state in which the buyer will use or resell the goods. According to this view, a failure to examine these registries where examination would have revealed the existence of third party rights would mean that a seller "could not have been unaware" of the existence of third party rights. Others have argued that this view imposes too heavy a burden on the seller.[669] The better view is, it is suggested, that the phrase "could not have been unaware" places a duty on the seller not to shut his eyes to obvious facts or be grossly negligent about information that is reasonably at hand at the time the parties concluded the contract, especially if the other side is not likely to have the same information. It follows from this that a failure to examine relevant registries which would have shown a third party right need not lead to the conclusion that the seller "could not have been unaware" of the existence of the right. Instead, the answer will depend on whether in the circumstances the buyer has established that it would have been grossly negligent[670] of the seller not to have been aware of the existence of a third party right or claim. The existence of an easily searchable registry would be a relevant but by no means conclusive factor.

4. Exclusion of liability

The seller's liability under Art. 42 CISG is excluded in two situations. First, the seller is not liable if at the time of the conclusion of the contract the buyer knew or could not have been unaware of the existence of the t right or claim (lit. (a)).[671] The language of this provision is similar to t Art. 35(3) CISG and, as in that provision, "could not have been unaware" notes more than mere negligence and requires proof of something much closer to "blind eye" recklessness or at the very least gross negligence.[672] Under the second exception to Art. 42 CISG, the seller is not liable if the right or claim results from the seller's compliance with technical drawings, designs, formulae or other such specifications furnished by the buyer (lit.(b)).

668 See in that direction *Secretariat Commentary*, Art. 40 para. 5; *Schwenzer*, in: Schlechtriem/Schwenzer, Commentary, Art. 42 para. 14; *Rauda/Etier*, Warranty for Intellectual Property Rights in the International Sale of Goods, 4 Vindobona Journal of International Commercial Law and Arbitration (2000) 30, 45 (available online at http://www.cisg.law.pace.edu/cisg/biblio/raudaetier2.html).

669 See the careful arguments marshalled by *Shinn* in: Liabilities under Art. 42 of the United Nations Convention on International Sales, 2 Minnesota Journal of Global Trade (1993) 115, 125 et seq., available online at http://www.cisg.law.pace.edu/cisg/biblio/shinn.html.

670 See in that direction *Magnus*, in: Staudinger Kommentar zum Bürgerlichen Gesetzbuch, Art. 42 para. 22.

IV. Notice requirements (Art. 43, 44 CISG)

The buyer's right to rely on the seller's liability for the existence of third party rights or claims depends upon having fulfilled the notice requirement in Art. 43 CISG. Pursuant to para. 1 of that provision the buyer loses the right to rely on Art. 41 or 42 CISG if he does not give notice to the seller specifying the nature of the third party right or claim within a reasonable time after he has become aware or ought to have become aware of that right. This rule is similar to the notice requirement of Art. 39(1) CISG so that, as a general rule, the considerations concerning that provision will also apply with regard to Art. 43 CISG.[673] It should be noted however that (unlike in Art. 38 CISG) there is no duty to examine the goods for the existence of third party rights or claims. It follows that the buyer "ought to have become aware of the right" only when there were concrete indications that such a right or claim existed.[674] In assessing whether notice has been given within a "reasonable time" under Art. 43 CISG, the need for the buyer to take legal advice about the existence, or otherwise, of the third party right will frequently be a relevant factor.[675]

Under Art. 43(2) CISG the seller is not entitled to rely on the buyer's failure to give notice under Art. 43(1) CISG if the seller knew of the third party right or claim and the nature of it. It is submitted that the relevant time to assess whether such knowledge is given is the time when the buyer's notice under Art. 43(1) CISG would have reached the seller.[676] Unlike under

671 Art. 42(2) lit. (a) CISG.

672 See in that direction *Magnus*, in: Staudinger Kommentar zum Bürgerlichen Gesetzbuch, Art. 42 para. 26.

673 See in that direction *Schwenzer*, in: Schlechtriem/Schwenzer, Commentary, Art. 43 para. 2 et seq.

674 *Schwenzer*, in: Schlechtriem/Schwenzer, Commentary, Art. 43 para. 4.

675 *Schwenzer*, in: Schlechtriem/Schwenzer, Commentary, Art. 43 para. 3.

676 *Schwenzer*, in: Schlechtriem/Schwenzer, Commentary, Art. 43 para. 11.

Art. 40 CISG the mere fact that the seller "could not have been unaware" of the third party right is irrelevant under Art. 43(2) CISG which requires positive knowledge. What is more, unlike in Art. 39(2) CISG there is no absolute "cut off" period in Art. 43 CISG.

If the buyer fails to give notice under Art. 43(1) CISG and if the seller is not precluded from invoking this failure under Art. 43(2) CISG the buyer will not be able to rely on the existence of the third party right or claim (in the sense of Art. 41, 42 CISG). As a rule, the buyer will therefore not have any of the remedies under Art. 45 et seq. CISG based on the seller's breach of Art. 41 or 42 CISG. The situation will be different however where Art. 44 CISG applies: if the buyer has a reasonable excuse for his failure to give the required notice under Art. 43(1) CISG, he may reduce the price under Art. 50 CISG or claim damages (except for loss of profit).[677]

[677] Art. 44 CISG has been discussed above p. 165 et seq.

Part 5: Remedies of the buyer

§ 9. Outline of the buyer's remedies

The starting point for an assessment of the buyer's remedies under the CISG is Art. 45(1) CISG which provides: "If the seller fails to perform any of his obligations under the contract or this Convention, the buyer may: (a) exercise the rights provided in articles 46 to 52; (b) claim damages as provided in articles 74 to 77 CISG."

This means that the buyer can resort to the following remedies:
- performance, including substitute delivery and repair in the cases of non-conformity (Art. 46 CISG)
- avoidance of the contract (Art. 49 CISG)
- reduction of the purchase price (Art. 50 CISG)
- damages (Art. 45(1)(b), Art. 74 et seq. CISG)

Further, there are specific provisions for instalment contracts (Art. 73 CISG) and for cases of anticipatory breach of contract (Art. 71, 72 CISG) which modify the general system of remedies under Art. 45 et seq. CISG. These provisions will be dealt with in a separate chapter (§§ 17, 18).

What is more, there are specific provisions for partial breaches (Art. 51 CISG), for early delivery (Art. 52(1) CISG) and for delivery of an excess quantity (Art. 52(2) CISG); see § 14.

I. General outline of the buyer's remedies under Art. 45 et seq. CISG

1. Performance

Art. 46 CISG governs the buyer's right to claim performance from the seller. Art. 46(1) CISG deals with the general claim for performance. Art. 46(2) and (3) CISG provide specific rules for substitute delivery or repair in cases where the seller has delivered goods that do not conform with the contract.