



**United Nations Commission
on International Trade Law**

**UNCITRAL Digest of case law on the United Nations
Convention on the International Sale of Goods***

Article 38

(1) The buyer must examine the goods, or cause them to be examined, within as short a period as is practicable in the circumstances.

(2) If the contract involves carriage of the goods, examination may be deferred until after the goods have arrived at their destination.

(3) If the goods are redirected in transit or redispached by the buyer without a reasonable opportunity for examination by him 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.

* The present digest was prepared using the full text of the decisions cited in the Case Law on UNCITRAL Texts (CLOUT) abstracts and other citations listed in the footnotes. The abstracts are intended to serve only as summaries of the underlying decisions and may not reflect all the points made in the digest. Readers are advised to consult the full texts of the listed court and arbitral decisions rather than relying solely on the CLOUT abstracts.

Overview of Article 38

1. Article 38 directs a buyer to whom goods have been delivered to examine them or cause them to be examined. Much of the text of article 38 focuses on the time when this examination should take place. Thus article 38 (1) specifies the general rule that the examination must occur “within as short a period as is practicable in the circumstances.” Article 38 (2) provides a special rule for cases involving carriage of goods, permitting the examination to be deferred until the goods arrive at their destination. With respect to the relationship between articles 38 (1) and 38 (2), one court has explained that normally the place of examination is the place where the seller’s delivery obligation is performed under article 31 of the Convention, but if the contract involves carriage of the goods the examination may be deferred until the goods reach their destination.¹ Article 38 (3) contains another special rule, applicable if the buyer redirects goods while they are in transit or redispaches goods before having a reasonable opportunity to examine them: in such cases, examination may be deferred until after the goods arrive at their “new destination,” provided the seller was on notice of the possibility of such redirection or redispach when the contract was concluded.

2. As is asserted by the Secretariat Commentary relating to article 38² and by numerous cases,³ the time when a buyer is required to conduct an examination of the goods under article 38 is intimately connected to the time when the buyer “ought to have discovered” a lack of conformity under article 39—an occurrence that starts the clock running on the buyer’s obligation to give notice of the non-conformity. The examination obligation imposed by article 38, therefore, can have very serious consequences: if a buyer fails to detect a lack of conformity because it did not conduct a proper and timely examination, and as a result fails to give the notice required by article 39, the buyer will lose rights—quite possibly all rights—relating to the lack of conformity.⁴

3. The obligation to examine under article 38 (and to give notice of lack of conformity under article 39) applies not just to non-conformities under CISG article 35, but also to non-conformities under contractual provisions that derogate from article 35.⁵ The examination mandated by article 38, furthermore, should ascertain not only that the quality, quantity, capabilities and features of the goods

¹ Landgericht Landshut, Germany, 5 April 1995.

² Secretariat Commentary to draft counterpart to final Article 38, p. 34, para. 2.

³ E.g., CLOUT case No. 123 [Bundesgerichtshof, Germany, 8 March 1995]; CLOUT case No 378 [Tribunale di Vigevano, Italy, 12 July 2000]; ICC Arbitration Case No. 8247, June 1996, *International Court of Arbitration Bulletin*, vol. 11, p. 53 (2000); CLOUT case No. 81 [Oberlandesgericht Düsseldorf, Germany, 10 February 1994]; CLOUT case No. 48 [Oberlandesgericht Düsseldorf, Germany, 8 January 1993].

⁴ See, e.g., CLOUT case No. 4 [Landgericht Stuttgart, Germany, 31 August 1989]; Hoge Raad, the Netherlands, 20 February 1998, Unilex; CLOUT case No. 364 [Landgericht Köln, Germany 30 November 1999]; CLOUT case No. 56 [Canton of Ticino Pretore di Locarno Campagna, Switzerland, 27 April 1992] (see full text of the decision). For further information concerning the effect of failure to give timely notice, see the discussion *infra* of arts. 39, 40 and 44.

⁵ CLOUT case No. 237 [Arbitration—Arbitration Institute of the Stockholm Chamber of Commerce, 5 June 1998].

conform to the seller's obligations, but also that the goods are accompanied by documentation required by the contract.⁶

4. According to several opinions, the purpose of the article 38 examination obligation, in conjunction with the notice requirement imposed by article 39, is to make it clear, in an expeditious fashion, whether the seller has properly performed the contract.⁷ In this regard, article 38 is similar to rules commonly found in domestic sales law—and, indeed, article 38 has been applied as a matter of “international trade usage” even though the States of neither the buyer nor the seller had, at the time of the transaction, ratified the Convention.⁸ Article 38, however, is a provision of international uniform law distinct from similar domestic rules,⁹ and is to be interpreted (pursuant to article 7 (1)) from an international perspective and with a view to promoting uniformity in its application.¹⁰ It has been asserted that the requirements of article 38 are to be strictly applied.¹¹

Article 38 (1) in general

5. Article 38 (1) mandates that the buyer “examine the goods, or cause them to be examined, within as short a period as is practicable in the circumstances.” The meaning of the phrase specifying the time within which the examination must be conducted—“as short a period as is practicable in the circumstances”—has been addressed in many decisions.¹² The text of article 38 (1) does not expressly address the type or method of examination required, and this issue has also generated substantial comment in the cases.¹³

6. Under article 6 of the Convention, the parties can derogate from or vary the effect of any provision of the CISG. This principle has been applied to article 38, and an agreement concerning the time and/or manner of the examination of goods has been found to supersede the usual rules of article 38.¹⁴ On the other hand, it has been found that contractual provisions addressing the terms and duration of warranties, the buyer's obligation to give notice of defects occurring after delivery,

⁶ Gerechtshof Arnhem, the Netherlands, 17 June 1997, Unilex.

⁷ Oberster Gerichtshof, Austria, 27 August 1999, available on the Internet at http://www.cisg.at/1_22399x.htm; CLOUT case No. 284 [Oberlandesgericht Köln, Germany, 21 August 1997] (see full text of the decision). The buyer's obligation to examine goods under Article 38 has also been linked to the principle of good faith in the performance of international sales contracts. Arrondissementsrechtbank Zwolle, the Netherlands, 5 March 1997, Unilex.

⁸ CLOUT case No. 45 [Arbitration—International Chamber of Commerce No. 5713 1989].

⁹ CLOUT case No. 230, Germany, 1997 (see full text of the decision).

¹⁰ CLOUT case No. 284 [Oberlandesgericht Köln, Germany 21 August 1997] (see full text of the decision).

¹¹ CLOUT case No. 81 [Oberlandesgericht Düsseldorf, Germany, 10 February 1994] (see full text of the decision).

¹² See the discussion paras. 11–14 *infra*. The time frame specified in article 38 (1) is subject to articles 38(2) and 38(3), which state special rules applicable to particular situations. See paras. 16–17 *infra*. See also the discussion of latent defects in para. 15 *infra*.

¹³ See the discussion paras. 9–10 *infra*.

¹⁴ CLOUT case No. 94 [Arbitration—Internationales Schiedsgericht der Bundeskammer der gewerblichen Wirtschaft—Wien, 15 June 1994] (agreement as to time and manner of examination); Oberster Gerichtshof, Austria, 27 August 1999, available on the Internet at http://www.cisg.at/1_22399x.htm; Arrondissementsrechtbank Zwolle, the Netherlands, 5 March 1997, Unilex (agreement as to time).

and the buyer's rights if the seller did not cure defects, did not displace the provisions of article 38.¹⁵ Derogation from article 38 can also occur by trade usage,¹⁶ although the express terms of the agreement may negate the applicability of a usage.¹⁷

7. After the goods have been delivered, the seller may waive its right to object to the propriety of the buyer's examination of the goods,¹⁸ or it may be stopped from asserting such right.¹⁹ On the other side, it has been asserted that a buyer may lose its rights to object to a lack of conformity if the buyer takes actions indicating acceptance of the goods without complaining of defects that it had discovered or should have discovered in its examination.²⁰

8. Evidentiary questions can play a crucial role in determining whether a buyer has met its obligations under article 38 (1). Several decisions have asserted that the buyer bears the burden of proving that it conducted a proper examination.²¹ In

¹⁵ CLOUT case No. 229 [Bundesgerichtshof, Germany, 4 December 1996].

¹⁶ Helsinki Court of Appeal, Finland, 29 January 1998, available on the Internet at <http://www.utu.fi/oik/tdk/xcisg/tap4.html#engl>; Oberster Gerichtshof, Austria, 27 August 1999, available on the Internet at http://www.cisg.at/1_22399x.htm; Arrondissementsrechtbank Zwolle, the Netherlands, 5 March 1997, Unilex; CLOUT case No. 170 [Landgericht Trier, Germany, 12 October 1995] (see full text of the decision); CLOUT case No. 290 [Oberlandesgericht Saarbrücken, Germany, 3 June 1998].

¹⁷ CLOUT case No. 292 [Oberlandesgericht Saarbrücken, Germany, 13 January 1993].

¹⁸ CLOUT case No. 270 [Bundesgerichtshof, Germany, 25 November 1998] (seller impliedly waived its rights because it had negotiated for a period of 15 months over the amount of damages for non-conforming goods without reserving the right to rely on articles 38 and 39, it had paid for an expert at buyer's request, and it had offered damages amounting to seven times the price of the goods); CLOUT case No. 235 [Bundesgerichtshof, Germany, 25 June 1997], (seller waived rights by agreeing to give a credit for goods that the buyer showed were non-conforming). But see CLOUT case No. 94 [Arbitration—Internationales Schiedsgericht der Bundeskammer der gewerblichen Wirtschaft—Wien, 15 June 1994] (seller had not waived its rights under articles 38 and 39 merely by failing to object immediately to the timeliness of buyer's notice; the seller's intention to waive must be clearly established); CLOUT case No. 251 [Handelsgericht des Kantons Zürich, Switzerland, 30 November 1998] (the fact that seller, at the buyer's request, examined goods that the buyer claimed were non-conforming did not mean that seller waived its right to claim late notice of the non-conformity).

¹⁹ CLOUT case No. 94 [Arbitration—Internationales Schiedsgericht der Bundeskammer der gewerblichen Wirtschaft—Wien, 15 June 1994] (seller was estopped from asserting its rights under arts. 38 and 39 because (1) it engaged in conduct that the buyer could justifiably interpret as indicating the seller accepted the validity of buyer's complaint of lack of conformity, and (2) buyer relied upon the indication that seller would not raise a defence based on arts. 38 or 39).

²⁰ CLOUT case No. 343 [Landgericht Darmstadt, Germany, 9 May 2000]; CLOUT case No. 337 [Landgericht Saarbrücken, Germany, 26 March 1996]. But see CLOUT case No. 253 [Cantone del Ticino Tribunale d'appello, Switzerland, 15 January 1998] (acceptance of pre-shipment certificate showing proper quality of cocoa beans, for purposes of drawing on letter of credit, did not deprive the buyer of right to examine goods after delivery and to contest their quality) (see full text of the decision).

²¹ CLOUT case No. 251 [Handelsgericht des Kantons Zürich, Switzerland 30 November 1998]; CLOUT case No. 97 [Handelsgericht des Kantons Zürich, Switzerland 9 September 1993]; CLOUT case No. 378 [Tribunale di Vigevano, Italy, 12 July 2000]; Oberster Gerichtshof, Austria, 27 August 1999 available on the Internet at http://www.cisg.at/1_22399x.htm. See also Landgericht Duisburg, Germany, 17 April 1996, Unilex (holding in favour of seller because buyer had not produced evidence of timely examination of goods and timely notice of defect).

determining whether an adequate examination was conducted, furthermore, it has been asserted that a tribunal should consider both “objective” and “subjective” factors, including the buyer’s “personal and business situation.”²² Some decisions appear in fact to take into account the buyer’s subjective circumstances in judging the adequacy of an examination, at least where such considerations suggest a high standard for the examination.²³ Other decisions, however, have refused to consider the buyer’s particular situation when it was invoked to argue for a low standard for the examination.²⁴

Method of examination

9. By stating that the buyer must either examine the goods or “cause them to be examined,” article 38 (1) implies that the buyer need not personally carry out the examination. In a number of cases, examinations were (or should have been) conducted by a person or entity other than the buyer, including the buyer’s customer,²⁵ subcontractor,²⁶ or an expert appointed by the buyer.²⁷ It has also been held, however, that the buyer bears ultimate responsibility under article 38 for examinations carried out by others.²⁸

10. Except for implying that the examination need not be carried out by the buyer personally, article 38 (1) is silent about the method the buyer should employ in examining the goods. In general, it has been asserted, the manner of inspection will depend on the parties’ agreement, trade usages and practices²⁹; and that in the absence of such indicators a “reasonable” examination, “thorough and professional”

²² Oberster Gerichtshof, Austria, 27 August 1999, available on the Internet at http://www.cisg.at/1_22399x.htm.

²³ CLOUT case No. 232 [Oberlandesgericht München, Germany, 11 March 1998] (because buyer was an experienced merchant, it should have conducted an expert examination and detected defects) (see full text of the decision); CLOUT case No. 4 [Landgericht Stuttgart, Germany, 31 August 1989] (in light of its expertise and the fact that it had found defects in the first delivery, buyer should have conducted a more thorough examination).

²⁴ Hoge Raad, the Netherlands, 20 February 1998, Unilex (despite buyer’s summer vacation, it should not have delayed in examining the goods when its customer complained in July); CLOUT case No. 285 [Oberlandesgericht Koblenz, Germany, 11 September 1998] (fact that buyer’s manufacturing facilities were still under construction and that buyer was disorganized should not be considered in determining whether the buyer conducted a proper examination).

²⁵ CLOUT case No. 167 [Oberlandesgericht München, Germany, 8 February 1995] (buyer’s customer should have examined goods and discovered defect sooner than it did); CLOUT case No. 120 [Oberlandesgericht Köln, Germany, 22 February 1994] (examination by buyer’s customer, to whom the goods had been transhipped, was timely and proper) (see full text of the decision).

²⁶ CLOUT case No. 359 [Oberlandesgericht Koblenz, Germany, 18 November 1999] (third party to whom buyer transferred the goods (fibreglass fabrics) for processing would conduct the article 38 examination; because buyer unjustifiably delayed transferring the goods to the third party, the examination was late).

²⁷ CLOUT case No. 319 [Bundesgerichtshof, Germany, 3 November 1999]; Oberster Gerichtshof, Austria, 27 August 1999, Unilex.

²⁸ CLOUT case No. 167 [Oberlandesgericht München, Germany, 8 February 1995].

²⁹ Oberster Gerichtshof, Austria, 27 August 1999, available on the Internet at http://www.cisg.at/1_22399x.htm. For discussion of contractual provisions and usages relating to examination, see para. 6 *supra*.

is required, although “costly and expensive examinations are unreasonable.”³⁰ It has also been asserted that the extent and intensity of the examination are determined by the type of goods, packaging and the capabilities of the typical buyer.³¹ The issues relating to the method or manner of examination that have been addressed in decisions include: the impact of the buyer’s expertise on the level of examination required³²; whether spot testing or “sampling” is required³³ or adequate³⁴; the effect of the packaging or shipping condition of the goods on the type of examination the buyer should conduct³⁵; whether an outside expert can or must be utilized³⁶; and

- ³⁰ Oberster Gerichtshof, Austria, 27 August 1999, available on the Internet at http://www.cisg.at/1_22399x.htm. See also Landgericht Paderborn, Germany, 25 June 1996, Unilex (holding that the buyer did not need to conduct special chemical analyses of plastic compound).
- ³¹ CLOUT case No. 230 [Oberlandesgericht Karlsruhe, Germany, 25 June 1997], reversed on other grounds by CLOUT case No. 270 [Bundesgerichtshof, Germany, 25 November 1998].
- ³² CLOUT case No. 232 [Oberlandesgericht München, Germany, 11 March 1998] (see full text of the decision); CLOUT case No. 4 [Landgericht Stuttgart, Germany, 31 August 1989] (see full text of the decision) (in view of his expertise, merchant buyer should have conducted “a more thorough and professional examination”).
- ³³ CLOUT case No. 230 [Oberlandesgericht Karlsruhe, Germany, 25 June 1997] (requiring test use of goods for defects that would only become apparent upon use and asserting that random testing is always required), reversed on other grounds by CLOUT case No. 270 [Bundesgerichtshof, Germany, 25 November 1998]; CLOUT case No. 232 [Oberlandesgericht München, Germany, 11 March 1998] (see full text of the decision); CLOUT case No. 98 [Rechtbank Roermond, Netherlands, 19 December 1991] (buyer required to thaw and examine a portion of shipment of frozen cheese) (see full text of the decision); Oberster Gerichtshof, Austria, 27 August 1999, available on the Internet at http://www.cisg.at/1_22399x.htm; CLOUT case No. 292 [Oberlandesgericht Saarbrücken, Germany, 13 January 1993]; CLOUT case No. 285 [Oberlandesgericht Koblenz, Germany, 11 September 1998] (buyer should have conducted a test by processing a sample of delivered plastic using its machinery) (see full text of the decision); CLOUT case No. 251 [Handelsgericht des Kantons Zürich, Switzerland, 30 November 1998]; CLOUT case No. 81 [Oberlandesgericht Düsseldorf, Germany, 10 February 1994]; CLOUT case No. 4 [Landgericht Stuttgart, Germany, 31 August 1989] (spot checking of delivery of shoes not sufficient where defects had been discovered in an earlier delivery).
- ³⁴ CLOUT case No. 170 [Landgericht Trier, Germany, 12 October 1995] (taking samples of wine for examination the day after delivery was adequate; buyer did not have to examine for dilution with water because that is not generally done in the wine trade); CLOUT case No. 280 [Oberlandesgericht Jena, Germany, 26 May 1998] (examination of random samples of live fish after delivery would have been sufficient); CLOUT case No. 192 [Obergericht des Kantons Luzern, Switzerland, 8 January 1997] (spot checking of wrapped medical devices would be adequate) (see full text of the decision). But see Rechtbank Zwolle, the Netherlands, 5 March 1997, Unilex (examination of delivery of fish by sample would not be sufficient where the buyer had ready opportunity to examine entire shipment when it was processed and buyer had discovered lack of conformity in another shipment by the seller).
- ³⁵ CLOUT case No. 98 [Rechtbank Roermond, the Netherlands, 19 December 1991] (fact that delivery consisted of frozen cheese did not excuse buyer from obligation to examine: buyer should have thawed and examined a portion of shipment); CLOUT case No. 292 [Oberlandesgericht Saarbrücken, Germany, 13 January 1993] (fact that doors had been delivered wrapped in plastic sheets on pallets and buyer contemplated sending them on to its customers did not prevent buyer from examining goods: buyer should have unwrapped a sample of the doors); Rechtbank van Koophandel Kortrijk, Belgium, 6 October 1997, Unilex (not reasonable to expect buyer of yarn to unroll the yarn in order to examine it before processing); CLOUT case No. 192 [Obergericht des Kantons Luzern, Switzerland, 8 January 1997] (buyer should have removed a sample of medical devices from shipping boxes and examined them through transparent wrapping) (see full text of the decision).

whether the presence or absence of defects in earlier deliveries or transactions should affect the manner of examination.³⁷

Time period for examination

11. Article 38 (1) states that the buyer must examine the goods “within as short a period as is practicable in the circumstances.” It has been asserted that the purpose of the deadline for examination established in article 38 (1) is to allow the buyer an opportunity to discover defects before the buyer resells,³⁸ and to permit prompt clarification of whether the buyer accepts the goods as conforming,³⁹ but the period for examination has been interpreted in a fashion that serves other purposes—for example, to mandate examination before the condition of the goods so changes that the opportunity to determine if the seller is responsible for a lack of conformity is lost.⁴⁰

12. Except where the contract involves carriage of the goods (a situation governed by article 38 (2), discussed below) or where the goods are redirected in transit or redispached (circumstances handled in article 38 (3), discussed below), the time for the buyer’s examination as a rule begins to run upon delivery of the goods⁴¹—which

³⁶ CLOUT case No. 319 [Bundesgerichtshof, Germany, 3 November 1999]; Oberster Gerichtshof, Austria, 27 August 1999, available on the Internet at http://www.cisg.at/1_22399x.htm; Landgericht Ellwangen, Germany, 21 August 1995, Unilex.

³⁷ Landgericht Ellwangen, Germany, 21 August 1995, Unilex; CLOUT case No. 4 [Landgericht Stuttgart, Germany, 31 August 1989] (spot checking of delivery of shoes not sufficient where defects had been discovered in an earlier delivery).

³⁸ CLOUT case No. 251 [Handelsgericht des Kantons Zürich, Switzerland, 30 November 1998].

³⁹ CLOUT case No. 230 [Oberlandesgericht Karlsruhe, Germany, 25 June 1997] (see full text of the decision).

⁴⁰ CLOUT case No. 284 [Oberlandesgericht Köln, Germany, 21 August 1997] (immediate examination of chemicals required where the chemicals were going to be mixed with other substances soon after delivery); Rechtbank Zwolle, the Netherlands, 5 March 1997, Unilex (examination was due quickly where shipment of fish was to be processed by the buyer, making it impossible to ascertain whether the fish were defective when sold); Arrondissementsrechtbank 's-Hertogenbosch, the Netherlands, 15 December 1997, Unilex (examination of furs not conducted until they had already undergone processing was not timely).

⁴¹ E.g., CLOUT case No. 48 [Oberlandesgericht Düsseldorf, Germany, 8 January 1993] (where the contract provided for delivery of cucumbers “free on refrigerated truck Turkish loading berth,” the German buyer should have examined the goods when they were loaded in Turkey, instead of waiting until they had been forwarded to Germany); CLOUT case No. 81 [Oberlandesgericht Düsseldorf, Germany, 10 February 1994] (asserting that the period for examining the goods under art. 38 and giving notice under art. 39 begins upon delivery to the buyer); CLOUT case No. 378 [Tribunale di Vigevano, Italy, 12 July 2000] (buyer’s time for examining goods begins to run upon delivery or shortly thereafter, except where the defect can only be discovered when the goods are processed); CLOUT case No. 56 [Canton of Ticino Pretore di Locarno Campagna, Switzerland, 27 April 1992] (buyer must examine goods upon delivery); Rechtbank Zwolle, the Netherlands, 5 March 1997, Unilex (examination due at the time of delivery or shortly after). The German Supreme Court has suggested that an article 38 examination of machinery should be conducted both at the time of delivery and at the time of installation; see CLOUT case No. 319 [Bundesgerichtshof, Germany, 3 November 1999] (see full text of the decision). In a decision involving the sale and installation of sliding gates, one court held that the defects in the gates should have been discovered when installation of the gates was substantially complete, even though some minor work remained unperformed by the seller; see CLOUT case No. 262 [Kanton St. Gallen, Gerichtskommission Oberrheintal, Switzerland, 30 June 1995]. The court

in general corresponds to the time risk of loss passed to the buyer.⁴² Requiring the buyer to conduct an examination after delivery, therefore, is consistent with article 36 (1) of the Convention, which establishes the seller's liability for any lack of conformity existing when the risk passes. Where the lack of conformity is a hidden or latent one not reasonably discoverable in the initial examination, however, decisions have indicated that the period for conducting an examination to ascertain the defect does not begin to run until the defects reveal (or should reveal) themselves. Thus where a buyer alleged a lack of conformity in a grinding device that suffered a complete failure approximately two weeks after being put into service (approximately three weeks after delivery), one court indicated that the period for examining the goods with respect to this defect began to run at the time of the failure.⁴³

13. The mandate in article 38 (1) to examine the goods "within as short a period as is practicable" has indeed been applied in a strict fashion in several cases.⁴⁴ It has also been asserted that the phrase is to be strictly interpreted.⁴⁵ In light of the requirement in article 38 (1) that the time period for examination be one that is "practicable in the circumstances," however, decisions have also recognized that the

did not actually cite article 38. Instead, it discussed the article 39 (1) obligation to give notice of a lack of conformity within a reasonable time after the non-conformity was discovered or should have been discovered—but the decision clearly implies that the time for the buyer's examination of the goods commenced even before seller had completed all its duties.

⁴² See CISG art. 69.

⁴³ CLOUT case No. 319 [Bundesgerichtshof, Germany, 3 November 1999] (see full text of the decision). See also CLOUT case No 378 [Tribunale di Vigevano, Italy, 12 July 2000] ("the time when the buyer is required to examine the goods under Art. 38(1) . . . as a rule is upon delivery or shortly thereafter and only exceptionally may be later, for instance when the defect is discoverable only by processing the goods."); Hoge Raad, the Netherlands, 20 February 1998, Unilex (implying that the period for examining for latent defects in floor tiles began to run when buyer's customer complained, some seven months after seller delivered the tiles to buyer); Landgericht Düsseldorf, Germany, 23 June 1994, Unilex (suggesting that period to examine engines for latent defects did not begin until buyer had installed and put goods into operation); Rechtbank van Koophandel Kortrijk, Belgium, 27 June 1997, available on the Internet at <http://www.law.kuleuven.ac.be/int/tradelaw/WK/1997-06-27.htm> (time for examination of goods and notice of lack of conformity was extended for goods that had to be processed before defects could be discovered).

⁴⁴ ICC Arbitration Case No. 8247, June 1996, *International Court of Arbitration Bulletin*, vol. 11, p. 53 (2000) (buyer should have examined a large shipment of chemical compound on the day it arrived in the port of destination); Landgericht Landshut, Germany, 5 April 1995, Unilex (asserting that buyer's obligation to examine the goods must be complied with immediately, even if the goods are not perishable); CLOUT case No. 56 [Canton of Ticino Pretore di Locarno Campagna, Switzerland, 27 April 1992] (because both buyer and seller were merchants, buyer should have examined the goods immediately upon delivery) (see full text of the decision); Hof Arnhem, the Netherlands, 17 June 1997, Unilex (buyer, who was a dealer in medical equipment, should have checked immediately after delivery whether documents necessary to satisfy regulations were present); CLOUT case No. 290 [Oberlandesgericht Saarbrücken, Germany, 3 June 1998] (buyer must examine flowers on the day of delivery); CLOUT case No. 81 [Oberlandesgericht Düsseldorf, Germany, 10 February 1994] (examination of shirts was required immediately following delivery).

⁴⁵ CLOUT case No. 81 [Oberlandesgericht Düsseldorf, Germany, 10 February 1994] (see full text of the decision); CLOUT case No. 251 [Handelsgericht des Kantons Zürich, Switzerland, 30 November 1998].

standard is a flexible one, and that the period for examination will vary with the facts of each case. According to one court, the short period for the examination depends on the size of the buyer's company, the type of the goods to be examined, their complexity or perishability or their character as seasonal goods, the type of the amount in question, the efforts necessary for an examination, etc. Furthermore, the objective and subjective circumstances of the concrete case must be considered, in particular the buyer's personal and business situation, characteristic features of the goods, the amount of the delivery of goods or the type of the chosen legal remedy.⁴⁶

14. As the aforementioned statement indicates, the perishable nature of goods is a factor that tribunals have considered in determining the period for examination.⁴⁷ Other factors that the decisions recognize as relevant include the professionalism and/or expertise of the buyer,⁴⁸ the timing and nature of the buyer's expected use or resale of the goods,⁴⁹ the buyer's knowledge of the seller's need for speedy notice of lack of conformity,⁵⁰ whether the goods had passed a pre-delivery inspection,⁵¹

⁴⁶ Oberster Gerichtshof, Austria, 27 August 1999, available on the Internet at http://www.cisg.at/1_22399x.htm. The opinion continues by asserting that "the reasonable periods pursuant to arts. 38 and 39 CISG are not long periods." For other statements on the flexible standard for the time for examination and/or the factors that should be considered in determining whether examination was timely, see CLOUT case No. 192 [Obergericht des Kantons Luzern, Switzerland, 8 January 1997] (indicating that a tribunal should consider "the nature of the goods, the quantity, the kind of wrapping and all other relevant circumstances") (see full text of the decision); Tribunale Civile di Cuneo, Italy, 31 January 1996, Unilex (asserting that scholars discussing Article 38 have indicated that the time frame is "elastic, leaving space to the interpreter and in the end to the judge, in terms of reasonableness, so that the elasticity will be evaluated in accordance with the practicalities of each case"); CLOUT case No. 81 [Oberlandesgericht Düsseldorf, Germany, 10 February 1994] (in determining the time for examining the goods "the circumstances of the individual case and the reasonable possibilities of the contracting parties are crucial") (see full text of the decision); CLOUT case No. 230 [Oberlandesgericht Karlsruhe, Germany, 25 June 1997] (asserting that, although the "median" time for an examination of durable goods is three to four days, "[t]his figure can be corrected upward or downward as the particular case requires") (see full text of the decision).

⁴⁷ CLOUT case No. 290 [Oberlandesgericht Saarbrücken, Germany, 3 June 1998] (flowers); CLOUT case No. 98 [Rechtbank Roermond, the Netherlands, 19 December 1991] (cheese); Rechtbank Zwolle, the Netherlands, 5 March 1997, Unilex (fish).

⁴⁸ CLOUT case No. 56 [Canton of Ticino Pretore di Locarno Campagna, Switzerland, 27 April 1992] (see full text of the decision); Hof Arnhem, the Netherlands, 17 June 1997, Unilex.

⁴⁹ CLOUT case No. 284 [Oberlandesgericht Köln, Germany, 21 August 1997] (immediate examination of chemicals required where the chemicals were going to be mixed with other substances soon after delivery); Rechtbank Zwolle, the Netherlands, 5 March 1997, Unilex (examination was due quickly where shipment of fish was to be processed by the buyer, making it impossible to ascertain whether the fish were defective when sold);

Arrondissementsrechtbank 's-Hertogenbosch, the Netherlands, 15 December 1997, Unilex (examination of furs not conducted until they had already undergone processing was not timely).

⁵⁰ Landgericht Köln, Germany, 11 November 1993, Unilex, reversed on other grounds by CLOUT case No. 122 [Oberlandesgericht Köln, Germany, 26 August 1994] (see full text of the decision).

⁵¹ Compare Helsinki Court of First Instance, 11 June 1995, available on the Internet at <http://www.cisg.law.pace.edu/cisg/wais/db/cases2/980630f5.html#proceed> (existence of pre-delivery tests showing acceptable vitamin content for skin care products excused buyer from testing for vitamin content immediately after delivery) with CLOUT case No. 280 [Oberlandesgericht Jena, Germany, 26 May 1998] (buyer was not entitled to rely on pre- importation veterinarian's inspection certificate certifying health of live fish: buyer should have examined samples of fish after delivery).

whether there were non-business days during the period for examination,⁵² the complexity of the goods,⁵³ the difficulty of conducting an examination,⁵⁴ whether there were defects in prior deliveries,⁵⁵ and the obviousness (or non-obviousness) of the lack of conformity.⁵⁶

15. Although the flexibility and variability of the period within which the buyer must examine the goods is widely recognized, several decisions have attempted to

⁵² CLOUT case No. 120 [Oberlandesgericht Köln, Germany, 22 February 1994] (buyer's examination was timely, taking into account the fact that two days of the period were weekend days) (see full text of the decision); Amtsgericht Riedlingen, Germany, 21 October 1994, Unilex (3 days for examining delivery of ham was sufficient even though Christmas holidays interfered with examination). But see Hoge Raad, the Netherlands, 20 February 1998, Unilex (despite buyer's summer vacation, it should not have delayed in examining the goods when its customer complained in July).

⁵³ Landgericht Düsseldorf, Germany, 23 June 1994, Unilex (where the goods consisted of two engines to be used for manufacturing hydraulic presses and welding machines, buyer had more than the usual time for an examination in order to determine conformity with technical specifications; because buyer delayed examining the goods until some four months after delivery of the second engine (16 months after delivery of first engine), however, the examination was untimely).

⁵⁴ CLOUT case No. 315 [Cour de Cassation, France, 26 May 1999] (time for examination took into account the difficulty of handling the metal sheets involved in the sale); Rechtbank van Koophandel Kortrijk, Belgium, 27 June 1997, Unilex (period for examination was longer for goods that had to be processed before defects could be discovered (in this case, yarn to be woven)); Rechtbank van Koophandel Kortrijk, Belgium, 6 October 1997, Unilex (buyer of crude yarn did not have to examine goods until they were processed; it would be unreasonable to expect buyer to unroll the yard in order to examine it before processing); Landgericht Düsseldorf, Germany, 23 June 1994, Unilex (buyer had longer than normal period to examine engines to be used in its manufacturing process because buyer had to install and put goods into operation in order to discover defects). Compare CLOUT case No. 81 [Oberlandesgericht Düsseldorf, Germany, 10 February 1994] (the time for examination depends on the circumstances of the particular case, in this case, involving a sale of shirts, "it was easily possible to examine the shirts—at least by way of sampling—immediately after their delivery") (see full text of the decision). But see CLOUT case No. 98 [Rechtbank Roermond, the Netherlands, 19 December 1991] (fact that sale involved frozen cheese did not excuse buyer from prompt examination, buyer could thaw and examine a sample of delivery) (see full text of the decision).

⁵⁵ Rechtbank Zwolle, the Netherlands, 5 March 1997, Unilex (buyer should have examined fish before processing and selling them to its customers given that buyer had already discovered lack of conformity in a previous shipment by the seller); Rechtbank van Koophandel Kortrijk, Belgium, 27 June 1997, available on the Internet at <http://www.law.kuleuven.ac.be/int/tradelaw/WK/1997-06-27.htm> ("defects in prior shipments a factor to consider in determining timeliness of examination").

⁵⁶ Amtsgericht Riedlingen, Germany, 21 October 1994, Unilex (defects in under-seasoned ham were easily discernible, and thus buyer should have examined goods and discovered defects quickly); Landgericht Köln, Germany, 11 November 1993, Unilex, reversed on other grounds in CLOUT case No. 122 [Oberlandesgericht Köln, Germany, 26 August 1994] (mistake in business report was easily discoverable, and thus examination was required to be quick) (see full text of the decision); CLOUT case No. 359 [Oberlandesgericht Koblenz, Germany, 18 November 1999] (where defects are easy to discover, the time for examination should not exceed one week); CLOUT case No. 284 [Oberlandesgericht Köln, Germany, 21 August 1997] (where chemicals were to be mixed with other substances and defects were easily discernible, immediate examination of the goods was required). See also Tribunale Civile di Cuneo, Italy, 31 January 1996, Unilex (time period for notice (and, perhaps, examination) is reduced if defects are easily recognizable).

establish presumptive time periods for the buyer's examination. Thus some opinions have asserted that the general base-line period for examination (which might be lengthened or shortened by particular circumstances) is one week after delivery.⁵⁷ Other decisions have set presumptive examination periods ranging from three or four days⁵⁸ to a month.⁵⁹ Based on the facts of the particular case, examinations have been found timely when they were conducted within approximately two weeks of the first delivery under the contract,⁶⁰ within a few days after delivery at the port of destination,⁶¹ and on the day of delivery.⁶² An examination by an expert was also deemed timely when it was conducted and completed at an unspecified time following delivery, but where arrangements to have the expert examine the goods were initiated before the goods arrived at their destination.⁶³ Examinations in the following periods have been found to be untimely in the particular circumstances: four months after the delivery of the second of two engines (20 months after the delivery of the first engine)⁶⁴; more than 10 days following delivery⁶⁵; beyond one week to 10 days after delivery⁶⁶; beyond one week following delivery⁶⁷; more than a few days after delivery⁶⁸; after three or four days following delivery⁶⁹; beyond three

⁵⁷ CLOUT case No. 285 [Oberlandesgericht Koblenz, Germany 11 September 1998] (“Generally speaking, examination of the goods by the buyer should occur within a week after delivery”); CLOUT case No. 284 [Oberlandesgericht Köln, Germany, 21 August 1997] (where chemicals were to be mixed with other substances and defects were easily discernible, immediate examination of the goods was required); CLOUT case No. 359 [Oberlandesgericht Koblenz, Germany, 18 November 1999] (“where defects are easy to discover . . . the examination period should not exceed a period of one week”); Landgericht Mönchengladbach, Germany, 22 May 1992, Unilex (generally allowing one week for examination of goods). Compare Oberster Gerichtshof, Austria, 27 August 1999 available on the Internet at http://www.cisg.at/1_22399x.htm (unless special circumstances suggest otherwise, buyer has a total of approximately 14 days to examine and give notice of defects).

⁵⁸ CLOUT case No. 230 [Oberlandesgericht Karlsruhe, Germany, 25 June 1997]. Compare Landgericht Düsseldorf, Germany, 23 June 1994 (a few working days).

⁵⁹ CLOUT case No. 284 [Oberlandesgericht Köln, Germany, 21 August 1997].

⁶⁰ CLOUT case No. 315 [Cour de Cassation, France, 26 May 1999] (see full text of the decision).

⁶¹ China International Economic and Trade Arbitration Commission (CIETAC) Arbitration, China, 1995, Unilex.

⁶² CLOUT case No. 46 [Landgericht Aachen, Germany, 3 April 1990] (see full text of the decision).

⁶³ CLOUT case No. 45 [Arbitration—International Chamber of Commerce, No. 5713 1989] (see full text of the decision).

⁶⁴ Landgericht Düsseldorf, Germany, 23 June 1994 Unilex.

⁶⁵ CLOUT case No. 192 [Obergericht des Kantons Luzern, Switzerland, 8 January 1997] (see full text of the decision).

⁶⁶ CLOUT case No. 251 [Handelsgericht des Kantons Zürich, Switzerland 30 November 1998].

⁶⁷ CLOUT case No. 285 [Oberlandesgericht Koblenz, Germany, 11 September 1998]; Landgericht Mönchengladbach, Germany, 22 May 1992, available on the Internet at <http://www.jura.uni-freiburg.de/ipr1/cisg/urteile/text/56.htm>; CLOUT case No. 359 [Oberlandesgericht Koblenz, Germany, 18 November 1999].

⁶⁸ Landgericht, Köln, Germany, 11 November 1993, Unilex.

⁶⁹ CLOUT case No. 230 [Oberlandesgericht Karlsruhe, Germany, 25 June 1997].

days after delivery⁷⁰; after the day of arrival at the port of destination⁷¹; any time later than immediately following delivery.⁷²

Latent lack of conformity

16. The question of the buyer's obligation to examine the goods for a hidden or latent lack of conformity not discernible during an initial inspection⁷³ is an important one because article 39 (1) of the Convention requires the buyer to give notice of a lack of conformity "within a reasonable time after [the buyer] discovered or ought to have discovered it" (emphasis added). Tribunals have adopted different approaches to examination for latent defects, apparently varying with the view taken of the nature of the examination required by article 38. Some decisions appear to conceive of the article 38 examination as an ongoing or repeated process involving a continuous search for all non-conformities, including latent ones. Such decisions seem to treat the question of when the buyer ought to have found any defect, including a latent one not discoverable in an initial examination, as an issue governed by article 38, on the apparent assumption that article 38 requires the buyer to continue examining the goods until all defects are revealed. Thus some decisions indicate that the period for an article 38 examination for latent defects does not begin to run until such defects should reveal themselves,⁷⁴ whereas the period for examination of obvious defects begins to run immediately upon delivery.⁷⁵ These opinions apparently contemplate multiple or continuous examinations under article 38. Other decisions appear to conceive of the examination required by article 38 as a single discrete event to occur shortly after delivery. For tribunals adopting this approach, the question of when latent defects should be discovered if they are not reasonably discernible in the initial article 38 examination is an issue beyond the scope of article 38.⁷⁶

⁷⁰ Amtsgericht Riedlingen, Germany, 21 October 1994, Unilex; Landgericht Landshut, Germany, 5 April 1995, Unilex (examination for proper quantity of sports clothing).

⁷¹ ICC Arbitration Case No. 8247, 1996, Unilex.

⁷² CLOUT case No. 81 [Oberlandesgericht Düsseldorf, Germany, 10 February 1994].

⁷³ For the distinction between latent and obvious (patent) defects, see CLOUT case No. 4 [Landgericht Stuttgart, Germany, 31 August 1989]; CLOUT case No. 378 [Tribunale di Vigevano, Italy, 12 July 2000]; CLOUT case No. 284 [Oberlandesgericht Köln, Germany 21 August 1997] (see full text of the decision); CLOUT case No. 230 [Oberlandesgericht Karlsruhe, Germany, 25 June 1997].

⁷⁴ See footnote 43 *supra* and accompanying text discussing CLOUT case No. 319 [Bundesgerichtshof, Germany, 3 November 1999] (period for examination to discover latent defects in grinding device did not begin until device broke down approximately three weeks after delivery).

⁷⁵ See footnote 41 *supra* and accompanying text; footnote 56 *supra* and accompanying text.

⁷⁶ Under this approach, the question of the timely discovery of such latent defects is an issue governed not by article 38 but by the requirement in article 39 (1) that the buyer notify the seller of a lack of conformity "within a reasonable time after [the buyer] discovered or ought to have discovered it." In other words, even though this approach posits that a latent defect might not be reasonably discoverable during the examination required by article 38, the buyer still is charged with taking reasonable action to discover such defects under article 39. For further discussion related to this issue, see the discussion *infra* of article 39.

17. Illustrating this approach, one decision has emphasized that the article 38 examination occurs upon delivery of the goods, and failure to discern a lack of conformity that was not discoverable at the time does not violate article 38.⁷⁷

Article 38 (2)

18. As was noted previously, under article 38 (1) the period for the buyer to examine the goods as a rule begins to run upon delivery of the goods.⁷⁸ Where such delivery is to occur, in turn, is governed by the sales contract or, in the absence of a contractual provision addressing this question, by the default rules stated in article 31.⁷⁹ In many transactions in which the goods will be delivered to the buyer by means of a third-party carrier, the place of delivery will be where the seller hands over the goods to the carrier for transportation.⁸⁰ In such cases, it will often not be convenient or even possible for the buyer to examine the goods at the point of delivery, and thus in fairness the period for examination should not begin running at that point. For this reason, in transactions involving “carriage of goods” (i.e., transportation by third-party carrier), article 38 (2) permits the buyer to defer the examination “until after the goods have arrived at their destination.” This rule has been applied in several cases. In one transaction involving goods to be transported from Tallinn, Estonia to Abu Dhabi in the United Arab Emirates, the court found that the buyer could postpone examination until the goods arrived at Abu Dhabi even though the contract provided for delivery FOB Tallinn.⁸¹ On the other hand,

⁷⁷ Landgericht Paderborn, Germany, 25 June 1996 (see full text of the decision). For other decisions that may take a similar approach to the relationship between the article 38 examination and discovery of latent defects, see CLOUT case No. 280 [Oberlandesgericht Jena, Germany, 26 May 1998] (failure to examine goods as provided in art. 38 would be irrelevant if the buyer could show that an expert examination would not have detected the defect); Oberster Gerichtshof, Austria, 27 August 1999, available on the Internet at http://www.cisg.at/1_22399x.htm (suggesting that, if buyer had conducted a thorough and professional post-delivery examination of the goods that did not reveal a latent lack of conformity, buyer would have satisfied its obligations under art. 38); Landgericht Ellwangen, Germany, 21 August 1995, Unilex (suggesting that buyer satisfied its art. 38 obligations by examining the goods without a chemical analysis that, when conducted later, revealed a latent defect).

⁷⁸ See footnote 41 *supra* and accompanying text.

⁷⁹ See Landgericht Landshut, Germany, 5 April 1995, Unilex (stating that the art. 38 examination must usually be conducted at the place for the performance of the obligation to deliver under art. 31).

⁸⁰ This will be true, for example, if the parties agree to any of the various trade terms under which the buyer bears the risk of loss while the goods are in transit—e.g., Free Carrier (FCA) named point under the Incoterms. The same result would occur in transactions involving carriage of the goods if the parties have not agreed upon the place of delivery: in such cases, article 31 (a) provides that delivery occurs when the seller hands the goods over to the first carrier for transmission to the buyer.

⁸¹ Helsinki Court of Appeal, Finland, 29 January 1998, available on the Internet at <http://www.utu.fi/oik/tdk/xcisg/tap4.html#engl>. For other cases applying article 38(2), see CLOUT case No. 123 [Bundesgerichtshof, Germany, 8 March 1995] (see full text of the decision); ICC Arbitration Case No. 8247, June 1996, *International Court of Arbitration Bulletin*, vol. 11, p. 53 (2000); Tribunale Civile di Cuneo, Italy, 31 January 1996, Unilex; Landgericht Landshut, Germany, 5 April 1995, Unilex; China International Economic and Trade Arbitration Commission (CIETAC) Arbitration, China, 1995, Unilex (under a CIF contract, where delivery to the buyer occurs when the goods pass the ship’s rail at the port for loading, the buyer’s time for examination did not start until the goods arrived at the port of destination).

article 38 (2) is subject to the contrary agreement of the parties.⁸² Thus where a contract between a seller and a buyer provided that the goods were to be delivered “free on refrigerated truck Turkish loading berth (Torbali)” and from there to be shipped on to the buyer’s country by carrier, the court found that the parties’ agreement had excluded article 38 (2) and the buyer was required to conduct the article 38 examination in Turkey rather than at the place of arrival, because the contract contemplated that a representative of the buyer would inspect the goods at the Turkish loading dock and the buyer was responsible for making arrangements for transporting the goods to its country.⁸³

Article 38 (3)

19. Article 38 (3) permits a buyer in certain circumstances to defer examination of the goods until after the time that the period for examination would otherwise have commenced.⁸⁴ Specifically, where the goods are “redirected in transit” or “redispached by the buyer without a reasonable opportunity for examination by him,”⁸⁵ article 38 (3) permits examination to be deferred “until after the goods have arrived at the new destination,” provided the seller “knew or ought to have known of the possibility of such redirection or redispach” when the contract was concluded. Under this provision, an examination of a delivery of rare hard woods that the buyer (with the seller’s knowledge) redispached to the buyer’s customer could be deferred until the goods arrived at the customer’s facilities.⁸⁶ Several decisions, however, have strictly construed the requirements for article 38 (3) to apply. Thus it has been stated that the provision only applies if the goods are delivered directly from the seller to the end customer or if the buyer acts simply as an intermediary between the seller and the end customer, and the provision was held inapplicable where the buyer received and stored the goods in its own warehouse without knowing in advance whether and when they would be resold.⁸⁷ It has also been stated that article 38 (3) allows a deferred examination only if all (rather than

⁸² Not only does article 6 of the CISG provide that the parties may “derogate from or vary the effect of any of [the Convention’s] provisions,” but article 38 (2) itself is phrased in permissive (“examination *may* be deferred”) as opposed to mandatory fashion.

⁸³ CLOUT case No. 48, Germany, 1993 (see full text of the decision).

⁸⁴ Unless article 38 (3) applies, the time for the buyer to examine the goods usually commences when the goods are delivered or, in the case of goods transported by a third-party carrier, when the goods arrive at their destination. See para. 18 *supra*.

⁸⁵ According to a statement of a delegate from the Netherlands at the 1980 Vienna Diplomatic Conference at which the final text of the CISG was adopted, the distinction between “redirected in transit” and “redispached” is as follows: “‘Redispached’ implied that the goods had reached their first destination and had subsequently been sent on. ‘Redirected in transit’ implied that they had never reached their first destination.” Summary Records of the United Nations Conference on Contracts for the International Sale of Goods, 16th meeting of Committee 1, A/CONF.97/C.1/SR.16, reproduced in Official Records of the United Nations Conference on Contracts for the International Sale of Goods, Vienna, 10 March–11 April 1980, at p. 320, para. 18; Note to Secretariat Commentary on Article 38 (Article 36 of the draft Convention) available on the internet at <http://www.cisg.law.pace.edu/cisg/text/secomm/secomm-38.html>.

⁸⁶ Oberlandesgericht Köln, Germany, 22 February 1994, Unilex.

⁸⁷ CLOUT case No. 292 [Oberlandesgericht Saarbrücken, Germany, 13 January 1993].

just a part) of a delivery of goods is redispached, or redirected in transit, and then only if the buyer does not have a reasonable opportunity to examine the delivery.⁸⁸

⁸⁸ CLOUT case No. 192 [Obergericht des Kantons Luzern, Switzerland, 8 January 1997] (see full text of the decision).
