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**United Nations Commission  
on International Trade Law**

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

*Article 39*

(1) 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.

(2) In any event, the buyer loses the right to rely on a lack of conformity of the goods if he does not give the seller notice thereof at the latest within a period of two years from the date on which the goods were actually handed over to the buyer, unless this time limit is inconsistent with a contractual period of guarantee.

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\* 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 39

1. Article 39 imposes on a buyer who claims that delivered goods do not conform to the contract an obligation to give the seller notice of the lack of conformity. The provision is divided into two subsections addressing different time periods for the required notice: article 39 (1) requires that the notice be given within a reasonable time after the buyer has discovered it or ought to have discovered it; article 39 (2) specifies that, in any event, the buyer must give the seller notice of the claimed lack of conformity within two years of the date on which the goods were actually handed over to the buyer, unless this time limit is inconsistent with a contractual period of guarantee.

## Scope of article 39

2. The notice obligation imposed by article 39 applies if the buyer claims that delivered goods suffer from a lack of conformity. The concept of conformity is defined in article 35. The great majority of decisions applying the article 39 notice requirements involve claims that the goods were defective or otherwise not of conforming quality. Nevertheless, the article 39 notice obligation has been applied not only to breaches of the quality obligations imposed by article 35, but also to a breach of a contractual warranty made in derogation of article 35.<sup>1</sup> It has also been applied where the claimed lack of conformity was a failure to provide proper instruction manuals to accompany the goods<sup>2</sup>. Several decisions have found that article 39 requires notice when the buyer claims that an inadequate quantity (as opposed to quality) of goods was delivered.<sup>3</sup> One court has also applied the article 39 notice requirement when the buyer complained that delivery of seasonal goods was late,<sup>4</sup> although that decision has not been followed in other cases.<sup>5</sup> Each separate lack of conformity is subject to the notice requirement, and the fact that the buyer may have given proper notice as to one defect does not necessarily mean it has given valid notice as to all claimed non-conformities.<sup>6</sup>

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<sup>1</sup> CLOUT case No. 237 [Arbitration—Arbitration Institute of the Stockholm Chamber of Commerce, 5 June 1998].

<sup>2</sup> CLOUT case No. 343 [Landgericht Darmstadt, Germany, 9 May 2000] (see full text of the decision).

<sup>3</sup> CLOUT case No. 48 [Oberlandesgericht Düsseldorf, Germany, 8 January 1993] (see full text of the decision); CLOUT case No. 282 [Oberlandesgericht Koblenz, Germany, 31 January 1997]; Landgericht Landshut, Germany, 5 April 1995, Unilex.

<sup>4</sup> Amtsgericht Augsburg, Germany, 29 January 1996, Unilex.

<sup>5</sup> Note that the CISG provision governing time of delivery (art. 33) is not found in the section of the CISG entitled “Conformity of the goods and third party claims” (Section II of Part III, Chapter I), but rather is located in the section entitled “Delivery of the goods and handing over of documents” (Section I of Part III, Chapter II).

<sup>6</sup> CLOUT case No. 123 [Bundesgerichtshof, Germany, 8 March 1995] (see full text of the decision); Landgericht Landshut, Germany, 5 April 1995, Unilex; Landgericht Bielefeld, Germany, 18 January 1991, Unilex; Oberster Gerichtshof, Austria, 27 August 1999, available on the Internet at [http://www.cisg.at/1\\_22399x.htm](http://www.cisg.at/1_22399x.htm).

## Consequences of failure to give notice

3. Both article 39 (1) and article 39 (2) state that failure to give the requisite notice results in the buyer losing the right to rely on the lack of conformity. This appears to mean that the buyer loses the right to any remedy for the non-conformity, including, e.g., the right to require the seller to repair the goods,<sup>7</sup> the right to claim damages,<sup>8</sup> the right to reduce the price,<sup>9</sup> and the right to avoid the contract.<sup>10</sup> One court, however, appears to have permitted the buyer to partially avoid the contract based on a lack of conformity that had not been timely noticed.<sup>11</sup> It should also be noted that a buyer's remedies for a lack of conformity concerning which it has not given proper notice may be restored in whole or in part under CISG articles 40 and 44.<sup>12</sup>

## Burden of proof

4. There appears to be a consensus in reported decisions that the buyer bears the burden of proving that it gave the required article 39 notice of non-conformity. This position has been adopted both expressly<sup>13</sup> and by implication.<sup>14</sup> Although several decisions have invoked domestic legal rules to justify allocating the burden to the buyer,<sup>15</sup> a larger number have based their allocation on the general principles underlying the CISG.<sup>16</sup> A decision by an Italian court, for example, expressly

<sup>7</sup> CLOUT case No. 196 [Handelsgericht des Kantons Zürich, Switzerland, 26 April 1995].

<sup>8</sup> CLOUT case No. 50 [Landgericht Baden-Baden, Germany, 14 August 1991]; CLOUT case No. 230 [Oberlandesgericht Karlsruhe, Germany, 25 June 1997] (see full text of the decision), reversed on other grounds by CLOUT case No. 270 [Bundesgerichtshof, Germany, 25 November 1998].

<sup>9</sup> CLOUT case No. 232 [Oberlandesgericht München, Germany, 11 March 1998] (see full text of the decision); CLOUT case No. 273 [Oberlandesgericht München, Germany, 9 July 1997]. Compare also CLOUT case No. 46 [Landgericht Aachen, Germany, 3 April 1990] (finding that buyer had the right to reduce the price under art. 50 because it had given proper notice of lack of conformity) (see full text of the decision).

<sup>10</sup> CLOUT case No. 232 [Oberlandesgericht München, Germany, 11 March 1998]; CLOUT case No. 282 [Oberlandesgericht Koblenz, Germany, 31 January 1997] (see full text of the decision).

<sup>11</sup> CLOUT case No. 50 [Landgericht Baden-Baden, Germany, 14 August 1991].

<sup>12</sup> See the discussion of these provisions *infra*.

<sup>13</sup> CLOUT case No. 378 [Tribunale di Vigevano, Italy, 12 July 2000]; CLOUT case No. 251 [Handelsgericht des Kantons Zürich, Switzerland, 30 November 1998]; Oberster Gerichtshof, Austria, 27 August 1999, Unilex; CLOUT case No. 305 [Oberster Gerichtshof, Austria, 30 June 1998]; Pretura di Torino, Italy, 30 January 1997, Unilex; CLOUT case No. 196 [Handelsgericht des Kantons Zürich, Switzerland, 26 April 1995] (see full text of the decision); CLOUT case No. 97 [Handelsgericht des Kantons Zürich, Switzerland, 9 September 1993].

<sup>14</sup> Rechtbank 's-Gravehage, the Netherlands, 7 June 1995, Unilex; Landgericht Marburg, Germany, 12 December 1995, Unilex; Landgericht Duisburg, Germany, 17 April 1996, Unilex; CLOUT case No. 290 [Oberlandesgericht Saarbrücken, Germany, 3 June 1998]; CLOUT case No. 289 [Oberlandesgericht Stuttgart, Germany, 21 August 1995]; CLOUT case No. 291 [Oberlandesgericht Frankfurt a.M., Germany, 23 May 1995], (see full text of the decision); CLOUT case No. 81 [Oberlandesgericht Düsseldorf, Germany, 10 February 1994] (see full text of the decision); ICC Award No. 8611 of 1997, Unilex; Arbitral Panel of the Zurich Chamber of Commerce, award No. ZHK 273/95, 31 May 1996, Unilex.

<sup>15</sup> Pretura di Torino, Italy, 30 January 1997, Unilex.

<sup>16</sup> CLOUT case No. 378 [Tribunale di Vigevano, Italy, 12 July 2000]; CLOUT case No. 251 [Handelsgericht des Kantons Zürich, Switzerland, 30 November 1998]; CLOUT case No. 196

rejected reliance on domestic law in determining the burden of proof, and discovered in provisions such as article 79 (1) a general CISG principle (in the sense of article 7 (2)) requiring the buyer to prove valid notice.<sup>17</sup>

### Form of notice

5. Article 39 does not specify the form of notice required, although the parties can by agreement require a particular form.<sup>18</sup> Notice in written form has often been found satisfactory, and the contents of a series of letters have been combined in order to satisfy the article 39 requirement.<sup>19</sup> Oral notice (by telephone) has also been found sufficient,<sup>20</sup> although in several cases evidentiary issues have caused a buyer's claim to have given telephonic notice to fail.<sup>21</sup> One court has found that a buyer claiming to have given notice by telephone must prove when the call took place, to whom the buyer spoke, and what was said during the conversation; the buyer's failure to prove these elements prevented it from establishing that the article 39 notice requirement was satisfied.<sup>22</sup> An earlier decision had similarly found that a buyer's claim of telephonic notice had not been sufficiently substantiated because the buyer had not proven the date of the call, the party spoken to, or the information conveyed concerning the lack of conformity.<sup>23</sup> In one decision, moreover, a court appeared to impose special requirements for sufficient oral notice by stating that, if the seller failed to respond to telephone notice given to the seller's agent, the buyer was obliged to follow-up with written notice to the seller.<sup>24</sup> Finally, a court has rejected a buyer's argument that it gave implied notice of lack of

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[Handelsgericht des Kantons Zürich, Switzerland, 26 April 1995] (see full text of the decision); CLOUT case No. 97 [Handelsgericht des Kantons Zürich Switzerland 9 September 1993].

<sup>17</sup> CLOUT case No. 378 [Tribunale di Vigevano, Italy, 12 July 2000].

<sup>18</sup> CLOUT case No. 222 [Federal Court of Appeals for the Eleventh Circuit, United States, 29 June 1998], the buyer had signed an order form containing a clause requiring complaints of defects in the goods to be in writing and made by certified letter. The decision proceeds on the premise that, if this clause became part of the parties' contract, the buyer's oral notice of lack of conformity would not have been valid. The court remanded the case to determine whether the clause had in fact been incorporated into the agreement.

<sup>19</sup> CLOUT case No. 225 [Cour d'appel, Versailles, France, 29 January 1998] (see full text of the decision).

<sup>20</sup> Landgericht Frankfurt, Germany, 9 December 1992, Unilex. This is one of the very rare decisions in which a particular telephonic notice was held to satisfy the notice requirement in fact. Another decision recognized the theoretical validity of telephone notice while finding on its particular facts that the requirements of article 39 had not been satisfied. Landgericht Frankfurt, Germany, 13 July 1994, Unilex. Some decisions have found that telephonic notice failed to satisfy article 39 in some respect (e.g., because it was given too late) without commenting on the form of the notice. Landgericht Bochum, Germany, 24 January 1996, Unilex; Rechtbank van Koophandel Kortrijk, Belgium, 16 December 1996, Unilex.

<sup>21</sup> Landgericht Marburg, Germany, 12 December 1995, Unilex; Amtsgericht Kehl, Germany, 6 October 1995, Unilex; CLOUT case No. 4 [Landgericht Stuttgart, Germany, 31 August 1989] (see full text of the decision).

<sup>22</sup> Landgericht Frankfurt, Germany, 13 July 1994, Unilex.

<sup>23</sup> CLOUT case No. 4 [Landgericht Stuttgart, Germany, 31 August 1989] (see full text of the decision).

<sup>24</sup> Rechtbank van Koophandel Kortrijk, Belgium, 27 June 1997, Unilex.

conformity when it refused to pay the seller, holding that the notice required by article 39 must be express.<sup>25</sup>

### **To whom must notice be given**

6. Article 39 states that the required notice of lack of conformity must be given to the seller.<sup>26</sup> Thus it has been stated that communications between the buyer and its customer concerning defects in the goods did not satisfy the article 39 notice requirement because they did not involve the seller.<sup>27</sup> Notice of defects conveyed by the buyer to an independent third party who had acted as an intermediary in the formation of the contract but who had no further relationship to the seller was found not to have been given by means appropriate in the circumstances within the meaning of article 27, and thus the buyer bore the risk when the notice was not received by the seller.<sup>28</sup> Similarly, notice given to an employee of the seller who was not authorized to receive such communications but who promised to transmit the information to the seller was found to be insufficient when the employee in fact did not inform the seller; the court noted that, when notice is not given to the seller personally, the buyer must ensure that the seller actually receives the notice.<sup>29</sup> On the other hand, it has been found that notice given to an agent of the seller would satisfy article 39, although the question of the recipient's agency status and authority were matters beyond the scope of the CISG to be determined under applicable domestic law.<sup>30</sup>

### **Agreements relating to notice**

7. Article 39 is subject to the parties' power under article 6 to derogate from or vary the effect of any provision of the Convention. A significant number of decisions have involved agreements relating to the buyer's obligation to give the seller notice of claims that the goods do not conform to the requirements of the contract. Such agreements have generally been enforced, and buyers have several times lost the right to complain of a lack of conformity because they failed to

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<sup>25</sup> Landgericht Aachen, Germany, 28 July 1993, Unilex, reversed on other grounds by the Oberlandesgericht Köln, Germany, 22 February 1994, Unilex.

<sup>26</sup> Article 39 (1) requires the buyer to give notice to the seller, and article 39 (2) states that the buyer must give the seller notice.

<sup>27</sup> CLOUT case No. 220 [Kantonsgericht Nidwalden, Switzerland, 3 December 1997] (see full text of the decision).

<sup>28</sup> Landgericht Kassel, Germany, 15 February 1996, Unilex. The court also noted that the notice must be specifically directed to the seller.

<sup>29</sup> Landgericht Bochum, Germany, 24 January 1996, Unilex.

<sup>30</sup> CLOUT case No. 364 [Landgericht Köln, Germany 30 November 1999].

comply with the terms of such an agreement.<sup>31</sup> A few decisions, however, appear reluctant to enforce contractual provisions governing notice: they rely on the standards of article 39 even though the parties' contract included clauses addressing notice of defects,<sup>32</sup> and/or they suggest that the contract provisions are enforceable only to the extent they are judged reasonable by the standards of article 39.<sup>33</sup> Of course to be enforceable under any approach, terms relating to notice of lack of conformity must have become part of the parties' agreement under applicable contract formation rules, which in the case of the CISG are found in Part II of the Convention. Thus it has been found that, although the parties can derogate from article 39, they had not done so where a clause requiring the buyer to give notice within eight days of delivery was illegible and appeared on documents unilaterally generated by the seller after the contract was concluded.<sup>34</sup> Parties also have been found not to have derogated from article 39 just by agreeing to an 18-month contractual warranty.<sup>35</sup> On the other hand, it has been recognized that a trade usage relating to notice of defects can derogate from article 39 if the trade usage is binding on the parties under CISG article 9.<sup>36</sup> To the extent an agreement by the

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- <sup>31</sup> CLOUT case No. 336 [Canton of Ticino Tribunale d'appello, Switzerland, 8 June 1999]; Landgericht Gießen, Germany, 5 July 1994, Unilex; Landgericht Hannover, Germany, 1 December 1993, Unilex; CLOUT case No. 303 [Arbitration—International Chamber of Commerce No. 7331 1994] (see full text of the decision); CLOUT case No. 94 [Arbitration—Internationales Schiedsgericht der Bundeskammer der gewerblichen Wirtschaft—Wien, 15 June 1994]; CLOUT case No. 50 [Landgericht Baden-Baden, Germany, 14 August 1991]. See also CLOUT case No. 305 [Oberster Gerichtshof, Austria, 30 June 1998] (remanding to determine whether contractual provision governing time for giving notice of defects had been complied with); but see Rechtbank Zwolle, the Netherlands, 5 March 1997, Unilex (although the court notes that the seller's standard term setting the time for giving notice of defects applied to the contract, the court apparently did not apply the term—although its analysis of whether the buyer gave notice within a reasonable time was influenced by the term).
- <sup>32</sup> CLOUT case No. 232 [Oberlandesgericht München Germany 11 March 1998] (see full text of the decision); CLOUT case No. 292 [Oberlandesgericht Saarbrücken, Germany, 13 January 1993] (see full text of the decision).
- <sup>33</sup> CLOUT case No. 232 [Oberlandesgericht München, Germany, 11 March 1998] (see full text of the decision); CLOUT case No. 303 [Arbitration—International Chamber of Commerce No. 7331 1994] (see full text of the decision).
- <sup>34</sup> CLOUT case No. 378 [Tribunale di Vigevano, Italy, 12 July 2000] (see full text of the decision). In CLOUT case No. 222 [Federal Court of Appeals for the Eleventh Circuit, United States, 29 June 1998] the court ruled that, although the parties had each signed a form with a provision requiring the buyer to give written notice of defects within 10 days of delivery, evidence showing the parties did not subjectively intend to be bound by the provision should have been admitted under CISG article 8 (1). One court has held that a term requiring the buyer to give notice of defects within 30 days of delivery bound the buyer because it had been incorporated into the contract under the rules of article 19 of the CISG; see CLOUT case No. 50 [Landgericht Baden-Baden, Germany, 14 August 1991] (see full text of the decision). Another court found that under article 18 (1) a buyer accepted terms on the seller's order confirmation, including a clause requiring notice of defects to be given within eight days after delivery, by accepting delivery of the goods; see CLOUT case No. 292 [Oberlandesgericht Saarbrücken, Germany, 13 January 1993] (see full text of the decision).
- <sup>35</sup> CLOUT case No. 237 [Arbitration—Arbitration Institute of the Stockholm Chamber of Commerce, 5 June 1998] (see full text of the decision).
- <sup>36</sup> CLOUT case No. 292 [Oberlandesgericht Saarbrücken, Germany, 13 January 1993]. On the facts of the particular case, the court found that the parties' agreement to a clause requiring notice within eight days of delivery excluded the applicability of any such trade usage.

parties relating to notice of non-conformity fails to address particular issues, the provisions of article 39 have been invoked to fill the gaps.<sup>37</sup>

### **Waiver by the seller or the buyer**

8. Although article 39 gives a seller the right to prevent a buyer from relying on a lack of conformity if the buyer does not give the seller timely and proper notice thereof, a seller can waive this right by misleading the buyer into thinking that the seller would not object to the buyer's notice. Thus where the seller, after receiving notice from the buyer that the delivered goods were not conforming, declared that it would give credit for the goods if the buyer's complaints about defects were confirmed, one court found that the seller had waived its right to object to the timeliness of the buyer's notice.<sup>38</sup> On the other hand, another court invoked domestic law and a policy encouraging amicable settlements in concluding that a seller did not waive its right to claim that notice was untimely just because it accepted return of the goods in order to examine them and granted the buyer a provisional pro forma credit for the price.<sup>39</sup> And yet another court has found that the mere fact that the seller examined the goods, at the buyer's request, after receiving the buyer's complaint of lack of conformity did not constitute a waiver of the right to argue that the buyer's notice of non-conformity was late.<sup>40</sup> Another court has stated that a seller can waive its rights under article 39 either expressly or impliedly, and that implied waiver requires specific indications that would lead the buyer to understand that the seller's actions constituted a waiver; the court went on to conclude that, although the seller in the case did not waive its right to object to the timeliness of notice of a lack of conformity by entering into settlement negotiations with the buyer over the non-conformity, the willingness to negotiate was a fact to consider; and this fact, in combination with the extended period during which such negotiations continued (15 months), the failure of the seller to reserve its rights under article 39 during that time, and the seller's actions in acceding to the buyer's request to pay for an expert to examine the goods and in offering the buyer damages equal to seven times the price for the goods, supported the conclusion that the seller had waived its right to object to late notice.<sup>41</sup> Another court has distinguished between waiver of a seller's article 39 rights and estoppel from asserting such rights: it concluded that the seller had not waived its right to object to late notice because the intention of parties to waive rights had to be very clearly established, and the mere fact that the seller did not immediately reject the notice as late at the time it was given was not sufficient evidence of waiver; on the other hand, by

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<sup>37</sup> CLOUT case No. 229 [Bundesgerichtshof, Germany, 4 December 1996] (agreement requiring the buyer to give immediate notice of defects occurring after delivery of the goods did not govern the obligation to notify of defects existing at delivery; the latter was therefore regulated by article 39 (1)); ICC Arbitration Case No. 8611, 1997, Unilex (because the parties' agreement regarding notice of defects did not address, e.g., the specificity with which the notice must describe the claimed defect, the court supplemented the agreement by reference to article 39 (1)).

<sup>38</sup> CLOUT case No. 235 [Bundesgerichtshof, Germany, 25 June 1997].

<sup>39</sup> CLOUT case No. 310 [Oberlandesgericht Düsseldorf, Germany, 12 March 1993]. The court indicated that waiver by the seller of its article 39 rights would only be deemed to occur in clear circumstances, as where the seller unconditionally accepted return of the goods by the buyer.

<sup>40</sup> CLOUT case No. 251 [Handelsgericht des Kantons Zürich, Switzerland, 30 November 1998].

remaining in communication with the buyer in order to keep informed of the buyer's customer's complaints, and by making statements to the buyer indicating that the seller would not raise the defence of late notice, the seller became estopped from invoking that defence when the buyer relied on the impression that the seller would not complain of untimely notice.<sup>42</sup>

9. Buyers have also been deemed to have waived (or to be estopped from exercising) their rights under article 39 when they affirmatively indicated acceptance of delivered goods and/or acknowledged an obligation for the price without raising objection to defects that were apparent. Thus a buyer was found to have lost its right to complain about missing parts and defects that should have been discovered when it agreed to the amount of a disputed balance remaining on the purchase price and signed bills of exchange for that balance.<sup>43</sup> Similarly, a buyer who negotiated a reduction in the price of video recorders on the basis of certain defects lost its right to object to other defects known to the buyer at the time the price-reduction was agreed to.<sup>44</sup> And a buyer who paid outstanding invoices with bank checks and then stopped payment on the checks before they were honoured was deemed to have lost its right to complain of defects known when the checks were provided.<sup>45</sup>

### *Article 39 (1)—Purposes*

10. Article 39 (1) requires a buyer who claims that the goods do not conform to the contract to 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. This requirement has been identified with several different purposes. A number of decisions indicate that a purpose is to promote prompt clarification as to whether a breach has occurred.<sup>46</sup> It has also been suggested that the required notice is designed to give the seller the information needed to determine how to proceed in general with respect to the buyer's claim,<sup>47</sup> and more specifically to facilitate the seller's cure of defects.<sup>48</sup> One decision states that the purpose is to promote the quick settlement of disputes and to assist the seller in defending

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<sup>41</sup> CLOUT case No. 270 [Bundesgerichtshof, Germany, 25 November 1998].

<sup>42</sup> CLOUT case No. 94 [Arbitration—Internationales Schiedsgericht der Bundeskammer der gewerblichen Wirtschaft—Wien, 15 June 1994]. According to the court, the buyer had relied on the impression that the seller would not object to late notice because the buyer refrained from taking immediate legal action against its customer or the seller.

<sup>43</sup> CLOUT case No. 337 [Landgericht Saarbrücken, Germany, 26 March 1996].

<sup>44</sup> CLOUT case No. 343 [Landgericht Darmstadt, Germany, 9 May 2000].

<sup>45</sup> Arrondissementsrechtsbank 's-Hertogenbosch, the Netherlands, 26 February 1992, Unilex.

<sup>46</sup> Oberster Gerichtshof, Austria, 27 August 1999, available on the Internet at [http://www.cisg.at/1\\_22399x.htm](http://www.cisg.at/1_22399x.htm); CLOUT case No. 48 [Oberlandesgericht Düsseldorf, Germany, 8 January 1993] (see full text of the decision); CLOUT case No. 284 [Oberlandesgericht Köln, Germany, 21 August 1997] (see full text of the decision); CLOUT case No. 3 [Landgericht München, Germany, 3 July 1989] (see full text of the decision).

<sup>47</sup> CLOUT case No. 337 [Landgericht Saarbrücken, Germany, 26 March 1996]; CLOUT case No. 378 [Tribunale di Vigevano, Italy, 12 July 2000] (see full text of the decision).

<sup>48</sup> CLOUT case No. 344 [Landgericht Erfurt, Germany, 29 July 1998]; CLOUT case No. 3 [Landgericht München, Germany, 3 July 1989] (see full text of the decision). *See also* CLOUT case No 282 [Oberlandesgericht Koblenz, Germany, 31 January 1997] (implying that purpose of notice is to facilitate cure by the seller).



itself.<sup>49</sup> Another decision similarly suggests that article 39 (1) assists the seller in defending itself against invalid claims.<sup>50</sup> The notice requirement has also been associated with a buyer's obligation of good faith.<sup>51</sup>

### Contents of notice; specificity required

11. The notice required by article 39 (1) must “specify the nature of the lack of conformity. . .”. This language has been interpreted and applied in a large number of decisions. Several have made general pronouncements concerning the specificity requirement. It has been said that notice of the mere fact of a lack of conformity is insufficient, but that the buyer must specify the precise nature of the defects<sup>52</sup>; that notice should indicate both the nature and the extent of the lack of conformity, and should convey the results of the buyer's examination of the goods<sup>53</sup>; that notice should be specific enough to allow the seller to comprehend the buyer's claim and to take appropriate steps in response, *i.e.*, to examine the goods and arrange for a substitute delivery or otherwise remedy the lack of conformity<sup>54</sup>; that the purpose of the specificity requirement is to enable the seller to understand the kind of breach claimed by the buyer and to take the steps necessary to cure it, such as initiating a substitute or additional delivery<sup>55</sup>; that notice should be sufficiently detailed that misunderstanding by the seller would be impossible and the seller could determine unmistakably what the buyer meant<sup>56</sup>; that the notice should be sufficiently specific to permit the seller to know what item was claimed to lack conformity and what the claimed lack of conformity consisted of.<sup>57</sup> Several decisions have emphasized that the notice should identify the particular goods claimed to be non-conforming<sup>58</sup>; one such decision found that, even though the piece of agricultural machinery that the buyer claimed was defective was the only one of its type that the buyer had purchased from the seller, the specificity requirement was not satisfied where the notice failed to identify the serial number or the date of delivery, because the seller should not be forced to search its files for the records of the machine in question.<sup>59</sup> A number of decisions have noted that each claimed non-conformity must be specifically described, and the fact that notice may be sufficiently specific as to one

<sup>49</sup> Landgericht Kassel, Germany, 15 February 1996, Unilex.

<sup>50</sup> Oberster Gerichtshof, Austria, 27 August 1999, available on the Internet at [http://www.cisg.at/1\\_22399x.htm](http://www.cisg.at/1_22399x.htm).

<sup>51</sup> Rechtbank Zwolle, the Netherlands, 1997, Unilex.

<sup>52</sup> Landgericht Hannover, Germany, 1 December 1993, Unilex.

<sup>53</sup> CLOUT case No. 344 [Landgericht Erfurt, Germany, 29 July 1998] (see full text of the decision).

<sup>54</sup> *Id.*

<sup>55</sup> CLOUT case No. 229 [Bundesgerichtshof, Germany, 4 December 1996] (see full text of the decision). For a similar statement, see CLOUT case No. 319 [Bundesgerichtshof, Germany, 3 November 1999] (see full text of the decision); see also CLOUT case No. 282 [Oberlandesgericht Koblenz, Germany, 31 January 1997] (implying that the purpose of the specificity requirement is to permit the seller to remedy the lack of conformity).

<sup>56</sup> *Id.*

<sup>57</sup> See also CLOUT case No. 319 [Bundesgerichtshof, Germany, 3 November 1999].

<sup>58</sup> CLOUT case No. 319 [Bundesgerichtshof, Germany, 3 November 1999]; ICC Arbitration Award No. 8611, 1997, Unilex; CLOUT case No. 282 [Oberlandesgericht Koblenz, Germany, 31 January 1997]; Landgericht München, Germany, 20 March 1995, Unilex.

<sup>59</sup> Landgericht Marburg, Germany, 12 December 1995, Unilex.

defect does not mean that the notice requirement for other claimed defects is satisfied.<sup>60</sup> The specificity requirement has been applied to oral notice of lack of conformity.<sup>61</sup> On the other hand, several decisions have warned against setting up an overly-demanding standard of specificity.<sup>62</sup> It has also been suggested that different standards of specificity are required of different kinds of buyers, with expert buyers expected to provide more detailed notice.<sup>63</sup> In the case of machinery and technical equipment, it has been found that the specificity requirement is satisfied by a description of the symptoms of a lack of conformity, and that an explanation of the underlying causes is not required.<sup>64</sup>

12. The following descriptions of a lack of conformity have been found to be sufficiently specific to satisfy article 39 (1): notice informing a seller of shoes that the buyers customer had received an alarming number of complaints about the goods, that the shoes had holes, and that the outer sole and heel of the children's shoes became loose<sup>65</sup>; notice to a seller of a machine for processing moist hygienic tissues that the buyer's customer had found steel splinters in semi-finished products produced by the machine, resulting in patches of rust on the finished products<sup>66</sup>; notice that floor tiles suffered from serious premature wear and discoloration.<sup>67</sup>

13. The following descriptions in notices have been found not to satisfy article 39 (1) because they were insufficiently specific<sup>68</sup>: notice that stones for the facade of a building were mislabelled, that some stones and sills were not the proper size, and that the glue provided for mounting the stones was defective, where the notice failed to specify which specific items were unlabelled, the quantity and specific items that were of the wrong size, and the exact quantity of stones treated

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<sup>60</sup> CLOUT case No. 123 [Bundesgerichtshof, Germany, 8 March 1995] (see full text of the decision); Landgericht Bielefeld, Germany, 18 January 1991; Oberster Gerichtshof, Austria, 27 August 1999, available on the Internet at [http://www.cisg.at/1\\_22399x.htm](http://www.cisg.at/1_22399x.htm).

<sup>61</sup> CLOUT case No. 4 [Landgericht Stuttgart, Germany, 31 August 1989] (see full text of the decision).

<sup>62</sup> CLOUT case No. 229 [Bundesgerichtshof, Germany, 4 December 1996] (see full text of the decision); CLOUT case No. 252 [Handelsgericht des Kantons Zürich, Switzerland, 21 September 1998].

<sup>63</sup> CLOUT case No. 252 [Handelsgericht des Kantons Zürich, Switzerland, 21 September 1998]; CLOUT case No. 344 [Landgericht Erfurt, Germany, 29 July 1998] (see full text of the decision).

<sup>64</sup> CLOUT case No. 319 [Bundesgerichtshof, Germany, 3 November 1999]. See also Hoge Raad, the Netherlands, 20 February 1998, Unilex (implying that description of symptoms rather than causes of defects in floor tiles would be sufficient); Tribunale di Busto Arsizio, Italy, 13 December 2001, published in *Rivista di Diritto Internazionale Privato e Processuale*, 2003, 150–155, also available on Unilex (buyer under no duty to indicate the specific case of the malfunction in a machine, particularly where the seller could not provide the necessary information).

<sup>65</sup> Oberster Gerichtshof, Austria, 27 August 1999, Unilex.

<sup>66</sup> CLOUT case No. 319 [Bundesgerichtshof, Germany, 3 November 1999] (see full text of the decision).

<sup>67</sup> Hoge Raad, the Netherlands, 20 February 1998, Unilex.

<sup>68</sup> For other decisions holding that buyer's notice lacked sufficient specificity, see CLOUT case No. 337 [Landgericht Saarbrücken, Germany, 26 March 1996]; CLOUT case No. 336 [Canton of Ticino Tribunale d'appello, Switzerland, 8 June 1999]; ICC Arbitration case No. 8611 of 1997; CLOUT case No. 4 [Landgericht Stuttgart, Germany, 31 August 1989] (see full text of the decision); CLOUT case No. 252 [Handelsgericht des Kantons Zürich, Switzerland, 21 September 1998] (see full text of the decision).

with the defective glue<sup>69</sup>; notice that flowering plants were in miserable condition and suffered from poor growth (the court noted that the latter might refer to either the size or the appearance of the plants)<sup>70</sup>; notice that cotton cloth was of bad quality<sup>71</sup>; notice that furniture had wrong parts and much breakage<sup>72</sup>; notice of poor workmanship and improper fitting as to fashion goods<sup>73</sup>; notice that failed to specify that cheese was infested with maggots<sup>74</sup>; notice that the quality of fabric was objectionable and the dimensions of the delivered cloth prevented it from being cut in an economical fashion, where the notice failed to specify the nature of the quality problems and failed to indicate what dimensions would permit economical cutting<sup>75</sup>; notice that agricultural machinery failed to function properly but that did not specify the serial number or the delivery date of the machine<sup>76</sup>; notice that truffles had softened when they in fact contained worms, even though most professional sellers would understand that softness implied worms<sup>77</sup>; notice that shoes were not of the quality required by the contract, but which did not describe the nature of the defects<sup>78</sup>; notice that frozen bacon was rancid, but which did not specify whether all or only a part of the goods were spoiled<sup>79</sup>; notice that documentation for a printer was missing, where it was ambiguous whether the buyer was referring to the entire printing system or just the printer component of system<sup>80</sup>; notice that sheets of vulcanized rubber for shoe soles had problems or presented defects<sup>81</sup>; notice stating that leather goods did not conform to the buyer's specifications, could not be sold to the buyer's customers, and 250 items were badly stamped<sup>82</sup>; notice that five reels of blankets were missing, but which did not specify the design of the missing blankets and therefore did not permit seller to cure.<sup>83</sup>

14. Beyond the specificity requirement discussed above, the CISG does not further define the contents of the notice required by article 39 (1). One court has stated that, so long as the notice precisely describes defects in the goods reported by the buyer's customer, the notice need not claim that such defects constitute a breach by the seller, and may even express doubts that the customer's complaints were justified.<sup>84</sup> On the other hand, another court has concluded that a buyer who merely requested the seller's assistance in addressing problems with computer software had not given notice of lack of conformity as required by article 39 (1).<sup>85</sup>

<sup>69</sup> CLOUT case No. 364 [Landgericht Köln, Germany, 30 November 1999].

<sup>70</sup> CLOUT case No. 290 [Oberlandesgericht Saarbrücken, Germany, 3 June 1998].

<sup>71</sup> Rechtbank van Koophandel Kortrijk, Belgium, 16 December 1996, Unilex.

<sup>72</sup> CLOUT case No. 220 [Kantonsgericht Nidwalden, Switzerland, 3 December 1997].

<sup>73</sup> CLOUT case No. 3 [Landgericht München, Germany, 3 July 1989].

<sup>74</sup> CLOUT case No. 98 [Rechtbank Roermond, the Netherlands, 19 December 1991].

<sup>75</sup> CLOUT case No. 339 [Landgericht Regensburg, Germany, 24 September 1998].

<sup>76</sup> Landgericht Marburg, Germany, 12 December 1995, Unilex.

<sup>77</sup> Landgericht Bochum, Germany, 24 January 1996, Unilex.

<sup>78</sup> Landgericht Hannover, Germany 1 December 1993, Unilex.

<sup>79</sup> Landgericht München, Germany, 20 March 1995, Unilex.

<sup>80</sup> CLOUT case No. 229 [Bundesgerichtshof, Germany, 4 December 1996].

<sup>81</sup> CLOUT case No. 378 [Tribunale di Vigevano, Italy, 12 July 2000].

<sup>82</sup> CLOUT case No. 273 [Oberlandesgericht München, Germany, 9 July 1997] (see full text of the decision).

<sup>83</sup> CLOUT case No. 282 [Oberlandesgericht Koblenz, Germany, 31 January 1997].

<sup>84</sup> Hoge Raad, the Netherlands, 20 February 1998, Unilex.

<sup>85</sup> CLOUT case No. 131 [Landgericht München, Germany, 8 February 1995].

**Timely notice in general**

15. Article 39 (1) requires the buyer to give notice of lack of conformity within a reasonable time after he has discovered or ought to have discovered it. This limitation on the time in which notice must be given, it has been asserted, is to be determined on the basis of the interests of good business, so that neither side has an unfair advantage and the rapid settlement of disputes is promoted.<sup>86</sup> Framing the time for notice in terms of a reasonable time is designed to promote flexibility,<sup>87</sup> and the period varies with the facts of each case.<sup>88</sup> Several decisions have indicated that the reasonable time standard is a strict one.<sup>89</sup> It has also been asserted that the reasonable time for giving notice of lack of conformity under article 39 (1) is the same as the reasonable time for giving notice of avoidance under article 49 (2) (b).<sup>90</sup>

**When time for notice begins to run—relation to article 38**

16. The reasonable time within which the buyer must give notice under article 39 (1) commences at the moment the buyer discovered or ought to have discovered the lack of conformity. Thus the period for the buyer's notice begins to run at the earlier of two moments: the time the buyer actually (or subjectively) discovered the non-conformity, and the time the buyer theoretically should have discovered (ought to have discovered) the non-conformity.<sup>91</sup>

17. The time when the buyer actually discovered the lack of conformity can be shown if the buyer admits the time at which it became subjectively aware of the defects<sup>92</sup> or there are objective facts proving when the buyer acquired such

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<sup>86</sup> CLOUT case No. 310 [Oberlandesgericht Düsseldorf, Germany, 12 March 1993] (see full text of the decision).

<sup>87</sup> Tribunale Civile di Cuneo, Italy, 31 January 1996, Unilex.

<sup>88</sup> *Id.*; CLOUT case No. 310 [Oberlandesgericht Düsseldorf, Germany, 12 March 1993] (see full text of the decision); CLOUT case No. 81 [Oberlandesgericht Düsseldorf, Germany, 10 February 1994] (see full text of the decision); CLOUT case No. 378 [Tribunale di Vigevano, Italy, 12 July 2000].

<sup>89</sup> Oberster Gerichtshof, Austria, 27 August 1999, available on the Internet at [http://www.cisg.at/1\\_22399x.htm](http://www.cisg.at/1_22399x.htm); CLOUT case No. 310 [Oberlandesgericht Düsseldorf, Germany, 12 March 1993] (see full text of the decision); 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] (see full text of the decision).

<sup>90</sup> CLOUT case No. 196 [Handelsgericht des Kantons Zürich, Switzerland, 26 April 1995] (see full text of the decision). See also CLOUT case No. 123 [Bundesgerichtshof, Germany, 8 March 1995] (distinguishing between late notice of lack of conformity under article 39 (1) and late notice of avoidance under article 49 (2) (b), but suggesting that the periods for both notices should be limited in the interest of promoting prompt clarification of the legal relationship between the parties) (see full text of the decision).

<sup>91</sup> For decisions in which the buyer's notice was found to be too late because it should have discovered the defects before it in fact did, see, e.g., CLOUT case No. 378 [Tribunale di Vigevano, Italy, 12 July 2000]; CLOUT case No. 4 [Landgericht Stuttgart, Germany, 31 August 1989]; CLOUT case No. 81 [Oberlandesgericht Düsseldorf, Germany, 10 February 1994].

<sup>92</sup> This was the case in the decision of the Landgericht Berlin, Germany, 16 September 1992, Unilex.

knowledge.<sup>93</sup> Complaints that the buyer received from customers to whom the goods were resold may establish actual knowledge: it has been found that the time for giving notice of lack of conformity commences, if it has not started previously, when the buyer receives such complaints,<sup>94</sup> even if the buyer doubts their accuracy.<sup>95</sup>

18. As was earlier noted in the discussion of article 38,<sup>96</sup> the time at which the buyer should have discovered a lack of conformity for purposes of article 39 (1) is closely connected to the buyer's obligation under article 38 to examine the goods. In the case of a non-conformity that should reasonably have been discovered by the buyer upon the initial examination of the goods, the buyer's time for giving notice begins to run from the time such examination should have been conducted. As one court stated, "[t]he point in time at which the buyer was obligated to have determined the breach of contract is governed by the provisions regulating the duty to examine. In this context, CISG article 38 provides that the goods must be examined within as short a period of time as the circumstances permit".<sup>97</sup> Thus in cases in which an initial examination following delivery should have revealed the lack of conformity, the buyer's reasonable time for giving notice begins after the period for examining the goods under article 38 has run, and the deadline for buyer's notice should accommodate both the period for examination under article 38 and a further reasonable time for notice under article 39 (1). Many decisions have recognized these two separate components of the time for the buyer's notice of non-

<sup>93</sup> An example of such objective evidence can be found in Helsinki Court of First Instance, Finland, 11 June 1995, and Helsinki Court of Appeals, Finland, 30 June 1998, Unilex, where the buyer commissioned a chemical analysis of the goods which revealed their defects.

<sup>94</sup> CLOUT case No. 210 [Audiencia Provincial Barcelona, Spain, 20 June 1997].

<sup>95</sup> Hoge Raad, the Netherlands, 20 February 1998, Unilex.

<sup>96</sup> See the discussion *supra* Article 38 at para. 2.

<sup>97</sup> CLOUT case No. 81 [Oberlandesgericht Düsseldorf, Germany, 10 February 1994] (see full text of the decision). Accord, CLOUT case No. 378 [Tribunale di Vigevano, Italy, 12 July 2000]. For decisions finding that the buyer's notice came too late because the buyer should have discovered the lack of conformity during the initial examination of the goods, see CLOUT case No. 81 [Oberlandesgericht Düsseldorf, Germany, 10 February 1994] (the buyer should have examined and discovered the lack of conformity within a few days after delivery, and therefore buyer's notice given more than two months after delivery was too late); CLOUT case No. 262 [Kanton St. Gallen, Gerichtskommission Oberrheintal, Switzerland, 30 June 1995] (buyer's time for giving notice of lack of conformity began to run upon delivery and substantial installation of sliding gates, even though the seller had not entirely completed its duties; notice given a year after delivery was too late); Pretura di Torino, Italy, 30 January 1997, Unilex; ICC Arbitration Case No. 8247, June 1996, *International Court of Arbitration Bulletin* vol. 11, p. 53 (2000); CLOUT case No. 48 [Oberlandesgericht Düsseldorf, Germany, 8 January 1993]; CLOUT case No. 123 [Bundesgerichtshof, Germany, 8 March 1995]; Arrondissementsrechtbank 's-Hertogenbosch, the Netherlands, 15 December 1997, Unilex; CLOUT case No. 4 [Landgericht Stuttgart, Germany, 31 August 1989].

conformities,<sup>98</sup> although some decisions do not appear to acknowledge the distinction.<sup>99</sup>

19. In the case of latent defects not reasonably detectable before some period of actual use, the time when the buyer should discover the lack of conformity occurs later than the time for the initial examination of the goods immediately following delivery.<sup>100</sup> One decision raised the question whether the time for giving notice of latent defects should ever start before the buyer acquires actual knowledge of the defects, although the decision avoided resolving the issue.<sup>101</sup> Other decisions, however, have determined that the reasonable time for giving notice of latent defects commenced at a time when the buyer should have discovered the defects, whether or not the buyer had actual knowledge of the defects at that time.<sup>102</sup> Some decisions appear to recognize that the discovery of latent defects may be a process that occurs over a period of time, and have suggested that the buyer's notice need only convey the information reasonably available to the buyer at the time of the notice, to be supplemented by information in later notices.<sup>103</sup>

### Presumptive periods for notice

20. Although the time period set in article 39 (1) for the buyer to give notice—within a reasonable time after the buyer discovers or ought to have discovered the non-conformity—is designed to be flexible<sup>104</sup> and will vary with the circumstances of the case,<sup>105</sup> a number of decisions have attempted to establish specific

<sup>98</sup> E.g., CLOUT case No. 123 [Bundesgerichtshof, Germany, 8 March 1995] (see full text of the decision); CLOUT case No. 251 [Handelsgericht des Kantons Zürich, Switzerland, 30 November 1998]; CLOUT case No. 285 [Oberlandesgericht Koblenz, Germany, 11 September 1998]; Landgericht Düsseldorf, Germany, 23 June 1994, Unilex; Landgericht Mönchengladbach, Germany, May 22 1992, Unilex; Amtsgericht Riedlingen, Germany, 21 October 1994, Unilex.

<sup>99</sup> E.g., Tribunal commercial de Bruxelles, Belgium, 5 October 1994, Unilex; CLOUT abstract No. 256 [Tribunal Cantonal du Valais, Switzerland, 29 June 1998] (concluding that notice given seven to eight months after delivery was too late, without distinguishing time for examination and discovery) (see full text of the decision).

<sup>100</sup> Landgericht Paderborn, Germany, 25 June 1996, Unilex; Landgericht Ellwangen, Germany, 21 August 1995, Unilex; Helsinki Court of First Instance, Finland, 11 June 1995, and Helsinki Court of Appeals, Finland, 30 June 1998, Unilex. In the case of latent defects not reasonably discoverable in an initial examination, it is not clear whether the obligation to examine under article 38 remains relevant to determining when the buyer ought to have discovered the non-conformity; see the discussion *supra* article 38 para. 15.

<sup>101</sup> CLOUT case No. 319 [Bundesgerichtshof, Germany, 3 November 1999].

<sup>102</sup> CLOUT case No. 378 [Tribunale di Vigevano, Italy, 12 July 2000] (even supposing that the defects could not have been discovered at delivery, the buyer should have discovered them at the latest when processing the goods and given notice immediately thereafter, while it waited until it received complaints by its own customer); Landgericht Düsseldorf, Germany, 23 June 1994, Unilex.

<sup>103</sup> CLOUT case No. 225, France, 1998; Hoge Raad, the Netherlands, 20 February 1998, Unilex; Tribunale di Busto Arsizio, Italy, 13 December 2001, published in *Rivista di Diritto Internazionale Privato e Processuale*, 2003, 150–155, also available on Unilex.

<sup>104</sup> Tribunale Civile di Cuneo, Italy, 31 January 1996, Unilex.

<sup>105</sup> *Id.*; see also CLOUT case No. 310 [Oberlandesgericht Düsseldorf, Germany, 12 March 1993]; CLOUT case No. 81 [Oberlandesgericht Düsseldorf, Germany, 10 February 1994] (see full text of the decision); CLOUT case No. 378 [Tribunale di Vigevano, Italy, 12 July 2000].

presumptive time periods as general guidelines or default rules. Courts adopting this approach usually contemplate that the presumptive notice periods they put forward will be adjusted to reflect the facts of the particular case.<sup>106</sup> The suggested presumptive periods vary considerably both in length and in the approach taken to measuring the period. Several decisions propose presumptive periods measured from the time goods are delivered, so that the periods encompass not only the time for giving notice after discovery of the lack of conformity, but also the time for the buyer to discover the non-conformity in the first place. In this vein, presumptive periods of 8 days after delivery (in the case of durable, non-seasonal goods),<sup>107</sup> 14 days for examination and notice,<sup>108</sup> and one month after delivery<sup>109</sup> have been suggested. Other decisions distinguish between the time for discovering the lack of conformity and the time for giving notice following discovery, often proposing presumptive periods for both components and frequently indicating particular categories of goods to which the period would apply. The following have been suggested as the presumptive reasonable time for giving notice: a few days after discovery of the lack of conformity<sup>110</sup>; one week (following one week for examination under article 38)<sup>111</sup>; eight days following discovery<sup>112</sup>; two weeks (following one week for examination).<sup>113</sup> A theory that in normal circumstances the reasonable time for giving notice is one month following the time the defect was or ought to have been discovered—sometimes referred to as the noble month approach—has been accepted in several decisions.<sup>114</sup> Where the goods are perishable, some decisions have suggested very short presumptive notice periods.<sup>115</sup>

- <sup>106</sup> *E.g.*, Oberster Gerichtshof, Austria, 27 August 1999, Unilex (suggesting a presumptive period of 14 days for examining the goods and giving notice “[i]nsofar as there are no specific circumstances militating in favour of a shorter or longer period”); CLOUT case No. 284 [Oberlandesgericht Köln, Germany, 21 August 1997]; CLOUT case No. 164 [Arbitration—Arbitration Court attached to the Hungarian Chamber of Commerce and Industry, Hungary, 5 December 1995] (see full text of the decision).
- <sup>107</sup> CLOUT case No. 167 [Oberlandesgericht München, Germany, 8 February 1995] (see full text of the decision).
- <sup>108</sup> Oberster Gerichtshof, Austria, 27 August 1999, Unilex.
- <sup>109</sup> CLOUT case No. 192 [Obergericht des Kantons Luzern, Switzerland, 8 January 1997]; CLOUT case No. 232 [Oberlandesgericht München, Germany, 11 March 1998] (see full text of the decision).
- <sup>110</sup> Landgericht Landshut, Germany, 5 April 1993 Unilex database (presumptive time period for defects that are not hidden).
- <sup>111</sup> CLOUT case No. 285 [Oberlandesgericht Koblenz, Germany, 11 September 1998]; Landgericht Mönchengladbach, Germany, 22 May 1992. The latter case indicated that the presumptive periods it proposed applied where the goods were textiles.
- <sup>112</sup> CLOUT case No. 280 [Oberlandesgericht Jena, Germany, 26 May 1998]; CLOUT case No. 230 [Oberlandesgericht Karlsruhe, Germany, 25 June 1997], reversed on other grounds, CLOUT case No. 270 [Bundesgerichtshof, Germany, 25 November 1998] (presumptive period applicable to non-perishable goods).
- <sup>113</sup> CLOUT case No. 359 [Oberlandesgericht Koblenz, Germany, 18 November 1999] (applicable to case of obvious defects); CLOUT case No. 251 [Handelsgericht des Kantons Zürich, Switzerland, 30 November 1998] (also proposing presumptive period of seven to 10 days for examination).
- <sup>114</sup> CLOUT case No. 123 [Bundesgerichtshof, Germany, 8 March 1995]; CLOUT case No. 289 [Oberlandesgericht Stuttgart, Germany, 21 August 1995]; Amtsgericht Augsburg, Germany, 29 January 1996; CLOUT case No. 319 [Bundesgerichtshof, Germany, 3 November 1999]. See also CLOUT case No. 164 [Arbitration—Arbitration Court attached to the Hungarian Chamber of Commerce and Industry, Hungary, 5 December 1995] (suggesting acceptance of a notice

## Factors influencing reasonable time for notice

21. It is clear that the reasonable time for notice will vary with the circumstances of the particular case.<sup>116</sup> Decisions have identified a variety of factors that will impact the length of the notice period. A frequently cited factor relates to the obviousness of the lack of conformity—a patent, easily noticeable defect tends to shorten the period for notice.<sup>117</sup> The nature of the goods is another frequently-cited factor<sup>118</sup>: goods that are perishable<sup>119</sup> or seasonal<sup>120</sup> require earlier notice of defects; notice with respect to durable or non-seasonal goods, in contrast, is subject to a longer notice period.<sup>121</sup> The buyer’s plans to process the goods<sup>122</sup> or otherwise

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period of approximately one month in general, but finding that facts of particular case required quicker notice) (see full text of the decision).

- <sup>115</sup> CLOUT case No. 290 [Oberlandesgericht Saarbrücken, Germany, 3 June 1998] (in sales of fresh flowers, notice should be given on day of delivery); CLOUT case No. 230 [Oberlandesgericht Karlsruhe, Germany, 25 June 1997] (see full text of the decision), reversed on other grounds CLOUT case No. 270 [Bundesgerichtshof, Germany, 25 November 1998] (asserting that notice of defects in perishable goods often due in a few hours). See also Amtsgericht Riedlingen, Germany, 21 October 1994, Unilex, where the court stated that the buyer should have examined ham within 3 days and given notice within further three days. Although the goods in that case were perishable, the court did not specifically mention this factor in setting out its time limits.
- <sup>116</sup> Tribunale Civile di Cuneo, Italy, 31 January 1996, Unilex; CLOUT case No. 310 [Oberlandesgericht Düsseldorf, Germany, 12 March 1993]; CLOUT case No. 81 [Oberlandesgericht Düsseldorf, Germany, 10 February 1994]; CLOUT case No. 378 [Tribunale di Vigevano, Italy, 12 July 2000].
- <sup>117</sup> Rechtbank van Koophandel Kortrijk, Belgium, 16 December 1996, Unilex; CLOUT case No 310 [Oberlandesgericht Düsseldorf, Germany, 12 March 1993] (see full text of the decision); CLOUT case No. 284 [Oberlandesgericht Köln, Germany, 21 August 1997] (see full text of the decision); Landgericht Landshut, Germany, 5 April 1995, Unilex; Landgericht Berlin, Germany, 16 September 1992, Unilex; Amtsgericht Riedlingen, Germany, 21 October 1994, Unilex; Tribunale Civile di Cuneo, Italy, 31 January 1996, Unilex; Landgericht Berlin, Germany, 30 September 1993, Unilex. Consideration of the obviousness of the defect may be more relevant to determining when the reasonable time for notice should commence (i.e., when the buyer ought to have discovered the lack of conformity) than to the question of the duration of the reasonable time.
- <sup>118</sup> CLOUT case No. 98 [Rechtbank Roermond, the Netherlands, 19 December 1991]; Pretura di Torino, Italy 30 January 1997, Unilex (referring to the “nature and value of the goods”); CLOUT case No. 378 [Tribunale di Vigevano, Italy, 12 July 2000].
- <sup>119</sup> CLOUT case No. 98 [Rechtbank Roermond, the Netherlands, 19 December 1991]; CLOUT case No. 290 [Oberlandesgericht Saarbrücken, Germany, 3 June 1998]; CLOUT case No. 378 [Tribunale di Vigevano, Italy, 12 July 2000] (see full text of the decision). See also Rechtbank Zwolle, the Netherlands, 5 March 1997, Unilex (citing perishable nature of goods as factor mandating a short period for examination under art. 38, which in turn meant that buyer’s notice was given beyond a reasonable time from when it should have discovered the defects).
- <sup>120</sup> Oberster Gerichtshof, Austria, 27 August 1999, Unilex; Amtsgericht Augsburg, Germany, 29 January 1996, Unilex.
- <sup>121</sup> CLOUT case No. 167 [Oberlandesgericht München, Germany, 8 February 1995] (see full text of the decision). See also CLOUT case No. 248 [Schweizerisches Bundesgericht, Switzerland, 28 October 1998] (noting that the appeals court did not review lower court’s decision that notice was timely because the goods consisted of frozen rather than fresh meat).
- <sup>122</sup> Arrondissementsrechtbank ’s-Hertogenbosch, the Netherlands, 15 December 1997, Unilex; Rechtbank van Koophandel Kortrijk, Belgium, 16 December 1996, Unilex; see also Rechtbank Zwolle, the Netherlands, 5 March 1997, Unilex (citing buyer’s plans to process goods as factor mandating a short period for examination under art. 38, which in turn meant that buyer’s notice was given beyond a reasonable time from when it should have discovered the defects).



handle them in a fashion that might make it difficult to determine if the seller was responsible for a lack of conformity<sup>123</sup> may also shorten the time for notice. Trade practices<sup>124</sup> as well as usages established between the parties<sup>125</sup> can also influence the time for notice, as can the buyer's awareness that the seller itself was operating under a deadline that would require prompt notice of defects.<sup>126</sup> An expert or professional buyer has been found to be subject to a shorter period for notice.<sup>127</sup>

### Application of reasonable time standard

22. It has been found that a buyer who did not give any notice of a lack of conformity before filing suit against the seller had failed to meet the requirements for timely notice under article 39 (1), and had lost the right to rely on the lack of conformity.<sup>128</sup> Even where the buyer did provide notice, the notice has been found too late in many instances. As measured from the date the goods were delivered, notices given at the following times have been found untimely on the facts of particular cases: 24 months<sup>129</sup>; one year<sup>130</sup>; nine months<sup>131</sup>; seven to eight months<sup>132</sup>; four months<sup>133</sup>; three and one-half months<sup>134</sup>; three months<sup>135</sup>; more than two and one-half months<sup>136</sup>; two months<sup>137</sup>; two months in the case of one delivery and approximately seven weeks in the case of another delivery<sup>138</sup>; six weeks<sup>139</sup>; one month<sup>140</sup>; 25 days<sup>141</sup>; 24 days<sup>142</sup>; 23 days<sup>143</sup>; 21 days<sup>144</sup>; 20 days<sup>145</sup>;

<sup>123</sup> CLOUT case No. 284 [Oberlandesgericht Köln, Germany, 21 August 1997].

<sup>124</sup> Rechtbank van Koophandel Kortrijk, Belgium, 16 December 1996, Unilex; Rechtbank Zwolle, the Netherlands, 5 March 1997, Unilex.

<sup>125</sup> CLOUT case No 164 [Arbitration—Arbitration Court attached to the Hungarian Chamber of Commerce and Industry, Hungary, 5 December 1995] (see full text of the decision).

<sup>126</sup> Landgericht Köln, Germany, 11 November 1993, Unilex.

<sup>127</sup> Gerechtshof Arnhem, the Netherlands, 17 June 1997, Unilex; CLOUT case No. 232 [Oberlandesgericht München, Germany, 11 March 1998] (see full text of the decision).

<sup>128</sup> CLOUT case No. 219 [Tribunal Cantonal Valais, Switzerland, 28 October 1997] (see full text of the decision). See also CLOUT case No. 341 [Ontario Superior Court of Justice, Canada, 31 August 1999], where on disputed evidence the court concluded the buyer had not given the seller notice of lack of conformity.

<sup>129</sup> Landgericht Düsseldorf, Germany, 23 June 1994, Unilex.

<sup>130</sup> CLOUT case No. 262 [Kanton St. Gallen, Gerichtskommission Oberrheintal, Switzerland 30 June 1995]; CLOUT case No. 263 [Bezirksgericht Unterrheintal, Switzerland, 16 September 1998].

<sup>131</sup> Tribunal commercial de Bruxelles, Belgium, 5 October 1994, Unilex.

<sup>132</sup> CLOUT case No. 256 [Tribunal Cantonal du Valais, Switzerland, 29 June 1998].

<sup>133</sup> CLOUT case No. 232 [Oberlandesgericht München, Germany, 11 March 1998] (see full text of the decision); CLOUT case No. 378 [Tribunale di Vigevano, Italy, 12 July 2000].

<sup>134</sup> CLOUT case No. 192 [Obergericht des Kantons Luzern, Switzerland, 8 January 1997]; Landgericht Berlin, Germany, 16 September 1992, Unilex.

<sup>135</sup> Hof Arnhem, the Netherlands, 17 June 1997, Unilex; Rechtbank van Koophandel Kortrijk, Belgium, 27 June 1997, Unilex; CLOUT case No. 167 [Oberlandesgericht München, Germany, 8 February 1995].

<sup>136</sup> CLOUT case No. 292 [Oberlandesgericht Saarbrücken, Germany, 13 January 1993].

<sup>137</sup> Rechtbank van Koophandel Kortrijk, Belgium, 16 December 1996, Unilex; CLOUT case No. 81 [Oberlandesgericht Düsseldorf, Germany, 10 February 1994].

<sup>138</sup> Oberster Gerichtshof, Austria, 27 August 1999, Unilex.

<sup>139</sup> Amtsgericht Kehl, Germany, 6 October 1995, Unilex.

<sup>140</sup> Landgericht Mönchengladbach, Germany, 22 May 1992, Unilex.

<sup>141</sup> CLOUT case No. 359 [Oberlandesgericht Koblenz, Germany, 18 November 1999]; CLOUT case

19 days<sup>146</sup>; 16 days<sup>147</sup>; almost two weeks<sup>148</sup>; any time beyond the day of delivery (involving perishable flowers).<sup>149</sup> As measured from the date that the buyer discovered or ought to have discovered the lack of conformity, notices given at the following times have been found too late on the facts of particular cases: seven months<sup>150</sup>; almost four months<sup>151</sup>; more than two months<sup>152</sup>; six weeks<sup>153</sup>; 32 days<sup>154</sup>; one month (by fax) and three weeks (by telephone)<sup>155</sup>; four weeks<sup>156</sup>; three weeks<sup>157</sup>; approximately two weeks<sup>158</sup>; seven days.<sup>159</sup> On the other hand, a number of decisions have found that the buyer gave notice in timely fashion. On the facts of particular cases, notices given at the following times have been found to be within the reasonable time mandated by article 39 (1): one day after the goods were handed over to the buyer<sup>160</sup>; one day after the goods were examined<sup>161</sup>; three days after delivery<sup>162</sup>; seven days after the buyer learned of the defects<sup>163</sup>; within eight days after the goods were examined<sup>164</sup>; eight days after an expert's report

No. 310 [Oberlandesgericht Düsseldorf, Germany, 12 March 1993].

<sup>142</sup> CLOUT case No. 230 [Oberlandesgericht Karlsruhe, Germany, 25 June 1997].

<sup>143</sup> Tribunale Civile di Cuneo, Italy, 31 January 1996, Unilex.

<sup>144</sup> CLOUT case No. 285 [Oberlandesgericht Koblenz, Germany, 11 September 1998]; Landgericht Köln, Germany, 11 November 1993, Unilex, reversed on grounds that CISG was inapplicable by CLOUT case No. 122 [Oberlandesgericht Köln, Germany, 26 August 1994].

<sup>145</sup> Amtsgericht Riedlingen, Germany, 21 October 1994, Unilex; Landgericht Berlin, Germany, 16 September, 1992, Unilex.

<sup>146</sup> Landgericht Landshut, Germany, 5 April 1995, Unilex.

<sup>147</sup> CLOUT case No. 4 [Landgericht Stuttgart, Germany, 31 August 1989].

<sup>148</sup> CLOUT case No. 284 [Oberlandesgericht Köln, Germany, 21 August 1997] (see full text of the decision).

<sup>149</sup> CLOUT case No. 290 [Oberlandesgericht Saarbrücken, Germany, 3 June 1998].

<sup>150</sup> Pretura di Torino, Italy 30 January 1997, Unilex.

<sup>151</sup> Hoge Raad, the Netherlands, 20 February 1998, Unilex.

<sup>152</sup> Landgericht Berlin, Germany, 16 September, 1992, Unilex.

<sup>153</sup> CLOUT case No. 123 [Bundesgerichtshof, Germany, 8 March 1995] (see full text of the decision).

<sup>154</sup> CLOUT case No 164 [Arbitration—Arbitration Court attached to the Hungarian Chamber of Commerce and Industry, Hungary, 5 December 1995] (see full text of the decision).

<sup>155</sup> ICC Arbitration Case No. 8247, 1996, Unilex.

<sup>156</sup> CLOUT case No. 280 [Oberlandesgericht Jena, Germany, 26 May 1998]; CLOUT case No. 196 [Handelsgericht des Kantons Zürich, Switzerland, 26 April 1995] (see full text of the decision).

<sup>157</sup> Arrondissementsrechtbank 's-Hertogenbosch, the Netherlands, 15 December 1997, Unilex.

<sup>158</sup> CLOUT case No. 230 [Oberlandesgericht Karlsruhe, Germany, 25 June 1997].

<sup>159</sup> CLOUT case No. 48 [Oberlandesgericht Düsseldorf, Germany, 8 January 1993]. Several other decisions have found that the buyer's notice was untimely, although the precise time of the buyer's notice is not clear. In this respect see CLOUT case No. 210 [Audiencia Provincial Barcelona, Spain, 20 June 1997]; CLOUT case No. 339 [Landgericht Regensburg, Germany, 24 September 1998]; CLOUT case No. 56 [Canton of Ticino Pretore di Locarno Campagna, Switzerland, 27 April 1992]; Rechtbank Zwolle, the Netherlands, 5 March 1997, Unilex.

<sup>160</sup> CLOUT case No. 229 [Bundesgerichtshof, Germany, 4 December 1996] (see full text of the decision).

<sup>161</sup> CLOUT case No. 46 [Landgericht Aachen, Germany, 3 April 1990] (see full text of the decision).

<sup>162</sup> Landgericht Bielefeld, Germany, 18 January 1991, Unilex.

<sup>163</sup> Helsinki Court of First Instance, Finland, 11 June 1995, and Helsinki Court of Appeals, Finland, 30 June 1998, available on the Internet at <http://www.utu.fi/oik/tdk/xcisg/tap5.html#engl>.

<sup>164</sup> Oberlandesgericht Köln, Germany, 22 February 1994, Unilex (noting that buyer examined goods at the beginning of July and gave notice on or before July 8, which the court held was timely, particularly in light of fact that July 4 and 5 were weekend days).

identified defects in the goods<sup>165</sup>; a series of notices, one given two weeks after an initial provisional test on the goods, another given a month after a second test, and final notices given six months after delivery of one machine and eleven months after delivery of another machine<sup>166</sup>; 19 days after delivery<sup>167</sup>; 19–21 days after the examination of the goods<sup>168</sup>; four weeks after the buyer hypothetically ought to have known of the lack of conformity<sup>169</sup>; within one month of delivery.<sup>170</sup>

### *Article 39 (2)*

23. Article 39 (2) establishes an absolute cut-off date for notice of lack of conformity—two years from the date the goods were actually handed over to the buyer, subject to an exception where such a time limit would be inconsistent with a contractual period of guarantee.<sup>171</sup> Without such a limit the time for notice might not have a clear end under the flexible and variable time standards in article 39 (1). In the case of latent defects, for example, the time the buyer discovers or ought to discover the lack of conformity, and thus the moment that the buyer’s reasonable time for giving notice under article 39 (1) commences, could be long after the goods are delivered. In such cases, absent a contractual guarantee period that protects the buyer for a longer time, article 39 (2) will cut-off the buyer’s right to give notice at two years after the goods were actually handed over, and thus prevent the buyer from preserving its rights to rely on a lack of conformity which is not discovered and noticed before that point.<sup>172</sup> Unlike the period for notice established in 39 (1), which is designed to be flexible and to vary with the circumstances, the two-year limit in article 39 (2) is precise and non-variable (except where the contractual period of guarantee exception applies). Indeed, the apparent purpose of article 39 is to provide a specific, predictable period beyond which a seller can be confident that claims of a lack of conformity in the goods will not be legally cognizable.

24. The rather limited number of decisions applying article 39 (2) have addressed several aspects of the provision. Thus several decisions have indicated that notice which is not specific enough to satisfy article 39 (1) will not constitute adequate notice under article 39 (2), even though the latter provision does not expressly

<sup>165</sup> CLOUT case No. 45 [Arbitration—International Chamber of Commerce No. 5713 1989] (see full text of the decision).

<sup>166</sup> CLOUT case No. 225 [Cour d’appel, Versailles, France, 29 January 1998] (see full text of the decision); see also Tribunale di Busto Arsizio, Italy, 13 December 2001, published in *Rivista di Diritto Internazionale Privato e Processuale*, 2003, 150–155, also available on Unilex (notice made immediately after installation of machinery reasonable, followed by subsequent notices regarding further discoveries made by the buyer).

<sup>167</sup> Landgericht Frankfurt, Germany, 9 December 1992, Unilex.

<sup>168</sup> CLOUT case No. 315 [Cour de Cassation, France, 26 May 1999] (see full text of the decision).

<sup>169</sup> CLOUT case No. 319 [Bundesgerichtshof, Germany, 3 November 1999].

<sup>170</sup> CLOUT case No. 202 [Cour d’appel, Grenoble, France, 13 September 1995]. Several other decisions have found that the buyer’s notice was timely, although the precise period found reasonable by the court is not clear; see CLOUT case No. 98 [Rechtbank Roermond, the Netherlands 19 December 1991]; Landgericht Paderborn, Germany, 25 June 1996, Unilex.

<sup>171</sup> The buyer’s obligation to give notice under article 39 (2) is also subject to article 40, which prevents the seller from invoking article 39 “if the lack of conformity relates to facts of which he knew or could not have been unaware and which he did not disclose to the buyer”.

<sup>172</sup> See Landgericht Marburg, Germany, 12 December 1995, Unilex, where the court invoked article 39 (2) to deny the buyer any remedy for a claimed lack of conformity.

incorporate the language in article 39 (1) requiring that the notice specify the nature of the lack of conformity.<sup>173</sup> Several other decisions have explored the relationship between article 39 (2) and rules specifying a deadline for commencing litigation based on breach of a sales contract (statutes of limitation or prescription periods). One court which considered this question struggled to reconcile a one-year limitations period in domestic law with the two-year notice period in article 39 (2), eventually opting to extend the domestic limitations period to two years.<sup>174</sup> Other decisions were at pains to distinguish between the rule of article 39 (2), which establishes a deadline for giving notice of lack of conformity, and a statute of limitations or prescription period, which establishes deadlines for commencing litigation.<sup>175</sup> A number of decisions have involved claims that the parties had derogated from article 39 (2) by agreement. Thus an arbitral tribunal found that the parties had derogated from article 39 (2) by agreeing to a maximum guarantee period of 18 months, although the tribunal also explained that the prescription period for a buyer who has given timely notice was not governed by article 39 (2), and was a matter beyond the scope of the CISG to be subject to domestic law.<sup>176</sup> On the other hand, an arbitral panel has determined that a clause requiring that disputes be submitted to arbitration within 30 days after the parties reached an impasse in negotiations did not operate as a derogation from article 39 (2).<sup>177</sup> Yet another arbitral decision found that the parties had not derogated from the two-year cut-off in article 39 (2) just because the seller may have orally represented to the buyer that the goods (sophisticated machinery) would last 30 years.<sup>178</sup> This decision presumably implies that such a representation does not constitute a contractual period of guarantee within the meaning of article 39 (2), because otherwise the clause would have extended the cut-off period for notice. Another decision also dealt with the meaning of the phrase contractual period of guarantee, finding that a clause fixing a deadline for submitting disputes to arbitration did not create such a contractual guarantee period.<sup>179</sup>

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<sup>173</sup> CLOUT case No. 344 [Landgericht Erfurt, Germany, 29 July 1998]; Landgericht Marburg, Germany, 12 December 1995, Unilex. Both of these cases held that, because the notice given by the buyer was not specific enough to satisfy article 39 (1), the two-year period in article 39 (2) had elapsed before proper notice was given. Neither court, apparently, considered the possibility that the buyer's notice might have been sufficient to satisfy article 39 (2) even though it did not comply with the specificity requirement in article 39 (1).

<sup>174</sup> CLOUT case No. 249 [Cour de Justice, Genève, Switzerland, 10 October 1997].

<sup>175</sup> CLOUT case No. 202 [Cour d'appel, Grenoble, France, 13 September 1995] (see full text of the decision); CLOUT case No. 302 [Arbitration—International Chamber of Commerce No. 7660 1994]; CLOUT case No. 300 [Arbitration—International Chamber of Commerce No. 7565 1994].

<sup>176</sup> CLOUT case No. 302 [Arbitration—International Chamber of Commerce No. 7660 1994].

<sup>177</sup> CLOUT case No. 300 [Arbitration—International Chamber of Commerce No. 7565 1994].

<sup>178</sup> CLOUT case No. 237 [Arbitration—Arbitration Institute of the Stockholm Chamber of Commerce, 5 June 1998] (see full text of the decision).

<sup>179</sup> CLOUT case No. 300 [Arbitration—International Chamber of Commerce No. 7565 1994].