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LL.M by Coursework and Minor Dissertation

The Uniform International Keyword “Reasonable”

Pathfinder or Insurmountable Obstacle for a Uniform Application of the CISG?

- An Examination of Case law –

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I hereby declare that I have read and understood the regulations governing the submission of LL.M dissertations, including those relating to length and plagiarism, as contained in the rules of this University, and that this dissertation conforms to those regulations.

Outline

| | |
|---|-----------|
| A. INTRODUCTION..... | 1 |
| I. “Reasonable” – a keyword of the CISG | 2 |
| II. “Reasonable” - the “elephant” of the CISG | 3 |
| III. “Reasonable” – the meaning in general and the legal meaning | 4 |
| IV. “Reasonable” – the requirement of a uniform application of the CISG | 5 |
| V. “Reasonable” – a contradiction to a uniform application of the CISG? | 6 |
| VI. “Reasonable” – the degree of uniformity required by the CISG | 7 |
| VII. “Reasonable” – the development of a “reasonable” uniformity? | 8 |
| B. THE SEVERAL APPLICATIONS OF “REASONABLE” IN THE CISG: | |
| CRITERIA APPLIED, STARTING POINT, UNIFORM APPLICATION | 9 |
| I. “Reasonable Person” | 10 |
| II. Reasonable to rely on | 16 |
| III. Reasonably be expected..... | 18 |
| IV. Reasonable and temporal requirements | 22 |
| V. Further “reasonable” means and measures | 63 |
| C. INTERRELATION BETWEEN TECHNICAL PROGRESS AND REASONABLENESS | |
| CONSIDERING TEMPORAL REQUIREMENTS AS AN EXAMPLE | 84 |
| I. The development of communication and transport..... | 84 |
| II. Development of the “reasonable time” concerning provisions involving transport | 87 |
| III. Development of the “reasonable time” concerning provisions involving communication | 88 |
| D. THE KEYWORD “REASONABLE” AS A PATHFINDER | TO |
| A UNIFORM APPLICATION OF THE CISG..... | 90 |
| Bibliography | 92 |
| Table of cases | 96 |

Table of Contents

| | |
|---|----------|
| A. INTRODUCTION..... | 1 |
| I. "Reasonable" – a keyword of the CISG | 2 |
| II. "Reasonable" - the "elephant" of the CISG | 3 |
| III. "Reasonable" – the meaning in general and the legal meaning | 4 |
| IV. "Reasonable" – the requirement of a uniform application of the CISG | 5 |
| V. "Reasonable" – a contradiction to a uniform application of the CISG? | 6 |
| VI. "Reasonable" – the degree of uniformity required by the CISG | 7 |
| VII. "Reasonable" – the development of a "reasonable" uniformity? | 8 |
| B. THE SEVERAL APPLICATIONS OF "REASONABLE" IN THE CISG: CRITERIA | |
| APPLIED, STARTING POINT, UNIFORM APPLICATION | 9 |
| I. "Reasonable Person" | 10 |
| 1. Article 8 (2) and (3) CISG: "understanding of a reasonable person" | 10 |
| a. "Understanding of a reasonable person" – guideline | |
| provided by Article 8 (3) CISG | 10 |
| b. "Understanding of a reasonable person" – | |
| criteria applied under Article 8 (2) CISG | 11 |
| 2. Article 25 | 14 |
| 3. Reasonable person – conclusion | 15 |
| II. Reasonable to rely on | 16 |
| 1. Article 35 CISG | 16 |
| 2. Reasonable to rely on - Conclusion | 17 |
| III. Reasonably be expected..... | 18 |
| 1. Article 60 CISG – acts which could reasonably be expected..... | 18 |
| 2. Article 79 CISG - Could not reasonably be expected | |
| to take into account, to avoid or to overcome..... | 18 |

| | |
|---|----|
| a. Could not reasonably be expected to take into account, to avoid or to overcome - criteria..... | 19 |
| b. Could not reasonably be expected to take into account, to avoid or to overcome - conclusion | 21 |
| 3. Reasonably be expected - conclusion..... | 22 |
| IV. Reasonable and temporal requirements | 22 |
| 1. Article 33 c CISG - "reasonable time"..... | 22 |
| a. Delivery within a reasonable time – criteria | 23 |
| b. Delivery within a reasonable time – determination of a starting point | 24 |
| c. Delivery within a reasonable time – conclusion | 25 |
| 2. Article 39 (1) CISG - "reasonable time" | 25 |
| a. "Reasonable time" for notice - commencement of the time limit | 26 |
| (1) Presumptive periods assessed from the time goods are delivered..... | 27 |
| (2) Distinguishing approach..... | 28 |
| (3) Conclusion | 29 |
| b. "Reasonable time" for notice - criteria..... | 30 |
| (1) Basis of the interest of good business | 30 |
| (2) The contract | 30 |
| (3) General terms and conditions | 31 |
| (4) Trade Practices | 31 |
| (5) Usages established between the parties | 31 |
| (6) Deadline of the buyer itself | 32 |
| (7) The defect | 32 |
| (8) The nature of the goods..... | 33 |
| (9) Processing the goods | 34 |
| (10) Mixing the goods..... | 36 |

| | |
|--|----|
| (11) Expertise of the buyer | 36 |
| (12) Remedy chosen | 37 |
| (13) Concurrence of several factors..... | 37 |
| (14) Conclusion | 37 |
| c. "Reasonable time" for notice– determination of a starting point? | 38 |
| (1) Contractual agreements..... | 38 |
| (2) Untimely periods (non-perishable)..... | 38 |
| (3) Obvious timeliness..... | 40 |
| (4) The "noble month" approach | 40 |
| (a) Foodstuffs, perishable goods, living animals..... | 41 |
| (b) Sale of textiles, machines, non perishable goods | 42 |
| (c) Conclusion | 46 |
| d. "Reasonable time" for notice – conclusion | 48 |
| 3. Article 48 (2) CISG - "reasonable time" | 48 |
| 4. Article 49 (2) CISG - "reasonable time" | 48 |
| a. Reasonable time for avoidance – commencement of the time limit..... | 49 |
| b. Reasonable time for avoidance – criteria | 50 |
| c. Reasonable time for avoidance – determination of a starting point | 51 |
| (1) Late delivery, Article 49 (2) (a) CISG..... | 51 |
| (2) Any breach other than late delivery, Article 49 (2) (b) CISG | 51 |
| (3) Starting point - Conclusion..... | 52 |
| d. Reasonable time for avoidance – conclusion | 53 |
| 5. Article 73 (2) CISG - "reasonable time" | 54 |
| 6. Article 75 CISG - "reasonable time" | 55 |
| a. Reasonable time for substitute transaction – commencement..... | 55 |
| b. Reasonable time for substitute transaction – criteria..... | 56 |

| | |
|--|----|
| c. Reasonable time for substitute transaction – starting point..... | 56 |
| d. Reasonable time for substitute transaction – conclusion | 56 |
| 7. Article 47 (1) CISG - “period of time of a reasonable length” | 57 |
| a. Reasonable length of additional time – criteria..... | 57 |
| b. Reasonable length of additional time – starting point..... | 58 |
| c. Reasonable length of additional time – conclusion..... | 59 |
| 8. Article 63 (1) CISG - “period of time of a reasonable length” | 59 |
| 9. Article 48 (1) CISG - “without unreasonable delay” | 60 |
| a. Without unreasonable delay - criteria | 60 |
| b. Without unreasonable delay - conclusion | 60 |
| 10. Article 88 (1) CISG - “without unreasonable delay” | 61 |
| 11. Further provisions including temporal reasonableness-requirements | 61 |
| 12. Conclusion | 61 |
| V. Further “reasonable” means and measures | 63 |
| 1. Article 38 (3) CISG – without a reasonable opportunity to examine the goods | 63 |
| a. Reasonable opportunity - criteria..... | 63 |
| b. Reasonable opportunity – conclusion..... | 64 |
| 2. Article 44 CISG - reasonable excuse for buyer’s failure to give proper notice | 65 |
| a. Reasonable excuse – criteria | 65 |
| b. Reasonable excuse – conclusion | 67 |
| 3. Article 46 (3) CISG - reasonableness of a request for repair..... | 69 |
| a. Reasonableness of a request for repair - criteria | 69 |
| b. Reasonableness of a request for repair – conclusion | 69 |
| 4. Article 48 (1) CISG – without unreasonable inconvenience or uncertainty of reimbursement by the seller | 70 |
| 5. Article 75 CISG - reasonable manner | 70 |

| | |
|--|------------------|
| a. Reasonable manner – criteria..... | 70 |
| b. Reasonable manner – conclusion | 72 |
| 6. Article 77 CISG - measures as are reasonable in the circumstances | 73 |
| a. Reasonable measures to mitigate the loss - criteria..... | 73 |
| b. Reasonable measures to mitigate the loss – conclusion | 76 |
| 7. Article 85, 87, 88 CISG – reasonable steps, reasonable expenses | 79 |
| a. Reasonable steps, reasonable expenses - criteria..... | 80 |
| b. Reasonable steps, reasonable expenses – conclusion | 80 |
| 8. Article 86 (1), 87, 88 CISG - reasonable steps, reasonable expenses..... | 82 |
| a. Reasonable steps, reasonable expenses – criteria..... | 82 |
| b. Reasonable steps, reasonable expenses – conclusion | 82 |
| 9. Article 88 (1) CISG – reasonable notice..... | 83 |
| <u>C. INTERRELATION BETWEEN TECHNICAL PROGRESS AND REASONABLENESS</u> | |
| <u>CONSIDERING TEMPORAL REQUIREMENTS AS AN EXAMPLE</u> | <u>84</u> |
| I. The development of communication and transport..... | 84 |
| II. Development of the “reasonable time” concerning provisions involving transport | 87 |
| 1. Article 33 (c) CISG..... | 87 |
| 2. Article 47 (1) and 63 (1) CISG | 88 |
| 3. Conclusion | 88 |
| III. Development of the “reasonable time” concerning provisions involving communication | 88 |
| <u>D. THE KEYWORD “REASONABLE” AS A PATHFINDER</u> | |
| <u>TO A UNIFORM APPLICATION OF THE CISG.....</u> | <u>90</u> |
| <u>Bibliography</u> | <u>92</u> |
| <u>Table of cases</u> | <u>96</u> |

A. INTRODUCTION

The United Nations Convention on Contracts for the International Sale of Goods¹(CISG) entered into force on 1 January 1988. It is the uniform international sales law of countries that account for over two-thirds of all world trade.² As of 17 November 2005, the United Nations reports that 66 States have adopted the CISG.³

One of the keyarticles of the CISG is Article 7 (1) CISG. It requires regard to the international character of the Convention and to the need to promote uniformity in its application and the observance of good faith in international trade. Article 7 (1) CISG raised a lot of hope that the provisions and terms of the CISG are interpreted in the same way by the practitioners of the CISG. Leading scholars classified the CISG as a chance for a common international language.⁴

Some general terms incorporated in the CISG seem to dash this hope. As the Convention forms part of the UN regime there is no supranational instance or Court of uniformity. Problems of uniformity must therefore be tackled in the domestic domain.⁵ Especially general terms are imputed to provide problems of uniformity because of discrepancies in domestic practice.

¹ April 11, 1980, U.N.Doc. A/CONF.97/18, Annex I, reprinted in 19 I.L.M. 668 (hereinafter CISG).

² See www.cisg.law.pace.edu/cisg/cisgintro.html#current.

³ The contracting states are: Argentina, Australia, Austria, Belarus, Belgium, Bosnia & Herzegovina, Bulgaria, Burundi, Canada, Chile, China, Colombia, Croatia, Cuba, Cyprus, Czech Republic, Denmark, Ecuador, Egypt, Estonia, Finland, France, Gabon, Georgia, Germany, Greece, Guinea, Honduras, Hungary, Iceland, Iraq, Israel, Italy, Kyrgyzstan, Latvia, Lesotho, Liberia, Lithuania, Luxembourg, Mauritania, Mexico, Moldova, Mongolia, Netherlands, New Zealand, Norway, Peru, Poland, Republic of Korea, Romania, Russian Federation, Saint Vincent and the Grenadines, Serbia and Montenegro, Singapore, Slovakia, Slovenia, Spain, Sweden, Switzerland, Syrian Arab Republic, Uganda, Ukraine, Uruguay, USA, Uzbekistan, Zambia, see www.cisg.law.pace.edu/cisg/countries/cntries.html.

⁴ Peter Schlechtriem, *Uniform Sales Law – The Experience with Uniform Sales Laws in the Federal Republic of Germany*, 1 Jurikisk Tidskrift vid Stockholms Universitet 1, 28 (1991-92); cf. also Jan Hellner, The UN-Convention on the International Sale of Goods – an Outsider's view, reprinted in Festschrift für Stefan Riesenfeld 71, 73; Cf. Felemegas, *The United Nations Convention on Contracts for the International Sale of Goods: Article 7 and Uniform Interpretation*, in: Pace International Law Review (ed.), *Review of the Convention on Contracts for the International Sale of Goods (CISG) 2000-201*, Chapter Five, p. 115, 235 sqq.

⁵ Cf. Baasch Andersen, *Reasonable Time in Article 39 (1) of the CISG – is Article 39 (1) Truly a Uniform Provision?*, in: Pace International Law Review (ed.), *Review of the Convention on Contracts for the International Sale of Goods (CISG) 1998*, Chapter Four, p. 63, 70.

I. "Reasonable" – a keyword of the CISG

One of the most significant keywords of the CISG is the general term "reasonable". It is incorporated into the CISG 49 times.⁶ Moreover Article 7 (2) CISG requires, that questions concerning matters governed by the Convention, which are not expressly settled in it, are to be settled in conformity with the general principles on which it is based. One of these principles is that of "reasonableness", i.e. it governs all issues governed by but not settled in the Convention.⁷ The keyword therefore has a great impact on the CISG, its content and application.

Terminology is of the utmost significance in the science of law as well as in judicial practice.⁸ Consequentially the acceptance of the term has to be defined with high diligence. A famous quote concerning the "reasonable man" originates from 1903. Lord Justice Bowen sought to define the "reasonable man" by equating him with "the man on the Clapham Omnibus".⁹ Today we still have to ask, if the term "reasonable"

⁶ Application of the term "reasonable" in the CISG: Art. 8 (2): reasonable person; Art. 8 (3): reasonable person; Art. 16 (2) (b): reasonable to rely on; Art. 18 (2): reasonable time; Art. 25: reasonable person; Art. 33: reasonable time; Art. 34: unreasonable inconvenience and unreasonable expense; Art. 35 (2) (b): unreasonable to rely on; Art. 37: unreasonable inconvenience and unreasonable expense; Art. 38 (3): reasonable opportunity; Art. 39: reasonable time; Art. 43 (1): reasonable time; Art. 44: reasonable excuse; Art. 46 (2): reasonable time; Art. 46 (3): unreasonable having regard to all circumstances, reasonable time; Art. 47 (1): period of time of reasonable length; Art. 48 (1): unreasonable delay, unreasonable inconvenience or uncertainty; Art. 48 (2): reasonable time; Art. 49 (2) (a): reasonable time; Art. 49 (2) (b): reasonable time; Art. 60: reasonably expected; Art. 63 (1): period of reasonable length of time; Art. 64 (2) (b): reasonable time; Art. 65 (1): reasonable time; Art. 65 (2): reasonable time; Art. 72 (2): reasonable notice; Art. 73 (2) reasonable time; Art. 75: reasonable manner, reasonable time; Art. 76 (2): reasonable substitute; Art. 77: measures as are reasonable in the circumstances; Art. 79 (1): not reasonably be expected; Art. 79 (4): reasonable time; Art. 85: reasonable in the circumstances, reasonable expenses; Art. 86 (1): reasonable in the circumstances, reasonable expenses; Art. 86 (2): unreasonable inconvenience and unreasonable expense; Art. 87: expense is not unreasonable; Art. 88 (1): unreasonable delay, reasonable notice; Art. 88 (2): unreasonable expense, reasonable measures; Art. 88 (3): reasonable expenses.

⁷ Cf. Kritzer, *Guide to Practical Applications Of The United Nations Convention On Contracts For The International Sale Of Goods* (1989), p. 79-84: the general principles include (a) providing needed co-operation, (b) a duty to disclose material information, (c) reasonableness, (d) equal treatment and respect for the different culture, social and legal backgrounds of individual traders; cf. Baasch Andersen, *Reasonable Time in Article 39 (1) of the CISG – is Article 39 (1) Truly a Uniform Provision?*, in: Pace International Law Review (ed.), *Review of the Convention on Contracts for the International Sale of Goods (CISG) 1998*, Chapter Four, p. 63, 74.

⁸ Cf. Baasch Andersen, *Reasonable Time in Article 39 (1) of the CISG – is Article 39 (1) Truly a Uniform Provision?*, in: Pace International Law Review (ed.), *Review of the Convention on Contracts for the International Sale of Goods (CISG) 1998*, Chapter Four, p. 63, 66.

⁹ Lord Justice Bowen, *McQuire v Western Morning News* (1903) 2 KB 100; Clapham is a neighborhood in south London, said to consist of ordinary people, and the man on the Clapham

conveys an identical meaning among the users of the CISG. Often the legal meaning of a term differs from its linguistic definition.¹⁰ In case of international instruments moreover the semantics of the ratifying countries often diverge from one another.¹¹ Can there nevertheless be a uniform application of the CISG? Partly this has been negated.

II. "Reasonable" - the "elephant" of the CISG

Criticism was voiced, that the CISG using general terms like "reasonable" became too vague.¹² This criticism cannot be acceded. For the CISG is an international instrument, it needs to be drafted in international understandable language. The aim of the working group was to make as many countries as possible ratify the CISG in order to make the CISG a useful instrument for international sales contracts. Thus, the Convention represents a compromise of "equal ground".¹³ Accordingly, a certain vagueness is inevitable. The necessity of a wide acceptance such as that concerning the CISG justifies some of its draftmanship that has been criticised as too vague.

omnibus is suggested to be an ordinary, educated but non-specialist person, Cf. Wikipedia – The Free Enzyklopedia: The man on the Clapham omnibus,
http://en.wikipedia.org/wiki/The_man_on_the_Clapham_omnibus.

¹⁰ Cf. Baasch Andersen, *Reasonable Time in Article 39 (1) of the CISG – is Article 39 (1) Truly a Uniform Provision?*, in: Pace International Law Review (ed.), *Review of the Convention on Contracts for the International Sale of Goods (CISG) 1998*, Chapter Four, p. 63, 66.

¹¹ Ibid.

¹² Cf. e.g. Baasch Andersen, "The Uniform International Sales Law and the Global Jurisconsultorium", 24 Journal of Law and Commerce (2005) 159, 161, 164, <http://cisgw3.law.pace.edu/cisg/biblio/andersen3.html#iii>; Bonell, "The Unidroit Principles of International Commercial Contracts and CISG – Alternatives or Complementary Instruments?", 26 Uniform Law Review (1996), 26-39, I.a., <http://www.cisg.law.pace.edu/cisg/biblio/ulr96.html>; Eoersi, "General Provisions", published in Galston & Smit ed., *International sales: The United Nations Convention on Contrcats for the International Sale of Goods*, Matthew Bender (1984), Chapter 2, page 2-2, <http://www.cisg.law.pace.edu/cisg/biblio/eorsi1.html>; Rosett, "The International Sales Convention: A Dissenting View", 18 *International Law* 445, 446 (1984); id., "CISG Laid Bare: A Lucid Guide to a Muddy Code", 21 *Cornell International Law Journal* (1988), 575, <http://cisgw3.law.pace.edu/cisg/biblio/arthurrosett.html>; Stephan, "The Futility of Unification and harmonization in International Commercial Law", 39 *Virginia Journal of International Law* (1999), 743, 773, <http://cisgw3.law.pace.edu/cisg/biblio/stephan.html#iii>; Cf. as well Cook, "The Need for Uniform Interpretation of the 1980 United Nations Convention on Contracts for the International Sale of Goods", 50 *University of Pittsburgh Law Review* (1988), 197, 211, <http://cisgw3.law.pace.edu/cisg/biblio/cook2.html#89>; Honnold, "The Sales Convention in Action – Uniform International Words: Uniform Application?", 8 *Journal of Law and Commerce* 207, 211 (1988), <http://cisgw3.law.pace.edu/cisg/biblio/honnold-sales.html>.

¹³ Cf. Baasch Andersen, *Reasonable Time in Article 39 (1) of the CISG – is Article 39 (1) Truly a Uniform Provision?*, in: Pace International Law Review (ed.), *Review of the Convention on Contracts for the International Sale of Goods (CISG) 1998*, Chapter Four, p. 63, 74.

A saying reflects very well the benefit of a term like this: “everybody finds it difficult to define an elephant, but everyone recognises the animal, when he sees one”. This is true for the term “reasonable” as well. Since the concept of reasonableness indicates justice and flexibility and since it is amongst others a cornerstone of all legal systems, the keyword “reasonable” is easily adoptable by the different involved nations. Because many countries could comprehend the meaning of the term, they found it easy to identify with the CISG. Thus the aim of a high number of ratifications was reached.

III. “Reasonable” – the meaning in general and the legal meaning

The linguistic definition of “reasonable” reads “within the limits of reason, not greatly less or more than expected” and “tolerable, fair”¹⁴. This definition is highly based on expectations and toleration, which often deviate in different countries.¹⁵ It is therewith very subjective.

The linguistic definition affects the legal meaning: to determine “reasonable” behaviour from a legal perspective all circumstances may be of influence.¹⁶ The concept of the reasonable man does not require perfect behaviour but means that all circumstances may be taken into consideration.¹⁷ It is not easy to find a precise legal definition for the term “reasonable”. Combrink J stated in *Maree v Registrar*¹⁸: “I have yet to find a comprehensive definition of the concept of reasonableness, but can well understand why this is so. The concept is simply too wide to place within the confines of a definition without distracting from its import. However, common to all the manifestations of the concept of reasonableness in our law is that it provides an objective criterion to whatever it is applied and requires a consideration of all the facts in a given situation.”

¹⁴ Cf. Baasch Andersen, *Reasonable Time in Article 39 (1) of the CISG – is Article 39 (1) Truly a Uniform Provision?*, in: Pace International Law Review (ed.), *Review of the Convention on Contracts for the International Sale of Goods (CISG) 1998*, Chapter Four, p. 63, 66.

¹⁵ Ibid.

¹⁶ Ibid, p. 74 sq.

¹⁷ Ibid, p. 74 sq.

¹⁸ *Maree v Registrar, Durban and Coast Local Division 2001 4 SA 110 (D) 117.*

The term thus provides a high level of flexibility. Flexibility as an expression of individual fairness is one legal ideal. On the other hand objective predictability is the second legal ideal: legal definitions need to be precise. This is the classical conflict of individual fairness and objective predictability.¹⁹ The more objective and definite a legal term is, the higher is its degree of a uniform application, respectively of an objective predictability.

IV. "Reasonable" – the requirement of a uniform application of the CISG

The CISG is a uniform international sales law. The goal of uniformity is presented in the preamble by stating the interest of removing "legal barriers in international trade" and promoting "the development of international trade". Article 7 (1) CISG explicitly requires that the Convention has to be applied and interpreted uniformly. The practitioner of the CISG is obliged to regard case law from other Contracting States (Article 1 (1) (a) CISG), from other states when the rules of private international law lead to the application of the law of the Contracting States (Article 1 (1) (b) CISG) and from Arbitral Tribunals.²⁰ He has the duty to look to standards of international practice in the interpretation and determination of the provisions of the Convention.²¹ The uniformity of application, interpretation and defining legal terms is at the core of the Convention's usefulness as it was drafted to provide international legal certainty regarding international sales contracts.²²

¹⁹ Cf. Baasch Andersen, *Reasonable Time in Article 39 (1) of the CISG – is Article 39 (1) Truly a Uniform Provision?*, in: Pace International Law Review (ed.), *Review of the Convention on Contracts for the International Sale of Goods (CISG) 1998*, Chapter Four, p. 63, 66 sq.

²⁰ Audiencia Provincial de Valencia, Spain, 7 June 2003, www.unilex.info; see CLOUT case No. 378, Tribunale de Vigevano, Italy, 12 July 2000, referred to forty foreign court decisions as well as arbitral awards; Tribunale Rimini, Italy, 22 November 2002, *Giurisprudenza italiana*, 2003, 896 sqq, quoted 37 foreign court decisions; Rechtbank Northern District Court for Illinois, 28 March 2002

²¹ Cf. Baasch Andersen, *Reasonable Time in Article 39 (1) of the CISG – is Article 39 (1) Truly a Uniform Provision?*, in: Pace International Law Review (ed.), *Review of the Convention on Contracts for the International Sale of Goods (CISG) 1998*, Chapter Four, p. 63, 66, 72; idem, *Furthering the Uniform Application of the CISG: Sources of Law on the Internet*, PILR 1998, 403, 405.

²² Cf. Baasch Andersen, *Reasonable Time in Article 39 (1) of the CISG – is Article 39 (1) Truly a Uniform Provision?*, in: Pace International Law Review (ed.), *Review of the Convention on Contracts for the International Sale of Goods (CISG) 1998*, Chapter Four, p. 63, 66, 72.

V. "Reasonable" – a contradiction to a uniform application of the CISG?

Uniformity does not result automatically from the use of uniform terms. The Convention has been ratified by countries with different legal systems and completely diverse social, economic and cultural backgrounds.²³ Differences in application, interpretation and defining legal terms seem to be inevitable.

The flexibility of the term "reasonable" makes it both appropriate and inappropriate, valuable and dangerous for implementation in a uniform law.²⁴ There are two steps towards uniformity: the creation of a uniform law and moreover the interpretation and uniform application of that law.²⁵ The term "reasonable" is flexible enough to be acceptable to the ratifying countries and to avoid labelling terms that seem precise but may have diverse domestic legal meanings.²⁶ Its flexibility prevents the practitioner from assuming a precise meaning of the term and thus becoming even more imprecise than seemingly more ambiguous terms.²⁷ On the other hand, it may jeopardise the uniformity of its application.

The need for objective predictability especially applies to the CISG as a uniform law that must be interpreted uniformly.²⁸ The drafters of the CISG have implemented this requirement as an overriding principle into the CISG, Article 7 (1).

Thereby one is presented with a conflict of interest between objectivity and flexibility. This conflict accompanies the classical conflict of individual fairness and objective predictability. As it is common practice for the classical conflict it is true for the problem of the uniform application of a general term in the CISG: Only a simultaneous

²³ Cf. Camilla Andersen Baasch, *Furthering the Uniform Application of the CISG: Sources of Law on the Internet*, PILR 1998, 403, 404.

²⁴ Cf. Baasch Andersen, *Reasonable Time in Article 39 (1) of the CISG – is Article 39 (1) Truly a Uniform Provision?*, in: Pace International Law Review (ed.), *Review of the Convention on Contracts for the International Sale of Goods (CISG) 1998*, Chapter Four, p. 63, 73.

²⁵ Cf. Felemegas, *The United Nations Convention on Contracts for the International Sale of Goods: Article 7 and Uniform Interpretation*, in: Pace International Law Review (ed.), *Review of the Convention on Contracts for the International Sale of Goods (CISG) 2000-201*, Chapter Five, p. 115, 232.

²⁶ Cf. Baasch Andersen, *Reasonable Time in Article 39 (1) of the CISG – is Article 39 (1) Truly a Uniform Provision?*, in: Pace International Law Review (ed.), *Review of the Convention on Contracts for the International Sale of Goods (CISG) 1998*, Chapter Four, p. 63, 73.

²⁷ Ibid.

²⁸ Ibid, p. 67.

appreciation of the values "individual fairness" (subjective) and "objective predictability" can lead to a satisfying result.²⁹

VI. "Reasonable" – the degree of uniformity required by the CISG

The Convention does not expressly determine which degree of uniformity it strikes to meet. Absolute uniformity is incapable of being realized or achieved and would be an utopian goal concerning the diversity of the applying states.³⁰ Some scholars classify the CISG as an instrument for a common language.³¹ Does this require an absolute transnational uniformity? This can barely be expected as it would make an international instrument unachievable. It is also clear that the uniformity of the CISG should not suffer under its flexibility.³² The different circumstances and individual facts of each case should be taken into account but it was not intended that the diverse determinations of a term in domestic laws influence the uniformity of the Convention's application. Quite the contrary was intended as represented in Article 7 (1) CISG: As national rules on the law of sales diverge seriously, it is important to refrain from interpreting the Convention based on national law.³³ Rather the courts should interpret the Convention "autonomously", i.e. independent of their domestic law.³⁴ Nevertheless

²⁹ Ibid, p. 67.

³⁰ Cf. Andersen Baasch, *Furthering the Uniform Application of the CISG: Sources of Law on the Internet*, PILR 1998, 403, 404.

³¹ Honnold, *"The Sales Convention in Action – Uniform International Words: Uniform Application?"*, 8 Journal of Law and Commerce 207, 211 (1988), <http://cisgw3.law.pace.edu/cisg/biblio/honnold-sales.html>; Schlechtriem, *Uniform Sales Law – The Experience with Uniform Sales Laws in the Federal Republic of Germany*, 1 Jurikisk Tidskrift vid Stockholms Universitet 1, 28 (1991-92); cf. also Hellner, *The UN-Convention on the International Sale of Goods – an Outsider's view*, reprinted in Festschrift für Stefan Riesenfeld 71, 73; Zeller, *"International Trade Law – Problems of Language and Concepts?"*, 23 Journal of Law and Commerce (2003) 39-51, <http://cisgw3.law.pace.edu/cisg/biblio/zeller7.html>.

³² Cf. Baasch Andersen, *Reasonable Time in Article 39 (1) of the CISG – is Article 39 (1) Truly a Uniform Provision?*, in: Pace International Law Review (ed.), *Review of the Convention on Contracts for the International Sale of Goods (CISG) 1998*, Chapter Four, p. 63, 75.

³³ Cf. United Nations Conference on Contracts for the International sale of Goods, Vienna, 10 March – 11 April 1980, Official Records, Documents of the Conference and Summary Records of the Plenary Meetings and of the Meetings of the Main Committee, p. 17; see CLOUT case No. 222, Federal Court for the Eleventh Circuit, United States, 29 June 1998; CLOUT case No. 413, Federal District Court, Southern District of New York, United States, 6 April 1998; Oberlandesgericht Karlsruhe, Germany, 25 June 1997, www.unilex.info; CLOUT case No. 171, Bundesgerichtshof, Germany, 3 April 1996; CLOUT case No. 201, Richteramt Laufen des Kantons Berne, Switzerland, 7 May 1993.

³⁴ Cf. CLOUT case No. 217 und No. 333, Handelsgericht des Kantons Aargau, Switzerland, 26 September 1997 and 11 June 1999; CLOUT case No. 271, Bundesgerichtshof, Germany, 24 March 1999.

it was stated that references to inform the court are acceptable where the terms of the Convention resemble the domestic law³⁵, to the legislative history³⁶ and to international scholarly writing³⁷.

Hence "little variation in international practice"³⁸ has to be required, but "perfect uniformity" cannot be expected³⁹. It is therefore a reasonable but not absolute uniformity that seems to be adequate, desirable, feasible and meeting the Convention's own requirements under Article 7 (1) CISG.

VII. "Reasonable" – the development of a "reasonable" uniformity?

The aim of the thesis at hand will be to establish patterns to the application of the keyword "reasonable" under the different provisions and to assess whether the term was applied "reasonably uniform". Is the uniform international keyword "reasonable" a pathfinder or an insurmountable obstacle for a Uniform Application of the CISG? An examination of case law should shed light on this question.

At first the several different mentions of "reasonable" in the CISG and their application by courts and tribunals will be examined (part B). Thus, it shall be examined, which criteria were applied by the courts and tribunals, what they deemed "reasonable" and if there are changes in the application throughout the years in order to assess if the term was applied uniformly.

In part C I try to outline the technical development since the coming into force of the CISG in 1988. Considering temporal requirements as an example, the interrelation between technical progress and reasonableness shall be examined in order to determine which influence technical progress has on the (uniform?) application of the term "reasonable".

³⁵ Cf. CLOUT case No. 138, Federal Court of Appeals for the Second Circuit, United States, 6 December 1995; *Schmitz-Werke GmbH & Co. v. Rockland Industries, Inc.*; *Rockland International FSC, Inc.*, Federal Court of Appeals for the Fourth Circuit, 21 June 2002, US App. LEXIS 12336.

³⁶ Cf. Landgericht Aachen, Germany, 20 July 1995, published on the internet www.unilex.info.

³⁷ Cf. Oberster Gerichtshof Austria, 13 April 2000, published on the internet www.unilex.info.

³⁸ See Camilla Andersen Baasch, *Furthering the Uniform Application of the CISG: Sources of Law on the Internet*, PILR 1998, 403, 404.

³⁹ Honnold, *"The Sales Convention in Action – Uniform International Words: Uniform Application?"*, 8 Journal of Law and Commerce 207, 211 (1988), <http://cisgw3.law.pace.edu/cisg/biblio/honnold-sales.html>.

B. THE SEVERAL APPLICATIONS OF "REASONABLE" IN THE CISG: CRITERIA APPLIED. STARTING POINT. UNIFORM APPLICATION

The term "reasonable" applies several times in the CISG. Some provisions provide guidelines for a more precise interpretation of the "reasonableness"-requirement, e.g. Article 8 (3); others fail to imply any criteria. Although representatives asked for a definition, e.g. for the term "reasonable time" for giving notice under Article 39 (1) CISG⁴⁰, a definition of the term "reasonable" was not incorporated into the CISG. Neither the Secretariat Commentary⁴¹ nor the Convention itself provide a definition of the keyword. The decisive criteria are therefore provided by case law: "it is the actual application of the provision that ultimately defines it"⁴².

It has to be noticed that a general definition would not be very helpful either. Considering the frequent use of the term, its flexibility and the international character of the Convention, it seems to be essential to give each application its own special guideline and definition.⁴³ "Reasonable" with reference to "time" might well have a different connotation than with reference to "measure". Even in a closer context like "reasonable time" the wording appears in too many provisions as to apply a general definition.

Subsequent, I aim to research the application of the 49 mentions of the term "reasonable". It shall be established under each provision, which criteria the courts

⁴⁰ See Working Group on the International sale of Goods, Report on the Work of the Second Session, 7-18 December 1970, II Y.B. UNCITRAL 1971, 50, U.N.Doc. A/CN.9/52, § 94 (United Nations, New York 1972); Comments by Governments and International Organizations on the Draft Convention on the International sale of Goods, VII Y.B. UNCITRAL 1971, 109, 126, U.N. Doc. A/CN.9/125 (United Nations 1978); Draft Convention on the International Sale of Goods, VII UNCITRAL 1976, 89, 91, U.N. Doc. A/CN.9/116, Annex 1 (United Nations, New York 1977)

⁴¹ Commentary on the Draft Convention on Contracts for the International Sales of Goods, prepared by the Secretariat, <http://www.cisg.law.pace.edu/cisg/text/secomm/secomm-38.html>. The Secretariat Commentary is a special report that accompanied the final drafts of the Convention as an explanatory note. It comments on an earlier draft, but is considered to be the nearest substitute to an official commentary, cf. Baasch Andersen, *Reasonable Time in Article 39 (1) of the CISG – is Article 39 (1) Truly a Uniform Provision?*, in: Pace International Law Review (ed.), *Review of the Convention on Contracts for the International Sale of Goods (CISG) 1998*, Chapter Four, p. 63, 69; cf. Lookofsky, *Understanding the CISG in Scandinavia*, p. 23.

⁴² Baasch Andersen, *Reasonable Time in Article 39 (1) of the CISG – is Article 39 (1) Truly a Uniform Provision?*, in: Pace International Law Review (ed.), *Review of the Convention on Contracts for the International Sale of Goods (CISG) 1998*, Chapter Four, p. 63, 99.

⁴³ Ibid, p. 76.

and tribunals applied, what they considered reasonable, whether it is possible to establish a "starting point", which can function as point of reference that is subject to change due to the applicable criteria and whether the term was applied uniformly.

I. "Reasonable Person"

The term "reasonable person" is of utmost importance as it is e.g. contained in Article 8 CISG, which rules the interpretation of any statements or other conduct of a party provided that those statements or conduct relate to a matter governed by the Convention⁴⁴, and therefore has an extensive impact on the application of the CISG.

1. Article 8 (2) and (3) CISG: "understanding of a reasonable person"

Under Article 8 (1) CISG statements made by and other conduct of a party are to be interpreted according to his intent where the other party knew or could have not been unaware what that intent was. According to Article 8 (2) CISG, if Art 8 (1) CISG is not applicable, statements made by and other conduct of a party are to be interpreted according to the understanding that a reasonable person of the same kind as the other party would have had in the same circumstances. Thus, the right to interpret actions according to the understanding of a "reasonable person" applies to the whole Convention.

a. "Understanding of a reasonable person" – guideline provided by Article 8 (3) CISG

Article 8 (3) CISG gives further guidelines on how to determine the understanding a reasonable person would have had: due consideration is to be given to all relevant circumstances of the case including the negotiations⁴⁵, any practices which the parties have established between themselves⁴⁶, usages and any subsequent conduct of the

⁴⁴ Cf. Oberster Gerichtshof, Austria, 24 April 1997, www.unilex.info.

⁴⁵ Cf. Juzgado Nacional de Primera Instancia en lo Comercial No. 18, Argentina, 20 October 1989, www.unilex.info; Tribunal Commercial de Nivelles, Belgium, 19 September 1995, www.unilex.info; Bundesgerichtshof, Germany, 11 December 1996, www.unilex.info; U.S. District Court, N.D., Illinois, Eastern Division, USA, 28 October 1998, www.unilex.info.

⁴⁶ Cf. U.S. District Court, S.D., New York, USA, 14 April 1992, www.unilex.info; Oberlandesgericht Karlsruhe, Germany, 20 November 1992, www.unilex.info; Cour d'Appel de Grenoble, France, 21 October 1999, www.unilex.info; Bundesgerichtshof, Germany, 11 December 1996, www.unilex.info; Oberlandesgericht Düsseldorf, Germany, 30 January 2004, www.unilex.info.

parties⁴⁷.⁴⁸ Thereby Article 8 (3) CISG essentially rejects the parol evidence rule.⁴⁹ An American Court found that "contracts governed by the CISG are freed from the parol evidence rule" and that "there is a wider spectrum of admissible evidence to consider in construing the terms of the parties' agreement".⁵⁰

**b. "Understanding of a reasonable person" – criteria applied under
Article 8 (2) CISG**

While Article 8 (1) CISG permits a "substantial inquiry into the parties' subjective intent, even if the parties did not engage in any objectively ascertainable means of registering this intent"⁵¹, Article 8 (2) CISG provides "a more objective analysis" by referring to the understanding of "a reasonable person"⁵².

In regard to Article 8 (2) CISG several courts took into account the circumstances of the case.⁵³ According to a German Court the result of an interpretation under Article 8 (2) CISG is considered to correspond to the results of a "reasonable interpretation".⁵⁴

⁴⁷ Cf. Landgericht Hamburg, Germany, 26 September 1990, www.unilex.info; U.S. District Court, S.D., New York, USA, 14 April 1992, www.unilex.info; Oberlandesgericht Düsseldorf, Germany, 12 March 1993, www.unilex.info; Oberster Gerichtshof, Austria, 10 November 1994, www.unilex.info; Obergericht des Kantons Thurgau, Switzerland, 19 December 1995, www.unilex.info; Oberlandesgericht Koblenz, Germany, 31 January 1997, www.unilex.info; Bezirksgericht St. Gallen, Switzerland, 03 July 1997, www.unilex.info; Cour d'Appel de Grenoble, France, 21 October 1999, www.unilex.info; U.S. District Court, S.D., Michigan, USA, 17 December 2001, www.unilex.info.

⁴⁸ These criteria have to be taken into consideration when interpreting actions under both Art. 8 (1) and (2) CISG, ICC Court of Arbitration, award No. 8324/1995, www.unilex.info.

⁴⁹ CLOUT case No. 23, Federal District Court, Southern District of New York, United States, 14 April 1992; cf. also CLOUT case No. 222, Federal Court of Appeals for the Eleventh Circuit, United States, 29 June 1998; cf. CLOUT case No. 413, Federal District Court, Eleventh District of New York, United States, 6 April 1998; one court stated that, in order to avoid this, the parties can include a merger clause in their agreement that extinguishes any and all prior agreements and understandings not expressed in writing, CLOUT case No. 222, Federal Court of Appeals for the Eleventh Circuit, United States, 29 June 1998.

⁵⁰ CLOUT case No. 23, Federal District Court, Southern District of New York, United States, 14 April 1992.

⁵¹ CLOUT case No. 222, Federal Court of Appeals for the Eleventh Circuit, United States, 29 June 1998; Art. 8 (1) CISG requires that the parties have established practices between themselves and know each other well or that the statements are very clear, ICC Court of Arbitration, Paris, award No. 8324, published on the internet www.unilex.info.

⁵² Cf. ICC Court of Arbitration, Paris, award No. 8324, published on the internet www.unilex.info.

⁵³ Cf. Obergericht des Kantons Thurgau, Switzerland, 19 December 1995, www.unilex.info; Schiedsgericht der Handelskammer - Hamburg, Germany, 21 June 1996, www.unilex.info; Hoge Raad, The Netherlands, 07 November 1997, www.unilex.info.

⁵⁴ Cf. CLOUT case No. 273, Oberlandesgericht München, Germany, 9 July 1997.

Interpreting an arbitration agreement according to the understanding of a reasonable person an arbitration Tribunal 1996 considered what was to be expected.⁵⁵

In 1995, a German Court had to decide, if a notice was effective. The notice was given in a language that was not that of the contract or that of the addressee. The court considered if the foreign language could be the language normally used in the respective trade sector, to which the parties may be considered to have agreed upon, or if the addressee could have reasonably been expected to request from the sender of the notice explanations or a translation.⁵⁶ Therefore the Court did not only consider if the party understood the notice, but also what it could have done to understand it. Another German Court 1997 instead held that the reference by one party to its standard terms must be such as to put a reasonable person of the same kind as the other party in a position to understand it and to gain knowledge of the standard terms.⁵⁷ If the standard terms are in another language than that of the contract, the seller needs to send a translation or at least a text both in both languages.⁵⁸ The German Supreme Court stated in 2001, that the effective inclusion of standard terms in a contract *inter alia* depends on the understanding that a reasonable person of the same kind as the other party would have had in the same circumstances. Thereby the court confirmed that the reference by one party to its standard terms must be such as to put a reasonable person of the same kind as the other party in a position to understand it and to gain knowledge of the standard terms.⁵⁹ The Court held that the intention of the other party to include the standard terms into the contract needs to be recognisable and that it is necessary that the user of the standard terms sends the text to the addressee or makes it otherwise available to him.⁶⁰ The Court argued that the user could easily make the standard terms, which are in most cases benefiting for him,

⁵⁵ Schiedsgericht der Handelskammer - Hamburg, Germany, 21 June 1996, www.unilex.info.

⁵⁶ Oberlandesgericht Hamm, Germany, 08 February 1995, www.unilex.info.

⁵⁷ Landgericht Heilbronn, Germany, 15 September 1997, www.unilex.info, The Court found that the inclusion of standard terms in a contract has to be determined by interpreting the contract in the light of Art. 8 CISG.

⁵⁸ *Ibid.*

⁵⁹ Bundesgerichtshof, Germany, 31 October 2001, www.unilex.info.

⁶⁰ *Ibid.*

available.⁶¹ It referred to the general principle of good faith in international trade (Article 7(1) CISG) and the parties' duties to cooperate and to give information deriving thereof. The court held that it would be contradictory to these principles to suggest a duty of the addressee to request explanations from the sender and to make him carry the burden of disadvantages and risks, which arise from the use of standard terms.⁶² Another German Court followed the decision of the German Supreme Court in 2004. It stated that the addressee must be able to gain knowledge of the standard terms without unreasonable inconvenience. Therefore, it required that it must be clear to the addressee that the offeror wants to include its standard terms in the contract.⁶³

At first sight the first decisions seems to differ significantly from the latter ones, but one needs to consider, that the second one deals with standard terms predefined by one party which were intended to become part of the contract while the first one refers to a notice given by one party after conclusion of the contract.

In addition, the German Supreme Court 1998 took into account what the party did and what it could have done.⁶⁴ The Court considered that the seller could have set up the defence that notice of lack of conformity was not given timely but instead negotiated for almost 15 month on the measure and modalities of the payment of damages for lack of conformity.⁶⁵ The Court found that although as a general rule the mere availability of the seller to an amicable settlement does not substantiate a waiver of the defence, the conduct in the case at hand could only be reasonably interpreted by the buyer as an implied waiver of the defence.⁶⁶

Two further German Courts found that a reasonable interpretation includes to consider what is "commercially reasonable"⁶⁷ (1999) respectively what a "conscious businessman"⁶⁸ (1996) would have done. Moreover, a Swiss Court in 1998 stated that

⁶¹ Ibid.

⁶² Ibid.

⁶³ Oberlandesgericht Düsseldorf, Germany, 30 January 2004, www.unilex.info.

⁶⁴ Bundesgerichtshof, Germany, 25 November 1998, www.unilex.info.

⁶⁵ Ibid.

⁶⁶ Ibid.

⁶⁷ Oberlandesgericht Dresden, Germany, 27 December 1999, www.unilex.info.

⁶⁸ Landgericht Oldenburg, Germany, 28 February 1996, www.unilex.info.

the need for certainty in commercial transactions and the principle of good faith influence what is reasonable to expect⁶⁹, i.e. how an action has to be interpreted.

In 1999, another German Court stated that overriding the wording of the agreement needed to be drawn on.⁷⁰ Moreover, it took into consideration the interests of the parties.⁷¹

A Swiss Court in 2000 took into consideration the expertise of the parties. It stated that the seller could reasonably expect the buyer to have knowledge about the fact, that a 12 years old machine might technically differ from a new one of the same kind, as the buyer was an experienced trader of the kind of goods involved.⁷²

In 2000, a German court expressly stated and confirmed that according to Article 8 CISG it depends on the objective content of a statement how one needs to understand the conduct of the other party and how such a conduct needs to be interpreted.⁷³

In 2003, a Swiss court considered the interpretation under Article 8 CISG as an expression of the principle of reliance as a general principle underlying the CISG.⁷⁴

In only one of the available decisions, a New Zealand court in 2000 decided for a literal interpretation of a contract clause instead of an interpretation according to Article 8 CISG. The court argued that the Privy Council in London would not allow it to do otherwise, because England had not yet adopted the CISG and liberal interpretations of contracts are contradictory to English common law. The court admitted that a "liberal interpretation" would be desirable for the courts in New Zealand to bring the law in line with international instruments.

2. Article 25

Article 25 CISG defines the term "fundamental breach" as it is used in several provisions of the Convention. A breach of contract committed by one of the parties is

⁶⁹ Cf. CLOUT case No. 251, Handelsgericht des Kantons Zürich, Switzerland, 30 November 1998.

⁷⁰ Oberlandesgericht Dresden, Germany, 27 December 1999, www.unilex.info.

⁷¹ Ibid.

⁷² Schweizerisches Bundesgericht, Switzerland, 22 December 2000, www.unilex.info.

⁷³ Oberlandesgericht Frankfurt, Germany, 30 August 2000, www.unilex.info.

⁷⁴ Tribunale d'Appello di Lugano; Switzerland, 29 October 2003, www.unilex.info.

fundamental if it results in such detriment to the other party as substantially to deprive him of what he is entitled to expect under the contract, unless the party in breach did not foresee and a reasonable person of the same kind in the same circumstances would not have foreseen such a result, Article 25 CISG. Although this is an important provision, there are no decisions available, which shed light on the last clause referring to a reasonable person of the same kind in the same circumstances.

3. Reasonable person – conclusion

As decisions referring to Article 25 CISG do not give any further information about the term "reasonable person of the same kind in the same circumstances", only Article 8 CISG can be taken into consideration for a conclusion.

Article 8 (3) CISG provides important guidelines on what to consider when interpreting statements made by and other conduct of a party according to the understanding that a reasonable person of the same kind as the other party would have had in the same circumstances. Due consideration is to be given to all relevant circumstances of the case including the negotiations, any practices which the parties have established between themselves, usages and any subsequent conduct of the parties. These criteria cover a wide range of circumstances that influence the "understanding of a reasonable person" and govern which criteria might be suitable for the objective interpretation required.

Besides the guideline provided by Article 8 (3) CISG, the courts considered different criteria making up such an objective analysis in accordance to the "understanding of a reasonable person". The "understanding of a reasonable person" was equated with a "reasonable interpretation". The interpretation under Article 8 CISG was considered an expression of the general principle of good faith in international trade (Article 7(1) CISG) and the parties' duty to cooperate and to give information deriving thereof as general principles underlying the CISG. These principles are therefore appropriate to influence the result of an interpretation under Article 8 (2) CISG.

Courts did not only consider the knowledge of the other party but also what it could have done to understand the conduct of the other party, respectively what a party did and what it could have done to make the other party understand its intention.

The wording of the agreement was named as an overriding criterion. In addition, it was held that the reference by one party to its standard terms must be such as to put a reasonable person of the same kind as the other party in a position to understand it and to gain knowledge of the standard terms.

Moreover, it was considered what was "commercially reasonable" respectively what a "conscious businessman" would have done. The interests of the parties as well as their expertise were further criteria applied.

All available decisions agree insofar as they refer to the objective content of a statement when determining how one needs to understand the conduct of the other party and how such conduct needs to be interpreted. The criteria applied by the different courts all point into the same direction, coincide or complement one another, and are not contradictory. Therefore it can be stated that especially the term "understanding of a reasonable person" in Article 8 (2) CISG, supported by the guidelines provided by Article 8 (3) CISG, is applied uniformly. I could not find relevant differences concerning the definition of "understanding of a reasonable person" in the available decisions. Concerning this statement, it has however to be pointed out that the available decisions are from countries with an at least similar cultural background. Therefore, the conclusion might have turned out differently in case more decisions from countries with a completely different background would have been available. The decisions of the New Zealand Court sticking to a literal interpretation can only be qualified as an exception which does not even apply Article 8 (2) CISG. Thus, it does not give any further information about the uniform application of the term "reasonable".

II. Reasonable to rely on

Articles 16 (2) (b) and 35 CISG refer to the question, if it was reasonable to rely on something. The available decisions concerning Article 16 (2) (b) CISG do not shed light on the definition of the term "reasonable".

1. Article 35 CISG

Article 35 CISG deals with the conformity of the goods with the contract. Paragraph 2 provides standards concerning the goods' quality, function and packaging that, while not mandatory, are presumed to be included in the sales contract and to bind the

seller even without express agreement.⁷⁵ Article 35 (2) (b) CISG determines that, except where the parties have agreed otherwise, the goods do not conform with the contract unless they *inter alia*⁷⁶ 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. A German court decided that a buyer could not reasonably rely on the seller's knowledge of the importing country's public law requirements or administrative practices relating to the goods, unless the buyer pointed such requirements out to the seller.⁷⁷ A Finnish court held that a buyer can reasonably rely on skin care products maintaining a specified content of vitamin A throughout their shelf life when "the special purpose...was known by the (seller) with sufficient clarity" and "the buyer counted on the seller's expertise in terms of how the seller reaches the required vitamin A content and how the required preservation is carried out".⁷⁸ Although the courts arrived at different conclusions, they both took into account the same criteria. The courts considered the seller's knowledge of the characteristics as contractual requirements and the seller's expertise.

2. Reasonable to rely on - Conclusion

Decisions referring to Article 16 (2) (b) CISG do not shed light on what is deemed "reasonable to rely on". The criteria applied by courts under Article 35 CISG are the seller's knowledge of the characteristics as contractual requirements and the seller's expertise. These criteria are especially suitable under this Article because they are closely connected to the question if it is reasonable for the buyer to rely on the seller's skill and judgement.

Moreover, I am of the opinion that, in order to determine if these criteria are fulfilled, the guidelines given in Article 8 (3) CISG can be consulted. Articles 16 (2) (b) and 35

⁷⁵ Cf. UNCITRAL Digest of case law on the United Nations Convention on the International Sale of Goods, Art. 35, p. 3: Art. 35 (2): Overview, www.uncitral.org/uncitral/en/case_law/digests/cisg.html.

⁷⁶ Art. 35 (2) (a)-(d) provides cumulative requirements, i.e. the goods do not conform to the contract unless they meet all applicable subparagraphs.

⁷⁷ CLOUT case No. 123, Bundesgerichtshof, Germany, 8 March 1995.

⁷⁸ Helsinki Court of First Instance, Finland, 11 June 1995, affirmed by Helsinki Court of Appeal, Finland, 30 June 1998, www.unilex.info.

CISG correspond to Article 8 CISG, which refers to the understanding of a reasonable person to interpret statements and conduct.

III. Reasonably be expected

Two provisions refer to the term "reasonably be expected".

1. Article 60 CISG – acts which could reasonably be expected

Article 60 CISG defines the buyer's obligation to take delivery of the goods. Paragraph (a) requires the buyer to cooperate; he must perform "all the acts which could reasonably be expected of him in order to enable the seller to make delivery". An American court stated in 2002 "further, preparatory measures such as the provisions of plans or data, are also part of the cooperation required of the buyer since ultimately they serve to enable the seller to make delivery"⁷⁹, thereby referring to a commentary on the CISG. Moreover, the court held that the contractual agreement is decisive: the buyer must perform those obligations defined under the contract.⁸⁰ It found that the buyer could not rely on industry custom to displace a contractual obligation.⁸¹

The court developed a useful and quite detailed guideline, which seems to make decisions under Article 60 satisfactorily predictable. Nevertheless, it must remain anyone's guess that these criteria would be applied uniformly, as there are no further decisions available.

2. Article 79 CISG - Could not reasonably be expected to take into account, to avoid or to overcome

Article 79 CISG determines that a party is not liable for a failure to perform any of his obligations if he proves that the failure was due to an impediment beyond his control and that he could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome it or its consequences.

⁷⁹ U.S District Court, S.D., New York, USA, 10 May 2002, www.unilex.info, see full text of the decision.

⁸⁰ Ibid.

⁸¹ Ibid.

**a. Could not reasonably be expected to take into account, to avoid or
to overcome - criteria**

In 1989, a Tribunal stated, with reference to Blagojevic-Krulj⁸², that Article 133 of the Yugoslav Law on Obligations of 1978⁸³ and Article 79 (1) CISG are both "exonerations for events which a reasonable person in the same situation was not bound (could not be expected) to take into account or to avoid or to overcome".⁸⁴ The Tribunal held that "accordingly, the facts are situated in the vicinity of an act of force majeure".⁸⁵

In 1992, an Arbitral Tribunal stated that, in case a suspension of payment of foreign debts ordered by a Government has already been declared at the time of the conclusion of the contract, the impediment of difficulties in opening the documentary credit is foreseeable and therefore Article 79 CISG is not applicable.⁸⁶

In 1995, a Tribunal rejected the applicability of Article 79 CISG, because the seller was inter alia not able to constitute that he could not reasonably be expected to take the impediment into account at the time of conclusion of the contract or to have avoided or overcome the impediment or its consequences.⁸⁷

In the same year, a Belgian Court found that a significant drop in the market price, which leads to an economic loss on part of the buyer, is foreseeable in international

⁸² Comments on the Law of Obligations, pp. 351.

⁸³ Paragraphs 1 and 2 of Article 133 of the Yugoslav Law on Obligations of 1978 read as follows (in an unofficial translation), (ICC Court of Arbitration – Paris, Award No. 6281/1989, 26 August 1989, www.unilex.info, see full text of decision) :

(1) In case of circumstances occurring after the conclusion of the contract, which are of the nature to render the contractual performance of one of the parties difficult or to prevent the scope of the contract to be attained, both to such an extent that it becomes obvious that the contract ceases to correspond to the expectations of the parties and that it would be generally considered unjust to maintain it in force in the unchanged form, the party whose performance has been rendered difficult or which is prevented to attain the scope of the contract by the changed circumstances, can request that the contract be rescinded.

(2) The rescission of the contract cannot be claimed if the party, which invokes the changed circumstances, should have taken these circumstances into account at the time of the conclusion of the contract or could have escaped or overcome such circumstances.

⁸⁴ ICC Court of Arbitration – Paris, Award No. 6281/1989, 26 August 1989, www.unilex.info, see full text of the decision.

⁸⁵ Ibid.

⁸⁶ ICC Court of Arbitration – Paris, Award No. 7197/1992, www.unilex.info.

⁸⁷ CLOUT case No 140, Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, Arbitral award in case No. 155/1994, 16 March 1995.

trade. It argued that it is therefore part of the buyer's commercial risk that could have been reasonably expected by him at the time of the conclusion of the contract.⁸⁸

In 1996, an Arbitral Tribunal held that though a public authority prohibition on exports was an impediment beyond the seller's control, the requirement that the seller "could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract" was not fulfilled, because the prohibition was already in force at the time of the conclusion of the contract.⁸⁹

In 1998, a French Court found that the last two requirements of Article 79 CISG were fulfilled because there was no evidence that the seller had acted in bad faith.⁹⁰

An Arbitral Tribunal held in 1998 that a negative development in the market situation, problems with the storage of the goods, revaluation of the currency of payment and a decrease of trade volume in the construction industry are part of the buyer's commercial risk that could have been reasonably expected by him at the time of the conclusion of the contract.⁹¹

In the same year, a Dutch Court held that Article 79 CISG was not applicable because the seller was aware of a Singaporean ban on food imports polluted by radioactivity before conclusion of the contract and therefore took the risk of not being able to supply goods conforming to those regulations.⁹²

In 1999, the German Supreme Court held that Article 79 CISG is not applicable in case the failure is not due to an impediment beyond the party's control and emphasised that Article 79 CISG does not modify the contractual distribution of risks.⁹³ The court generalised that, if the failure by a third party is an obstacle in the sense of Article 79 CISG at all, it is as a basic principle one that the seller reasonably has to

⁸⁸ Rechtbank van Koophandel, Hasselt, Belgium, 02 May 1995, www.unilex.info.

⁸⁹ Bulgarska turgosko-promishlena palata (Bulgarian Chamber of Commerce and Industry), Arbitral Award, 24 April 1996, www.unilex.info.

⁹⁰ Tribunal de Commerce de Besançon, France, 19 January 1998, www.unilex.info.

⁹¹ Bulgarska turgosko-promishlena palata (Bulgarian Chamber of Commerce and Industry), Arbitral Award, 12 February 1998, www.unilex.info.

⁹² Rechtbank's Hertogenbosch, The Netherlands, 02 October 1998, www.unilex.info.

⁹³ Bundesgerichtshof, Germany, 24 March 1999, www.unilex.info.

avoid or to overcome.⁹⁴ The court argued that for the buyer it makes no difference if the seller produces the goods himself or if a third party engaged by the seller performs the contract.⁹⁵

In 2001, a French Court found that in case of a long term purchase contract the reduction of the repurchase price by the final customer is predictable at the time of conclusion of the contract.⁹⁶ Therefore, the court required the buyer, which was experienced in international commercial transactions, to take care of this problem, e.g. by including a hardship clause in the contract.⁹⁷

In 2004, an American Court applied a three stage test: (1) whether an impediment occurred, (2) whether the impediment made performance impractical and (3) whether the impediment was foreseeable.⁹⁸ The court thereby took into account case law construing analogous domestic law on excuse.⁹⁹

b. Could not reasonably be expected to take into account, to avoid or to overcome - conclusion

Overall, it can be stated that courts and tribunals interpreted Article 79 CISG quite strictly.

Firstly, Article 79 CISG requires that the party relying on Article 79 CISG could not reasonably be expected to have been taken the impediment into account at the time of the conclusion of the contract. The requirement was rejected by several courts in case the impediment was known, foreseeable or ought to have taken into consideration at the time of the conclusion of the contract. Foreseeable developments in international trade were deemed part of the parties' normal commercial risk.

Secondly, it is required that the party relying on Article 79 CISG could not reasonably be expected to have avoided or overcome the impediment or its consequences. This

⁹⁴ Ibid.

⁹⁵ Ibid.

⁹⁶ Cour d'Appel de Colmar, France, 12 June 2001, confirmed by Cour de Cassation, France, 30 June 2004, www.unilex.info.

⁹⁷ Ibid.

⁹⁸ U.S. District Court, Northern District of Illinois, East. Div., USA, 06 July 2004, www.unilex.info.

⁹⁹ Ibid.

requirement was rejected in case the failure to perform its obligation was caused by a failure of its supplier. The German Supreme Court went to such lengths as to generalise that, as a basic principle, the failure by a third party is an impediment that the seller reasonably has to avoid or to overcome.

Although one court took into account case law construing analogous domestic law on excuse, I am of the opinion that Article 79 CISG was applied satisfactory uniformly. All of the courts and tribunals opted for a strict application of the reasonableness-requirements under Article 79 CISG. They established a consistent list of criteria, which make the application of the reasonableness-requirements under Article 79 CISG predictable and uniform in the degree required by the CISG.

3. Reasonably be expected - conclusion

Although Article 60 CISG and Article 79 CISG both contain the term "reasonably be expected", courts applied different criteria under the two provisions. Thereby the need to give each application its own special guideline and definition is mirrored even in case the same term is used.

IV. Reasonable and temporal requirements

The CISG refers 15 times to the term "reasonable time", 2 times to the term "period of time of reasonable length" and 2 times to the term "without unreasonable delay". The temporal requirements are of utmost importance as they are often decisive for the question if a party is entitled to exercise a right provided in the CISG, e.g. Article 39 (1) CISG.

1. Article 33 c CISG - "reasonable time"

Article 33 CISG deals with the delivery of the goods. Subparagraph (c) determines that the seller must deliver the goods within a reasonable time after conclusion of the contract if a date or a period of time is neither fixed nor determinable from the

contract. Article 33 CISG expressly only addresses the obligation to deliver but applies as well to other duties of the seller.¹⁰⁰

a. Delivery within a reasonable time – criteria

A "reasonable time" is a time adequate in the circumstances.¹⁰¹ However, the definition remains unclear.

A technical criterion is the means of transportation. In the absence of an express agreement of the parties, the goods have to be delivered within the usual time that the means of transportation chosen by the seller take to reach the place of delivery.¹⁰²

As a decisive criterion the "parties' statements" are considered. One court stated that a modifying agreement saying "delivery as soon as possible" had to be understood as implying a period of time longer than the one agreed on earlier and lengthens the time frame.¹⁰³

Another court found that former offers of the buyer/ negotiations between the parties have to be taken into account to determine the reasonable time for delivery in case the seller has knowledge of or could have recognised the fundamental importance of a period indicated for delivery.¹⁰⁴ On the other hand, in this case it was not deemed decisive if delay in delivery of certain goods is usual.¹⁰⁵ Also "seasonality" and the fact that time of delivery was then crucial in case no term of delivery was fixed or determinable from the contract were not taken into consideration as decisive criteria.¹⁰⁶

¹⁰⁰ Cf. UNCITRAL Digest of case law on the United Nations Convention on the International Sale of Goods, Art. 33, p. 2, No. 2.: Meaning and purpose of the provision; www.uncitral.org/uncitral/en/case_law/digests/cisg.html.

¹⁰¹ Cf. UNCITRAL Digest of case law on the United Nations Convention on the International Sale of Goods, Art. 33, p. 3, No. 7.: Reasonable time (lit. c), www.uncitral.org/uncitral/en/case_law/digests/cisg.html.

¹⁰² Bezirksgericht der Saane, Switzerland, 20 February 1997, www.unilex.info.

¹⁰³ Rechtbank van Koophandel (Commercial Court), Kortrijk, Belgium, 03.10.2001, www.unilex.info.

¹⁰⁴ CLOUT case No. 362, Oberlandesgericht Naumburg, Germany, 27 April 1999.

¹⁰⁵ Ibid.

¹⁰⁶ Audiencia Provincial de Barcelona, Spain, 20 June 1997, www.unilex.info.

A Swiss court rejected the buyer's argument of delay by stating that there was neither evidence that the parties had fixed a date for the deliveries, nor that the alleged delays had caused any harm onto the buyer.¹⁰⁷

**b. Delivery within a reasonable time –
determination of a starting point**

In 1997, delivery of a bulldozer two weeks after receipt of invoice and payment of first instalment has been held "within the shortest period of time" and therefore reasonable by a Swiss court.¹⁰⁸

Also in 1997, a Spanish court had to decide whether the seller fulfilled his obligation under Article 33 CISG. The goods were ordered before Christmas and delivered in January of the following year. Although the goods were "seasonal items" and time of delivery was therefore crucial, the court found that the seller performed its obligations by delivering the goods within a reasonable time after the conclusion of the contract.¹⁰⁹

In 1999, a German court found that if a reasonable time applies and the buyer had made it clear that he was interested in delivery until 15 March, the reasonable time ends before 11 April.¹¹⁰

In 2001 a Dutch court held that, even if a pre-existing agreement from the 15 December 1999 between the parties provided for a period of four weeks for delivery, the contract had additionally been modified on the 10 January 2000 requiring delivery to be effected "as soon as possible" and therefore 8 weeks were still a reasonable time for delivery.¹¹¹

¹⁰⁷ Tribunal Cantonal de Sion, Switzerland, 29 June 1998, www.unilex.info.

¹⁰⁸ Tribunal Cantonal de Vaud, Switzerland, 28 October 1997, www.unilex.info.

¹⁰⁹ Audiencia Provincial de Barcelona, Spain, 20 June 1997, www.unilex.info.

¹¹⁰ CLOUT case No. 362, Oberlandesgericht Naumburg, Germany, 27 April 1999.

¹¹¹ Rechtbank van Koophandel (Commercial Court), Kortrijk, Belgium, 03.10.2001, www.unilex.info.

c. Delivery within a reasonable time – conclusion

The "reasonable time" determined under Article 33 (c) CISG has varied significantly and it is not possible to establish a starting point concerning the time-frame considered reasonable. On the other hand, the criteria mentioned above coincide.

As decisive criteria negotiations between the parties, statements made by the parties and the contractual agreement were mentioned. This illuminates the differing time-frames. As negotiations, statements and contracts can include very different periods for delivery, the determination of a reasonable time under Article 33 (c) CISG might differ significantly as well without indicating that a uniform interpretation failed. Moreover, it was taken into consideration if the seller had knowledge of or could have recognised the fundamental importance of a period indicated for delivery. One court took into consideration if the alleged delays caused any harm to the buyer.¹¹²

Facts that were deemed to not influence the period under Article 33 (c) CISG were seasonality and usualness of delay. Seasonality was not considered a criterion in case a time for delivery was not fixed or determinable from the contract. Usualness of delay was not found to be a criterion that lengthens the time-frame under Article 33 (c) CISG.

2. Article 39 (1) CISG - "reasonable time"

Article 39 CISG enjoins on the buyer, who claims that delivered goods do not conform to the contractual agreement, an obligation to give the seller notice of the lack of conformity¹¹³.

¹¹² Tribunal Cantonal de Sion, Switzerland, 29 June 1998, www.unilex.info.

¹¹³ The concept of conformity is defined in Art. 35 CISG.

Article 39 (1) CISG¹¹⁴ determines that the buyer loses the right to rely on a lack of conformity of the goods if he does not give notice to the seller specifying the nature of the lack of conformity within a reasonable time after he has discovered it or ought to have discovered it. Paragraph (2) defines a period of two years from the date on which the goods were actually handed over to the buyer as a maximum, unless this time limit is inconsistent with a contractual period of guarantee. The time limit in paragraph (2) is precise and non-variable, its purpose is to provide a predictable time limit beyond which a seller can be sure that non-conformity can no longer be claimed, because Article 39 (2) CISG will cut-off the buyer's right to give notice.¹¹⁵ In contrast, the time limit contained in paragraph (1) is variable and needs to be specified.

Subsequently case law will be examined in regard of the commencement of the reasonable time and criteria determining its time-frame. Article 39 CISG is one of the most interesting provisions containing a temporal reasonableness-requirement, meanwhile several decisions on the "reasonable time" under Article 39 (1) CISG are published. On the internet at www.unilex.info e.g. 66 decisions are listed. Most of these decisions originate from Germany (twenty-three), eleven are from Belgium and nine from the Netherlands; other countries, like France (four) and Switzerland (six) provide only a minimum of the published decisions.¹¹⁶

a. "Reasonable time" for notice - commencement of the time limit

Article 39 (1) CISG requires the buyer to give notice to the seller within a reasonable time after he has discovered or ought to have discovered a lack of conformity. Article 39 CISG and Article 38 CISG interdigitate. Article 38 CISG determines that the buyer

¹¹⁴ Art. 39 (1) CISG is a nearly literal repetition of the first line of Art. 39 (1) of the ULIS. Only the term "promptly" has been replaced by "within a reasonable time". Actually Art. 11 of the ULIS defined "promptly" similar to the new wording as "within as short a period as possible, in the circumstances, from the moment when the act could reasonably be performed". Therefore the change of wording is not too incisive, but there has been a change of context: the nature of the CISG allows "generous international compromises". Cf. Baasch Andersen, *Reasonable Time in Article 39 (1) of the CISG – is Article 39 (1) Truly a Uniform Provision?*, in: Pace International Law Review (ed.), *Review of the Convention on Contracts for the International Sale of Goods (CISG) 1998*, Chapter Four, p. 63, 92 sq.

¹¹⁵ Cf. Landgericht Marburg, Germany, 12 December 1995, www.unilex.info; cf. UNCITRAL Digest of case law on the United Nations Convention on the International Sale of Goods, Art. 39, No. 23, www.uncitral.org/uncitral/en/case_law/digests/cisg.html.

¹¹⁶ Cf. www.unilex.info, furthermore there are 4 arbitral awards, 3 decisions from the USA, 2 from Italy, and 1 in each case from Austria, Canada, Denmark and Spain;

must examine the goods, or cause them to be examined, within as short a period as practicable in the circumstances. In order to define the "reasonable time" under Article 39 (1) CISG it is necessary to determine the point in time when the time limit commences.

(1) Presumptive periods assessed from the time goods are delivered

A number of decisions from different countries¹¹⁷ suggest assessing the presumptive periods from the time when the goods are delivered.¹¹⁸ Thus, the presumptive period of time not only covers the time limit for giving notice but also for discovering the lack of conformity.¹¹⁹ The suggested periods differ between 8 days from delivery up to one month.¹²⁰

¹¹⁷ Especially the published (www.unilex.info) Belgian decisions do not follow the distinguishing approach, cf. Cour d'Appel, Mons, Belgium, 8 March 2001, www.unilex.info, notice 52 days after delivery not within a reasonable time; Rechtbank van Koophandel (Commercial Court), Veurne, Belgium, 25 April 2001, www.unilex.info, notice four months after delivery untimely; Rechtbank van Koophandel Hasselt, Belgium, 6 March 2002, www.unilex.info, notice given nearly five and two month after delivery not timely.

¹¹⁸ Cf. CLOUT case No. 167, Oberlandesgericht München, Germany, 8 February 1995; Oberlandesgericht München, Germany, 11 March 1998; Oberster Gerichtshof, Austria, 27 August 1999, www.unilex.info; CLOUT case No. 192, Obergericht des Kantons Luzern, Switzerland, 8 January 1997; Cour d'Appel, Mons, Belgium, 8 March 2001, www.unilex.info; CLOUT case No. 232, Rechtbank van Koophandel (Commercial Court), Veurne, Belgium, 25 April 2001, www.unilex.info; Rechtbank van Koophandel Hasselt, Belgium, 6 March 2002, www.unilex.info.

¹¹⁹ Cf. CLOUT case No. 167, Oberlandesgericht München, Germany, 8 February 1995: The Oberlandesgericht München suggested a period of 8 days after delivery for durable, non-seasonal goods; Oberlandesgericht München, Germany, 11 March 1998 suggested one month after delivery as the time limit; Oberster Gerichtshof, Austria, 27 August 1999, www.unilex.info, submitted 14 days for examination and notice; CLOUT case No. 192, Obergericht des Kantons Luzern, Switzerland, 8 January 1997, notice four months after delivery untimely; Cour d'Appel, Mons, Belgium, 8 March 2001, www.unilex.info, notice 52 days after delivery not within a reasonable time; CLOUT case No. 232, Rechtbank van Koophandel (Commercial Court), Veurne, Belgium, 25 April 2001, www.unilex.info, notice four months after delivery untimely; Rechtbank van Koophandel Hasselt, Belgium, 6 March 2002, www.unilex.info, notice given nearly five and two month after delivery not timely.

¹²⁰ Cf. CLOUT case No. 167, Oberlandesgericht München, Germany, 8 February 1995: The Oberlandesgericht München suggested a period of 8 days after delivery for durable, non-seasonal goods; Oberlandesgericht München, Germany, 11 March 1998 suggested one month after delivery as the time limit; Oberster Gerichtshof, Austria, 27 August 1999, www.unilex.info, submitted 14 days for examination and notice;

(2) Distinguishing approach

Several decisions differentiate between the period for discovering the non-conformity and that for giving notice afterwards. According to this "distinguishing approach" after the period for the examination under Article 38 (1) CISG ends, the period of timely notice according to Article 39 (1) CISG begins.¹²¹ The two articles define two successive periods of time. Article 38 CISG is the bridge between the delivery and the commencement of the time limit under Article 39 CISG. In case the buyer did not actually discover the lack of conformity, Article 38 CISG defines the point when the buyer normally ought to have discovered it (without delay regarding the objective circumstances of the case¹²²).¹²³ Therefore, Article 39 CISG is violated if the buyer

CLOUT case No. 192, Obergericht des Kantons Luzern, Switzerland, 8 January 1997, notice four months after delivery untimely;

Cour d'Appel, Mons, Belgium, 8 March 2001, www.unilex.info, notice 52 days after delivery not within a reasonable time; CLOUT case No. 232, Rechtbank van Koophandel (Commercial Court), Veurne, Belgium, 25 April 2001, www.unilex.info, notice four months after delivery untimely; Rechtbank van Koophandel Hasselt, Belgium, 6 March 2002, www.unilex.info, notice given nearly five and two month after delivery not timely.

¹²¹ Oberlandesgericht Oldenburg, Germany, 5 December 2000, www.unilex.info.

German courts (e.g. CLOUT case No. 285, Oberlandesgericht Koblenz, Germany, 11 September 1998; Landgericht Mönchengladbach, Germany, 22 May 1992 www.unilex.info (in case of textiles)), e.g. suggested one week after the discovery of the lack of conformity following one week for examination under Art. 38 CISG as a reasonable time.

Further German courts (e.g. CLOUT case No. 280, Oberlandesgericht Jena, Germany, 26 May 1998; Oberlandesgericht Karlsruhe, Germany, 25 June 1997, www.unilex.info (reversed on other grounds); CLOUT case No. 270, Bundesgerichtshof, Germany, 25 November 1998) e.g. submitted 8 days after discovery as the reasonable time for giving notice.

Cf. Tribunale di Vigevano, Italy, 12 July 2000, www.unilex.info: The period commences as from the time when the buyer is required to examine the goods under Art. 38(1), which as a rule is upon delivery or shortly thereafter and only exceptionally may be later, notice has to be given *immediately after the defect should have been discovered at the latest*, the Court held that a notice given four months after *delivery* was not timely. On the one hand the court seems to distinguish between the two time-frames, on the other hand it refers to the four month period after delivery as not timely thereby blurring the distinguishing approach;

Arrondissementsrechtbank Dordrecht, The Netherlands, 21 November 1990, published on t einternt at www.unilex.info; Arrondissementsrechtbank Roermond, The Netherlands, 19 December 1991, www.unilex.info; Arrondissementsrechtbank Roermond, The Netherlands, 6 May 1993, www.unilex.info, within a reasonable time means 'as soon as possible' upon discovery of the defects; Hoge Raad, The Netherlands, 4 February 2005, www.unilex.info.

Obergericht Kanton Luzern, Switzerland, 8 January 1997, www.unilex.info.

¹²² Cf. Bianca, *Examination of Goods – Art. 38 CISG*, in: Bonell/ Bianca, *Commentary on the International Sales Law – The 1980 Vienna Sales Convention*, 295, 299.

¹²³ Cf. *Commentary on the Draft Convention on Contracts for the International Sales of Goods*, prepared by the Secretariat, at 34, § 2 (Art. 36, former draft to Art. 38 CISG). The Secretariat Commentary is a special report that accompanied the final drafts of the Convention as an explanatory note. It comments on an earlier draft, but is considered to be the nearest substitute to an

gives notice only after the date when he ought to have discovered the non-conformity, even if he submits the notice immediately after the (then late-) discovery. Hence, the time for examination has an impact on the date when notice needs to be given.

(3) Conclusion

It stands out that especially the German and the Dutch decisions follow at least since 1998¹²⁴ the distinguishing approach. As stated above, the time for examination has an impact on the date when notice needs to be given. Nevertheless, the two periods should not be mixed up.¹²⁵ Two different Articles establish two successive and in my view intertwined but basically autonomous periods of time. The end of the Article 38 CISG period of time is the point in time when the non-conformity ought to have been discovered. After that, or when the non-conformity has actually been discovered earlier, the Article 39 CISG time limit commences.¹²⁶ One can make a clear cut between the two terms at this particular moment. This logically leads to the possibility to establish an exactly defined "reasonable time" under Article 39 CISG. Although this separation of the time limits is highly academic, it allows determining the "reasonable time" more precisely, because the factors under the two Articles are not blurred with the result of one approximate period of time for examination and notice. The time limit for examination might differ, but it should not influence the term for giving notice. Aiming at preciseness the thesis at hand therefore tries to focus on those decisions that follow the distinguishing approach.

official commentary, cf. Baasch Andersen, *Reasonable Time in Article 39 (1) of the CISG – is Article 39 (1) Truly a Uniform Provision?*, in: Pace International Law Review (ed.), *Review of the Convention on Contracts for the International Sale of Goods (CISG) 1998*, Chapter Four, p. 63, 69; cf. Lookofsky, *Understanding the CISG in Scandinavia*, p. 23.

¹²⁴ Two German decisions before September 1998 (CLOUT case No. 167, Oberlandesgericht München, Germany, 8 February 1995; Oberlandesgericht München, Germany, 11 March 1998) did not follow the distinguishing approach.

¹²⁵ Cf. Baasch Andersen, *Reasonable Time in Article 39 (1) of the CISG – is Article 39 (1) Truly a Uniform Provision?*, in: Pace International Law Review (ed.), *Review of the Convention on Contracts for the International Sale of Goods (CISG) 1998*, Chapter Four, p. 63, 87.

¹²⁶ Only if a satisfactory examination would not reasonably have disclosed the non-conformity Art. 38 is irrelevant to Article 39, cf. Baasch Andersen, *Reasonable Time in Article 39 (1) of the CISG – is Article 39 (1) Truly a Uniform Provision?*, in: Pace International Law Review (ed.), *Review of the Convention on Contracts for the International Sale of Goods (CISG) 1998*, Chapter Four, p. 63, 84.

b. "Reasonable time" for notice - criteria

The circumstances of each case differ from one another. Certainly, the "reasonable time" differs according to the particulars of each case.¹²⁷ Here again the term "reasonable time" establishes flexibility¹²⁸, but there is evidence to suggest that it provides a strict time limit¹²⁹. There have been established different criteria for determining the "reasonable time" under Article 39 (1) CISG.

(1) Basis of the interest of good business

It has been suggested that the "reasonable time" has to be determined based on the interest of good business.¹³⁰ Thus, no party should obtain unfair advantages.¹³¹

(2) The contract

Decisive for the relationship of seller and buyer is the contract. The time period can be agreed on or be implied in case of e.g. a contract that reflects urgency.¹³² If the parties have agreed on a time-frame the agreed period of time is decisive for the question if the notice was given timely.¹³³ One can differentiate between two agreements: on the one hand, the parties can stipulate a period that represents a "reasonable time"¹³⁴ and on the other hand, the parties can agree on an Article 6 CISG derogation from Article 39 CISG¹³⁵. The latter category proves that the factor "agreement" is decisive in

¹²⁷ C.f. Tribunale Civile di Cuneo, Italy, 31 January 1996, www.unilex.info; CLOUT case No. 310, Oberlandesgericht Duesseldorf, Germany, 12 March 1993; CLOUT case No. 81, Oberlandesgericht Duesseldorf, Germany, 10 February 1994; CLOUT case No. 378, Tribunale di Vigevano, Italy, 12 July 2000.

¹²⁸ C.f. Tribunale Civile di Cuneo, Italy, 31 January 1996, www.unilex.info.

¹²⁹ Oberster Gerichtshof, Austria, 27 August 1999, www.unilex.info; CLOUT case No. 310, Oberlandesgericht Duesseldorf, Germany, 12 March 1993; CLOUT case No. 81, Oberlandesgericht Duesseldorf, Germany, 10 February 1994; CLOUT case No. 251, Handelsgericht des Kantons Zuerich, Switzerland, 30 November 1998.

¹³⁰ CLOUT case No. 310, Oberlandesgericht Duesseldorf, Germany, 12 March 1993; c.f. UNCITRAL Digest of case law on the United Nations Convention on the International Sale of Goods, Art. 39, p. 12, No. 15: Timely notice in general; www.uncitral.org/uncitral/en/case_law/digests/cisg.html.

¹³¹ Ibid.

¹³² Cf. Landgericht Berlin, 21 March 2003, www.unilex.info.

¹³³ Cf. Landgericht Baden-Baden, Germany, 14 August 1991, www.unilex.info.

¹³⁴ Cf. Landgericht Hannover, Germany, 1 December 1993, www.unilex.info, does not seem to consider a period of 10 days for giving notice in case a sale of shoes an Art. 6 derogation but as conform with Art. 39 CISG.

¹³⁵ Cf. Oberlandesgericht Muenchen, Germany, 11 March 1998, www.unilex.info; Landgericht Giessen, Germany, 5 July 1994, www.unilex.info.

determining the “reasonable time”. The former category of periods that are not considered Article 6 CISG derogations furthermore can shed light on the periods deemed reasonable under Article 39 (1) CISG.¹³⁶ Unfortunately imprecision creeps in at this point: the times agreed upon often commence at the time of delivery and therefore contain a mix-up of the Article 38 and Article 39 CISG time-frames.¹³⁷ The cases cited above classified 10-30 days as non-derogations.

(3) General terms and conditions

The seller's standard terms, applicable to the contract, can influence the “reasonable time” when they provide for a certain time-frame¹³⁸, e.g. short terms for notice of defects.¹³⁹ A German court found a period of fourteen days given in the standard terms reasonable.¹⁴⁰ As it was still reasonable under Article 39 CISG, the fourteen days notice of non-conformity was validly agreed upon and shortened the time that was usually reasonable under the circumstances.¹⁴¹

(4) Trade Practices

Trade practice can have an impact on the time that is “reasonable” under Article 39 CISG. A Dutch court referred to the usage in the fish market when determining the term for a notice of non-conformity.¹⁴²

(5) Usages established between the parties

Usages established between the parties can be of influence, too. The usual speed in which the parties undertake their trading and in which they were used to carry on their relationship under the contract, can be a measure under Article 39 CISG.¹⁴³

¹³⁶ Cf. Baasch Andersen, *Reasonable Time in Article 39 (1) of the CISG – is Article 39 (1) Truly a Uniform Provision?*, in: Pace International Law Review (ed.), *Review of the Convention on Contracts for the International Sale of Goods (CISG) 1998*, Chapter Four, p. 63, 110 sq.

¹³⁷ Ibid, p. 111.

¹³⁸ Cf. Oberlandesgericht München, Germany, 11 March 1998, www.unilex.info; Landgericht Baden-Baden, Germany, 14 August 1991, www.unilex.info.

¹³⁹ Rechtbank Zwolle, The Netherlands, 05 March 1997, for frozen products (fish), www.unilex.info; Oberster Gerichtshof, Austria, 14 January 2002, www.unilex.info.

¹⁴⁰ Oberlandesgericht München, Germany, 11 March 1998, www.unilex.info.

¹⁴¹ Ibid.

¹⁴² Rechtbank Zwolle, The Netherlands, 05 March 1997, www.unilex.info

¹⁴³ Hungarian Chamber of Commerce and Industry Court of Arbitration, 05.12.1995, www.unilex.info.

(6) Deadline of the buyer itself

In case the buyer operates under a deadline itself after which a rectification of alleged defects is no longer of any use, the period for notice has to be adapted to the deadline.¹⁴⁴ A German court decided that the buyer of an analysis failed to give timely notice as he submitted the notice after his own deadline for a presentation had expired while the date of consignment and the volume of the report allowed an earlier review, which would have made rectification of the alleged defects possible.¹⁴⁵

(7) The defect

A main criterion is the defect that leads to the non-conformity. Defects that are not hidden and easily noticeable often give rise to shorter periods of time for the notice of non-conformity.¹⁴⁶ Closely examined this seems to be an improper factor to be considered for determining the time available for giving notice. It appears to be more precise to factor the obviousness of the defect for determining the time for examination of the goods. As shown before, decisions distinguish between these two periods of time. On the other hand, it seems to make sense to lengthen the time limit in case of hidden defects, which require an expert examination. The German Supreme Court¹⁴⁷ decided that such hidden defects allow for an extension of about one week from discovery of the damage to consider which actions were required plus a the two-

¹⁴⁴ Cf. Landgericht Köln, 11.11.1993, <http://www.cisg-online.ch/cisg/urteile/200.htm>; capable of being misunderstood UNCITRAL Digest of case law on the United Nations Convention on the International Sale of Goods, Art. 39, p. 17, No. 21 refers to the deadline of the seller: "...as can the buyer's awareness that the *seller* itself was operating under a deadline that would require prompt notice of defects".

¹⁴⁵ Landgericht Köln, 11 November 1993, <http://www.cisg-online.ch/cisg/urteile/200.htm>

¹⁴⁶ Oberster Gerichtshof, Austria, 14 January 2002, www.unilex.info, refers to the efforts necessary to examine the goods.

Rechtbank van Koophandel Kortrijk, Belgium, 16 December 1996, www.unilex.info; CLOUT case No. 310,

Oberlandesgericht Düsseldorf, Germany, 12 March 1993; CLOUT case No. 284, Landgericht Berlin, Germany, 30 September 1993, www.unilex.info; Oberlandesgericht Köln, Germany, 21 August 1997; Landgericht Landshut, Germany, 5 April 1995, www.unilex.info; Landgericht Berlin, Germany, 16 September 1992, www.unilex.info; Amtsgericht Riedlingen, Germany, 21 October 1994, www.unilex.info;

Tribunale Civile di Cuneo, Italy, 31 January 1996, www.unilex.info;

Pretura di Locarno-Campagna, Switzerland, 29 April 1992, www.unilex.info;

Arrondissementsrechtbank Rotterdam, The Netherlands, 21 November 1996, www.unilex.info;

¹⁴⁷ Bundesgericht, Germany, 3 November 1999, www.unilex.info.

week period of the expert examination. This extension is followed by the reasonable time for notice, which according to the Court usually amounts to one month.

(8) The nature of the goods

As another decisive criterion, the nature of the goods is mentioned frequently.¹⁴⁸

Perishable goods are a category of their own. In case of perishable goods, a very strict interpretation of the term "reasonable time" is recognisable: notice is suggested to be due in days up to only a few hours.¹⁴⁹

A Dutch court factored the perishableness to determine the time limit for examining the goods. Results-oriented this leads to a shortening of the "reasonable time" for giving notice at the same time. Logically the perishableness should be considered twice. Perishable goods need to be examined quickly to ascertain their conformity with the contract. As a factor for the reasonable time for giving notice, they seem to be sensible too: A buyer who observes a lack of conformity during a short time for examination and gives notice quickly after that gives the seller an opportunity to react to the non-conformity while the goods might still be useful for some other purpose.

A German court suggested that notice has to be given on the day of delivery in case of fresh flowers.¹⁵⁰

¹⁴⁸ Oberster Gerichtshof, Austria, 14 January 2002, www.unilex.info, refers to the characteristic feature and the quantity of the goods;

Pretura di Torino, Italy, 30 January 1997, www.unilex.info; CLOUT case No. 378, Tribunale di Vigevano, Italy, 12 July 2000;

Arrondissementsrechtbank Roermond, The Netherlands, 19 December 1991, www.unilex.info;

U.S. District Court, S.D., Michigan, USA, 17 December 2001, published on the internet at www.unilex.info, The Court took into consideration that the goods involved (unique and complicated equipment, delivered in installments and subject to training and on-going repairs on the part of Seller's engineers) gave reason for a period of notice longer than the one usually required for simple goods.

¹⁴⁹ Arrondissementsrechtbank Roermond, The Netherlands, 19 December 1991, www.unilex.info; Arrondissementsrechtbank Rotterdam, The Netherlands, 21 November 1996, www.unilex.info; CLOUT case No. 290, Oberlandesgericht Saarbrücken, Germany, 31 June 1998; Oberlandesgericht Karlsruhe, Germany, 25 June 1997, www.unilex.info (reversed on other grounds); CLOUT case No. 270, Bundesgerichtshof, Germany, 25 November 1998; CLOUT case No. 378, Tribunale di Vigevano, Italy, 12 July 2000; cf. Amtsgericht Riedlingen, Germany, 21 October 1994, www.unilex.info.

¹⁵⁰ CLOUT case No. 290, Oberlandesgericht Saarbrücken, Germany, 31 June 1998.

The German Supreme Court announced that in case of perishable goods notice often needs to be given in a few hours.¹⁵¹

A further German court did not explicitly allege the perishableness of the goods in question but asserted that for ham the time limit for giving notice of non-conformity¹⁵² is three days.¹⁵³

The nature of goods can furthermore be seasonality. Seasonal goods require a quicker notice, too.^{154 155}

In comparison to the aforementioned goods, durable or non-seasonable goods allow a longer notice term.¹⁵⁶

As stated above for the factor "noticeable defect", some criteria seem to be more suitable to determine the time for examination of the goods under Article 38 CISG than for affecting the period under Article 39 (1) CISG. On the one hand, this is true for the nature of the goods, too.¹⁵⁷ On the other hand, the nature of the goods can make a quicker notice desirable in order to give the seller the chance to react on the defect before the goods are worthless.

(9) Processing the goods

The buyer's intention to hand over the goods to a third party in order to process them has an influence on the "reasonable time".

A Dutch court distinguished between the period for discovering the non-conformity and that for giving notice afterwards.¹⁵⁸

¹⁵¹ CLOUT case No. 270, Bundesgerichtshof, Germany, 25 November 1998.

¹⁵² Following a 3 days time-period for examining the goods (ham).

¹⁵³ Amtsgericht Riedlingen, Germany, 21 October 1994, www.unilex.info.

¹⁵⁴ Oberster Gerichtshof, Austria, 27 August 1999, www.unilex.info; Amtsgericht Augsburg, Germany, 29 January 1996, www.unilex.info.

¹⁵⁵ Ibid.

¹⁵⁶ CLOUT case No. 167, Oberlandesgericht München, Germany, 08 February 1995; Cf. CLOUT case No. 248, Schweizerisches Bundesgericht, Switzerland, 28 October 1998.

¹⁵⁷ Cf. a Swiss decision which differentiated precisely between the two time-frames and considered the nature of the goods under Art. 38 CISG, Obergericht Kanton Luzern, Switzerland, 8 January 1997, www.unilex.info.

¹⁵⁸ Gerechtshof's Hertogenbosch, The Netherlands, 15 December 1997, sale of furs, www.unilex.info.

The court found that the buyer did not examine the goods 'within as short a period as practicable in the circumstances' because he did not examine the goods before processing them and had therefore lost its right to rely on a lack of conformity.¹⁵⁹ The court held that the buyer could have the goods examined by an expert before sending them to a third party.¹⁶⁰

Moreover, the court held that the buyer had not given timely notice of the defects.¹⁶¹ In case, the goods have been sent to a third party for processing and if the goods have already undergone processing, a notice is considered not timely.¹⁶²

Another Dutch court arrived at a similar decision in a case where fish was sold and transformed into fish fillets.¹⁶³

The court held that the buyer did not examine all the goods as soon as practicable (Article 38 CISG) which under the circumstances was considered as at the time of delivery or shortly afterwards.¹⁶⁴

The "reasonable time" was affected by the processing for two reasons. The fact that the goods had to be transformed by the buyer made it impossible for the seller to ascertain whether the goods sold were defective.¹⁶⁵ Therefore, the notice of non-conformity has to be submitted before processing the goods.¹⁶⁶ The buyer also had a duty to examine all the fish and not only a sample of it before selling them to the customer.¹⁶⁷ As the fish was transformed into fish fillets, the latest possibility for such an examination was before processing the fish.¹⁶⁸ As the buyer therefore should have

¹⁵⁹ Ibid.

¹⁶⁰ Ibid.

¹⁶¹ Ibid.

¹⁶² Ibid.

¹⁶³ Rechtbank Zwolle, The Netherlands, 05 March 1997, www.unilex.info.

¹⁶⁴ Ibid.

¹⁶⁵ Cf. Ibid.

¹⁶⁶ Cf. Ibid.

¹⁶⁷ Cf. Ibid.

¹⁶⁸ Cf. Ibid.

known about the non-conformity before the fish was transformed, he should have given notice earlier.¹⁶⁹

(10) Mixing the goods

Similar to the problem of processing the goods is that of mixing them.

A German court decided that mixing of a delivery of goods with former deliveries, for which a timely notice of non-conformity is no longer available, leads to a failure of timely notice in case the buyer cannot prove that the goods derived from a particular delivery.¹⁷⁰ In such a case, examination of the goods has to be undertaken before mixing the goods.¹⁷¹ "The court held that, by mixing the goods without prior examination, the buyer failed to take due care of its own goods."¹⁷²

(11) Expertise of the buyer

The expertise of the buyer can lead to a shorter limit for notice of non-conformity.¹⁷³ A Dutch court found that a notice three months after delivery is not timely because it could be expected that a dealer in medical equipment such as the buyer would have checked immediately whether the requested documents were present and informed the seller of their absence shortly afterwards.¹⁷⁴ A German court also held that an expert merchant could become aware of a lack of conformity by spot check examination and could give notice of lack of conformity much earlier.¹⁷⁵ The court found that in this case one month after delivery of the goods would have been a reasonable time to discover and give notice of lack of conformity.¹⁷⁶

While the expertise of the buyer concerning the specific goods or the specific purchase might suit as a restrictive factor, the commercial character of the parties

¹⁶⁹ Cf. Ibid.

¹⁷⁰ CLOUT case No. 284, Oberlandesgericht Köln, Germany, 21 August 1997.

¹⁷¹ Cf. Ibid.

¹⁷² Cf. Ibid, ... "consequently it also failed to mitigate its loss (Art. 77 CISG)".

¹⁷³ Cf. Oberster Gerichtshof, Austria, 14 January 2002, www.unilex.info, considers the size and the structure of the buyer's firm.

¹⁷⁴ Gerechtshof Arnhem, The Netherlands, 17 June 1997, www.unilex.info.

¹⁷⁵ Oberlandesgericht München, Germany, 11 March 1998, www.unilex.info.

¹⁷⁶ Ibid.

alone should not be a decisive criterion for the restriction of the time-frame¹⁷⁷, as commerciality is the standard case under the CISG and not the exception. Therefore, the exception of the rule, a non-commercial character would be more useful as an extending factor.

(12) Remedy chosen

The type of legal remedy selected can influence the time-frame under Article 39 (1) CISG.¹⁷⁸ It has been suggested that the remedy of damages might be a factor, albeit not a decisive one, for extending the time-frame.¹⁷⁹

(13) Concurrence of several factors

It is not unusual that more than one of the aforementioned criteria are given. Courts consider several factors in that case. A Dutch court considered (a), the seller's standard terms, which were also abiding to a usage in the fish market, (b) the nature of the goods, (c) the fact that the goods had to be transformed by the buyer, (d) the buyer's opportunity and duty to examine all the fish and finally, (e), the principle of good faith and the duty to cooperate, which is provided for by the domestic law otherwise applicable to the contract.¹⁸⁰ A German court considered the expertise of the buyer and underlined its decision in respect of the applicable standard terms.¹⁸¹

(14) Conclusion

Therefore, the contract including the general terms and conditions, trade practice and usages established between the parties provide the basis for the particular "reasonable time". As restrictive criteria, a deadline of the buyer itself, the obviousness of the defect, perishableness or seasonality of the goods, processing or mixing of the goods, expertise of the buyer and concurrence of several factors can be named. As

¹⁷⁷ But cf. Pretura di Locarno-Campagna, Switzerland, 29 April 1992, www.unilex.info, the court referred to the fact that both parties were merchants.

¹⁷⁸ Oberster Gerichtshof, Austria, 14 January 2002, www.unilex.info.

¹⁷⁹ Landgericht Frankfurt, Germany, 09 December 1992, www.unilex.info; but cf. also Oberlandesgericht Karlsruhe, Germany, 25 June 1997, www.unilex.info: although the buyer wanted damages the court considered only three to four days as a reasonable time in case of non-perishable, non-seasonal goods.

¹⁸⁰ Rechtbank Zwolle, The Netherlands, 05 March 1997, for frozen products (fish), www.unilex.info.

¹⁸¹ Oberlandesgericht München, Germany, 11 March 1998, www.unilex.info.

extending factors, only few suggestions can be made. The "weaker" non-commercial character of the buyer was named as a reason to concede a longer notice period.

c. "Reasonable time" for notice– determination of a starting point?

The question of a common starting point for determining the "reasonable time" under Article 39 (1) CISG has been raised before.¹⁸² In 1997, Baasch Andersen found that a vantage point has not yet been identified satisfyingly.¹⁸³ How can the situation be assessed nowadays: has case law established a starting point and in case, is it restrictive or is it generous? The starting point is decisive for the further criteria that influence the determination of the time limit. If the starting point is a more generous one, then comprehensive criteria should be defined to restrict it, while only a few criteria should be permitted to extend it even further.¹⁸⁴ In case of a restrictive starting point, the guideline should be the other way round: wide criteria should be established, which allow an extension of the time-frame, while there is only little room for restricting the period.¹⁸⁵ The assessment of criteria is much more effective with the determination of a common starting point.

(1) Contractual agreements

Firstly, there are those decisions that consider contractual agreements concerning the "reasonable time" under Article 39 (1) CISG. These decisions do not give information about the Article 39 (1) CISG time-frame. Even if the agreement pertains predominantly to Article 38 CISG, it might influence the Article 39 (1) CISG period by implying certain intentions of the parties.¹⁸⁶ Therefore, an agreement concerning the time-frame excludes a decision from shedding light on the "general" reasonable time.

(2) Untimely periods (non-perishable)

¹⁸² Baasch Andersen, *Reasonable Time in Article 39 (1) of the CISG – is Article 39 (1) Truly a Uniform Provision?*, in: Pace International Law Review (ed.), *Review of the Convention on Contracts for the International Sale of Goods (CISG) 1998*, Chapter Four, p. 63, 155 sq.

¹⁸³ Ibid, p. 155 sqq., 161.

¹⁸⁴ Ibid, p. 155.

¹⁸⁵ Ibid, p. 155.

¹⁸⁶ Cf. Oberlandesgericht Duesseldorf, Germany, 8 January 1993, published on the intrnet at www.unilex.info; cf. also Landgericht Baden-Baden, Germany, 14 August 1991, www.unilex.info.

Several German, Belgian, French, Italian, Dutch, Swiss decisions between 1992 and 2002 except periods between six weeks and 20 month from being timely.¹⁸⁷ One court found in 1993 that a period of 25 days after delivery was not reasonable.¹⁸⁸ In this case, the court did follow the "distinguishing approach"; therefore, it is difficult to determine which period the court considered timely for *giving notice*. At all events it found a period of 25 days for giving notice as not being timely because this is the time it declared not reasonable including both time-frames, that of Article 38 and that of Article 39 (1) CISG.

¹⁸⁷ Landgericht Berlin, Germany, 16 September 1992, www.unilex.info; Landgericht Berlin, Germany, 30 September 1992, www.unilex.info; Oberlandesgericht Saarbruecken, Germany, 13 January 1993, www.unilex.info; Landgericht Duesseldorf, Germany, 23 June 1994, www.unilex.info; Bundesgerichtshof, Germany, 8 March 1995, www.unilex.info; Amtsgericht Kehl, Germany, 6 October 1995, www.unilex.info; Landgericht Muenchen, Germany, 20 February 2002, www.unilex.info

Tribunal de Commerce de Bruxelles, 7ème ch., Belgium, 5 October 1994, www.unilex.info; Rechtbank van Koophandel, Kortrijk, Belgium, 16 December 1996, www.unilex.info; Rechtbank van Koophandel, Hasselt, Belgium, 21 January 1997, www.unilex.info; Rechtbank van Koophandel, Kortrijk, Belgium, 27. June 1997, on the internet at www.unilex.info; Cour d'Appel, Mons, Belgium, 8 March 2001, www.unilex.info, the court did not exactly differentiate between the Art. 38 and 39 (1) CISG time-frames but held that given the circumstances of the case, a notice 52 days after delivery is not within a reasonable time according to the provision of Art. 39 CISG; Rechtbank van Koophandel (Commercial Court), Veurne, Belgium, 25 April 2001, www.unilex.info, the court did not precisely differentiate between the Art. 38 and 39 (1) CISG time-frames but stated that as the defects could easily have been noticed (Art. 38 CISG), a notice of lack of conformity four months after delivery was untimely; Rechtbank van Koophandel Hasselt, Belgium, 6 March 2002, www.unilex.info, the court held that a notice given only after receipt of client's complaints, i.e. nearly five and two month after delivery, was not timely; hereby the court did not exactly distinguish between the Art. 38 and 39 CISG time-frames;

Cour d'Appel de Paris, France, 6 November 2001, www.unilex.info, notice only after receiving customer's complaint, i.e. two months after the buyer's inspection of the goods, not timely;

Tribunale di Vigevano, Italy, 12 July 2000, www.unilex.info

Arrondissementsrechtbank Roermond, The Netherlands, 6 May 1993, www.unilex.info, a notice given more than three months after discovery of the defects was found not to be reasonable; Arrondissementsrechtbank Rotterdam, The Netherlands, 21 November 1996, www.unilex.info, for perishable goods (daisies); Gerechtshof's Arnhem, The Netherlands, 17 June 1997, www.unilex.info; Hoge Raad, the Netherlands, 20 February 1998, www.unilex.info.

Gerichtskommission Oberrheintal, Switzerland, 30 June 1995, www.unilex.info; cf. as well Tribunal Cantonal de Sion, Switzerland, 29 June 1998, www.unilex.info, notice given 8 month after *delivery* not timely.

¹⁸⁸ Oberlandesgericht Duesseldorf, Germany, 12 March 1993, www.unilex.info.

(3) Obvious timeliness

Other decisions just declare that a notice was given timely.¹⁸⁹ The reason for this is the obviousness of the timeliness. As the notices were given very speedily, the required duration does not reflect the time-frame that makes up the "reasonable time". These decisions do not provide any further guidelines for other cases.¹⁹⁰

(4) The "noble month" approach

Further, there are those decisions that determine a longer period for giving notice as timely under Article 39 (1) CISG.¹⁹¹ Thereby they define the temporal limits of Article 39 (1) CISG. More previous decisions unfortunately differ in the duration they consider as timely, even if they concern similar sales. While in 1992 one court¹⁹² in the case of the sale of textiles, found that notice given after 18 days of delivery is clearly timely, another court¹⁹³ suggested a maximum period of 2 weeks after delivery, one for examination, one for giving notice¹⁹⁴. Therefore, these decisions show a pattern but not an exact time-frame on which the parties can rely. I focus on the subsequent development since 1994.

Although I am of the opinion that certain criteria like easy perceptibility of the defect should only influence the time for examination under Article 38 CISG, case law often

¹⁸⁹ Cf. ICC Court of Arbitration, Paris, 1989, www.unilex.info; Tribunal of International Commercial Arbitration at the Russian Federation, 11 February 2000, www.unilex.info;

Vestre Landsret (Western High Court), Denmark, 10 November 1999, www.unilex.info.

Landgericht Aachen, Germany, 3 April 1990, www.unilex.info; Landgericht Bielefeld, Germany, 18 January 1991, www.unilex.info (but the court found that the notice did not specify the non-conformity according to Art. 39 (1) CISG); Bundesgerichtshof, Germany, 4 December 1996, www.unilex.info; cf. as well Bundesgerichtshof, Germany, 25 June 1997, www.unilex.info, the court found that a notice given almost 7 month after the first delivery was timely because the seller had accepted it;

Tribunale di Busto Arsizio, Italy, 13 December 2001, www.unilex.info;

Schweizerisches Bundesgericht, Switzerland, 7 July 2004, www.unilex.info.

¹⁹⁰ Cf. Baasch Andersen, *Reasonable Time in Article 39 (1) of the CISG – is Article 39 (1) Truly a Uniform Provision?*, in: Pace International Law Review (ed.), *Review of the Convention on Contracts for the International Sale of Goods (CISG) 1998*, Chapter Four, p. 63, 98, 113.

¹⁹¹ Landgericht Frankfurt, Germany, 9 December 1992, www.unilex.info, considering a notice regarding a sale of shoes given 19 days after delivery as timely.

¹⁹² Ibid.

¹⁹³ Landgericht Moenchengladbach, Germany, 22 May 1992, www.unilex.info.

¹⁹⁴ Therefore the court did not assess presumptive times after delivery mixing up Art. 38 and 39 (1) CISG (as stated above I do not support this approach), but clearly defines a one week time-frame for giving notice.

neglects an exact distinguishing approach. Therefore, it is practical to differentiate based on such criteria.

(a) Foodstuffs, perishable goods, living animals

In 1994, a German court found that a period of three days for giving notice was reasonable and rejected a notice given twenty days after delivery.¹⁹⁵

In 1995, the German Supreme Court for the first time applied the “noble month” approach although the case concerned perishable goods.¹⁹⁶ The “noble month” approach considers a period of one month after the defect was discovered or ought to have been discovered. This seems to be a very generous time-frame for perishable goods. However, as the notice was given more than six weeks after discovery it was nevertheless rejected as not timely. Therefore, the very wide time limit did not influence the result of the particular decision. It appears that the “noble month” was applied as the idea of a general time-frame and to establish a “starting period” under Article 39 (1) CISG.¹⁹⁷

In 1999 a Belgian court did not especially name the “noble month” approach but stated in a case concerning the sale of living squirrels that the buyer did not fulfill its obligations as it notified the seller more than one month after the whole delivery had perished, while the squirrels had already begun to die a few days after delivery.¹⁹⁸ Thereby the court seems to have applied the “noble month” approach.

The “noble month” approach was applied in case of perishable goods especially by the aforementioned 1995 German Supreme Court decision. Most of the decisions concerning non-perishable goods refer to the “noble month” approach especially from

¹⁹⁵ Amtsgericht Riedlingen, Germany, 21 October 1994, www.unilex.info, following a period of three days for examination of the goods (ham). The court interpreted Art. 39 (1) CISG very strictly. As the buyer chose the remedy of price-reduction, i.e. he chose to keep the ham, (even for perishable goods) this seems to be a very rigorous time-frame under Art. 39 (1) CISG. The court differentiated between the time for examination and time for giving notice, so that the perishableness should in my opinion not affect the time for giving notice.

¹⁹⁶ Bundesgerichtshof, Germany, 8 March 1995, www.unilex.info, as an hypothetically acceptable period of time after discovery while it rejected a notice given more than six weeks after discovery.

¹⁹⁷ Cf. Baasch Andersen, *Reasonable Time in Article 39 (1) of the CISG – is Article 39 (1) Truly a Uniform Provision?*, in: Pace International Law Review (ed.), *Review of the Convention on Contracts for the International Sale of Goods (CISG) 1998*, Chapter Four, p. 63, 120 sq.

¹⁹⁸ Rechtbank van Koophandel, Hasselt, Belgium, 19 May 1999, www.unilex.info.

1997 on. This is true even in case the period needs to be shortened substantially because of the circumstances of the case¹⁹⁹. Notwithstanding this trend, a 2002 German decision²⁰⁰ concerning living animals does not mention the "noble month". The court stated that in such a case examination has to be done immediately on delivery or on the very next day and that the notice has to be given shortly thereafter.²⁰¹ As a result, this may be entirely appropriate; nevertheless would the mention and an examination of the "noble month" approach have been desirable.

A 2002 American decision²⁰² concerning frozen pork ribs does not mention the "noble month" approach either but applied strict time limits both under Article 38 and Article 39 (1) CISG. The Court held that inspection is required in as short a period of time as practicable and that notice needs to be given promptly after examination.²⁰³

(b) Sale of textiles, machines, non perishable goods

In May 1992, a period of one week was considered for giving notice in case of the sale of textiles by a German court²⁰⁴; in December of the same year, it was nineteen days²⁰⁵.

In 1995, a period of eight days for giving notice was defined as the "normal" reasonable time for non-perishable, non-seasonal goods by a German court.²⁰⁶

In the same year, a German court found that "a few days" are a reasonable time-frame for giving notice.²⁰⁷ The court argued that the defect was easy discernible.²⁰⁸ As mentioned above I am of the opinion that the time-frames under Article 38 and Article 39 (1) CISG should be dealt with separately and that the criterion of perceptibility should be applied under Article 38 but not under Article 39 (1) CISG. The court in this

¹⁹⁹ Oberlandesgericht Koeln, Germany, 21 August 1997, www.unilex.info, in case of mixing the goods.

²⁰⁰ Oberlandesgericht Schleswig, Germany, 22 August 2002, www.unilex.info.

²⁰¹ Ibid.

²⁰² U.S. District Court, North. District, Illinois, East. Div., USA, 21 May 2004, www.unilex.info.

²⁰³ Ibid.

²⁰⁴ Landgericht Moenchengladbach, Germany, 22 May 1992, www.unilex.info.

²⁰⁵ Landgericht Frankfurt, Germany, 9 December 1992, www.unilex.info.

²⁰⁶ Oberlandesgericht Muenchen, Germany, 8 February 1995, www.unilex.info.

²⁰⁷ Landgericht Landshut, Germany, 5 April 1995, www.unilex.info.

²⁰⁸ Ibid.

case followed the distinguishing approach but still mixed-up the criteria and thus applied an imprecise examination procedure: it considered the fact that the defect was easy noticeable two times under both Articles.²⁰⁹

Also in 1995, a German court referred to the decision of the German Supreme Court²¹⁰, which for the first time established the “noble month” period, and applied the approach in case of a sale of machines.²¹¹

The noble month approach was as well applied in 1996 by a German court that considered it the maximum period and established criteria for shortening this period.²¹²

Contrary to that, in 1996, a notice given twenty-five days after discovery was rejected as not submitted timely.²¹³ The German court did not refer to the “noble month” period and considered instead a time limit of three to four days after discovery.

A Swiss court²¹⁴ 1997 tried to find a compromise between the solutions provided in the German legal system²¹⁵ and both the Anglo-American and Dutch legal systems²¹⁶ in order to promote a uniform interpretation of the Convention. The Court decided that one month after delivery was a suitable balance between the two approaches.²¹⁷

Also in 1997, the “noble month” approach was applied by a German court²¹⁸ but shortened crucially because of mixing the goods.

The German Supreme Court in 1999 applied the “noble month” approach as a standard time, which is subject to change.²¹⁹ Due to the difficulty to determine the

²⁰⁹ Cf. Baasch Andersen, *Reasonable Time in Article 39 (1) of the CISG – is Article 39 (1) Truly a Uniform Provision?*, in: Pace International Law Review (ed.), *Review of the Convention on Contracts for the International Sale of Goods (CISG) 1998*, Chapter Four, p. 63, 121 sq.

²¹⁰ Bundesgerichtshof, Germany, 8 March 1995, www.unilex.info.

²¹¹ Oberlandesgericht Stuttgart, Germany, 21 August 1995, www.unilex.info.

²¹² Amtsgericht Augsburg, Germany, 29 January 1996, www.unilex.info.

²¹³ Oberlandesgericht Karlsruhe, Germany, 25 June 1997, www.unilex.info, the OLG Karlsruhe thereby reversed the foregoing decision of the Landgericht Heidelberg which found the notice timely applying the “noble month” approach, Landgericht Heidelberg, Germany, 2 October 1996, www.unilex.info.

²¹⁴ Obergericht Kanton Luzern, Switzerland, 8 January 1997, www.unilex.info.

²¹⁵ Time for notice is generally quite short (i.e. eight days after the discovery of defects), cf. Obergericht Kanton Luzern, Switzerland, 8 January 1997, www.unilex.info

²¹⁶ Time for notice is longer (i.e. even after several months), cf. Obergericht Kanton Luzern, Switzerland, 8 January 1997, www.unilex.info.

²¹⁷ Obergericht Kanton Luzern, Switzerland, 8 January 1997, www.unilex.info.

²¹⁸ Oberlandesgericht Koeln, Germany, 21 August 1997, www.unilex.info.

cause of the damage, an extension of the “noble month” was considered: a period of about one week from discovery of the damage to consider which actions were required plus a two-week period of the expert examination were added amounting to seven weeks after discovery of the damage.²²⁰

In 2000 a German court stated the period under Article 39 (1) CISG is a month at the longest.²²¹ Thereby the court applied the “noble month” approach, but did not consider a lengthening of that time-frame in the way the German Supreme Court did. As the defect was not difficult to determine this might not be a deviation from the German Supreme Court decision but simply a consideration that was out of question due to the circumstances of the case.

According to a German 2001 decision, a period of two weeks to a month is a reasonable time within which the buyer has to give notice.²²² Thereby the decision results in blurring the time-frame again.

A further German court ruled that a notice given over one month after the buyer received delivery was untimely (Article 39(1) CISG).²²³ The court ascertained that the buyer itself could have discovered the defects if it had properly inspected the goods in time, as required by Article 38 CISG.²²⁴ The court refers to the German Supreme Court decision from 1995²²⁵ concerning perishable goods.²²⁶ However, while the 1995 decision establishes a period of one month after the defect has been discovered or ought to have been discovered the 2002 decision refers to the delivery of the goods. Thereby it again presents an imprecise handling of the Article 38 and 39 (1) CISG time-frames. Although the court refers to the 1995 decision it does not precisely apply the same period for notice. On the other hand the court seems to have recognised the

²¹⁹ Bundesgerichtshof, Germany, 3 November 1999, www.unilex.info.

²²⁰ Ibid.

²²¹ Oberlandesgericht Oldenburg, Germany, 5 December 2000, www.unilex.info, with a general reference to American case law and with specific reference to German scholarly writing.

²²² Saarländisches Oberlandesgericht, Germany, 14 February 2002, www.unilex.info.

²²³ Landgericht Saarbrücken, Germany, 2 July 2002, www.unilex.info.

²²⁴ Landgericht Saarbrücken, Germany, 2 July 2002, www.unilex.info.

²²⁵ Bundesgerichtshof, Germany, 8 March 1995, www.unilex.info, as an hypothetically acceptable period of time after discovery while it rejected a notice given more than six weeks after discovery.

²²⁶ Cf. Landgericht Saarbrücken, Germany, 2 July 2002, www.unilex.info.

1999 German Supreme Court decision²²⁷ because it refers to the argumentation of the former decision by stating that the buyer itself could have discovered the defects if it had properly inspected the goods in good time.²²⁸

Also in 2002, a Spanish court found that notice given one month after examination of the goods was still timely.²²⁹

A German decision from 2003 fails to mention the "noble month" approach entirely.²³⁰ This may be due to the fact that the main argument of the court was that even if the buyer gave notice to the seller immediately after it had actually discovered the non-conformity, an examination of the goods about 7 weeks after delivery had to be considered untimely.²³¹

The latest decision of the German Supreme Court from 2004 confirms its former decision from 1999 concerning the commencement of the Article 39 CISG period, but does not explicitly mention the "noble month" approach.²³² Instead it stated that a notice given two month after the commencement of the Article 39 (1) CISG period is untimely and only referred to the remarks of the appellate court.²³³ Surprisingly the appellate court stated that the time for giving notice is approximately two weeks.²³⁴ Therefore, the result of the German Supreme Court does not conflict with its former decision but it does not support the encouragement of the "noble month" approach. Concerning the commencement of the Article 39 (1) CISG time-frame the court's argumentation is confirming its further decision: since it was not possible to discover the irradiation of the goods with routine examination at delivery or even during processing but only with a costly and difficult examination it also refers to the

²²⁷ Bundesgerichtshof, Germany, 3 November 1999, www.unilex.info; due to the difficulty to determine the cause of the damage, the court considered an extension of the "noble month".

²²⁸ Cf. Landgericht Saarbruecken, Germany, 2 July 2002, www.unilex.info.

²²⁹ Audiencia Provincial de Pontevedra, Spain, 3 October 2002, www.unilex.info.

²³⁰ Landgericht Berlin, Germany, 21 March 2003, www.unilex.info.

²³¹ Cf. Landgericht Berlin, Germany, 21 March 2003, www.unilex.info.

²³² Cf. Bundesgerichtshof, Germany, 30 June 2004, www.unilex.info.

²³³ Cf. Ibid.

²³⁴ Oberlandesgericht Celle, Germany, 24 September 2003, not published, cf. decision of the Bundesgerichtshof, Germany, 30 June 2004, www.unilex.info.

commencement of the period under Article 39 (1) CISG as only starting to run from the expert examination conducted by the buyer.²³⁵

(c) Conclusion

Several German decisions from 1995 on refer to the so-called "noble month" following the time the defect was or ought to have been discovered as a reasonable time for giving notice.²³⁶

In addition, Belgian, Spanish and Swiss courts refer to the reasonable time as one month.²³⁷

Therefore, one could conclude that the reasonable time under Article 39 (1) CISG is currently considered one month due to the circumstances of the case. Nevertheless even German courts, who established the "noble month" approach first, from time to time differ from that approach²³⁸ or fail to mention and examine it²³⁹. In other countries, the "noble month" approach still is not the rule.²⁴⁰ Those decisions that just declare notices timely²⁴¹ or untimely²⁴² normally are not inconsistent with, but support the noble month approach²⁴³.

²³⁵ Cf. Bundesgerichtshof, Germany, 30 June 2004, www.unilex.info.

²³⁶ Bundesgerichtshof, Germany, 8 March 1995, www.unilex.info; CLOUT case No. 289, Oberlandesgericht Stuttgart, Germany, 21 August 1995; Amtsgericht Augsburg, Germany, 29 January 1996, www.unilex.info; CLOUT case No. 319, Bundesgerichtshof, Germany, 3 November 1999; cf. also CLOUT case No. 164, Oberlandesgericht Koeln, Germany, 21 August 1997, www.unilex.info, Oberlandesgericht Oldenburg, Germany, 5 December 2000, www.unilex.info Arbitration, Arbitration court attached to the Hungarian Chamber of Commerce and Industry, Hungary, 5 December 1995.

²³⁷ Rechtbank van Koophandel, Hasselt, Belgium, 19 May 1999, www.unilex.info; Audiencia Provincial de Pontevedra, Spain, 3 October 2002, www.unilex.info; Obergericht Kanton Luzern, Switzerland, 8 January 1997, www.unilex.info.

²³⁸ Oberlandesgericht Karlsruhe, Germany, 25 June 1997, www.unilex.info, the OLG Karlsruhe thereby reversed the foregoing decision of the Landgericht Heidelberg which found the notice timely applying the "noble month" approach, Landgericht Heidelberg, Germany, 2 October 1996, www.unilex.info; Saarländisches Oberlandesgericht, Germany, 14 February 2002, www.unilex.info.

²³⁹ Oberlandesgericht Schleswig, Germany, 22 August 2002, www.unilex.info; Landgericht Berlin, Germany, 21 March 2003, www.unilex.info; Bundesgerichtshof, Germany, 30 June 2004, www.unilex.info.

²⁴⁰ Cf. U.S. District Court, North. District, Illinois, East. Div., USA, 21 May 2004, www.unilex.info

²⁴¹ Cf. ICC Court of Arbitration, Paris, 1989, www.unilex.info; Tribunal of International Commercial Arbitration at the Russian Federation, 11 February 2000, www.unilex.info;
Cf. Landsret (Western High Court), Denmark, 10 November 1999, www.unilex.info.

As more and more decisions refer to the "noble month" approach or at least do not conflict with the idea of the "noble month" it might become the rule. The starting point therefore in all likelihood seems to become a generous one, the criteria mentioned above will function as restrictive ones shortening the period of one month due to the circumstances of the case. Nevertheless, criteria lengthening the time limit are available.

Therefore, it can be stated as a conclusion that the "noble month" approach has proven of value and its application has increased. A strict uniform scale has not been

Cf. Landgericht Aachen, Germany, 3 April 1990, www.unilex.info; Landgericht Bielefeld, Germany, 18 January 1991, www.unilex.info (but the court found that the notice did not specify the non-conformity according to Art. 39 (1) CISG); Bundesgerichtshof, Germany, 4 December 1996, www.unilex.info;

Cf. Tribunale di Busto Arsizio, Italy, 13 December 2001, www.unilex.info.

Cf. Schweizerisches Bundesgericht, Switzerland, 7 July 2004, www.unilex.info.

²⁴² Landgericht Berlin, Germany, 16 September 1992, www.unilex.info; Landgericht Berlin, Germany, 30 September 1992, www.unilex.info; Oberlandesgericht Saarbruecken, Germany, 13 January 1993, www.unilex.info; Landgericht Duesseldorf, Germany, 23 June 1994, www.unilex.info; Bundesgerichtshof, Germany, 8 March 1995, www.unilex.info; Amtsgericht Kehl, Germany, 6 October 1995, www.unilex.info; Landgericht Muenchen, Germany, 20 February 2002, www.unilex.info

Tribunal de Commerce de Bruxelles, 7ème ch., Belgium, 5 October 1994, www.unilex.info; Rechtbank van Koophandel, Kortrijk, Belgium, 16 December 1996, www.unilex.info; Rechtbank van Koophandel, Hasselt, Belgium, 21 January 1997, www.unilex.info; Rechtbank van Koophandel, Kortrijk, Belgium, 27. June 1997, on the internet at www.unilex.info; Cour d'Appel, Mons, Belgium, 8 March 2001, www.unilex.info, the court did not exactly differentiate between the Art. 38 and 39 (1) CISG time-frames but held that given the circumstances of the case, a notice 52 days after delivery is not within a reasonable time according to the provision of Art. 39 CISG; Rechtbank van Koophandel (Commercial Court), Veurne, Belgium, 25 April 2001, www.unilex.info, the court did not precisely differentiate between the Art. 38 and 39 (1) CISG time-frames but stated that as the defects could easily have been noticed (Art. 38 CISG), a notice of lack of conformity four months after delivery was untimely; Rechtbank van Koophandel Hasselt, Belgium, 6 March 2002, www.unilex.info, the court held that a notice given only after receipt of client's complaints, i.e. nearly five and two month after delivery, was not timely; hereby the court did not exactly distinguish between the Art. 38 and 39 CISG time-frames;

Cour d'Appel de Paris, France, 6 November 2001, www.unilex.info, notice only after receiving customer's complaint, i.e. two months after the buyer's inspection of the goods, not timely;

Tribunale di Vigevano, Italy, 12 July 2000, www.unilex.info

Arrondissementsrechtbank Roermond, The Netherlands, 6 May 1993, www.unilex.info, a notice given more than three months after discovery of the defects was found not to be reasonable; Arrondissementsrechtbank Rotterdam, The Netherlands, 21 November 1996, www.unilex.info, for perishable goods (daisies); Gerechtshof's Arnhem, The Netherlands, 17 June 1997, www.unilex.info; Hoge Raad, the Netherlands, 20 February 1998, www.unilex.info.

Gerichtskommission Oberrheintal, Switzerland, 30 June 1995, www.unilex.info; cf. as well Tribunal Cantonal de Sion, Switzerland, 29 June 1998, www.unilex.info, notice given 8 month after *delivery* not timely.

²⁴³ Diff. Oberlandesgericht Duesseldorf, Germany, 12 March 1993, www.unilex.info.

developed. In my opinion such a strict guideline would not only be unnecessary but would actually do harm. To retain the necessary flexibility, the "noble month" approach seems to be a suitable tool.

d. "Reasonable time" for notice – conclusion

The interpretation of the "reasonable time" under Article 39 (1) CISG has become more uniform in the past years. The "noble month" seems to win recognition. The approach represents a compromise between the notions of a "reasonable time" in different countries and provided with an increasingly steady list of criteria it is the most recommendable approach to determine "reasonable" time-frames for each individual case. Concerning Article 39 (1) CISG the term "reasonable" seems to come up to a pretty well defined outline.

3. Article 48 (2) CISG - "reasonable time"

If the seller requests the buyer to make known whether he will accept performance and the buyer does not comply with the request within a reasonable time, the seller may perform within the time indicated in his request, Article 48 (2) CISG.

Concerning a contract, which provided for delivery before August, a German Court held that, as the buyer did not contest the date of 10 September as the date for delivery of a second consignment as communicated by the seller, the latter was entitled to deliver the goods until the indicated date.²⁴⁴ Unfortunately, the buyer did not comply with the request at all. Therefore, it is not possible to draw any conclusion concerning the question which period of time is reasonable for buyer's answer to the seller's request.

4. Article 49 (2) CISG - "reasonable time"

Article 49 CISG determines the conditions under which the buyer is entitled to declare the contract avoided.²⁴⁵ According to Article 49 (2) CISG, if the seller has delivered the

²⁴⁴ Amtsgericht Nordhorn, Germany, 14 June 1994, www.unilex.info.

²⁴⁵ The buyer may declare he contract avoided, (a) if the failure by the seller to perform any of his obligations under the contract or this Convention amounts to a fundamental breach of contract: or (b) in case of non-delivery, if the seller does not deliver the goods within the additional period of time fixed by the buyer in accordance with paragraph (1) of Article 47 or declares that he will not deliver within the period so fixed, Art. 49 (1) CISG.

goods, the buyer loses the right to avoid the contract in case he does not exercise it within a reasonable time. Article 49 (2) CISG contains the same term "reasonable time" as Articles 18 (2), 33 and 39 (1) CISG.

a. Reasonable time for avoidance – commencement of the time limit

Article 49 (2) CISG differentiates between two cases for commencement of the time-limit. In respect of late-delivery, the buyer loses the right to declare avoidance unless he does so within a reasonable time after he has become aware that delivery has been made (Article 49 (2) (a) CISG). In respect of any breach other than late delivery, the time limit commences, (i) after the buyer knew or ought to have known of the breach, (ii) after the expiration of any additional period of time fixed by the buyer in accordance with paragraph (1) of Article 47, or after the seller has declared that he will not perform his obligation within such an additional period or, (iii) after the expiration of any additional period of time indicated by the seller in accordance with paragraph (2) of Article 48, or after the buyer has declared that he will not accept performance.

An Italian Court²⁴⁶ stated that the "reasonable time" under Article 49 CISG differs from the "reasonable time" under Article 39 (1) CISG concerning its commencement and its length. It held that in the system of the Convention the remedy of avoidance constitutes a last resort in comparison to all other remedies available to the buyer.²⁴⁷ The court concluded that the time-frame for declaring avoidance is not the same period as that for giving notice of a lack of conformity.²⁴⁸ While notice under Article 39 (1) CISG has to be given as soon as non-conformity is discovered or ought to have been discovered, avoidance has to be declared only after it appears that the non-conformity amounts to a fundamental breach which cannot be otherwise remedied.²⁴⁹ Therefore, notice has to be submitted earlier than declaration of avoidance.²⁵⁰ Thereby the Court expressly held that the principle of good faith in the performance of the contract applies also "under international law", although it did not mention Article 7

²⁴⁶ Tribunale di Busto Arsizio, Italy, 13 December 2001, www.unilex.info.

²⁴⁷ Ibid.

²⁴⁸ Ibid.

²⁴⁹ Ibid; cf. furthermore CLOUT case No. 225, Cour d'appel, Versailles, France, 29 January 1998 concerning several time extensions for rectification of the defects.

²⁵⁰ Cf. Tribunale di Busto Arsizio, Italy, 13 December 2001, www.unilex.info

(1) CISG.²⁵¹ The view of the Italian Court is convincing. Nevertheless, other opinions are held: a Swiss Court noted that if the buyer wants to declare the contract avoided, it must do so within the same time required to give notice of non-conformity under 39(1) CISG.²⁵² I share the opinion of the Italian Court. The remedy of avoidance constitutes a last resort in comparison to all other remedies available to the buyer. Therefore, a defect does not only have to be discovered but the non-conformity needs to amount to a fundamental breach, which cannot be otherwise remedied. Hence, the commencement and length of the time-frame under the two Articles in question are not the same.

b. Reasonable time for avoidance – criteria

A German Court stated in 1997 that the reasonable time for avoidance has to be determined in the light of the seller's interest in certainty.²⁵³ Moreover, it has to be taken into consideration whether the seller needs to organise for alternative use of the goods.²⁵⁴

On the other hand, the court found that the time needed for consideration, to request legal advice, and required for negotiations between the parties has to be taken into account.²⁵⁵

Thereby the court supports the view of the Italian court that applied the principle of good faith.

One German Court took into consideration as lengthening the period under Article 49 (2) CISG the time spent by the seller in unsuccessfully attempting to repair the goods.²⁵⁶

Another German Court considered a declaration untimely especially considering that the goods in question were food products.²⁵⁷ In addition, seasonality of goods was

²⁵¹ Ibid, the Court found that avoiding the contract without waiting the outcome of the attempts to correct the defects would have been contrary to the principle of good faith.

²⁵² Handelsgericht Zürich, Switzerland, 26 April 1995, www.unilex.info.

²⁵³ CLOUT case No. 282, Oberlandesgericht Koblenz, Germany, 31 January 1997.

²⁵⁴ Ibid.

²⁵⁵ CLOUT case No. 282, Oberlandesgericht Koblenz, Germany, 31 January 1997.

²⁵⁶ Oberlandesgericht Oldenburg, Germany, 01 February 1995, www.unilex.info.

considered to shorten the period for declaration of avoidance.²⁵⁸ A French Court took into account the need for an expertise to ascertain the origin of defects, but pointed out, that the buyer should not wait for the results of such an expertise before asking for avoidance of the contract in case the defects are apparent.²⁵⁹ Foregoing notices of non-conformity and the attempt of the seller to cure the defect have to be taken into consideration.²⁶⁰

c. Reasonable time for avoidance – determination of a starting point

(1) Late delivery, Article 49 (2) (a) CISG

Concerning declarations of avoidance in respect of late delivery (Article 49 (2) (a) CISG) only very few decisions are available. Two German Courts found that a declaration submitted both 18 days and 6 weeks after the buyer became aware of the late delivery are not timely.²⁶¹

(2) Any breach other than late delivery, Article 49 (2) (b) CISG

In respect of a declaration of avoidance under Article 49 (2)(b) CISG periods between eight weeks and eighteen month after discovery of the breach have been found unreasonable by several courts.²⁶² A Swiss Court deemed a declaration submitted four weeks after discovery of the defect not timely.²⁶³ A declaration of avoidance only on Appeal was found to be beyond any reasonable time.²⁶⁴ In case of seasonal

²⁵⁷ Landgericht Muenchen, Germany, 20 March 1995, www.unilex.info.

²⁵⁸ Vestre Landsret (Western High Court), Denmark, 10 November 1999, www.unilex.info.

²⁵⁹ Cour d'Appel de Paris, France, 14 June 2001, www.unilex.info.

²⁶⁰ Cf. Tribunale di Busto Arsizio, Italy, 13 December 2001, www.unilex.info.

²⁶¹ Amtsgericht Nordhorn, Germany, 14 June 1994, www.unilex.info: 18 days; Amtsgericht Ludwigsburg, 21 December 1990, referred to by Landgericht Stuttgart, Germany, 13 August 1991, www.unilex.info: 6 weeks.

²⁶² CLOUT case No. 282, Oberlandesgericht Koblenz, Germany, 31 January 1997: 8 weeks; Oberlandesgericht Frankfurt am Main, Germany, 20 April 1994, www.unilex.info: 2 month after delivery in case of non-conformity of the packaging; Oberlandesgericht Muenchen, Germany, 2 March 1994, www.unilex.info: 4 month; Landgericht Muenchen, Germany, 20 March 1995, www.unilex.info: 4 month; CLOUT case No 124, Bundesgerichtshof, Germany, 15 February 1995: 5 month; Cour d'Appel de Paris, France, 14 June 2001, www.unilex.info: 8 month; Landgericht München, Germany, 25 January 1996, www.unilex.info: 18 month; cf. Arrondissementsrechtbank Rotterdam, The Netherlands, 21 November 1996, www.unilex.info.

²⁶³ Handelsgericht Zürich, Switzerland, 26 April 1995, www.unilex.info.

²⁶⁴ Cour d'Appel, Mons, Belgium, 8 March 2001, www.unilex.info.

goods²⁶⁵, which should have been sold within 22 days, a Danish Court considered a declaration 8 days after the buyer discovered or should have discovered the defects as untimely although the buyer submitted two earlier notices of non-conformity aiming at price reduction.²⁶⁶

One day after the discovery of a breach of contract was considered timely for declaring the contract avoided.²⁶⁷ Declaration submitted within 48 hours after the delivery of the last late instalment received was found timely.²⁶⁸ These are obviously timely periods. Concerning longer time-frames, the following decisions were available. A declaration submitted five weeks after delivery of repaired goods was deemed timely taking into consideration the time spent for unsuccessfully trying to repair the goods as lengthening the time-frame.²⁶⁹ A declaration of avoidance after several time extensions for rectification of defects was considered timely as well.²⁷⁰ Moreover, a declaration three weeks after submitting notice of non-conformity was found timely.²⁷¹ This underlines the approach to differentiate between the time-frames of Article 39 (2) and 49 (2) CISG.

(3) Starting point - Conclusion

The only two decisions available concerning late delivery do not allow deducing a pattern. It has to be noted that it seems strict to deem a period of only eighteen days untimely. Concerning the time limit under Article 49 (2) (b) CISG quite a few decisions were available. Periods between 8 weeks and eighteen months after discovery of the breach have been found unreasonable by several courts while 48 hours or 1 day were obviously deemed timely. Time-frames in-between these periods were considered differently, but the courts submitted convincing arguments. A declaration three weeks

²⁶⁵ The goods in question were Christmas trees, delivered on 2 December, and their sale should have taken place within a short period of time since the trees would be without any value after December 24.

²⁶⁶ Vestre Landsret (Western High Court), Denmark, 10 November 1999, www.unilex.info, (first notice on the day of delivery, second notice three days later).

²⁶⁷ Oberlandesgericht Frankfurt am Main, Germany, 17 September 1991, www.unilex.info.

²⁶⁸ CLOUT case No. 246, Audiencia Provincial de Barcelona, Spain, 3 November 1997.

²⁶⁹ Oberlandesgericht Oldenburg, Germany, 01 February 1995, www.unilex.info.

²⁷⁰ CLOUT case No. 225, Cour d'appel, Versailles, France, 29 January 1998.

²⁷¹ CLOUT case No. 348, Oberlandesgericht Hamburg, Germany, 26 November 1999, cf. UNCITRAL Digest on the CISG, www.uncitral.org/uncitral/en/case_law/digests/cisg.html.

after submitting notice of non-conformity was found timely. One court deemed a declaration after five weeks timely taking into consideration the time spent for unsuccessfully trying to repair the goods as lengthening the time-frame.

These decisions lead to the conclusion that, as a starting point, a time-frame of about one month is considered reasonable for declaration of avoidance. This conclusion is not contrary to the idea to distinguish between the Article 39 (2) CISG and the Article 49 (2) CISG time-frame. The Article 49 (2) CISG time limit commences only when the buyer discovers that the failure by the seller to comply with any of his obligations amounts to a fundamental breach. Therefore the point in time for declaration of avoidance is later than that for notice of non-conformity even if the period in itself is the same, i.e. one month.

The decision of the Swiss Court, which deemed period of four weeks after discovery as untimely, seems to be an exception. It is based on the idea that the two time-frames in Articles 39 (2) and 49 (2) CISG are the same. I already rejected this view.

d. Reasonable time for avoidance – conclusion

As the remedy of avoidance constitutes a last resort in comparison to all other remedies available to the buyer, the time limit for declaring avoidance is not the same as that for giving notice of a lack of conformity. Avoidance has to be declared only after it appears that the non-conformity amounts to a fundamental breach that cannot be otherwise remedied.

The courts applied different criteria from which a few correspond with those under Article 39 (2) CISG (nature of the goods: food products²⁷², seasonality²⁷³; need for an expertise²⁷⁴). In my opinion, this tendency can be generalised: criteria that are useful to determine the time-frame under Article 39 (2) CISG are as well suitable under Article 49 (2) CISG bearing in mind that commencement and length of the two time limits differ from each other.

²⁷² Landgericht Muenchen, Germany, 20 March 1995, www.unilex.info.

²⁷³ Vestre Landsret (Western High Court), Denmark, 10 November 1999, www.unilex.info.

²⁷⁴ Cour d'Appel de Paris, France, 14 June 2001, www.unilex.info.

In addition further criteria are applicable under Article 49 (2) CISG which are not yet suitable under Article 39 (2) CISG. As the declaration under Article 49 (2) leads to the avoidance of the contract, certainty and time for considerations are of an even higher importance. The reasonable time for avoidance has therefore to be determined in the light of the seller's interest in certainty; his need to organise for alternative use of the goods has to be taken into consideration. On the other hand, the time needed for consideration, to request legal advice, required for negotiations between the parties and spent by the seller in unsuccessfully attempting to repair the goods as well as foregoing notices of non-conformity are criteria applied under Article 49 (2) CISG.

As a starting point a time-frame of one month can be deduced from the available decisions. It has to be borne in mind that this does not mean that the point in time when an action is deemed untimely under Articles 39 (2) and 49 (2) CISG are the same, as the time limit under Article 49 (2) CISG commences later.

Altogether it has to be stated that Article 49 (2) CISG was applied quite uniformly by the different countries and that the term reasonable does not seem to contract a uniform application in this case.

5. Article 73 (2) CISG - "reasonable time"

Article 73 CISG provides special rules for instalment contracts. Article 73 (2) CISG determines that if one party's failure to perform any of his obligations in respect of any instalment gives the other party good grounds to conclude that a fundamental breach of contract will occur with respect to future instalments²⁷⁵, he may declare the contract avoided for the future, provided that he does so within a reasonable time.

48 hours within the third late delivery were deemed a reasonable time under Article 73 (2) CISG.²⁷⁶ As only a single decision is available and as this one deals with a seemingly obvious reasonable time no conclusions can be drawn concerning criteria, a starting point and interrelation with technical progress.

²⁷⁵ Art. 73 (1) CISG deals with single instalments, (3) with the contract as a whole.

²⁷⁶ CLOUT case No. 246, Audiencia Provincial de Barcelona, Spain, 3 November 1997.

6. Article 75 CISG - "reasonable time"

Article 75 CISG determines that the party claiming damages may recover the difference between the contract price and the price in a substitute transaction as well as further damages recoverable under Article 74 provided that the contract is avoided and if, in a reasonable manner and within a reasonable time after avoidance, the buyer has bought goods in replacement or the seller has resold the goods.

a. Reasonable time for substitute transaction – commencement

Article 75 CISG determines the avoidance of the contract as the point in time when the "reasonable time" under Article 75 CISG commences. Nevertheless an Australian Court found that where a seller (aggrieved party) is unable to resell the goods unless the buyer returns them to the seller, the reasonable time period commences only at the time of the return.²⁷⁷ As Article 75 CISG clearly defines the time of avoidance as the time for commencement of the time-limit, the reasoning of the Australian Court seems to be very imprecise. The time for commencement should be the time of avoidance while the fact that the seller was unable to resell the goods could function as a criterion that lengthens the time-limit under Article 75 CISG.

Another question is if "within a reasonable time" means, before or after a reasonable time has elapsed. Does a reasonable time have to pass after the avoidance before the aggrieved party is allowed to carry out a substitute transaction²⁷⁸ or does the aggrieved party have to transact that business before the time-limit has elapsed²⁷⁹? The former view was held by only one court and therefore represents a minority opinion. Due to the wording of Article 75 CISG ("within") it seems to be more convincing to define the reasonable time limit under Article 75 CISG as one within which the aggrieved party needs to undertake the substitute transaction.

²⁷⁷ CLOUT case No. 308, Federal Court of Australia, 28 April 1995.

²⁷⁸ ICC Court of Arbitration, award No. 8574, September 1996, www.unilex.info: "The Agreement was not, however, avoided until 23 January 1995, and no substitute transactions undertaken prior to a reasonable time after that date can be taken into account for purposes of establishing a duty of indemnification based on substitute transactions".

²⁷⁹ CLOUT case No. 130, Oberlandesgericht Duesseldorf, Germany, 14 January 1994; Corte di Appello di Milano, Italy, 11 December 1998, www.unilex.info; Bundesgericht, Switzerland, 15 September 2000, published on the internet at www.unilex.info: a substitute purchase was found reasonable although carried out promptly after avoidance; Supreme Court of Queensland - Court of Appeal, Australia, 12 October 2001, www.unilex.info.

b. Reasonable time for substitute transaction – criteria

The nature of the goods and the circumstances are mentioned as criteria to determine the "reasonable time" under Article 75 CISG.²⁸⁰

One German Court considered that most potential buyers had already bought winter shoes when the contract for a sale of such goods was avoided.²⁸¹ Therefore, it took the marketability of this seasonal product into account. An Australian Court took into consideration the market for the goods and therefore headed into the same direction.²⁸²

c. Reasonable time for substitute transaction – starting point

A resale or purchase before the contractual breach and the avoidance of the contract is not considered to be a substitute transaction under Article 75 CISG.²⁸³ A resale conducted promptly after avoidance was found reasonable by a Swiss Court.²⁸⁴ A German Court found a resale within 2 month (resale on the 6 and 15 October after avoidance on the 7 August) reasonable in case of seasonal goods because most of the potential buyers had already bought those goods (winter shoes).²⁸⁵ An Australian Court also found 2 month a reasonable time.²⁸⁶ An Italian Court found that 6 months were a reasonable time for the resale of a printing machine.²⁸⁷

d. Reasonable time for substitute transaction – conclusion

The reasonable time under Article 75 CISG commences at the point of time when the contract was avoided. The aggrieved party has to conduct the substitute transaction

²⁸⁰ Cf. UNCITRAL Digest of case law on the United Nations Convention on the International Sale of Goods, Art. 75, p. 5, No. 11: -substitute transaction – reasonable time, <http://daccessdds.un.org/doc/UNDOC/GEN/V04/555/70/PDF/V0455570.pdf?OpenElement>.

²⁸¹ CLOUT case No. 130, Oberlandesgericht Duesseldorf, Germany, 14 January 1994.

²⁸² Supreme Court of Queensland - Court of Appeal, Australia, 12 October 2001, www.unilex.info.

²⁸³ Audiencia Provincial de Barcelona, Spain, 2 February 2004, www.unilex.info.

²⁸⁴ Bundesgericht, Switzerland, 15 September 2000, www.unilex.info

²⁸⁵ CLOUT case No. 130, Oberlandesgericht Duesseldorf, Germany, 14 January 1994.

²⁸⁶ Supreme Court of Queensland - Court of Appeal, Australia, 12 October 2001, www.unilex.info.

²⁸⁷ Corte di Appello di Milano, Italy, 11 December 1998, published on the internet at www.unilex.info; cf. UNCITRAL Digest of case law on the United Nations Convention on the International Sale of Goods, Art. 75, p. 5, No. 11: -substitute transaction – reasonable time, www.uncitral.org/uncitral/en/case_law/digests/cisg.html.

within a reasonable time following the avoidance and not after a reasonable time has elapsed. The main criterion is, besides nature of the goods and the circumstances, the marketability of the goods. The aggrieved party has to seek for a market for the goods or to find goods, which it can purchase instead of goods contracted for. As a starting point the courts seem to consider a longer period than the “noble month” especially established under Article 39 CISG. Two months seem to be found reasonable in general. The more generous time selection under Article 75 CISG can be explained by the more involving and more time-consuming measures required for a substitute transaction. In general, the decisions available show a quite uniform interpretation of Article 75 CISG concerning the criteria, which were considered to determine a reasonable time for a substitute transaction.

7. Article 47 (1) CISG - “period of time of a reasonable length”

Article 47 (1) grants the buyer the right to fix an additional period of time of reasonable length for performance by the seller of any of his obligations.²⁸⁸

a. Reasonable length of additional time – criteria

There are a few decisions available where the courts stated the fixing of a too short period of time only triggers a reasonable time, which then is applicable.²⁸⁹

Two courts considered the time the buyer waited until he avoided the contract after the additional period of time elapsed to determine if the whole time provided for performance was reasonable.²⁹⁰

A French Court took into account the difficulties involved in the repairs of the goods.²⁹¹

A German Court considered the problems arising when organising the transport of the goods.²⁹² The seller was required to arrange for shipment within an additional period

²⁸⁸ Article 47 (1) CISG is especially important for the right to terminate the contract under Article 49 CISG.

²⁸⁹ Oberlandesgericht Celle, Germany, 24 May 1995, www.unilex.info; Landgericht Ellwangen, Germany, 21 August 1995, www.unilex.info; CLOUT case No. 362, Oberlandesgericht Naumburg, Germany, 27 April 1999.

²⁹⁰ Oberlandesgericht Celle, Germany, 24 May 1995, www.unilex.info; Landgericht Ellwangen, Germany, 21 August 1995, www.unilex.info.

²⁹¹ Cour d'Appel de Versailles, 12ème chambre, 1ère section, France, 29 January 1998, www.unilex.info.

of time.²⁹³ The court determined the reasonable period of time with regard to the seller's dependency on the sailing list and on the availability of cargo capacity.²⁹⁴ Moreover it took into consideration the distance between the port of origin and destination.²⁹⁵

b. Reasonable length of additional time – starting point

In a German case, after expiration of the terms for delivery of both a first and a second consignment, the buyer fixed an additional period and required shipment within eleven days.²⁹⁶ The court noted that this period might be too short but stated that in a case like this either a reasonable time is applicable or the reasonable requirement is satisfied if the buyer waits with his declaration of avoidance until a reasonable period of time has elapsed.²⁹⁷ In the case at hand, the buyer waited more than seven weeks until he declared the contract avoided.²⁹⁸ The court considered this as an obviously reasonable period of time.²⁹⁹

In another German case, the court deemed a period of 5 days as possibly too short and a period of 21 days including the time the buyer waited until avoidance after the additional time fixed had elapsed as reasonable.³⁰⁰

Another German court left open if a period of one week is reasonable for requiring delivery of a car but found that the reasonable time triggered by fixing a too short period of time would have elapsed after 7 weeks.³⁰¹

²⁹² Oberlandesgericht Celle, Germany, 24 May 1995, www.unilex.info.

²⁹³ Ibid, see full text of decision.

²⁹⁴ Ibid, see full text of decision.

²⁹⁵ Ibid, see full text of decision.

²⁹⁶ Ibid.

²⁹⁷ Ibid, see full text of decision.

²⁹⁸ Ibid, see full text of decision.

²⁹⁹ Ibid, see full text of decision.

³⁰⁰ Landgericht Ellwangen, Germany, 21 August 1995, www.unilex.info: the buyer send a letter to the seller on the 28.12.1994 and required delivery until the 02.01.1995 but waited until the 18.01.1995 until he declared he contract avoided.

³⁰¹ CLOUT case No. 362, Oberlandesgericht Naumburg, Germany, 27 April 1999.

c. Reasonable length of additional time – conclusion

It has to be noted that the fixing of a too short period of time only triggers a reasonable time. Moreover, the time the buyer waited until he avoided the contract after the additional period of time elapsed is considered to determine if the whole time provided for performance was reasonable.

Further important criteria regard the circumstances of the performance that is required: the difficulties involved in the repairs of the goods, the problems arising when organising the transport of the goods, the distance between the place of origin and destination.

5 to 11 days were deemed to be possibly too short while 7 weeks were considered obviously reasonable. Moreover, 21 days were found an additional time of reasonable length. This is a period that is located in-between those periods that are too short or obviously long enough. This single decision does not show an obvious pattern, neither refers it to one month as a reasonable period of time under Article 47 (1) CISG. Only with regard to the "reasonable month approach" one could assume that one month could be considered as a starting point under Article 47 (1) CISG as well, but there is no further evidence concerning this assumption.

8. Article 63 (1) CISG - "period of time of a reasonable length"

Article 63 CISG provides the seller the right to fix an additional period of time of reasonable length for performance by the buyer of his obligations.³⁰² Only one decision concerning the "reasonable length" was available. An Italian Court considered two and a half months a period of reasonable length.³⁰³ An arbitrator moreover found that waiting several months before declaring the contract avoided was equivalent to the fixing of an 'additional period of time' for performance pursuant to Article 63 CISG.³⁰⁴ It is not possible to draw further conclusions from these statements.

³⁰² After the additional time fixed elapsed the seller is entitled to declare the contract avoided even if the buyer has not been responsible for a fundamental breach of contract.

³⁰³ Corte di Appello di Milano, Italy, 11 December 1998, www.unilex.info.

³⁰⁴ ICC Court of Arbitration Paris, 1992, award No. 7585/1992, www.unilex.info.

9. Article 48 (1) CISG - "without unreasonable delay"

Article 48 (1) CISG allows the seller to remedy any failure to perform its obligations even after the date of delivery if he can do so without unreasonable delay and without causing the buyer unreasonable inconvenience or uncertainty of reimbursement by the seller of expenses advanced by the buyer.

a. Without unreasonable delay - criteria

The temporal requirement under Article 48 (1) CISG was deemed satisfied if the failure to perform can be remedied in due time and at trifling costs, e.g. the ICC Court of Arbitration took into account that defects could have been cured by way of a "minor mounting adjustment".³⁰⁵ The consequences of a delay were as well considered. A delay was found unreasonable by a German Court in case it leads a stop in the buyer's customer's production, which would have caused claims for damages on the part of the buyer's customer.³⁰⁶

b. Without unreasonable delay - conclusion

"Without unreasonable delay" therefore can be defined as in due time, while the reasonableness depends on the consequences for the aggrieved party. Hence, even a very short delay might be unreasonable if it causes the buyer consequences like claims for damages on his customer's part. This shows that "unreasonable delay" under Article 48 (1) CISG is closely connected with the second requirement of "without unreasonable inconvenience". Whenever a delay causes unreasonable inconvenience, it is consequently unreasonable itself.

Therefore it is not possible to determine a starting point, neither is it possible to draw a conclusion concerning the uniform application of Article 48 (1) CISG from the two available decisions. However, as Article 48 (1) CISG itself provides a guideline by requiring that no unreasonable inconvenience may be caused, it can be assumed that the provision will be applied quite uniformly.

³⁰⁵ ICC Court of Arbitration, France, 1995, award No. 7754/1995, www.unilex.info.

³⁰⁶ Amtsgericht München, Germany, 23 June 1995, www.unilex.info.

10. Article 88 (1) CISG - "without unreasonable delay"

According to Article 88 (1) CISG, a party who is bound to preserve the goods in accordance with Article 85 or 86 may sell them by any appropriate means if there has been an unreasonable delay by the other party in taking possession of the goods or in taking them back or in paying the price or the cost of preservation, provided that reasonable notice of the intention to sell has been given to the other party.

In a few decisions it was held that there has been an unreasonable delay by the other party in paying the price³⁰⁷, taking possession of the goods³⁰⁸ or taking them back³⁰⁹, but none of them determined when a delay is unreasonable in the sense of Article 88 (1) CISG. In most cases e.g. the price was not paid at all, so there obviously occurred an unreasonable delay. Therefore it is not possible to draw a conclusion concerning what makes up an unreasonable delay under Article 88 (1) CISG.

11. Further provisions including temporal reasonableness-requirements

Articles 18 (2), 43 (1), 46 (2) and (3), 64 (2) (b), 65 (1) (2) and 79 (4) CISG contain reasonableness-requirements as well. There are no decisions concerning these requirements available yet.

12. Conclusion

In the absence of guidelines or available decisions, a few Articles including temporal requirements using the term "reasonable" do not shed any further light on the

³⁰⁷ Iran-United States Claims Tribunal, 28 July 1989, www.unilex.info; Hof van Beroep (Court of Appeal), Ghent, Belgium, 12 May 2003, www.unilex.info; cf. as well Tribunal Cantonal de Vaud, Switzerland, 17 May 1994, www.unilex.info: In a case where the buyer of two components of machinery had only paid part of the price and the seller withheld delivery of the second delivery, the buyer sought interim relief in the form of an order preventing the seller from reselling the goods. The court held that the seller was not entitled to resell a component of machinery, although it recognised that Art. 88(1) CISG entitles the seller to sell the goods if there is an unreasonable delay by the buyer in taking possession of the goods or in paying the price. The court issued the order against resale and argued that it is not bound by Article 88 CISG in an action for interim relief.

³⁰⁸ Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce, Russia, 25 September 1995, www.unilex.info.

³⁰⁹ International Chamber of Commerce, International Court of Arbitration Paris, award no. 7531/1994, www.unilex.info, see full text of decision; Oberlandesgericht Hamburg, 26 November 1999, www.unilex.info, see full text of decision: In a case where the buyer had rightfully avoided the contract and made the goods available for return to the seller on 22 September 1993, the court found that the buyer was entitled to resell the goods between April 1995 and November 1996.

definition of “reasonable”, its uniform application or the interrelation with technical progress, e.g. Article 18 (2). Others allow drawing helpful conclusions: Articles 33 (c), 39 (1), 47 (1), 49 (2) and 75 CISG.

The “reasonable time”³¹⁰ determined under Article 33 (c), 39, 47 (1), 49 (2) and 75 CISG has varied significantly. Nevertheless it seems to be possible to determine a starting point at least under Articles 39 (1), 47 (1), 49 (2) and 75 CISG. The interpretation of the “reasonable time” under Article 39 (1) CISG has become more uniform in the past years. The “noble month” approach under Article 39 CISG seems to win recognition. Also under Article 49 (2) CISG a starting point of one month can be deduced from the available decisions.³¹¹ With regard to the “reasonable month approach” one could assume that one month could be considered as a starting point also under Article 47 (1) CISG. As a starting point under Article 75 CISG, the courts seem to consider a longer period than the “noble month”. Two months seem to be found reasonable in general. The more generous time selection under Article 75 CISG can be explained by the more involving and more time-consuming measures required for a substitute transaction.

Moreover, the criteria used by the courts of different countries coincide. Most notably the “noble month approach” under Article 39 CISG is provided with an increasingly steady, comprehensive and detailed list of criteria. Several criteria from that catalogue are suitable to determine the “reasonable time” under other Articles (e.g. Article 49 (2) CISG) as well. Under Articles 47 (2), 49 (2) and 75 CISG special “custom-made” criteria apply in addition. Under Article 47 (1) the circumstances of the performance, which is required, under Article 49 (2) the seller’s interest in certainty, his need to organise for alternative use of the goods and under Article 75 the “marketability” of the goods are criteria that especially suit the purpose of the named Articles.

Therefore, the term “reasonable” in connection with temporal requirements cannot be called an obstacle for a uniform application of the CISG but after all seems to lead to

³¹⁰ Including “period of time of a reasonable length”.

³¹¹ It has to be borne in mind that this does not mean that the point in time when an action is deemed untimely under Articles 39 (2) and 49 (2) CISG are the same, as the time limit under Article 49 (2) CISG commences later.

an increasingly uniform application, even though it does not provide a 100 % predictability of legal decisions in detail.

V. Further "reasonable" means and measures

There are several further provisions containing the term "reasonable". No decisions were available concerning the reasonableness-requirements under Articles 34, 37, 72 (2), 76 (2) and 86 (2) CISG.

1. Article 38 (3) CISG – without a reasonable opportunity to examine the goods

Article 38 CISG deals with the examination of the goods by the buyer. In case the buyer redirects goods while they are in transit or redispaches them without having a reasonable opportunity to examine them, and at the time of the conclusion of the contract the seller knew or ought to have known of the possibility of such redirection or redispach, examination may be deferred until after the goods have arrived at the new destination, Article 38 (3) CISG.

a. Reasonable opportunity - criteria

In 1993 a German Court found that a reasonable opportunity was given except where the buyer is a simple intermediary or when the goods are directly delivered to the end-customers.³¹² All other opportunities were deemed reasonable by the court although they might cause slight inconvenience for the buyer, e.g. where the buyer takes delivery of the goods at its own warehouse without knowing in advance to what extent and, above all, when the goods will be resold to its customers.³¹³

Another German Court held in 1994 that the buyer was allowed to defer the examination of a delivery of hard woods that he, with the seller's knowledge, redispached to his customer.³¹⁴

In 1997 a Swiss Court held that the buyer is allowed to defer the examination only if he does not have a "real opportunity" to examine the goods.³¹⁵ Moreover, it was

³¹² Oberlandesgericht Saarbrücken, Germany, 13 January 1993, www.unilex.info.

³¹³ Ibid.

³¹⁴ Oberlandesgericht Köln, Germany, 22 February 1994, www.unilex.info.

required that all the goods to be delivered are redirected or redispached to rule out a reasonable opportunity for examination.³¹⁶

b. Reasonable opportunity – conclusion

At first sight the decisions of the German Courts seem to differ significantly in how strict they construe Article 38 (3) CISG. The second one seems to interpret the provision more generous than the first one by allowing a deferment of the examination after the seller redispached the goods to his customer.³¹⁷

The term “redispach” is contained in Article 38 (3) CISG as one of two modalities and implies that the goods have been received by the buyer.³¹⁸

In the 1993 decision the court stated, that a reasonable opportunity was given except where the buyer is a simple intermediary or when the goods are directly delivered to the end-customers. This decision can only be understood as approving the deferment of goods after being received by the buyer as well as the 1997 decision. Otherwise it would be contradictory to the wording of Article 38 (3) CISG. Therefore, the two decisions are not contradictory.

All in all the requirement of “without having a reasonable opportunity for examination” has nevertheless been construed strictly by courts applying this provision. Only in case there is no “real opportunity” for examination the requirement was deemed as fulfilled, i.e. where the buyer is a simple intermediary (including redispachment) or when the goods are directly delivered to the end-customers and provided that all the goods to be delivered are redirected or redispached.

³¹⁵ Obergericht Kanton Luzern, Switzerland, 08 January 1997, www.unilex.info.

³¹⁶ Ibid.

³¹⁷ Cf. UNCITRAL Digest of case law on the United Nations Convention on the International Sale of Goods, Art. 38, p. 14, No. 19: Art. 38 (3), www.uncitral.org/uncitral/en/case_law/digests/cisg.html.

³¹⁸ While “redirected in transit” implies that the goods have never reached their destination, “redispach” means that the goods had reached their first destination and had subsequently been sent on, Summary Records of the United Nations Conference on Contracts for the International Sale of Goods, 16th meeting of Committee 1, A/CONF97/C.1/SR.16, reproduced in Official Records of the United Nations Conference on Contracts on the International Sale of Goods, Vienna, 10 March – 11 April 1980, at p. 320, paragraph 18; Note to the Secretariat Commentary on Article 38 (Article 36 of the draft Convention), <http://www.cisg.law.pace.edu/cisg/text/secomm/secomm-38.html>.

2. Article 44 CISG - reasonable excuse for buyer's failure to give proper notice

Article 44 CISG mitigates the consequences borne by the buyer who has failed to give notice required by Article 39 (1) or 43 (1) CISG: if the buyer has a reasonable excuse for his failure to give proper notice, some of the buyer's remedies, which he normally loses, are restored. The provision applies if the buyer has a "reasonable excuse for his failure to give the required notice".

In general, it has to be noted, that the burden of proofing the applicability of Article 44 CISG, i.e. the existence of a "reasonable excuse", has to be borne by the buyer.³¹⁹ Furthermore, Article 44 CISG does not apply in the case of improper examination of the goods.³²⁰

a. Reasonable excuse – criteria

In 1995 a German Court considered the relevant circumstances and equitable considerations, in this case as a matter of priority the nature of the buyer's business, which required quick decisions and prompt actions, as criteria, which argue against a "reasonable excuse".³²¹ The court added that it therefore would be easier to allow invoking Article 44 CISG to a single trader, an artisan, or to a free professional.³²²

Similar to this decision in 1997 a Swiss Court implied that the small size of the buyer's business and the fact that he could not afford a full-time employee for examination of goods could constitute a "reasonable excuse".³²³

A Dutch Court took in 1997 into account the possible time of examination.³²⁴ The court found that the buyer could have examined the goods earlier because an expert could

³¹⁹ CLOUT case No. 285, Oberlandesgericht Koblenz, Germany, 11 September 1998; cf. as well CLOUT case No. 280, Oberlandesgericht Jena, Germany, 26 May 1998, CLOUT case No. 303, Arbitration – International Chamber of Commerce No. 7331 1994, CLOUT case No. 378, Tribunale di Vigevano, Italy, 12 July 2000 and ICC Arbitration case No. 8611 1997, www.unilex.info; rejecting the applicability of Article 44 CISG stating that the buyer did not submit sufficient proof of a reasonable excuse.

³²⁰ Oberlandesgericht Karlsruhe, Germany, 26 June 1997, www.unilex.info.

³²¹ Oberlandesgericht München, Germany, 08 February 1995, www.unilex.info.

³²² Ibid.

³²³ Obergericht Kanton Luzern, Switzerland, 08 January 1997, www.unilex.info, see full text of the decision.

³²⁴ Gerechtshof's Hertogenbosch, The Netherlands, 15 December 1997, www.unilex.info.

have taken a sample at time of delivery.³²⁵ Furthermore, the court took into consideration the existing means of communication.³²⁶

In 1998, a German Court rejected the argument of the buyer that it was unable to examine the goods any earlier because the manufacturing facilities were still under construction.³²⁷ The court held that a "reasonable excuse" requires that the buyer takes reasonable care of prompt examination of the goods, including due organisation in providing timely construction of the manufacturing facilities.³²⁸ Disorganisation on the part of the buyer was not considered a criterion, which warrants the application of Article 44 CISG.³²⁹ Nevertheless, the court took into account the buyer's "concrete possibilities".³³⁰

On the other hand, the buyer might be excused pursuant to Article 44 CISG in case of a delayed notice of non-conformity through no fault of his own. In 1999 a Tribunal found that the buyer could invoke Article 44 CISG as his notice was delayed because of an incorrect examination of the goods by an independent inspection body, for which he could not be held responsible.³³¹

In a 2000 decision the contract provided that the buyer would inspect the goods at the port of shipment or on loading on board.³³² A postponement of the inspection of the first instalment until the arrival at the port of destination was held reasonable by the Tribunal, due to the technical difficulties incurred by the buyer.³³³ The buyer was found not to be responsible for the delay as "according to the requirements of the TC the inspection of the goods at the port of shipment ... was, evidently, technically and

³²⁵ Ibid.

³²⁶ Ibid.

³²⁷ CLOUT case No. 285, Oberlandesgericht Koblenz, Germany, 11 September 1998.

³²⁸ Ibid.

³²⁹ Ibid.

³³⁰ Ibid; cf. UNCITRAL Digest of case law on the United Nations Convention on the International Sale of Goods, Art. 44, p. 3: "Reasonable excuse" requirement: in general, www.uncitral.org/uncitral/en/case_law/digests/cisg.html.

³³¹ ICC Arbitration, case No. 9187, June 1999, www.unilex.info.

³³² Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce, Russian Federation, 24 January 2000, www.unilex.info.

³³³ Ibid.

economically unreasonable".³³⁴ As a result, the Tribunal stated, that the buyer had a reasonable excuse for not giving notice of non-conformity within the time-limit agreed in the contract.³³⁵

Another decision by a German Court dated in 2002 did not allow the buyer to invoke Article 44 CISG.³³⁶ The court rejected the buyer's argument that it had to wait until it received an official statement concerning the non-conformity of the goods as they were delivered without the required certificate anyway.³³⁷ Beneath the question of another lack of conformity this was in itself a case of non conformity which the buyer should have notified to the seller.³³⁸

Furthermore, a Danish Court (2002) did not see any reasonable excuse in case the buyer misestimates the situation.³³⁹ The buyer stated that it considered the contract avoided because the seller had allegedly delivered the wrong type of fish. As the court instead found that the buyer had acceded to the seller's written description of the goods, the buyer could not object the fish delivered and therefore the contract was not avoided. The buyer's argument that he thought the contract was avoided was rejected by the court.

b. Reasonable excuse – conclusion

In several decisions it was held that the buyer could not rely on Article 44 CISG, since it had not provided evidence of having a reasonable excuse for its failure to give notice.³⁴⁰ Only in a few cases, the buyer was successfully able to invoke Article 44 CISG.³⁴¹

³³⁴ Ibid, see full text of the decision.

³³⁵ Ibid.

³³⁶ Oberlandesgericht Muenchen, Germany, 13 November 2002, www.unilex.info.

³³⁷ Ibid.

³³⁸ Ibid.

³³⁹ So -og Handelsretten (The Maritime and Commercial Court of Copenhagen), Denmark, 31 January 2002, www.unilex.info, see full text of the decision; cf. UNCITRAL Digest of case law on the United Nations Convention on the International Sale of Goods, Art. 44, p. 4: "Reasonable excuse" requirement: application, www.uncitral.org/uncitral/en/case_law/digests/cisg.html.

³⁴⁰ Oberlandesgericht Saarbrücken, Germany, 13 January 1993, www.unilex.info; Oberlandesgericht München, Germany, 08 February 1995, www.unilex.info; Oberlandesgericht Karlsruhe, Germany, 26 June 1997, www.unilex.info; CLOUT case No. 292, Oberlandesgericht Muenchen, Germany, 09 July 1997; Bezirksgericht Unterrheintal, Switzerland, 16 September 1998, www.unilex.info; So -og

It was suggested that "the 'reasonable excuse' standard must take an even more particularized and 'subjective' approach to the buyer's circumstances" because Article 44 CISG is applied only "if the flexible notice standard of Article 39 (1) and 43 (1) CISG are not satisfied".³⁴² This assumption was confirmed by the courts considering the concrete possibilities of the buyer. In general, the relevant circumstances and equitable considerations were taken into account. In doing so, the courts considered the nature of the buyer's business, the potential time of examination and the existing means of communication. Misestimation of the situation on part of the buyer was not deemed a reasonable excuse.

The available cases show, that the decisive criterion is the responsibility of the buyer. In case the buyer can prove that he is not responsible for the delay – e.g. based on the size of the business or an incorrect examination of the goods by an independent inspection body- a reasonable excuse was suggested.

In the available decisions from 1993 to 1998, a reasonable excuse of the buyer was rejected. Only in 1999 and 2000, the buyer was allowed to invoke Article 44 CISG. These successful decisions were awarded by arbitral tribunals. I am nevertheless of the opinion that these facts neither show a development towards a more generous interpretation of Article 44 CISG, nor do they prove that tribunals are more in favour of admitting a reasonable excuse. Decisions dated in 2002 again reject an excuse pursuant to Article 4 CISG. The arbitral awards furthermore apply to the responsibility of the buyer as much as the courts. In conclusion, it can be held that the term "reasonable excuse" was applied uniformly through the years and by different courts respectively different tribunals.

Handelsretten (The Maritime and Commercial Court of Copenhagen), Denmark, 31 January 2002, www.unilex.info; Oberlandesgericht Muenchen, Germany, 13 November 2002, www.unilex.info;

³⁴¹ ICC Arbitration, case No. 9187, June 1999, www.unilex.info; Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce, Russian Federation, 24 January 2000, www.unilex.info.

³⁴² UNCITRAL Digest of case law on the United Nations Convention on the International Sale of Goods, Art. 44, p. 3: "Reasonable excuse" requirement: in general, www.uncitral.org/uncitral/en/case_law/digests/cisg.html.

3. Article 46 (3) CISG - reasonableness of a request for repair

Article 46 (3) CISG gives the buyer the right to require the seller to remedy a lack of conformity by repair, unless this is unreasonable having regard to all circumstances. The seller carries the burden of proof considering the unreasonableness of the request.³⁴³

a. Reasonableness of a request for repair - criteria

As a matter of course it was required that the lack of conformity needs to be curable by repair, i.e. the goods need to be reparable.³⁴⁴

The provision itself requires to determine the reasonableness in the light of "all the circumstances."

A request of the buyer for repair was suggested unreasonable in case the buyer could not repair the goods himself.³⁴⁵

In 2001, an Austrian Court stated that the seller could moreover not be required to repair the goods in case the repair is unreasonably expensive, whereas the proportion of those expenses and the purchase price is not a criterion for the reasonableness of the expenses for the repair.³⁴⁶

b. Reasonableness of a request for repair – conclusion

The only decision available does not shed much light on the question how to determine the reasonableness of a request for repair respectively if the term was applied uniformly. "Having regard to all the circumstances" the curability of the defect, the ability of the seller to repair the goods himself and the reasonableness of the expenses for the repair were taken into account.

³⁴³ 2d instance Oberlandesgericht Linz (GZ 11 R 167/01k-67), Austria, 18 July 2001: cf. Oberster Gerichtshof, Austria, 14 January 2002, www.unilex.info, see full text of decision.

³⁴⁴ Ibid., see full text of decision.

³⁴⁵ Cf. UNCITRAL Digest of case law on the United Nations Convention on the International Sale of Goods, Art. 46, p. 5: Repair (Article 46 (3)), www.uncitral.org/uncitral/en/case_law/digests/cisg.html.

³⁴⁶ 2d instance Oberlandesgericht Linz (GZ 11 R 167/01k-67), Austria, 18 July 2001: cf. Oberster Gerichtshof, Austria, 14 January 2002, www.unilex.info, see full text of decision.

4. Article 48 (1) CISG – without unreasonable inconvenience or uncertainty of reimbursement by the seller

Article 48 (1) CISG allows the seller to remedy any failure to perform its obligations even after the date of delivery if he can do so without unreasonable delay and without causing the buyer unreasonable inconvenience or uncertainty of reimbursement by the seller of expenses advanced by the buyer.

The requirements under Article 48 (1) CISG were found satisfied if the failure to perform can be remedied in due time and at minimal costs, e.g. the ICC Court of Arbitration took into account that defects could have been cured by way of a "minor mounting adjustment".³⁴⁷

5. Article 75 CISG - reasonable manner

Article 75 CISG determines that the party claiming damages may recover the difference between the contract price and the price in a substitute transaction as well as further damages recoverable under Article 74 provided that the contract is avoided and if, in a reasonable manner and within a reasonable time after avoidance, the buyer has bought goods in replacement or the seller has resold the goods.

a. Reasonable manner – criteria

Article 75 CISG requires that the party claiming damages has closed the substitute transaction in a reasonable manner.

A German Court stated in 1992 that a resale for only 25 % of the contract price could not be deemed a substitute transaction in a reasonable manner.³⁴⁸

A 1993 decision of a German Court implies that a resale for about 48 % of the initially agreed purchase price is a substitute transaction closed in a reasonable manner.³⁴⁹

In 1994, another German Court deemed a resale for 50.000 LIT per pair of winter shoes instead of the contractual agreed price of 105.000 to 299.000 LIT as still

³⁴⁷ ICC Court of Arbitration, France, 1995, award No. 7754/1995, www.unilex.info.

³⁴⁸ Oberlandesgericht Hamm, Germany, 22 September 1992, www.unilex.info.

³⁴⁹ Contract price: 17.720.000 LIT, price in the substitute transaction: 8.505.000 LIT, Landgericht Krefeld, Germany, 28 April 1993, www.unilex.info, see full text of the decision.

reasonable.³⁵⁰ This is in the worst case only a very low percentage of 16.7, in the best-case still only 47.6 % of the price originally agreed upon. Although seller resold a part of the goods to a third party at a loss, the court found that he did not breach his obligation to mitigate the loss.³⁵¹ The court held that the seller was obliged to undertake reasonable efforts to resell the goods at a most favourable price.³⁵² The court held that the seller fulfilled this requirement by offering the goods unsuccessfully to German retailers.³⁵³ The court found it decisive that due to the date the retailers were already supplied with the seasonal goods in question, so that it was difficult to find another bulk purchaser.³⁵⁴

In 1995, an arbitral tribunal held that a substitute transaction was closed in a reasonable manner if the buyer acted as a prudent and careful businessman.³⁵⁵ The tribunal stated that the first condition for that is that the goods bought in replacement are of the same kind and quality as the undelivered ones while small differences in the quality of the goods are of no importance.³⁵⁶ Moreover, the tribunal required that the purchase price for the substitute goods needs to be reasonable.³⁵⁷ In determining if the purchase price is reasonable, the tribunal considered that the buyer had to conclude the substitute transaction in a short period of time as he was obliged to deliver the goods to a third party.³⁵⁸ Therefore, the tribunal found a higher price than the one that could have been obtained if the buyer had more time to negotiate justified.³⁵⁹

In 1997, a substitute transaction was found to be in accordance with Article 75 CISG by a German court.³⁶⁰ The substitute purchase was considered in a reasonable

³⁵⁰ Oberlandesgericht Düsseldorf, Germany, 14 January 1994, www.unilex.info.

³⁵¹ Ibid.

³⁵² Ibid.

³⁵³ Ibid.

³⁵⁴ Ibid.

³⁵⁵ ICC Court of Arbitration, Basel, award No. 8128/1995, www.unilex.info.

³⁵⁶ Ibid.

³⁵⁷ Ibid.

³⁵⁸ Ibid.

³⁵⁹ Ibid.

³⁶⁰ Oberlandesgericht Hamburg, Germany, 28 February 1997, www.unilex.info.

manner because the goods were of a similar quality and quantity as those, which the buyer originally intended to buy from the seller.³⁶¹

In 2000, a resale at the market value on approximately the same freight terms as had been negotiated with the owners of the initially chartered vessel was deemed reasonable by an Australian Court. It was furthermore held that a purchase in another country, at a price, which on its estimates would give the same net return as if the seller had sold the goods in the country where it should have been sold initially, was reasonable.

An Australian Court held in 2002 that the development of the market rate needs to be taken into account.³⁶² The substitute transaction was closed at a market rate, which had dropped since the termination of the original contract.³⁶³ Furthermore, the court found that it is reasonable to arrange for substitute transportation as well, although the seller was left with those costs of the first transportation, which was no longer of any use.³⁶⁴ The court argued that the costs were approximately the same as those incurred for the actual transportation and that the seller subchartered the first vessel as soon as possible.³⁶⁵

b. Reasonable manner – conclusion

In general, a substitute transaction was deemed to be closed in a reasonable manner if the buyer acted as a prudent and careful businessman.

As decisive criterion for the reasonable manner of the substitute transaction, the price was factored in by several courts. While a resale for 25 % of the contract price was found not reasonable, a substitute transaction for about 48 % was considered to be concluded in a reasonable manner. In my opinion, the resale for a minimum of about 16.7 % of the contract price³⁶⁶ is an exception, which is based on the range of prices initially agreed upon and primarily justified by the aggravating factor of sales difficulties

³⁶¹ Ibid.

³⁶² Supreme Court of Queensland - Court of Appeal, Australia, 14 January 2002, www.unilex.info.

³⁶³ Ibid.

³⁶⁴ Ibid.

³⁶⁵ Ibid.

³⁶⁶ Oberlandesgericht Düsseldorf, Germany, 14 January 1994, www.unilex.info.

faced by the seller. The sales potential of the goods can therefore be considered an important criterion to determine what price is still reasonable. Furthermore, the market rate needs to be taken into account.

In case of a substitute purchase the goods bought in replacement need to be of the same kind and quality as the undelivered ones while small differences in the quality of the goods are of no importance.

By taking the price fetched for the resale respectively the price paid for the substitute purchase into account, Article 75 CISG is easily mixed up with Article 77 CISG, which requires the party who relies on the breach of contract to mitigate the loss.

6. Article 77 CISG - measures as are reasonable in the circumstances

Article 77 CISG requires a party who is claiming damages to take such measures as are reasonable in the circumstances to mitigate the loss, including loss of profit, resulting from the breach.

a. Reasonable measures to mitigate the loss - criteria

In 1989, a tribunal stated that the aggrieved party needs to make a reasonable effort in reselling the goods in order to mitigate the loss.³⁶⁷ The tribunal took into account that the seller tried to find buyers for the goods all over the world and that substantial part of the goods was sold, although it was difficult to sell it to other customers due to modifications made.³⁶⁸ The tribunal stated that for this reason it did not matter that the goods were sold for less than the Contract price agreed.³⁶⁹ As the seller made his best efforts to resell all the goods the tribunal found that it further did not matter that a part of the goods was used for 'training' purposes or 'scrapped'.³⁷⁰

³⁶⁷ Iran-United States Claims Tribunal, 28 July 1989, www.unilex.info.

³⁶⁸ Ibid.

³⁶⁹ Ibid.

³⁷⁰ Ibid.

In a 1994 case,³⁷¹ the German Court deemed a resale for 16.7 - 47.6 % of the price originally agreed upon as a reasonable measure to mitigate the loss.³⁷² The court took into account that the seller offered the goods unsuccessfully to German retailers for a higher price.³⁷³ Due to the date, the German retailers were already supplied with the seasonal goods in question, so that it was difficult to find another bulk purchaser.³⁷⁴ Considering these circumstances, the court found that the seller resold the goods at a most favourable price.³⁷⁵

Another German Court held also in 1994 that the entrustment of an agent with the power to recover the outstanding debts is not a reasonable measure until the agent could avail itself of better means to recover the aforementioned debts than the seller.³⁷⁶

In 1995 a German Court held that reasonable measures under Article 77 CISG are only taken if the seller has also made use of his remedies under Article 61 (1) (a) CISG as it was of the opinion that the fixing an additional period of time for performance and avoiding the contract might have caused the buyer to perform.³⁷⁷

Also in 1995, a German Court found that the buyer had not breached its duty to take reasonable measures to mitigate the loss although he did not earlier inform the seller that his customers needed the goods in order to commence production.³⁷⁸ The Court argued that it was not known whether the buyer's customer had specified a definite date for commencement of the production.³⁷⁹ Furthermore, the court found that the

³⁷¹ Cf. above, the court did not differentiate exactly between the criteria "reasonable manner" under Article 75 CISG and "measures as are reasonable in the circumstances to mitigate the loss" under Article 77 CISG. Therefore I mention the criteria considered by the court twice: Under the heading of Article 75 CISG and under that of Article 77 CISG.

³⁷² Oberlandesgericht Düsseldorf, Germany, 14 January 1994, www.unilex.info.

³⁷³ Ibid.

³⁷⁴ Ibid.

³⁷⁵ Ibid.

³⁷⁶ Landgericht Düsseldorf Kammer für Handelssachen, Germany, 25 August 1994, www.unilex.info.

³⁷⁷ Oberlandesgericht München, Germany, 08 February 1995, www.unilex.info.

³⁷⁸ Amtsgericht München, Germany, 23 June 1995, www.unilex.info.

³⁷⁹ Ibid.

seller himself should have recognised that any further delay would be unreasonable.³⁸⁰

In 1996, an Austrian Court stated that a measure to mitigate the loss is reasonable when the other party in good faith may expect the measure, taking into consideration all circumstances.³⁸¹ The court held that in determining what the other party may expect, the conduct of a reasonable person of the same kind as the aggrieved party in the same circumstances has to be applied.³⁸²

In 1997 a German Court stated that a substitute purchase at a higher price does not constitute a breach of the buyer's obligation to mitigate the loss in case the rise in price is due to a significant rise in the market price.³⁸³

Also in 1997, another German Court held that expenses arisen from modifying the buyer's equipment to be able to process the defective metal were to be considered unreasonable in relation to the amount of the outstanding purchase price.³⁸⁴

In 1998 a German Court held that the buyer has breached his obligation to mitigate the loss, as it has made efforts to conclude a substitute purchases only in its region, without trying to effect a replacement purchase with other suppliers in Germany or abroad.³⁸⁵

In 1999 a Chinese Court held that in case of shipping the goods back to the seller, the seller has to pay for the necessary documents, by which it would be possible for him to collect the goods, in order to avoid losses to the goods be provided.³⁸⁶ The goods were sent back to the seller after they were denied entry into the USA through customs.³⁸⁷

³⁸⁰ Ibid.

³⁸¹ Oberster Gerichtshof, Austria, 06 February 1996, published on the internet www.unilex.info.

³⁸² Ibid.

³⁸³ Oberlandesgericht Hamburg, Germany, 28 February 1997, www.unilex.info.

³⁸⁴ Bundesgerichtshof, Germany, 25 June 1997, www.unilex.info.

³⁸⁵ Oberlandesgericht Celle, Germany, 02 September 1998, www.unilex.info.

³⁸⁶ Rizhao Intermediate People's Court, Shandong Province, China, 17 December 1999, www.unilex.info.

³⁸⁷ Ibid.

In 2000 a Spanish Court found that the seller is required to accept a buyer's offer for a lower price than contractually agreed in case this price is still higher than a price fetched from a later substitute resale to a third party.³⁸⁸

Also in 2000 a tribunal rejected that the buyer had made reasonable effort to resell the goods, because a significant part of the goods, which were subject to rapid deterioration, spoiled in storage and the rest was given free of charge to charity organisations.³⁸⁹ Therefore, the tribunal awarded only 25% of the price.³⁹⁰

An Austrian Court held in 2000 that the fact that the seller did not conclude any substitute resale did not constitute a breach of its obligation to mitigate the loss.³⁹¹ The court argued that the seller would have suffered loss of profit even if it had entered into a substitute transaction with a third person.³⁹²

In 2001 a German Court held that a buyer is not required to breach its contracts with his customer and to pay a contractual penalty below the expenses of the substitute purchase made in order to mitigate the loss.³⁹³

b. Reasonable measures to mitigate the loss – conclusion

Several decisions from courts of different countries from 1989 to 2001 considering the reasonableness-requirement under Article 77 CISG are available which make a significant evaluation possible. In my opinion the cases mirror a satisfying uniform application of the Article 77 CISG.

Already in 1989 decision³⁹⁴ concerning a substitute resale, several criteria were taken into consideration: the extent (worldwide) of the seller's attempt to find buyers for the goods, the marketability of the goods, the extent of the resale and the price achieved for the goods were considered by the tribunal to determine if measures as reasonable in the circumstances to mitigate the loss were taken. Furthermore it was stated, that in

³⁸⁸ Tribunal Supremo, Spain, 28 January 2000, www.unilex.info.

³⁸⁹ Tribunal of International Commercial Arbitration at the Russian Federation, award No. 340/1999, 10 February 2000, www.unilex.info.

³⁹⁰ Ibid.

³⁹¹ Oberster Gerichtshof, Austria, 28 April 2000, www.unilex.info.

³⁹² Ibid.

³⁹³ Landgericht Braunschweig, Germany, 30 July 2001, www.unilex.info.

³⁹⁴ Iran-United States Claims Tribunal, 28 July 1989, www.unilex.info.

case the seller made his best efforts, the failure to resell a part of the goods, was negligible. These criteria, including a rise in price in case of a substitute purchase, were taken into account by several courts throughout the years.³⁹⁵

On the other hand, an Austrian Court held in 2000 that the fact that the seller did not conclude any substitute resale did not constitute a breach of its obligation to mitigate the loss.³⁹⁶ This does not necessarily contradict the considerations of the other courts as the Austrian Court especially pointed out that the seller would have suffered loss of profit even if it had entered into a substitute transaction with a third person

Concerning the obtained price for the resale, about 48 % of the contractual price was deemed reasonable. This can be considered as a starting point, which can be influenced by further criteria and is subject to change.³⁹⁷ The relation of expenses incurred (in a 1997 case³⁹⁸ the costs arisen from modifying the buyer's equipment to be able to process the defective metal of the amount of the outstanding purchase price) and the amount of the outstanding purchase price was taken into consideration.

Measures which do not provide the aggrieved party with better means to mitigate the loss than those that are available to the party itself where deemed unreasonable, e.g. in a 1994 case³⁹⁹ the commissioning of an agent.

It was required that the seller makes use of his remedies under Article 61 (1) (a) CISG in case the fixing an additional period of time for performance and avoiding the contract might cause the buyer to perform.

All in all I would like to emphasize that the courts required a fair conduct of the aggrieved parties. They were neither permitted to take measures that burden the other

³⁹⁵ Cf. Oberlandesgericht Düsseldorf, Germany, 14 January 1994, www.unilex.info; Oberlandesgericht Celle, Germany, 02 September 1998, www.unilex.info; Tribunal Supremo, Spain, 28 January 2000, www.unilex.info; Tribunal of International Commercial Arbitration at the Russian Federation, award No. 340/1999, 10 February 2000, www.unilex.info;

³⁹⁶ Oberster Gerichtshof, Austria, 28 April 2000, www.unilex.info.

³⁹⁷ Cf. Oberlandesgericht Düsseldorf, Germany, 14 January 1994, www.unilex.info), in which a German Court deemed a resale for 16.7 - 47.6 % of the contractual price as a reasonable considering further criteria.

³⁹⁸ Bundesgerichtshof, Germany, 25 June 1997, www.unilex.info.

³⁹⁹ Landgericht Düsseldorf Kammer für Handelssachen, Germany, 25 August 1994, www.unilex.info.

party unreasonably⁴⁰⁰, nor was their behaviour deemed reasonable in case they tried to sanction the other party⁴⁰¹. The aggrieved party was not only bared from unfair conduct but required to put sufficient effort in the successful performance of the contract⁴⁰² respectively in a for both parties economically sensible substitute transaction⁴⁰³. Business strategy and power struggle⁴⁰⁴, which might one suggest behind certain behaviour, were dismissed in favour of the only purpose of Article 77 CISG, the mitigation of the loss.

When however the aggrieved party put his best efforts in mitigating the loss and acted in all conscience, the courts pointed out that no more than this can be required. Therefore it did not matter that a part of the goods was used for 'training' purposes or 'scrapped'⁴⁰⁵, a resale for 16.7 - 47.6 % of the contract price was deemed reasonable⁴⁰⁶, measures taken to mitigate the loss were found reasonable although the buyer did not earlier inform the seller that his customers needed the goods in order to commence production⁴⁰⁷, the fact that a seller did not conclude any substitute resale did not constitute a breach of its obligation to mitigate the loss⁴⁰⁸ and a buyer was not required to breach its contracts with his customer and to pay a contractual penalty below the expenses of the substitute purchase.

The aforementioned assumption is supported by the Austrian Court, which stated in 1996, that a measure to mitigate the loss is reasonable when the other party in good faith may expect the measure, taking into consideration all circumstances; and that in

⁴⁰⁰ Cf. Landgericht Düsseldorf Kammer für Handelssachen, Germany, 25 August 1994, www.unilex.info; Bundesgerichtshof, Germany, 25 June 1997, www.unilex.info.

⁴⁰¹ Cf. e.g. Tribunal Supremo, Spain, 28 January 2000, www.unilex.info.

⁴⁰² Cf. Oberlandesgericht München, Germany, 08 February 1995, www.unilex.info.

⁴⁰³ Cf. Rizhao Intermediate People's Court, Shandong Province, China, 17 December 1999, www.unilex.info; Tribunal of International Commercial Arbitration at the Russian Federation, award No. 340/1999, 10 February 2000, www.unilex.info.

⁴⁰⁴ Cf. e.g. Rizhao Intermediate People's Court, Shandong Province, China, 17 December 1999, www.unilex.info; Tribunal Supremo, Spain, 28 January 2000, www.unilex.info.

⁴⁰⁵ Cf. Iran-United States Claims Tribunal, 28 July 1989, www.unilex.info.

⁴⁰⁶ Oberlandesgericht Düsseldorf, Germany, 14 January 1994, www.unilex.info.

⁴⁰⁷ Amtsgericht München, Germany, 23 June 1995, www.unilex.info.

⁴⁰⁸ Oberster Gerichtshof, Austria, 28 April 2000, www.unilex.info.

determining what the other party may expect, the conduct of a reasonable person of the same kind as the aggrieved party in the same circumstances, has to be applied.⁴⁰⁹

7. Article 85, 87, 88 CISG – reasonable steps, reasonable expenses

According to the first sentence of Article 85 CISG the seller must take such steps as are reasonable in the circumstances to preserve the goods in case he retained possession or control of them either because the buyer is in delay in taking delivery of them or, where payment of the price and delivery of the goods is to be made concurrently, if he fails to pay the price. The second sentence provides the seller's right to retain the goods until he has been reimbursed his reasonable expenses by the buyer.

Guidelines are provided in Articles 87 and 88 CISG.

A first guideline of what is considered a reasonable step to preserve the goods is given in Article 87 CISG: a party who is bound to take steps to preserve the goods may deposit them in a warehouse of a third person at the expense of the other party provided that the expense incurred is not unreasonable.

Moreover, Article 88 CISG specifies steps, which a party that relies on Article 85 or 86 CISG might take. According to paragraph 1 the party may sell the goods by any appropriate means if there has been an unreasonable delay by the other party in taking possession of the goods or in taking them back or in paying the price or the cost of preservation, provided that reasonable notice of the intention to sell has been given to the other party. If the goods are subject to rapid deterioration or their preservation would involve unreasonable expense, a party who is bound to preserve the goods in accordance with Article 85 or 86 must take reasonable measures to sell them, Article 88 (2) CISG. Paragraph 3 entitles a party selling the goods to retain out of the proceeds of sale an amount equal to the reasonable expenses of preserving the goods and of selling them. He must account to the other party for the balance.

⁴⁰⁹ Oberster Gerichtshof, Austria, 06 February 1996, published on the internet www.unilex.info.

a. Reasonable steps, reasonable expenses - criteria

Some courts held that steps taken by sellers and costs incurred for preservation and storage were reasonable without giving further reasons, referring to Article 85 CISG when awarding damages under Article 74 CISG.⁴¹⁰

Others did not even cite Article 85 CISG. In 1994 a Tribunal awarded damages in a case where the seller had fulfilled its obligations while the buyer neither submitted any claims concerning the goods nor did it pay the purchase price.⁴¹¹ The Tribunal found that costs incurred for storage of goods at the port of loading due to the delay of the ship, which was to be supplied by the buyer, were part of the loss.⁴¹² The Tribunal held that the costs incurred for the storage of the goods were recoverable under Article 74 CISG, as the sum paid and indicated on the bill provided by the seller met the usual standard of what is paid for such a service.⁴¹³ The Tribunal did not cite Article 85 CISG, but the decision implies that the steps taken by the seller and the expenses incurred are reasonable in the sense of Article 85 CISG.

In 1995 a Tribunal held, that the seller took reasonable steps in the sense of Articles 85 and 87 CISG to preserve the goods, including depositing them in a warehouse and servicing them, in a case where the buyer unjustifiably refused to take delivery of the goods.⁴¹⁴ The Tribunal found that both storage expenses and costs relating to the servicing of the goods while they were stored reasonable under Articles 85 and 87 CISG, because the goods could not have been resold without the provided servicing.⁴¹⁵

b. Reasonable steps, reasonable expenses – conclusion

A first guideline of what is considered reasonable is given in Article 87 CISG: a party who is bound to take steps to preserve the goods may deposit them in a warehouse of

⁴¹⁰ Cf. CLOUT case No. 104, Arbitration – International Chamber of Commerce, Award No. 7197/1993; Oberlandesgericht Braunschweig. Germany, 28 October 1999, www.unilex.info.

⁴¹¹ Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce, Russian Federation, 09 September 1994, www.unilex.info.

⁴¹² Ibid.

⁴¹³ Ibid.

⁴¹⁴ Ibid.

⁴¹⁵ Ibid.

a third person at the expense of the other party provided that the expense incurred is not unreasonable. As this is a step often taken by the seller the two Articles are in many cases cited together.

According to Article 88 CISG, the party may sell the goods by any appropriate means or is even obliged to do so in case the goods are subject to rapid deterioration or their preservation would involve unreasonable expense.

Both Article 87 and 88 CISG contain "reasonableness" – requirements themselves. The requirements "no unreasonable expense" (Article 87 and 88 (2) and (3) CISG) and "reasonable measure" match the requirements already given in Article 85 CISG and therefore need to be subject to the same criteria applied to Article 85 CISG. "Reasonable expenses" under Article 88 (3) CISG were e.g. assumed where the costs incurred were necessary to carry out the sales, including costs for the completion and modification of the equipment.⁴¹⁶ The requirements "unreasonable delay" and "reasonable notice" (Article 88 (1) CISG) are further reasonableness – requirements which I research elsewhere⁴¹⁷ in the thesis at hand.

The decisions cited above do not provide as many further criteria as to establish detailed guidelines, which exceed the guidelines already provided by Articles 87 and 88 CISG. The decisions are kept general and confine themselves to determining that the reasonableness requirements under Article 85 CISG are fulfilled. Steps taken by the seller were deemed reasonable when they were necessary to preserve the goods, e.g. to keep them suitable for resale. The costs incurred by these steps were considered reasonable when they met the usual standard of expenses for the provided services, e.g. storage in a warehouse.

The guidelines given and the decisions available are indications of a uniform application of the terms "reasonable steps/ measures" and "reasonable expense".

⁴¹⁶ Iran-United States Claims Tribunal, Arbitral Award, 28 July 1989, www.unilex.info.

⁴¹⁷ "Unreasonable delay" cf. under B.IV.10. at page 61; "reasonable notice" cf. under B.V.9. at page 83.

8. Article 86 (1), 87, 88 CISG - reasonable steps, reasonable expenses

Article 86 (1) CISG provides the buyer's obligation and right parallel to the sellers Article 85 CISG. According to Article 86 (1) CISG the buyer must take such steps to preserve the goods as are reasonable in the circumstances, if he has received them and intends to exercise any right under the contract or the Convention to reject them. He is entitled to retain them until he has been reimbursed his reasonable expenses by the seller. As it applies for Article 85 CISG, Articles 87 and 88 CISG provide first guidelines of what is considered reasonable.

a. Reasonable steps, reasonable expenses – criteria

Some decisions just state that the buyer is obliged to take reasonable steps to preserve the goods and entitled to recover the costs, provided that they are not unreasonable.⁴¹⁸ In addition, expenses incurred for storage of rejected goods have been held recoverable under Article 74 CISG without referring to Article 86 CISG.⁴¹⁹

In 1999 a Tribunal emphasised, that a buyer who is entitled to retain goods nevertheless has to take reasonable steps in order to preserve them. The Tribunal found that the buyer of shrimps did not fulfill this requirement since the goods were held so long that their value was nearly of no account.⁴²⁰

b. Reasonable steps, reasonable expenses – conclusion

As already stated in relation to the parallel provision of Article 85 CISG, Articles 87 and 88 CISG are applicable and the available decisions do not provide detailed criteria to establish guidelines or to determine if the "reasonable" – requirements were applied uniformly by the courts..

⁴¹⁸ Cf. Cour d'Appel de Paris, 15ème chambre, section A, France, 22 April 1992, www.unilex.info; CLOUT case No. 304, Arbitration – International Chamber of Commerce, award No. 7531/1994; Cour de Cassation, France, 04 January 1995, www.unilex.info; Audiencia Provincial de Barcelona, Spain, 11 March 2002, www.unilex.info.

⁴¹⁹ U.S. District Court, N.D., New York, USA, 09 September 1994, www.unilex.info.

⁴²⁰ Rizhao Intermediate People's Court, Shandong Province, China, 17 December 1999, www.unilex.info.

9. Article 88 (1) CISG – reasonable notice

Article 88 (1) CISG⁴²¹ requires that reasonable notice of the intention to sell has been given to the other party.

In 1989, a Tribunal considered this requirement fulfilled, as it believed that the seller made a reasonable effort to notify the buyer of its intention to sell the equipment by issuing two letters.⁴²² As the buyer did not respond to the sales notices, the tribunal considered it clear that the buyer was not interested in delivery of the goods. Therefore, the tribunal held that it was not necessary to issue another notice informing the buyer of the seller's intention to scrap some equipment, which he was not able to sell.⁴²³

A Spanish Court emphasised in 2003 that Article 88 (1) CISG requires the party who is bound to preserve the goods to give previous notice to the buyer of its intention to sell the goods.⁴²⁴

Further decisions concerning the "reasonable notice" requirement are not available. Therefore, it is not possible to draw any further conclusions.

⁴²¹ Art. 88 (1) CISG: A party who is bound to preserve the goods in accordance with Article 85 or 86 may sell them by any appropriate means if there has been an unreasonable delay by the other party in taking possession of the goods or in taking them back or in paying the price or the cost of preservation, provided that reasonable notice of the intention to sell has been given to the other party.

⁴²² Iran-United States Claims Tribunal, Arbitral Award, 28 July 1989, www.unilex.info.

⁴²³ Ibid.

⁴²⁴ Audiencia Provincial de Navarra, Spain, 22 January 2003, www.unilex.info.

C. INTERRELATION BETWEEN TECHNICAL PROGRESS AND REASONABLENESS CONSIDERING TEMPORAL REQUIREMENTS AS AN EXAMPLE

In part B., the different applications of the term "reasonableness" have been examined concerning their uniform application including the criteria applied and the development of what was deemed reasonable by the courts and tribunals. In part C., I try to relate the results of part B., especially the development of what was considered "reasonable", and the technical environment. The aim of examining the interrelation between technical progress and "reasonableness" will be to assess whether technical progress has a significant impact on what is deemed reasonable.

Since the CISG came into force in 1988 different new technologies have been developed, which could have an impact on what is qualified as "reasonable". Especially the temporal reasonableness-requirements might have been influenced by technical progress as the time necessary for e.g. transportation and communication depends on the technical means that are available.

I. The development of communication and transport

It would go beyond the scope of this work to give a detailed overall survey of the development of communication and transport since the CISG came into force in 1988. As examples of technical progress, I quote the container revolution, the development of electronic data processing, the introduction of the emails and the development concerning logistics. These examples should stand for the rapid technical development during the last 20 years.

Significant in the development of transport was the launch of containers, which are suitable for transportation on board of ships, by trucks and by train.⁴²⁵ The upheavals

⁴²⁵ First steps towards transportation via container were made in the 1930s when the US-American Malcom P. McLean loaded initially whole trucks and later trailers together with their cargo on board of ships in order to economise on the reloading (Cf. Wikipedia - die freie Enzyklopaedie: ISO-Container, <http://de.wikipedia.org/wiki/ISO-Container>; amp GmbH, Grundlagen: Schiffstypen - Containerschiffe, <http://www.myship.de/index.php?id=100>) The first trip of a modified ship was dated 26 April 1956. 58 containers were shipped from Newark (New Jersey) to Houston (Texas) (Cf. Wikipedia - die freie Enzyklopaedie: ISO-Container, <http://de.wikipedia.org/wiki/ISO-Container>; amp GmbH, Grundlagen: Schiffstypen - Containerschiffe, <http://www.myship.de/index.php?id=100>). 10 Years later the first containership reached Europe (Rotterdam, the Netherlands) on the 2 May 1966

in merchant shipping due to the containerisation are called container revolution.⁴²⁶ The container revolution itself took place before the CISG came into force in 1988, however there are still new developments concerning the containerisation, e.g. the launch of open-top-ships, which are built since 1994.⁴²⁷ By using open-top-ships the times for embarkation and disembarkation were decreased once more.⁴²⁸

In addition, electronic data processing as a rather new technology develops fast and the computing power increases all the time.⁴²⁹ It can be assumed, that the development in electronic data processing has a share in the temporal optimisation of transport and communication. The introduction of email as a long process starting in the 1960s in connection with the development of the ARPANET also belongs to the field of electronic data processing. Before the introduction of „emails“ the only possibility to communicate in written form was by letter or telegram, later by telex or fax. The “birth of the internet” as we know it today can be dated 1 January 1983, when the first TCP/IP wide area network was operational.⁴³⁰ A long time the sending of mails via the internet was still restricted to professional or at least skilful users. Only when external mail clients were developed the sending of emails was made easier accessible. According to Wikipedia the first public release of a free external email client (CITADEL) took place in 1987, the first stable release was dated in 1988.⁴³¹ In

(Cf. Wikipedia - die freie Enzyklopaedie: ISO-Container, <http://de.wikipedia.org/wiki/ISO-Container>; amp GmbH, Grundlagen: Schiffstypen - Containerschiffe, <http://www.myship.de/index.php?id=100>).

⁴²⁶ Cf. Wikipedia - die freie Enzyklopaedie: ISO-Container, <http://de.wikipedia.org/wiki/ISO-Container>; amp GmbH, Grundlagen: Schiffstypen - Containerschiffe, <http://www.myship.de/index.php?id=100>.

⁴²⁷ Cf. amp GmbH, Grundlagen: Schiffstypen - Containerschiffe, <http://www.myship.de/index.php?id=100>.

⁴²⁸ Ibid.

⁴²⁹ Cf. Wikipedia – The Free Enzyklopedia: History of computing hardware, <http://en.wikipedia.org/History> of computing hardware %281960s-present%29; “Moore's Law”, a rule of thumb based on empiric observation, says that computer complexity will double every 24 month. On the other hand this does not mean that the computing power grows exponential as well. Moreover “exponentially improved hardware does not necessarily imply exponentially improved software to go with it” (Wikipedia – The Free Enzyklopedia: Moore's Law, http://en.wikipedia.org/wiki/Moore's_Law).

⁴³⁰ Cf. Wikipedia – The Free Enzyklopedia: Internet – creation of the internet, <http://en.wikipedia.org/wiki/Internet>; Cf. Wikipedia – The Free Enzyklopedia: History of the internet, http://en.wikipedia.org/wiki/History_of_the_Internet.

⁴³¹ Cf. Wikipedia – The Free Enzyklopedia: Comparison of email clients, http://en.wikipedia.org/wiki/Comparison_of_email_clients

1989 the World Wide Web was developed⁴³², with it the growth of the internet came along.⁴³³ As the networking increased the sending of emails became more and more useful. Webmail (e.g. "hotmail" 1995) was released and the use of email was made open to the public.⁴³⁴

Moreover, logistics has developed significantly since the 1970s at which the progress in electronic data processing was an important cornerstone. „Logistics is the process of strategically managing the procurement, movement and storage of materials, parts, and finished inventory (and the related information flows) through an organisation and its marketing channels in such a way that current and future profitability are maximised through the cost-effective fulfillment of orders".⁴³⁵ Since the 1990s, the factor "time" gains substantially in importance.⁴³⁶ The purposes of modern logistics are therefore inter alia the increasing of the rapidity of order processing and the shortening of delivery times.⁴³⁷ The modern management of logistics has led to a more optimised use of transport and communication networks.⁴³⁸

The examples provided depict that the development in transport, information and communication technology as well as in logistics was smooth. Although the technical development is stunning, I did not detect innovations that influenced the time needed for transport and communication concerning international sales significantly from a certain date on. Considering the development over a longer period, it can be stated as a result that the means of transportation and communication have improved and became faster in their entirety.

⁴³² Cf. Wikipedia – The Free Enzyklopedia: History of the internet – a world library: from gopher to WWW, http://en.wikipedia.org/wiki/History_of_the_Internet

⁴³³ Cf. Gromov: "History of Internet and WWW: The Roads and Crossroads of Internet History", <http://www.netvalley.com/intval1.html>; id.: "History of the internet", <http://www.netvalley.com/archives/mirrors/davemarsh-timeline-1.htm>.

⁴³⁴ Cf. Wikipedia – The Free Enzyklopedia: Webmail - History, <http://en.wikipedia.org/wiki/Webmail>.

⁴³⁵ Wikipedia – The Free Enzyklopedia: Logistics – a more specific definition, <http://en.wikipedia.org/wiki/Logistics> Definition of logistics.

⁴³⁶ Cf. Zibell, Trends in der Logistik, 2001, <http://www.tis-gdv.de/tis/tagungen/svt/svt01/zibell2/zibell2.htm>.

⁴³⁷ Cf. Zibell, Trends in der Logistik, 21 May 2003, http://www.tis-gdv.de/tis/tagungen/workshop/2003/zibell_logistik.pdf

⁴³⁸ Cf. Ibid.

II. Development of the "reasonable time" concerning provisions involving transport

There are a few provisions involving the transport of the goods sold. The provisions most closely connected with the transport of the goods are Articles 33 (c), 47 (1) and 63 (1) CISG which apply temporal "reasonableness"-requirements. The transport of the goods is in most cases not the only obligation, which has to be fulfilled within the "reasonable time", because the seller still might have to produce or to buy the goods before he is able to deliver them. However, the time necessary for the transport of the goods is part of the "reasonable time" under the named provisions.

1. Article 33 (c) CISG

Article 33 CISG deals with the delivery of the goods. Subparagraph (c) determines that the seller must deliver the goods within a reasonable time after conclusion of the contract if a date or a period of time is neither fixed nor determinable from the contract. The time for delivery is linked to the mode of transportation.⁴³⁹ To determine the "reasonable time" one has to take into account the time that a chosen appropriate means of transport usually requires for the same distance.⁴⁴⁰ Therefore, the period deemed reasonable might change due to the development of new means of transportation.

The "reasonable time" determined under Article 33 (c) CISG has varied significantly. The mere "numbers" indicate that the periods deemed reasonable have become longer with time: the period increased from 2 weeks in 1997 to 8 weeks in 2001. To restrict the results to this statement would lead to a very surprising conclusion: while transportation gets faster and faster due to e.g. the developments concerning the container revolution, electronic data processing and logistics, courts consider longer periods of time as reasonable. However, this statement neglects to take the criteria under Article 33 (c) CISG, i.e. "negotiations between the parties", "statements made by the parties" and the "contractual agreement", into account. I am of the opinion that the period of time considered reasonable by the courts is decisively influenced by

⁴³⁹ Cf. Bezirksgericht der Saane, Switzerland, 20.02.1997, www.unilex.info.

⁴⁴⁰ Cf. Ibid.

these criteria, which lead to very different "reasonable times". In order to identify a pattern concerning the development of the "reasonable time" itself it would be necessary to compare identical or at least very similar situations and to have a larger amount of decisions available. Therefore it can neither be concluded, that times for transportation and the "reasonable time" develop contrary nor that the development in transportation has a detectable impact on the "reasonable time".

2. Article 47 (1) and 63 (1) CISG

Article 47 (1) grants the buyer, Article 63 CISG provides the seller, the right to fix an additional period of time of reasonable length for performance by the seller/ the buyer of any of his obligations. The few available decisions under both Articles do not mirror a development of the time deemed reasonable. Although the decisions concerning Article 47 (1) CISG let suggest that the "noble-month"-approach might be applicable, it does not provide any alterations concerning the time considered reasonable throughout the years, which justify an assumption concerning an interrelation with technical development.

3. Conclusion

The introduction of open-top-ships in 1994 respectively the whole development of transport towards speedier solutions could have an impact on what is deemed a reasonable time for e.g. delivery. However, the decisions, which were available, do not mirror any alteration in what was deemed reasonable before and after 1994, nor do they mirror that transport became faster all the time.

III. Development of the "reasonable time" concerning provisions involving communication

Several provisions apply "reasonableness" requirements in connection with communication, e.g. they require one of the parties to exercise a right within a reasonable time. Although it is not only necessary to communicate the wish to exercise a right, but also to make a decision whether to exercise it or not, the time needed for communication is part of the process and the time needed.

A few Articles (e.g. Article 18 (2) CISG) indicate that means of communication or rather technical progress might have an influence on what is qualified as a

"reasonable time" by requiring to take due account to the circumstances of the transaction. Nevertheless, it is not possible to examine their interrelation with technical development because there are no decisions available, which allow an examination of the development of the period that is deemed reasonable by the courts. This is true for Articles 18 (2), 43 (1), 46 (2), 48 (2), 64 (2), 65 (2), 73 (2) and 79 (4) CISG.

Other results allow for examination of the interrelation between what is considered reasonable and technical progress.

The interpretation of the "reasonable time" under Article 39 (1) CISG has become more uniform in the past years, whereby the "noble month" seems to win recognition concerning non perishable goods, while for perishable goods a quite prompt notice is required. A reason for the more and more uniform application might be the easier access of case law provided by internet databases. Concerning the development of the time frame it could be stated if need be, that in earlier decisions the courts considered shorter periods as timely, e.g. in 1995 a period of 8 days for giving notice was defined as the "normal" reasonable time for non-perishable, non-seasonal goods by a German court.⁴⁴¹ The period considered reasonable therefore did not shorten at all but rather lengthened since the CISG came into force. Therefore, the development of the information and communication technology towards speedier solutions did not influence the time under Article 39 CISG in an observable manner. The same is true for Article 43 CISG: the technical progress does not seem to have any influence on what the courts deemed reasonable as the periods did not shorten throughout the years.

⁴⁴¹ Oberlandesgericht Muenchen, Germany, 8 February 1995, www.unilex.info.

D. THE KEYWORD "REASONABLE" AS A PATHFINDER TO A UNIFORM APPLICATION OF THE CISG

After examining several decisions concerning different reasonableness-requirements, I am of the opinion that the term "reasonable" cannot be marked as an insurmountable obstacle to a uniform application of the CISG but has to be qualified as an essential cornerstone of an international instrument such as the CISG. The keyword "reasonable" can be qualified as a pathfinder towards a uniform application of the CISG.

Courts and tribunals largely have applied the term "reasonable" uniformly in a degree that complies with the requirements provided by article 7 (1) CISG. Although the term is highly subjective, it was applied with only little variation in international decisions so that its flexibility proved to be of great value. The criteria applied make up an increasingly steady list concerning the single applications of the term, whereby certain criteria can be applied under several provisions. Starting points can be established concerning certain provisions. The best example is the "noble month" approach, which is mostly applied under Article 39 CISG and which is provided with a persuasive list of criteria.

At first, it appears astonishing that so little interrelation between technical progress and "reasonableness" is detectable. The question arises if courts and tribunals paid sufficient attention to their technical environment and its changes. However, if one takes a closer look, this might be the result of another remarkable fact. Both criteria applied to determine the reasonableness and times deemed reasonable have been almost constant. The fact that allows for such a constant result might be the flexibility of the term "reasonable". In case of measures, it allows assessing the behaviour of a party and its manner to deal with its obligations but does not require certain technical measures, which change in time. Therefore, the criteria developed are adapted to the way a party needs to behave in order to fulfil its obligation. Hence, the criteria are still applicable although technical progress offers new methods to e.g. communicate. The same can be said concerning temporal requirements. Technical progress in examining the goods does not influence the time allowed for giving notice as this period only commences when the defect has been discovered or ought to have been discovered

by the party relying on a lack of conformity. Solely the time considered reasonable for giving notice might be subject to the available technical means. The -nevertheless- quite constant application of the "noble month" in this case seems to be due to the fact that the available means have not significantly changed since the CISG came into force. Nevertheless, the missing interrelation between technical progress and "reasonable time" might be a thought-provoking impulse. Courts and tribunals need to consider the prevailing technical environment when determining the "reasonable time".

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