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The Legal Regulation of Humanitarian Relief Actions in Armed conflicts

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Non-Conformity of Goods in Light of CISG, Unidroit Principles and the Palestinian Commercial Law Draft

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Abstract:

This research deals with non-conformity of goods under the 1980 United Nations Convention on Contracts for the International Sale of Goods (CISG) in terms of concept, criteria and timing. It also addresses the duties of the buyer upon taking over the goods, whether examination of the goods or giving notice to the seller of the non- conformity. Besides this research deals with all legal effects of non-conformity, whether the remedies the buyer has in such situations or the right of the seller to cure the non-conformity. It also covers all legal effects of the buyer's failure to respect his duties, i.e. the loss of his remedies and all exceptions thereto. This research tackles all these matters in comparison with the Unidroit Principles on International Commercial Contracts and the Palestinian Commercial Law Draft and other related laws effective in Palestine.

A: Introduction:

This article tackles the non-conformity of the goods delivered under the 1980 United Nations Convention on Contracts for the International Sale of Goods (hereinafter: CISG), the 2010 Unidroit Principles on International Commercial Contracts (hereinafter: Unidroit Principles; UP) and the Palestinian Commercial Law Draft (hereinafter: PCLD). The main purpose of this article is twofold: namely to analyze the non-conformity of goods in light of both doctrine and jurisprudence(1), and to reveal to which extent the Palestinian legal texts in this

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(1) It should be noted that, unless otherwise indicated, all case law cited in this paper is taken from: http://www.unilex.info.

regard are harmonized with the aforementioned international instruments, i.e. CISG and UP.

In 2000, a committee had been formed to review the commercial laws applicable in the Gaza Strip and the West Bank and prepare a (one) Commercial Law Draft for Palestine. In 2004, the PCLD was published with its Memorandum. However, this draft has not yet been enacted due to political impediments.

CISG was adopted in 1980, and entered into force in 1988(2). The main purpose of CISG is to unify the law of international sale of goods world-wide and to alleviate the problems arising from the application of domestic laws(3). However, CISG includes compromise provisions: CISG *per se* was indeed the maximum that could be achieved at the legislative level.

Therefore, Unidroit (i.e. the International Institute for the Unification of Private Law) decided to adopt another approach. In 2010, Unidroit published the third enlarged edition of the so-called Unidroit Principles of International Commercial Contracts(4). When drafting the Unidroit Principles, the crucial factor was not which rule was adopted by the majority of countries, but rather which of the rules at issue was persuasive and well-suited for cross-border transactions.

(2) CISG today has been ratified by, and is in effect in, 77 countries. For more information on the status of CISG, visit: http://www.cisg.law.pace.edu/cisg/countries/cntries.html

(3) To put it in the words of the preamble of CISG, "*the adoption of uniform rules which govern contracts for the international sale of goods and take into account the different social, economic and legal systems would contribute to the removal of legal barriers in international trade and promote the development of international trade*". An English version of the official text of CISG is available at: http://www.cisg.law.pace.edu/cisg/text/treaty.html

(4) The black letter rules of the UNIDROIT Principles in English are available at: http://www.unidroit.org/english/principles/contracts/principles2010/translations/blackletter2010-main.htm; the official integral version of the UNIDROIT Principles in English is available at: http://www.unilex.info/dynasite.cfm?dssid=2377&dsmid=13637&x=1. It should be mentioned that the first edition of the Unidroit Principles was published in 1994; the second edition thereof was published in 2004. The new (third) edition of the UNIDROIT Principles consists of 211 Articles (as opposed to the 120 Articles of the 1994 edition and the 185 Articles of the 2004 edition).

CSG, Unidroit Principles and PCLD differ in status and sphere of application: CISG is a binding instrument, whereas the Unidroit Principles is a non-legislative unification of international commercial contracts. PCLD is still a draft (domestic) law in Palestine.

With regard to sphere of application, CISG governs the international sale of goods' contracts only, particularly contract formation and rights and duties of the parties resulting therefrom (Article 4 CISG). The Unidroit Principles tackle (all) international commercial contracts, including contracts of service. Beside contract formation and rights and duties of the parties, the Unidroit Principles regulate other aspects of international commercial contracts, such as validity, third party rights, hardship, set-off, assignment of rights and contracts, restitution in case of failed contracts, illegality, conditions, and plurality of obligors and obligees … etc. PCLD, in turn, regulates different commercial matters(5), including commercial contracts. As far as the sale of goods is concerned, it basically deals with domestic sales(6),(7); international sale of goods shall, in contrast, be governed by related international conventions(8)

(5) It consists of six books, namely: commerce in general, obligations and commercial contracts, bank operations, commercial papers, bankruptcy, and final provisions. PCLD, with its memorandum, is available at: http://www.dft.gov.ps/images/stories/doc/alqanon_altjary.pdf (*in Arabic*).

(6) According to Article 2/1 PCLD, domestic commercial sales, like all commercial maters, must subject to the commercial law special rules incorporated in the PCLD (i.e. second book, chapter three (Articles 89 - 128) PCLD), otherwise to the commercial practices and usages, and – in the absence of such practices and usages – to the civil law rules (i.e. the civil law special rules of sales contract and the general rules of contract). The civil law applicable in Palestine is Mejella, i.e. the 1867 Ottoman Civil Code. Notably, a new civil law draft had been prepared in Palestine in 2003. However, it is not enacted yet.

(7) According to Article 89/1 PCLD, the commercial law special rules on sale of goods (i.e. Articles 89-104 PCLD) are restricted to commercial sales made between merchants in the course of their commerce.

(8) Pursuant to Article 88/2 of the Egyptian commercial code, i.e. the counterpart of Article 89/2 PCLD, the Court of Cassation in Egypt found that the Court of Appeals erred in applying the domestic law to the dispute between an Italian seller and Egyptian buyer on a contract for the sale of marble, and it therefore ruled that the CISG should govern the dispute and remanded the case so that the Appellate court issues another decision to that effect, (Decision No. 979 for judicial year 73, dated 11.04.2006, available at: http://cisgw3.law.pace.edu/cases/060411e1.html). By contrast, an ad hoc arbitration panel, in 18.09.2006 (available at: http://cisgw3.law.pace.edu/cases/060918e1.html),

(effective in Palestine[9]), international commercial usages[10] and the interpretations of the terms in international trade prepared by international organizations (e.g. incoterms) if the contract refers to them[11].

With regard to sale of goods contract, PCLD includes some provisions very similar to those of CISG and the Unidroit Principles. This is true, for instance, in relation to pricing (Article 90 PCLD[12]) and measurement of damages according to the substitute transaction or current price (Articles 97 & 99 PCLD[13]). As already said, this paper will only consider the non-conformity of

applied the Egyptian civil code to a dispute between an Austrian supplier and an Egyptian buyer who entered into a contract for the supply of electronic scales and their spare parts; the panel obviously failed to apply CISG to the dispute, although the requirements for its application as laid by Articles 1/1-a and 3 are met.

(9) It should however be noted that Palestine has not yet adhered to CISG. Nevertheless, CISG may be applied in Palestine: According to its Article 1/1-b, CISG may apply in countries to which the contract involved has no connection; it rather suffices that the parties to the contract have their places of business in different States and that the rules of private international law of the court before which the dispute is brought lead to the application of the law of a contracting state. Besides, the Palestinian Arbitration Law No. 3 of 2000 allows for such a possibility: According to Article 19 thereof, parties to an international arbitration may agree on the law applicable to their dispute; the arbitration panel shall take into consideration the customs applicable to the relation between the disputing parties. More importantly, in case of violation of what the parties had agreed upon regarding application of *legal rules* on the issues in dispute, each party of arbitration shall have the right to appeal against the arbitral award before the competent court pursuant to Article 43/5 thereof, (emphasis added).

(10) The Memorandum of Article 89 of the PCLD explicitly says that the Unidroit Principles may apply in Palestine to international sale of goods contracts as an expression of international commercial usages.

(11) Article 89/2 PCLD.

(12) Compare: Article 55 CISG, and Article 5.1.7/1 UP.

(13) With regard to the substitute transaction, compare: Article 75 CISG, and Article 7.4.5 UP. With regard to the current price, compare: Article 76 CISG, and Article 7.4.6 UP.
It should also be mentioned that Article 92 PCLD corresponds to Article 56 CISG with regard to the fixing of price according to the weight of the goods; Article 93 PCLD corresponds to Article 65 CISG with regard to the specification of the form, measurement or other features of the goods; Article 94/2 PCLD corresponds to Article 33/b CISG with regard to the determination of the time of delivery by the buyer; and Article 98 PCLD corresponds to Article 73 CISG with regard to avoidance of the contract for delivery of goods by instalments.

goods under CISG, the Unidroit Principles and PCLD. Because CISG is a *lex specialis* of (international) sale of goods, this paper will build on the approach adopted by CISG. Accordingly, the following questions will be tackled under all three instruments: Concept of the non-conformity (B), the buyer's duties upon taking over the goods (C), the legal effects of non-conformity (D), and the legal effects of the buyer's failure to respect his/her duties (E). The paper concludes with some remarks (F).

B: Concept of non-conformity:

In order to define the concept of non-conformity, this paper will address categories, criteria and the time of non-conformity of the goods delivered.

B-1: Categories of non-conformity:

CISG deals with non-conformity of the goods, whether it relates to discrepancies in the quantity or quality of the goods at issue(14). It makes no difference whether the quantity of the goods delivered is more or less than agreed upon(15). Such kind of non-conformity can already be shown by the

(14) Decision of Oberlandesgericht Koblenz – Germany, No. 2 U 31/96, dated 31.01.1997 (lack of quantity and non-conformity of acrylic blankets were at issue); Schwenzer, Ingeborg, Vertragsmäßigkeit der Ware sowie Rechte oder Ansprüche Dritter, in: Schlechtriem, P. / Schwenzer, I. (Eds.), "*Kommentar zum Einheitlichen UN-Kaufrecht – CISG -*" [Commentary on Uniform UN-Sales Law - *in German*] [commentaries by Bacher, Ferrari, Fountoulakis, Hager, Hornung, Maultzsch, Müller-Chen, Schlechtriem, Schmiddt-Kessel, Schroeter, Schwenzer, Widmer], München: Beck, 5th ed. (2008), 530; Henschel, Rene Franz, "Conformity of Goods in International Sales Governed by CISG Article 35: Caveat Venditor, Caveat Emptor and Contract Law as Background Law and as a Cometing Set of Rules", *Nordic J. Comp. L.* issue 2004 # 1, pp. 1-21, 6.

(15) Veneziano, Anna, "Non Conformity of Goods in international Sales a Survey of Current Caselaw on CISG", 39 *Int'l Bus. L. J.* 1997, pp. 39-66, 43; Magnus, Ulrich, Vertragsmäßigkeit der Ware sowie Rechte oder Ansprüche Dritter, in: Honsell, H. (Ed.), "*Kommentar zum UN-Kaufrecht. Übereinkommen der Vereinten Nationen über Verträge über den Internationalen Warenkauf (CISG)*" [Commentary on the CISG article by article - *in German*] [- by C. Brunner, T. Dornis, W. Ernst, B. Gsell, C. Hurni, T. Koller, R. Lauko, U. Magnus, W. Melis, A. K. Schnyder, H. Schönle, K. Siehr, R. M. Straub, R. H. Weber], Springer-Verlag Berlin Heidelberg, 2nd ed. (2010), 386; Poikela, Teija, "Conformity of Goods in the 1980 United Nations Convention on Contracts for the International Sale of Goods", *Nordic J. Comp. L.* issue 2003 # 1, pp. 1-68, 33-34; Abd-Elaziz, Jamal Mahmoud, "*Al-Eltizam Bil-Mudabaqa fi A'qd El-Bay' Ed-Dawli Lil-Badae'*" (Obligation of Conformity in the International Sale of Goods Contract – *in*

documents relating to the goods(16). Non-conformity of the quality of goods means delivery of goods whose quality is worse or better than agreed upon(17).

Non-conformity also covers situations in which the goods are not contained or packaged as required(18) by contract or convention. Likewise, delivery of a different kind of goods (*aliud*) is considered a case of non-conformity(19). Obviously, CISG adopts a one unified notion of non-conformity(20) (i.e. it

Arabic), An-Nisr Edhabi Li-Tiba'a, Cairo, 1996-1997, 35-37. Decision of Landgericht Landshut – Germany, No. 54 O 644/94, dated 05.04.1995, (insufficient quantity of the goods is considered a case of non-conformity).

(16) Schlechtriem / Schwenzer, Schwenzer, *supra* note 14, 530; Poikela, *supra* note 15, 33.

(17) Schlechtriem / Schwenzer, Schwenzer, *supra* note 14, 530; Leisinger, Benjamin K., "Fundamental Breach Considering Non-Conformity of the Goods", *Beiträge zum internationalen Wirtschaftsrecht*, Band 8, Sellier European Law Publishers, München, 2007, 128.

(18) Honsell, Magnus, *supra* note 15, 386; Henschel, *supra* note 14, 6; Abd-Elaziz, *supa* note 15, 99.

(19) Decision of Bundesgerichtshof – Germany, No. VIII ZR 51/95, dated 03.04.1996, (the Court stated that CISG, contrary to German domestic law, does not make any difference between delivery of goods of different kind (aliud) and delivery of non-conforming goods); Decision of Oberster Gerichtshof – Austria, No. 1 Ob 74/99 K, dated 29.06.1999, (the seller delivered unprepared planks instead of the preprepared planks agreed upon); Schlechtriem, P., "*Internationales UN-Kaufrecht*", Mohr Siebeck Tübingen, 2007, 106; Honnold, John O., "*Uniform Law for International Sales Under the 1980 United Nations Convention*", 3rd ed., Deventer: Kluwer Law International (1999), 335, also available at: http://www.cisg.law.pace.edu/cisg/biblio/honnold.html; Veneziano, *supra* note 15, 42.
Contra: Bianca, C. M., Conformity of Goods, in: Bianca, C. M. / Bonell, M. J. (Eds.), "*Commentary on the International Sales Law*", Giuffrè: Milan (1987) {Commentaries by J. Barrera Graf , H.T. Bennett , C.M. Bianca , M.J. Bonell , G. Eörsi , M. Evans , E.A. Farnsworth , W. Khoo , V. Knapp , O. Lando , D. Maskow , B. Nicholas , J. Rajski , K. Sono , D. Tallon , M. Will}, 273, "*Neither the text of the rule nor international trade needs support the extreme opinion which assumes that the seller has delivered the goods even when he has handed over goods which, according to common sense, are totally different from the goods expected by the buyer*"; Decision of Oberlandesgericht Düsseldorf – Germany, No. 6 U 119/93, dated 10.02.1994, "*Soweit die Kl. teilweise eine nicht bestellte Farbe geliefert hat, lag eine aliud-Lieferung vor, die zur teilweisen Nichterfüllung führte*".

(20) Decision of Tribunal Cantonal de Sion – Switzerland, No. C1 97 288, dated 29.06.1998; Maley, Kristian, **"**The limits to the conformity of the goods in the United Nationd Convention on Contracts for the International Sale of Goods (CISG)", 12 *Int'l Trade &*

combines differences of quality and quantity, delivery of a different kind of the goods agreed upon, and defects in packaging), even though latent defects play an essential role with regard to examination and notice(21) – as explained below.

According to PCLD, there is an apparent conceptual distinction between non-conformity, variances of quality or quantity and latent defects(22). Under PCLD, non-conformity means that the goods delivered are not in accord with the terms or sample contracted for, i.e. any lack of conformity between the obligation as agreed and as later performed. Article 102/1 PCLD provides that the goods delivered shall, in terms of quality and quantity, match the parties' agreement. If such quality or quantity of the goods delivered is less than agreed upon by the parties, Article 102/2 grants the buyer the same remedies he has in case of non-conformity (i.e. the buyer might demand rescission of the contract (in certain cases) or reduction of the price with damages; according to Article 96 PCLD, however, the seller shall not be liable for (minor) damage or lack of the quantity of the goods sold which are customarily tolerated(23)); delivery of

Bus. L. Rev. 2009, pp. 82-126, 95; Ferrari, Franco, "Divergences in the application of the CISG's rules on non-conformity of goods", 68 *RabelsZ* 2004-3, pp. 473-494, 474.

(21) Veneziano, *supra* note 15, 41.

(22) Article 468/1 of the Palestinian Civil Law Draft also distinguishes between non-conformity and latent defects, according to which, on one hand, the thing sold should possess the qualities the existence of which the seller guaranteed to the buyer, and on the other hand the thing sold should not have defects diminishing its value or usefulness for the purpose for which it was intended, as shown by the contract or resulting from the nature or the destined use of the thing. (It should be noted that the translation into English of the provisions of the Palestinian Civil Law Draft is heavily influenced by the translation of the counterpart provisions of the Egyptian Civil Code, available at: http://www.tashreaat.com/view_studies2.asp?id=483&std_id=82, retrieved on 12.07.2010).

(23) See also: Article 469 of the Palestinian Civil Law Draft; Decision of the Egyptian Court of Cassation, No. 169 for judicial year 25, dated 12.11.1959, cited in: Alfakahani, Hasan / Husni**,** Abd Elmunem, "*Almawasoua' Adhabiyah lil Qawaed Al-Qanounia alti qrrartih Mahkamat Ennaqd Elmasriyah Munth Enshaeha A'am 1931, Al-Esdar Al-Madani, Aljuza' Errabia'*" (Golden Encyclopedi of Legal Norms Laid Down by the Eqyptian Court of Cassasion since it is constituted in 1931, Civil Matters, Volume 4 – *in Arabic*), Addar Alarabiya lil Mawsoua'at - Cairo, 1982, 145-146.

different goods than agreed upon shall also be considered a case of non-conformity, even if the goods delivered are of better quality(24).

However, the excess in quantity of the goods is not deemed to be a matter of non-conformity, for which Article 103/1 PCLD rather lays down a special rule (i.e. the seller might not return the excess part of the goods unless the buyer refused to pay its price(25); the buyer may not demand rescission of the contract or reduction of the price with damages).

As far as the latent defect is concerned, it only exists if the goods delivered were defected and such defect(26) was not known by the buyer(27); hence it presumes that the condition of the goods at the time of delivery is the same as at the time of conclusion(28). In contrast, non-conformity under PCLD means that the condition of the goods at the time of delivery is not the same as at the time of conclusion(29). That is to say, the goods delivered are not like the goods as

(24) Shawarbi**,** Abd-Elhamid, *"Aliltizamit wal A'qoud Ettijariyya wifqan Liqanoun Attijara raqam 17 lisant 1999"*, (Commercial Contracts and Obligations According to the Code of Commerce No. 17 for the Year 1999 – *in Arabic*), Almaaref – Alexanderia, 2001, 486.

(25) This special rule is different from the counterpart civil law rule (Shawarbi, *supra* note 24, 490; Al-Manshawi, Abd-Elhamid, *"Attaleeq ala Alqanoun Ettijari Aljadeed raqam 17 lisant 1999fi doua' alfiqh walqada'"*, (Commentary on the New Commercial Code No. 17 for the Year 1999 in Light of Doctrine and Jurisprudence – *in Arabic*), Almaaref – Alexandria, 2005, 90), that stipulated in Article 454/2 of the Palestinian Civil Law Draft, according to which, if the quantity of the thing sold exceeds that indicated in the contract, and if the price has been fixed by unit, the buyer must, when the object of the purchase cannot be divided, make up the price unless the excess is very great, in which case he may demand rescission of the contract; see also Articles 225 & 226 Mejella.

(26) According to Article 338 Mejella, the defect is defined as the fault that, in the opinion of merchants and professionals, reduces the price of the thing sold.

(27) According to Mejella and the Palestinian Civil Law Draft, there is an implied condition that the thing sold should be free from any (hidden) defect (Articles 336 and 473, respectively). Such defect should exist before or at the time of delivery of the thing sold (i.e. regardless of whether before or after the contract conclusion), and be unknown to the buyer at the time of conclusion of the contract (Articles 339 & 340 and 473/2, respectively).

(28) Shawarbi, *supra* note 24, 485.

(29) Shawarbi, *supra* note 24, 484; Decision of the Egyptian Court of Cassasion, No. 56 for judicial year 2, dated 08.12.1932, cited in: Alfakahani / Husni, *supra* note 23, 136.

seen when bought. If the parties agree to certain specifications of the goods however, the goods delivered shall match their agreement(30).

Obviously, the strict meaning of non-conformity under PCLD reflects only one aspect of the non-conformity in the meaning of Article 35 CISG. This may be explained by reference to the sphere of application of each instrument: CISG, as a uniform law of international sale of goods, divorced the distinction made by common law jurisdictions between conditions and warranties and that made by civil law systems between latent and apparent defects(31). CISG pays attention to trading at distance according to which the seller very often controls the nature of the goods. In contrast, PCLD, which governs domestic contracts on sale of goods, takes into account that the goods concerned are often traded on the marketplace where the buyer can easily inspect them before concluding the contract.

It should also be noted that PCLD, contrary to CISG, does not adopt a unitary concept of non-conformity; it rather draws a distinction between a difference in the quantity of the goods and lack of conformity, non-conforming delivery and latent defects. Accordingly, any claim resulting from the non-conformity of the goods shall be based on Article 35 CISG(32), whereas PCLD allows the buyer to base his/her claims, resulting from latent defects, not only on PCLD, but also on general rules of contract incorporated in Mejella and the Palestinian Civil Law Draft (after enactment).

In addition, PCLD (Article 96) explicitly declares minor defects to be irrelevant provided that they are customarily tolerated. In contrast, according to Article 35/1 CISG, any non-conformity of the goods delivered with the agreed-upon description is assumed to mean that the goods do not conform with the contract(33). Nevertheless, insignificant discrepancies can normally justify

(30) Shawarbi, *supra* note 24, 486; Article 310 Mejella.

(31) This is actually in accord with the main purpose of CISG to achieve unification, and in so doing, has avoided terminology used by domestic law. This clearly reflects the autonomous interpretation requirements stipulated by Article 7 CISG.

(32) Kruisinga, Sonja A., *"(Non-)conformity in the 1980 UN Convention on contracts for the international sale of goods : a uniform concept?*" Intersentia, Antwerp – Oxford – New York, 2004, 25, 26.

(33) Henschel, *supra* note 14, 6; Kruisinga, *supra* note 32, 37.

damages and price reduction only(34) unless usages or practices established between the parties indicate otherwise(35).

Unidroit Principles address non-conformity in general terms only because – contrary to CISG – they cover all international commercial contracts. Thus non-conformity is generally mentioned in Article 7.1.1 UP as a category of non-performance(36).

B-2: Criteria of non-conformity:

In the following, this article will deal with the criteria of non-conformity under CISG, UP and PCLD.

B-2-a: Criteria of non-conformity under CISG:

Non-conformity of goods can be defined under CISG according to both subjective and objective criteria.

B-2-a-i: Subjective Criteria of non-conformity:

It goes without saying that the goods delivered shall be in conformity with all specifications agreed upon by the parties whether explicitly or implicitly(37). It does not matter whether the parties agreed thereupon through individual negotiations or by means of incorporation of the standard terms of either party(38); the general provisions of CISG, particularly Articles 7, 8 and 9, may apply in this context(39). The decision on the validity of such an agreement will, however, be taken in accordance with the applicable domestic law (Article 4/a CISG).

(34) Henschel, *supra* note 14, 6; Honsell, Magnus, *supra* note 15, 387.
(35) Leisinger, *supra* note 17, 9; Schlechtriem / Schwenzer, Schwenzer, *supra* note 14, 531.
(36) It says: "*Non-performance is failure by a party to perform any of its obligations under the contract, including defective performance or late performance*". The Official Comment to this Article further says "*that "non-performance" is defined so as to include all forms of defective performance*".
(37) Schlechtriem / Schwenzer, Schwenzer, *supra* note 14, 529; Honsell, Magnus, *supra* note 15, 387; Bianca / Bonell, Bianca, *supra* note 19, 273.
(38) Schlechtriem / Schwenzer, Schwenzer, *supra* note 14, 529; Poikela, *supra* note 15, 19; Abd-Elaziz, *supa* note 15, 51.
(39) Henschel, *supra* note 14, 4; Poikela, *supra* note 15, 19-20.

If the goods delivered do not match the contract specifications, there shall be a case of non-conformity(40) regardless of whether the goods are still usable or not(41). Thus, it is correctly ruled that, if one type of the delivered plastic PVC contained a lower percentage of a certain substance than the percentage agreed upon in the contract, then the seller had breached his/her obligation to deliver conforming goods(42).

Unfortunately, the case law also shows incorrect application of Article 35 CISG: In its decision, No. HG 930634/O, dated 30.11.1998, the Handelsgericht Zürich in Switzerland held that the fact that some of the coats had been identified with article numbers other than as had been originally agreed was not a defect under Article 35 CISG, and even if this were found to be a defect, such a lack of conformity does not rise to the level of a breach of contract if the goods are of equal value and their utility is not reduced. This decision clearly contradicts with the clear wording of Article 35/1 CISG which obliges the seller to deliver goods which are of the quantity, quality and description required by the contract. Besides, this decision does not take into account the fact that the seller is the party within whose sphere of application lays the nature of the goods(43). It is therefore a good luck that, to the best of my knowledge, the reasoning of this decision has not yet been followed by other courts or arbitral

(40) Schlechtriem, *supra* note 19, 105.

(41) Honsell, Magnus, *supra* note 15, 388; Maley, *supra* note 20, 104-105.
Contra: Shafik, M., "*Ittifaqiyat al-Umam al-Muttahidah bi-sha'n al-Bay' al-Dawli lil-Bada'i': dirasah fi qanun al-tijarah al-dawli*" [The United Nations Convention on Contracts for the International Sale of Goods: A Study of International Commercial Law - *in Arabic*], Dar El-Nahda Arabia, Cairo, 1988, 146-147; Abd-Elaziz, *supa* note 15, 60.

(42) Decision of Landgericht Paderborn – Germany, No. 7 O 147/94, dated 25.06.1996.
See also: Decision of Bundesgerichtshof – Germany, No. VIII ZR 51/95, dated 03.04.1996 (the delivered cobalt sulphate was of a lower quality than that agreed to under the contracts, and the cobalt was produced in South Africa and not in the UK as indicated in the contracts); Decision of Oberlandesgericht Köln - Germany, No. 22 U 4/96, dated 21.05.1996: (the difference between the date of first immatriculation and the mileage of the used car sold indicated in the contract on one side and the real ones on the other constituted a non conformity pursuant to Article 35/1 CISG).

(43) Henschel, *supra* note 14, 3.

tribunals. On the contrary, the case law that was made latter reassured the primacy of the party autonomy in respect with the goods specifications(44).

It should be noted that the above mentioned subjective criterion(45) of non-conformity is clearly stipulated in Article 35/1-2 CISG, Article 5.1.6 UP and Article 102/1 PCLD. It is also in accord with the principle of party autonomy(46) regulated by Article 6 CISG, Articles 1.1, 1.3, 1.5 UP and Article 2 PCLD (and Article 479 of the Palestinian Civil Law Draft).

B-2-a-ii: Objective Criteria of non-conformity:

If the parties did not agree to the goods specifications at all – like in the case of routine and quick orders of purchase(47), or if such an agreement was not sufficient(48), conformity of the goods will be decided according to objective criteria(49). According to Article 35/2 CISG, the goods will not conform unless they meet the following four cumulative(50) parameters or criteria:

First, the goods delivered shall be fit for the normal purpose of use of similar goods(51). It was decided, in one case, that this criterion reflects the average

(44) For instance, a Belgium court concluded in 2004 that, if the truck delivered had a different number and was four years older than agreed upon, there exists a case of non-conformity (Decision of Rechtbank van Koophandel, Kortrijk, No. AR/2136/2003, dated 04.06.2004). Also, a Spanish Court found, in 2007, that the seller had breached its obligations set forth in Articles 25 and 35 CISG, reasoning that the buyer was deprived of what he was entitled to expect under the contract since the machine's functioning and technical qualities did not conform to those agreed upon (Decision of Audiencia Provincial de Madrid, No. 244/2007, dated 22.03.2007). Above all, the Swiss supreme court held, in 2004, that the delivery by the seller of small crystals contrary to the contract specifications, namely "big crystals", was a case of non-conformity encompassed by Article 35 CISG (Decision of Schweizerisches Bundesgericht, No. 4C.245/2003, dated 13.01.2004).

(45) Schlechtriem / Schwenzer, Schwenzer, *supra* note 14, 529; Maley, *supra* note 20, 104.

(46) Honnold, *supra* note 19, 254; Maley, *supra* note 20, 83.

(47) Honnold, *supra* note 19, 255.

(48) Schlechtriem / Schwenzer, Schwenzer, *supra* note 14, 532.

(49) Veneziano, *supra* note 15, 44; Decision of Oberster Gerichtshof – Austria, No. 7 Ob 302/05w, dated 25.01.2006.

(50) Poikela, *supra* note 15, 59.

(51) Article 35/2-a CISG. See also: Decision of Hof van Hoger Beroep, Gent – Belgium, No. 2003/AR/2026, dated 10.05.2004; Decision of Cour d'Appel de Grenoble - France, No.

quality test(52). Some authors, by contrast, adopt the merchantability test in this regard(53). Taking into account the legislative history(54) however, neither the average quality test (well-known by the civil law countries), nor the common law test of merchantability may be applied(55). Non-conformity shall therefore be ascertained on a case-by-case basis(56) with reference to the parties' intention(57); the quality of the goods sold should be of a reasonable standard(58), i.e. that falls within the normal expectations of a reasonable person buying goods of the same description(59): If the goods are perishable in nature (e.g. foodstuffs), they must continue to exist safely for a reasonable period of time

R.G. 94/0258, dated 15.05.1995; Decision of Landgericht Regensburg - Germany, No. 6 U 107/98, dated 24.09.1998; Decision of Schweizerisches Bundesgericht, No. 4P.146/2005/biz, dated 10.10.2005.

(52) Decision of Landgericht Berlin – Germany, No. 52 S 247/94, dated 15.09.1994.

(53) Schlechtriem / Schwenzer, Schwenzer, *supra* note 14, 532; Maley, *supra* note 20, 83; Hyland, Richard, "Conformity of Goods to the Contract Under the United Nations Sales Convention and the Uniform Commercial Code", in: Schlechtriem**,** Peter H. (Ed.), *Einheitliches Kaufrecht und nationales Obligationenrecht, Referate und Diskussionen der Fachtagung Einheitliches Kaufrecht am 16./ 17. 2.1987, Veranstaltet von der Gesellschaft für Rechtsvergleichung Fachgruppe für vergleichendes Handels- und Wirtschaftsrecht*, Nomos Verlagsgesellschaft, Baden-Baden, 1987, pp. 305-341, 312, 316; Abd-Elaziz, *supa* note 15, 84-85.

(54) The Vianna Diplomatic Conference refused a Canadian proposal according to which the goods delivered should be of an average quality, see: Schlechtriem / Schwenzer, Schwenzer, *supra* note 14, 534; Kruisinga, *supra* note 32, 31.

(55) Arbitral Award of Netherlands Arbitration Institute, No. 2319, dated 15.10.2002.

(56) Bianca / Bonell, Bianca, *supra* note 19, 281; Maley, *supra* note 20, 112; Poikela, *supra* note 15, 38.

(57) Maley, *supra* note 20, 112; Honnold, *supra* note 19, 254-255; Schlechtriem, *supra* note 19, 107.

(58) Kruisinga, *supra* note 32, 31.

(59) Leisinger, *supra* note 17, 18; Bianca, C. M., Liability for lack of conformity, in: Bianca, C. M. / Bonell, M. J. (Eds.), "*Commentary on the International Sales Law*", Giuffrè: Milan (1987) {Commentaries by J. Barrera Graf , H.T. Bennett , C.M. Bianca , M.J. Bonell , G. Eörsi , M. Evans , E.A. Farnsworth , W. Khoo , V. Knapp , O. Lando , D. Maskow , B. Nicholas , J. Rajski , K. Sono , D. Tallon , M. Will}, 289; Decision of Bundesgericht - Switzerland , No. 4C.296/2000/rnd, dated 22.12.2000, "*Art. 35 CISG enthält keine spezifische Regelung für zugesicherte Eigenschaften in der Art von Art. 197 OR. Vielmehr hat der Verkäufer grundsätzlich für alle Eigenschaften einzustehen, die der Käufer nach dem Vertrag von der Ware erwarten darf*".

after delivery; other types of goods shall also stay safe for a period of time after delivery, which must be a reasonable period in light of the ordinary purpose of use of the goods at issue(60). The buyer is entitled to expect that the goods delivered posses certain basic qualities that make them usable for their ordinary purpose, even if the contract does not include an express provision to this effect(61).

According to the case law of CISG, the following are some examples in which the goods were not fitting for the ordinary purpose of use: wine being adulterated by the addition of a high quantity of sugar which caused an augmentation of the alcohol degree(62); baking dishes (cake pans, soufflé pans and plotters) not being resistant to high temperatures and broke when used in ovens(63); pressure cookers showing a defect that made their use dangerous(64); and special kind of wax sold being not in conformity with the industry standards that were known to and applied by both parties(65).

It should be noted here that the seller cannot as a rule be expected to observe the special public law requirements in the buyer's country(66) even in the situation where it knew the country of export(67). Such public law standards in

(60) Schlechtriem / Schwenzer, Schwenzer, *supra* note 14, 533; Bianca / Bonell, Bianca, *supra* note 59, 289, "*even without an express guarantee the buyer may expect the goods to last for a normal time. Goods cannot be said fit for their normal purposes, indeed, when they endure only for an exceptionally short period*".

(61) Poikela, *supra* note 15, 37.

(62) Decision of Cour de Cassation – France, No. 173 P, dated 23.01.1996.

(63) Decision of Cour de Cassation – France, No. 2205 D, dated 17.12.1996.

(64) Decision of Cour d'Appel de Paris – France, No. 2002/18702, dated 04.06.2004.

(65) Decision of Bundesgerichtshof – Germany, No. VIII ZR 121/98, dated 24.03.1999.

(66) Decision of U.S. District Court, E.D., Louisiana, No. Civ. A. 90-0380, dated 17.05.1999; Henschel, *supra* note 14, 7. Leisinger, *supra* note 17, 20.

(67) Decision of Oberster Gerichtshof – Austria, No. 7 Ob 302/05w, dated 25.01.2006; Decision of Bundesgerichtshof – Germany, No. VIII ZR 159/94, dated 08.03.1995; Decision of Oberlandesgericht Frankfurt am Main – Germany, No. 13 U 51/93, dated 20.04.1994; Decision of Bundesgerichtshof – Germany, No. VIII ZR 67/04, dated 02.03.2005; Decision of Audiencia Provincial de Granada – Spain, No. 143/2000, dated 02.03.2000; Decision of U.S. District Court, E.D., Louisiana, No. Civ. A. 90-0380, dated 17.05.1999; Maley, *supra* note 20, 116; Bianca / Bonell, Bianca, *supra* note 19, 283; Kruisinga, *supra* note 32, 43-44, 52.

the buyer's country can only be relevant under certain circumstances(68), if, for instance: (1) the same provisions also exist in the seller's country(69), (2) the parties had agreed upon their observance in the contract(70), (3) the buyer had made such provisions known to the seller at the time of conclusion of the contract(71) according to Article 35/2-b CISG(72), (4) the seller has a branch office in the buyer's country(73), (5) the parties had had a longstanding business relationship(74), (6) the seller has regularly exported in the buyer's country(75), or (7) the seller had marketed his own products in the buyer's country(76).

Second, the goods delivered must be fit for the buyer's particular purpose of use, provided a) this purpose is explicitly or implicitly made known to the seller at the time of the conclusion of the contract, and b) the buyer reasonably relied

(68) Decision of Oberster Gerichtshof – Austria, No. 7 Ob 302/05w, dated 25.01.2006; Decision of Bundesgerichtshof – Germany, No. VIII ZR 159/94, dated 08.03.1995; Decision of Bundesgerichtshof – Germany, No. VIII ZR 67/04, dated 02.03.2005; Decision of U.S. District Court, E.D., Louisiana, No. Civ. A. 90-0380, dated 17.05.1999; Bianca / Bonell, Bianca, *supra* note 19, 283; Ferrari, *supra* note 20, 476.

(69) Bianca / Bonell, Bianca, *supra* note 19, 283; Veneziano, *supra* note 15, 46; Poikela, *supra* note 15, 54.

(70) Decision of Supreme Court of Western Australia – Australia, No. [2003] WASC 11; CIV 1647 of 1998, dated 17.01.2003; Decision of Audiencia Provincial de Pontevedra – Spain, No. AC 2002\1851, dated 03.10.2003; Leisinger, *supra* note 17, 21; Kruisinga, *supra* note 32, 52.

(71) Bianca / Bonell, Bianca, *supra* note 19, 283; Poikela, *supra* note 15, 54; Leisinger, *supra* note 17, 21; Abd-Elaziz, *supa* note 15, 63, 91.

(72) Decision of Oberster Gerichtshof – Austria, 7 Ob 302/05w, dated 25.01.2006; Decision of Bundesgerichtshof – Germany, No. VIII ZR 67/04, dated 02.03.2005. Leisinger, *supra* note 17, 21.

(73) Decision of U.S. District Court, E.D., Louisiana, No. Civ. A. 90-0380, dated 17.05.1999; Henschel, *supra* note 14, 7.

(74) Decision of Landgericht Ellwangen – Germany, No. 1 KfH O 32/95, dated 21.08.1995; Decision of Cour d'Appel de Grenoble - France, No. 48992, dated 13.09.1995; Schlechtriem / Schwenzer, Schwenzer, *supra* note 14, 536; Kruisinga, *supra* note 32, 52; Ferrari, *supra* note 20, 477, though he bases this conclusion on Article 9 CISG, not on Article 35/2-a.

(75) Schlechtriem / Schwenzer, Schwenzer, *supra* note 14, 536; Bianca / Bonell, Bianca, *supra* note 19, 283; Henschel, *supra* note 14, 7.

(76) Decision of Bundesgerichtshof – Germany, No. II ZR 159/94, dated 08.03.1995; Henschel, *supra* note 14, 7.

on the seller's skill and judgment(77). The buyer's particular purpose could be, for instance, the use of the goods in a specific way of processing or the use of the goods in a certain region having special standards relating to religion(78). There is no problem when the buyer expressly informs the seller of the particular purpose for which the buyer acquires the goods; in such a situation, the seller will obviously have the opportunity to object as s/he pleases(79). In order to decide whether such a purpose is impliedly made known to the seller, an objective test shall be applied(80): the reasonable person, through an adequate means, should have known the buyer's particular purpose of use (81). In both cases, the seller shall be made aware of the buyer's special purpose at the time of conclusion. Thus, it is held by the *Cour d'Appel de Grenoble* – France that: because the seller delivered some metallic elements which could not be used for the reassembling of the second hand hanger as agreed upon by the parties, there was a lack of conformity as the seller knew at the time of contracting that such metallic elements had to be used for that particular purpose and were not fit for it(82).

Besides, the seller will not be responsible for delivering goods not fit for the buyer's special purpose if the circumstances show that the buyer did not rely, or that it was unreasonable for him to rely on the seller's skill and judgment. This would be the case if, for instance: (1) the buyer and the seller posses the same

(77) Article 35/2-b CISG.
(78) Leisinger, *supra* note 17, 14.
(79) Schlechtriem / Schwenzer, Schwenzer, *supra* note 14, 537; Poikela, *supra* note 15, 42; Abd-Elaziz, *supa* note 15, 91, 92.
(80) Maley, *supra* note 20, 118.
(81) Schlechtriem / Schwenzer, Schwenzer, *supra* note 14, 537; Leisinger, *supra* note 17, 15.
(82) Decision No. RG 93/4879, dated 26.04.1995.
For more case law applying Article 35/2-b CISG, see for instance: Decision of U.S. Court of Appeals, Fourth Circuit, No. 00-1125, dated 21.06.2002; Decision of Helsinki Court of Appeal – Finland, No. S 96/1215, dated 30.06.1999, available (with an English translation) at: http://cisgw3.law.pace.edu/cases/980630f5.html; Decision of Tribunale di Busto Arsizio - Italy, dated 13.12.2001; Decision of British Columbia Supreme Court – Canada, No. C993594, dated 21.08.200; Decision of Supreme Court of Western Australia - Australia, No. [2003] WASC 11; CIV 1647 of 1998, dated 17.01.2003.

level of skill and judgment(83), or the buyer's skill and judgment are superior(84); (2) the buyer refused the seller's advise relating to certain characteristics of the goods(85); (3) the buyer co-produced the goods(86); (4) the buyer participated in selecting the goods(87); or (5) the buyer buys the goods from non-expert or unspecialized person(88), i.e. an intermediary or middleman(89).

Third, the goods delivered must have the same qualities as the sample or model which the seller(90) has held out to the buyer(91). If the parties agreed upon certain specifications of the goods however, this agreement would prevail(92). In contrast, in case of conflict between Article 35/2-b (buyer's special purpose of use) and article 35/2-c (sample or model), the latter shall prevail(93) because the buyer could not rely in this case, or it could not be reasonable for him/her to rely, on the seller's skill and judgment(94).

(83) Honsell, Magnus, *supra* note 15, 391-392; Hyland, *supra* note 53, 322; Shafik, *supra* note 41, 145; Musa, Taleb Hasan, "*Qanoun Et-Tejara Ed-Dawliyya*" (International Commercial Law – *in Arabic*), Dar Ethaqafa Lin-Nasher Wa-Tawzee', Amman, 2005, 181.

(84) Hyland, *supra* note 53, 322; Leisinger, *supra* note 17, 17; Kruisinga, *supra* note 32, 32-33.

(85) Bianca / Bonell, Bianca, *supra* note 19, 275-276; Leisinger, *supra* note 17, 17.

(86) Schlechtriem / Schwenzer, Schwenzer, *supra* note 14, 538; Hyland, *supra* note 53, 321.

(87) Poikela, *supra* note 15, 43; Hyland, *supra* note 53, 321.

(88) Bianca / Bonell, Bianca, *supra* note 19, 275-276; Honsell, Magnus, *supra* note 15, 391.

(89) Leisinger, *supra* note 17, 17; Kruisinga, *supra* note 32, 33.

(90) Nevertheless, a Belgium court also applied Article 35/2-c CISG when the buyer provided the seller with a model (Decision of Rechtbank van Koophandel, Hasselt, No. AR/05/2945, dated 14.09.2005). In such a situation however, Article 35/1 should rather apply since the parties have implicitly agreed upon the specifications of the goods, (Schlechtriem, *supra* note 19, 112; Schlechtriem / Schwenzer, Schwenzer, *supra* note 14, 539).

(91) Article 35/2-c CICG.

(92) Poikela, *supra* note 15, 46; Leisinger, *supra* note 17, 22; Abd-Elaziz, *supa* note 15, 68. Kruisinga, *supra* note 32, 33.

(93) Bianca / Bonell, Bianca, *supra* note 19, 276.

(94) Schlechtriem / Schwenzer, Schwenzer, *supra* note 14, 539.
Contra: Honsell, Magnus, *supra* note 15, 392.

The case law has correctly applied this criterion of conformity in many situations(95). Nevertheless, in one case, it was incorrectly ruled that "*Ein Muster ist nur verbindlich, wenn die Parteien dies vereinbart haben*". That is to say, conformity to a model is relevant only when in the contract there is an express agreement of the parties thereupon(96). This decision is obviously in conflict with the clear wording of Article 35/2-c, according to which it suffices when the model is held out by the seller to the buyer. That is to say, the parties implicitly(97) agree that the goods must be in conformity with the model(98).

Fourth, the goods delivered must be contained or packaged in the manner usual for such goods or, where there is no such manner, in a manner adequate to preserve and protect the goods(99). The seller is obliged to package the goods, not only when the goods are dispatched, but also when he only has to place them at the buyer's disposal(100) for the collection by the buyer(101). Thus, the seller will commit a breach(102) if the goods are not contained or packaged according to the usage prevailing in the concerned sector of commerce(103). In the absence of such a usage, the goods shall be contained or packaged in the manner usual for such goods according to the surrounding circumstances(104),

(95) See, for instance: Decision of Landgericht Berlin – Germany, No. 102.0.181/98, dated 25.05.1995; Decision of U.S. Court of Appeals, 2nd Circuit, No. 95-7182, 95-7186, dated 06.12.1995; Decision of U.S. District Court, Southern District of New York, No. 00 Civ. 5189 (RCC), dated 23.08.2006.

(96) Decision of Landgericht Berlin – Germany, No. 52 S 247/94, dated 15.09.1994.

(97) Schlechtriem / Schwenzer, Schwenzer, *supra* note 14, 539.

(98) Decision of Oberlandesgericht Graz, No. 6 R 194/95, dated 19.11.1995.

(99) Article 35/2-d CISG. However, if the parties make some specifications with respect to the proper packaging of the goods sold, then the goods must conform to such contractual specifications pursuant to Article 35/1 CISG.

(100) Poikela, *supra* note 15, 51.

(101) Leisinger, *supra* note 17, 22; Kruisinga, *supra* note 32, 34.

(102) Decision of Oberlandesgericht Koblenz – Germany, No. 2 U 923/06, dated 14.12.2006; Poikela, *supra* note 15, 43.

(103) Schlechtriem / Schwenzer, Schwenzer, *supra* note 14, 539-540; Bianca / Bonell, Bianca, *supra* note 19, 277; Leisinger, *supra* note 17, 23. Az-Zuqrod, Ahmad Es-Sayyed, "*Osoul Qanoun Et-Tejara Ed-Dawliyya Al-Bai' Ed-Dawli Lil-Badai'*" (Principle of International Trade Law - International Sale of Goods – *in Arabic*),, Al-Maktaba Al-A'sriyya, Cairo, 2007, 176.

(104) Schlechtriem / Schwenzer, Schwenzer, *supra* note 14, 540.

including the category of goods involved, the means of transport(105) and the weather conditions(106). If the goods sold are new, and hence there is no usual manner for containing or packaging them(107), they shall be contained or packaged in a manner adequate to preserve and protect them. The seller shall be responsible for the non-conformity caused by the lack of packaging, even if the goods are damaged after the passing of risk(108). Thus, it is decided that the seller of canned fruit will commit a breach if the goods reached the buyer in bad conditions due to lack of adequate canning and packaging(109).

In all events, the buyer bears the burden of proof with regard to the nature and extent of the lack of conformity of the goods(110). Concerning, the buyer's

(105) Poikela, *supra* note 15, 51.

(106) Schlechtriem / Schwenzer, Schwenzer, *supra* note 14, 540; Kruisinga, *supra* note 32, 34.

(107) Honnold, *supra* note 19, 259; Schlechtriem / Schwenzer, Schwenzer, *supra* note 14, 540; Bianca / Bonell, Bianca, *supra* note 19, 277.

(108) Honsell, Magnus, *supra* note 15, 393; Schlechtriem / Schwenzer, Schwenzer, *supra* note 14, 540.

(109) Decision of COMPROMEX, Comisión para la Protección del Comercio Exterior de Mexico, No. M/21/95, dated 29.04.1996.

(110) Honsell, Magnus, *supra* note 15, 395; Veneziano, *supra* note 15, 47.
It should be noted that there is a divergence in opinion about whether the question of burden of proof is to be settled according to domestic law or CISG, (for a detailed discussion of this issue, see: Linne, Anna L., "Burden of Proof under Article 35 CISG", 20 *Pace Int'l L. Rev.* 31 (2008), pp. 31-44). Some case law argues that it shall be determined according to domestic law applicable on the basis of the conflict of law rules of the forum, (see, for instance: Decision of U.S. Court of Appeals, Fourth Circuit, No. 00-1125, dated 21.6.2002; Arbitral Award of ICC Court of Arbitration – Paris, No. 6653/1993, dated 00.00.1993). The prevailing case law however says that the question of burden of proof is an internal gap in CISG, i.e. a matter governed by CISG but not expressly settled in it, and should therefore be settled in conformity with the general principles on which CISG is based (Schlechtriem / Schwenzer, Schwenzer, *supra* note 14, 546; Ferrari, *supra* note 20, 478-479). Accordingly, the principle that the party asserting a fact bears the burden of proving it, (see, for instance: Decision of Tribunale di Appello di Lugano – Switzerland, No. 12.97.00193, dated 15.01.1998; Decision of Landgericht Düsseldorf Kammer für Handelssachen - Germany, No. 31 O 27/92, dated 25.08.1994; Award of Arbitral Institute of the Stockholm Chamber of Commerce, dated 05.04.2007; Decision of Hof van Beroep, Gent - Belgium, No. 1999A/2160, dated 23.05.2001; Decision of U.S. Court of Appeals (7th Circuit), No. 04-2551, dated 23.05.2005), e.g. the buyer should prove the lack of conformity he claims under CISG (Ferrari, *supra* note 20, 479), could be deduced from different provisions of CISG, such

special purpose of use, the buyer shall prove that such purpose was made known to the seller and the seller shall prove that the buyer could not rely on the seller's skills and judgment(111).

B-2-b: Criteria of non-conformity under UP:

As far as the Unidroit Principles are concerned, Article 5.1.6 adopts a one general criterion(112), i.e. the reasonable quality of the goods which shall not be less than average in the circumstances. According to the Official Comment to this UP Article, "*the minimum requirement is that of providing goods of average quality. The supplier is not bound to provide goods … of superior quality if that is not required by the contract, but neither may it deliver goods … of inferior quality. This average quality is determined according to the circumstances, which normally means that which is available on the relevant market at the time of performance (there may for example have been a recent technological advance). Other factors may also be of relevance, such as the specific qualifications for which the performing party was (chosen)*".

This general criterion encompasses all four criteria of Article 35/2 CISG: If the goods delivered do not fit with the ordinary purpose of use of similar goods, they cannot be considered of a reasonable quality: Even under CISG, the ordinary purpose of use requires delivery of reasonable quality goods. If the contract does not include specifications for the goods, the quality of such goods shall not be less than normal(113). Besides, the goods delivered shall not be defective(114).

as Article 2/a (Decision of Bundesgerichtshof – Germany, No. VIII ZR 304/00, dated 09.01.2002), Article 35 (Decision of Cour d'Appel, Mons - Belgium, No. R.G. 1999/242, dated 08.03.2001), Article 38-39 (Decision of Handelsgericht Zürich – Switzerland, No. HG930138 U/H93, dated 09.09.1993), and Article 79 (Decision of Tribunale di Vigevano – Italy, No. 405, dated 12.07.2000). It goes without saying that the prevailing opinion in the case law is preferable because it adopts an autonomous and uniform interpretation of the question in contingency with Article 7 CISG.

(111) Schlechtriem / Schwenzer, Schwenzer, *supra* note 14, 547; Maley, *supra* note 20, 119.

(112) The generality of this criterion corresponds with the fact the Unidroit principles govern not only the international sale of goods, but also other international commercial contracts, particularly the service contracts.

(113) Article 5.1.6, Official Comment: "*The contract will often be explicit as regards the quality due ("grade 1 oil"), or it will provide elements making that quality determinable.*

Likewise, the seller shall deliver goods fit for the buyer's special purpose of use which was made known to him at the time of the conclusion of the contract. Such a purpose may be expressly agreed upon by the parties in the contract or made known to the seller through the practices established between the parties. In the former case, the seller will commit a breach if he/she delivers goods that do not conform with the agreed-upon purpose(115). In the latter case, the quality of such goods may not be considered reasonable in the given circumstances. This conclusion is also supported by the principle of good faith and fair dealing in international trade stipulated in Article 1.7/1 UP, which is wide enough to cover such a case.

The quality of the goods delivered cannot also be considered reasonable if they do not possess the qualities of goods which the seller has held out to the buyer as a sample or model. Similarly, the delivery of goods contained or packaged in a commercially bad manner will not be considered reasonable. Nor can it be in accord with good faith and fair dealing, which are regarded by Article 1.7/1 UP as fundamental values throughout the life of the contract. Such a case should obviously be treated as a case of non-conformity(116).

B-2-c: Criteria of non-conformity under PCLD:

Under the PCLD, the condition of the goods at the time of delivery shall be the same as at the time of contracting. According to the civil law general rules

In other cases, the rule established by Art. 5.1.6 is that the quality must be "reasonable and not less than average in the circumstances"".

(114) Article 5.1.6, Official Comment, No. 1, Illustration No. 2: "*A buys 500 kgs. of oranges from B. If the contract says nothing more precise, and no other circumstances call for a different solution, those oranges may not be of less than average quality. Average quality will however suffice unless it is unreasonably defective*".

(115) In a case involved an agreement between two Spanish parties for the sale of an apartment plus a parking space, the Audiencia Provincial de Cádiz (Sección 2ª) in Spain, in its decision No. 25/2009, dated 19.01.2009, ordered the assignment of a new parking space that meets the contractually agreed specifications, and in this context it also rejected the request for termination of the contract as there was no fundamental beach of contract according to Article 7.3.1 of the UNIDROIT Principles, see: http://www.unilex.info/case.cfm?pid=2&do=case&id=1469&step=Abstract

(116) Huber, Peter, Chapter 7: Non-performance, Section 3: Termination, in: Vogenauer**,** Stefan / Kleinheisterkamp, Jan, "Commentary on the Unidroit Principles on International Commercial Contracts (PICC)", Oxford University Press, 2009, Article 7.3.2 para. 7.

of contract formation, that apply to the sale of goods too(117), the subject matter of the contract, i.e. the goods contracted for, shall be well-known by the parties(118). Therefore, it does not in principle matter whether the goods are delivered to be used for the ordinary purpose or for the buyer's particular purpose. It is also of no importance whether the goods are packaged or not, and, if yes, whether the manner of package is normal in the course of commerce or not. In all cases, it is rather important whether the goods delivered (that were well-known to the buyer at the time of contract) are still in the same condition in which they were at the time of sale(119). In this regard, PCLD materially differs from CISG under which the extent of fitness of the goods for the ordinary use has to be decided on a case-by-case basis. Besides, since PCLD governs domestic contracts only, the question whether the seller has to respect the public law standards in the buyer's country does not arise at all.

With regard to sample or model, Article 431/1 of the Palestinian Civil Law Draft explicitly states that, "*if the sale is made according to sample or model, the thing sold should conform to the sample or model*"(120). In case of non-conformity however, the buyer can either accept the goods delivered or reject them only. As far as the special purpose and packaging are concerned, neither PCLD nor the Palestinian Civil Law Draft regulates them; they can however be relevant if the parties' contract addresses them.

(117) Shawarbi, *supra* note 24, 403.

(118) Articles 200-204 Mejella. Article 429 Palestinian Civil Law Draft, which says: "*The buyer must have a sufficient acquaintance with the thing sold. This acquaintance will be deemed sufficient if the contract contains the description of the thing sold and its essential qualities, so that it may be identified*".

(119) Nevertheless, Article 130 of the Palestinian Civil Law Draft explicitly provides that, "*if there is no agreement as to the degree of quality, and the quality cannot be ascertained by usage or by any other circumstances, the debtor must supply an article of average quality*". Thus, the seller of unascertained goods must provide goods of average quality.

(120) See also: Decision of the Egyptian Court of Cassation, No. 222 for judicial year 25, dated 15.10.1959, cited in: Alfakahani / Husni, *supra* note 23, 144; Article 325 Mejella.

B-3: Time of non-conformity:

According to Article 36/1 CISG, the seller shall be liable for any lack of conformity which exists at the time when the risk passes to the buyer(121). The risk passes to the buyer at the time agreed upon by the parties(122); otherwise according to the prevailing usage(123), if any. In the absence of any agreement or usage, the risk passes to the buyer according to the CISG's rules (Articles 67-69)(124). The Helsinki Court of Appeal, by reference to Articles 67 and 36 CISG, stated that the time for evaluating conformity of goods is the time for passing of the risk(125). It is also ruled that the buyer was not entitled to reduce the price because he did not prove that the alleged lack of conformity existed before risk passed on him according to Articles 66 and 36 CISG, i.e. before delivery of the meat to the first carrier according to Article 31/a CISG(126).

In another case where the contract provided that risk would shift to the buyer when the goods were handed over to the first carrier, and that the seller should have – before the goods were shipped – supply a certificate from an independent testing agency confirming that the cocoa beans sold met certain quality specifications, and where the independent agency actually tested the goods some three weeks before they were packed for shipment, and issued the required certificate, but the buyer's own testing upon arrival of the beans revealed that they were below contract-quality, the court held that the seller was in breach for non-conformity because the goods were defective when handed over to the

(121) See also: Decision of Oberlandesgericht Linz – Austria, No. 6 R 160/05z, dated 23.01.2006; Decision of U.S. Court of Appeals (7th Circuit, No. 04-2551, 23.05.2005; Arbitral Awrad of CRCICA (Cairo), No. 19/1990, dated 13.04.1991.

(122) Maley, *supra* note 20, 98.

(123) Schlechtriem / Schwenzer, Schwenzer, *supra* note 14, 550.

(124) With regard to the contract of sale involving carriage of the goods, the risk normally passes to the buyer when the goods are handed over to the first carrier for transmission to the buyer (Article 67/1 CISG); Concerning the goods sold in transit, the risk passes to the buyer from the time of the conclusion of the contract (Article 68 CISG); in other cases, the risk passes to the buyer when he takes over the goods or, if he does not do so in due time, from the time when the goods are placed at his disposal and he commits a breach of contract by failing to take delivery (Article 69/1 CISG).

(125) Decision No. S 96/1129, dated 29.01.1998.

(126) Decision of Landgericht Flensburg – Germany, No. 2 0 291/98, dated 24.03.1999. See also: Decision of Amtsgericht Duisburg – Germany, No. 49 C 502/00, dated 13.04.2000.

carrier for transportation, regardless of whether the analysis made before shipment was mistaken, or the goods were deteriorated during the three-week period before their being closed into the containers and shipped, or else the goods lacked conformity upon passing of the risk but the defects became apparent only after their arrival at the port of destination(127) .

In yet another case where the buyer of a painting attributed to Henry van der Velde sued the seller when the party to whom the buyer resold the painting had determined that the said painting is not indeed attributed to that artist, the court held that the seller was not liable because, at the moment of delivery, there was no indication of any kind that the painting was no longer to be attributed to Henry van der Velde(128). This reasoning is surly not convincing "as it is impossible to doubt that the non-conformity existed before the passing of risk"(129).

Article 36/1 CISG also protects the buyer against the latent defects(130) (i.e. the defects in the goods delivered which exist at the time the risk passes to the buyer, but become apparent only after that time(131)), since they could not be discovered with the normal inspection of the goods upon delivery(132). So, a German court found that although the suspicion of contamination of the pork sold had become apparent only after the risk had passed to the buyer (Article 36/1 CISG), it amounted nonetheless to a lack of conformity as the facts which had given rise to suspicion already existed when the risk passed to the buyer(133).

(127) Decision of Tribunale di Appello di Lugano, seconda camera civile – Switzerland, No. 12.97.00193, dated 15.01.1998.

(128) Decision of Arrondissementsrechtbank Arnhem, in Kunsthaus Math. Lempertz OHG v. Wilhelmina van der Geld, dated 17.07.1997.

(129) Ferrari, *supra* note 20, 480.

(130) Schlechtriem / Schwenzer, Schwenzer, *supra* note 14, 550; Honnold, *supra* note 19, 265; Abd-Elaziz, *supa* note 15, 137.
See also: Decision of COMPROMEX, Comisión para la Protección del Comercio Exterior de Mexico, No. M/21/95, dated 29.04.1996; Decision of Bundesgerichtshof – Germany, No. VIII ZR 67/04, dated 02.03.2005.

(131) Maley, *supra* note 20, 99; Shafik, *supra* note 41, 148.

(132) Bianca / Bonell, Bianca, *supra* note 59, 285.

(133) Decision of Oberlandesgericht Frankfurt am Main – Germany, No. 8 O 57/01, dated 29.01.2004.

Moreover, when the lack of conformity became apparent shortly (about fifteen days) after delivery of the freezer, and even if the real cause remained unknown, the seller was considered liable for the non-conformity according to Articles 35/2-a and 36 CISG(134).

Under Articles 340 of Mejella, the existence of the defect in the thing sold should be before or at the delivery time of the goods; it partially states: "*A defect coming recently into existence after the conclusion of the contract and before the delivery of the thing sold is a good ground for rescission*"(135). This time of delivery is also the time in which the risk generally passes to the buyer(136). Thus, this rule is in contingency with the provision of Article 36/1 CISG.

According to Article 36/2 CISG, the seller shall be liable for any lack of conformity which occurs after the time in which the risk passes to the buyer and which is due to a breach of any of his obligations(137), including a breach of any guarantee. Notably, if the seller breaches any of his obligations relating to the delivery of the goods (e.g. the obligation to well package the goods(138)), the defect in the goods, which existed before the risk, will pass to the buyer(139) though it was hidden(140). If the seller, by contrast, breaches any secondary

(134) Decision of Cour d'Appel de Grenoble – France, No. R.G. 94/0258, dated 15.05.1996.

(135) See also Article 473/2 of the Palestinian Civil Law Draft.

(136) Article 264 Mejella; Article 459 of the Palestinian Civil Law Draft, which says: "*If the thing sold perishes before delivery as a result of a cause beyond the control of the seller, the sale shall be dissolved and the price refunded to the buyer unless he was summoned to take delivery before the loss*".

(137) Notably, this rule is reinforced by Article 66 CISG, which says: "*Loss of or damage to the goods after the risk has passed to the buyer does not discharge him from his obligation to pay the price unless the loss or damage is due to an act or omission of the seller*".

(138) Schlechtriem / Schwenzer, Schwenzer, *supra* note 14, 551.

(139) Honsell, Magnus, *supra* note 15, 398; Decision of Oberlandesgericht Koblenz – Germany, No. 2 U 923/06, dated 14.12.2006, (the seller had breached the contract by packing the bottles inappropriately according to Article 35/2-d CISG and therefore, although the risk should have passed to the buyer when the goods were handed over to the buyer's carrier, the seller was liable for damage because lack of conformity of the goods already existed at the time the risk had passed to the buyer under the contract, Article 36 CISG).

(140) Schlechtriem / Schwenzer, Schwenzer, *supra* note 14, 551.

obligation, like insurance of the goods(141), selection of the transporter or transportation means(142) or non-disclosure to the buyer the best way to use the goods (machines) (143), the lack of conformity due to such a breach may occur after the time in which the risk passes to the buyer. In this regard, it does not matter when the breach by the seller of his obligation happens whether before(144) or after(145) the time in which the risk passes to the buyer. It is also of no relevance whether the seller was at fault or not(146); the seller may only be exempted according to the rules of Article 79 CISG(147).

In Palestine, if the defect happens in the possession of the buyer, the seller will be in principle not liable(148) (Articles 339 and 340 Mejella). However, such a defect will be considered as a hidden defect (i.e. the one which existed in the thing sold when it was in the seller's hands) if it is due to an old cause which existed in the thing sold when it was in the possession of the seller (Article 473/4 of the Palestinian Civil Law Draft).

With regard to the guarantee, the seller is liable under Article 35/2-a, b CISG for any lack of conformity brought about by a breach of his/her obligation to guarantee the normal or the buyer's special purpose of use of the goods. Article

(141) Honsell, Magnus, *supra* note 15, 398.
(142) Bianca / Bonell, Bianca, *supra* note 59, 286.
(143) *Ibid*; Abd-Elaziz, *supa* note 15, 146-147.
(144) Schlechtriem / Schwenzer, Schwenzer, *supra* note 14, 551. Decision of Tribunal de commerce, Namur – Belgium, No. 985/01, dated 15.01.2002 (the seller should be liable for any lack of conformity existing after the time of delivery, but arising from a breach of his obligations occurring prior to the passing of risk. In the case at issue however, the buyer did not bring evidence to that effect).
(145) Honsell, Magnus, *supra* note 15, 399.
(146) Schlechtriem / Schwenzer, Schwenzer, *supra* note 14, 551; Honsell, Magnus, *supra* note 15, 399.
Contra: Shafik, *supra* note 41, p. 149; Musa, supra note 83, 183; Abd-Elaziz, *supa* note 15, 151, (the buyer must establish the seller's fault that results in the non-conformity of goods).
(147) Honsell, Magnus, *supra* note 15, 399; Schlechtriem / Schwenzer, Schwenzer, *supra* note 14, 551.
(148) Noteably, Mejella does not explicitly provide for a cut-off period of time for notice of the defect. Instead, Article 341 thereof only employs an acceptance rule to cut off buyer's option with regard to defects of which he knew at the time of delivery.

36/2 CISG expressly provides that seller is responsible for the whole period of time he guaranteed that the goods during which will remain fit for their ordinary purpose or for some particular purpose or will retain specified qualities or characteristics(149). This guarantee can be agreed upon by the parties(150) or made by the seller's sole intent(151) whether explicit or implicit(152), and whether before or after the time in which the risk passes to the buyer(153). In cases of implicit guarantee, the time of the guarantee may be deduced from category of goods (e.g. foodstuff), usage, or seller's advertisement about the goods(154). In all events, such guarantee shall be in evidence for a reasonable period of time which can be defined pursuant to Article 8 CISG in light of the circumstances of the given case(155).

Article 8 CISG also plays an important role in defining the scope of the guarantee: This guarantee normally covers the lack of conformity resulted from the goods themselves(156); it does not include any lack of conformity caused by an external cause(157), like force majeure or third party act(158). Taking into account the rules of Article 80 CISG, the buyer may not avail from the guarantee when he himself does not maintain or protect the goods(159).

(149) In many cases however, the buyer could not prove the existence of a guarantee by the seller as to the length of time during which the goods will remain fit for their ordinary purpose or for some particular purpose or will retain specified qualities or characteristics, see, for instance: Decision of Audiencia Provincial de Navarra – Spain, dated 27.03.2000; Decision of Rechtbank van Koophandel, Ieper – Belgium, No. A.R. 318/00, dated 18.02.2002; Decision of Oberlandesgericht Innsbruck – Austria, No. 4 R 161/94, dated 01.07.1994.

(150) Schlechtriem, *supra* note 19, 114.

(151) Honsell, Magnus, *supra* note 15, 399.

(152) Schlechtriem, *supra* note 19, 114. Honsell, Magnus, *supra* note 15, 399; Schlechtriem / Schwenzer, Schwenzer, *supra* note 14, 552.

(153) Honsell, Magnus, *supra* note 15, 400.

(154) Schlechtriem / Schwenzer, Schwenzer, *supra* note 14, 552.

(155) *Ibid*.

(156) Honnold, *supra* note 19, 267.

(157) Honsell, Magnus, *supra* note 15, 400.

(158) Schlechtriem / Schwenzer, Schwenzer, *supra* note 14, 552.

(159) Honnold, *supra* note 19, 266; Bianca / Bonell, Bianca, *supra* note 59, 287.

In Palestine, the action based on the defect is generally prescribed in six months from the time of delivery of the thing sold unless the seller agrees to be bound for a longer period (Article 484/1 of the Palestinian Civil Law Draft)(160). With regard to the guarantee by virtue of which the seller warrants the proper working of the thing sold for an agreed period of time, Article 481 of the Palestinian Civil Law Draft states that if a defect subsequently appears in the thing sold, the buyer must give notice to the seller within one month from the date of the appearance of the defect and commence an action within six months from the date of notification; otherwise, he would forfeit his right to the warranty.

Taking into consideration the sphere of application of the Unidroit Principles, i.e. the fact that they govern not only sale of goods, but also other commercial contracts, they do not include any specific rule with regard to the time of non-conformity; the Unidroit Principles do not have a counterpart provision to Article 36 CISG. Thus, where the Unidroit Principles are applicable to a (international) sale of goods contract, this matter will be determined by the domestic or uniform law otherwise applicable(161).

C: Buyers duties upon taking over the goods:

Upon delivery of the goods, the buyer has to inspect them and notify the seller of any lack of conformity. CISG expressly provides for the details of these duties in Articles 38 & 39, respectively, both were also applied by the case law with remarkable frequency(162). The Unidroit Principles, by contrast, tackles

(160) However, the seller cannot avail himself of the prescription of six months if it is proved that he has fraudulently concealed the defect from the buyer, (Article 484/2 of the Palestinian Civil Law Draft).

(161) Article 1.6/2 UP.

(162) CISG-AC Opinion no 2, "Examination of the Goods and Notice of Non-Conformity: Articles 38 and 39", 7 June 2004. Rapporteur: Professor Eric E. Bergsten, Emeritus, Pace University School of Law, New York, 16 *Pace Int'l L. Rev.* Vol. 16 (2004), pp. 377-408, also available at: http://www.cisg.law.pace.edu/cisg/CISG-AC-op2.html, Comment no 5.1; Flechtner, Harry M., ""Conformity of Goods, Third Party Claims, and Buyer's Notice of Breach under the United Nations Sales Convention ("CISG"), with Comments on the "Mussels Case," the "Stolen Automoblile Case," and the "Ugandan Used Shoes Case"", *University of Pittsburg School of Law Working Papers Series*, Paper 64, 2007,

these duties in more general terms because they regulate all international commercial contracts, and not only the sale of goods contract. Such duties may result from two principles set forth in the Unidroit Principles: that of good faith (Article 1.7/1[(163)]), and that of cooperation (Article 5.1.3[(164)]). It goes without saying that the examination of the goods by the buyer and giving notice to the seller of the lack of conformity, if any, would help the seller to perform his obligation to deliver conforming goods.

As far as the PCLD is concerned, Article 102/2-4 thereof explicitly regulates only the buyer's duty to give notice to the seller of the missing part of the goods, any defect or any lack of conformity; the duty to examine the goods may therefore be deduced implicitly[(165)].

C-1: Examination of the Goods:

Under Article 38/1 CISG, the buyer must examine the goods, or cause them to be examined, in order to determine whether or not they conform to the contract in the meaning of Article 35 CISG[(166)]. Such examination shall happen

pp. 1-24, available at: http://law.bepress.com/pittlwps/papers/art64, 3, 12; Poikela, *supra* note 15, 18.

(163) It says: "*Each party must act in accordance with good faith and fair dealing in international trade*".

(164) It says: "*Each party shall cooperate with the other party when such co-operation may reasonably be expected for the performance of that party's obligations*".

(165) With regard to defects in the thing sold under the Palestinian Civil Law Draft however, Article 470/1 explicitly stipulates for examination and notice: The buyer who takes delivery of the thing sold must ascertain its condition as soon as he is able to do so in accordance with common usage, and if he discovers a defect, he must give notice thereof to the seller within a reasonable time, failing which he will be deemed to have accepted the thing sold.

(166) It should however be noted that the failure to examine the goods by the buyer on time should not matter when he nevertheless gives the notice to the seller in a reasonable time according to Article 39 CISG (see also: Flechtner, *supra* note 162, 19; Decision of Obergericht Kanton Luzern – Switzerland, No. 11 95 123/357, dated 08.01.1997: "*Bei der Bestimmung der Fristdauer für die Untersuchung der Ware sind die Umstände des Einzelfalles und die angemessenen Möglichkeiten der Parteien heranzuziehen*"; Decision of Cour de Cassation – France, No. 994 D, dated 26.05.1999. Contra: Decision of Landgericht Frankfurt – Germany, No. 12/26 O 264/04, dated 11.04.2005, available at: http://cisgw3.law.pace.edu/cases/050411g1.html), particularly because Article 38 CISG

within as short a period as is practicable in the circumstances. With regard to the contracts for delivery of goods by installments, the buyer shall examine each installment separately(167) unless the installments are different parts of one and the same goods, in which case examination can be postponed till the last installment is delivered(168).

Taking into account that CISG governs sales of all types of goods (as defined in Articles 1-6 CISG), it was, on one hand, impossible to law down a precise pre-determined period within which the buyer must examine the goods. On the other hand, Article 38 CISG could not adopt the prompt examination rule of Article 38 ULIS, i.e. the 1964 Uniform Law on International Sale of Goods, which was influenced by legal systems whose domestic sales laws adopt rigid rule in this regard (like the German law)(169); it rather reflects a compromise among different legal systems, including those whose domestic laws eventually allow for a relatively long period of examination (such as Dutch and French laws(170)). So, the flexibility and variability of the period of time for the examination of the goods is widely recognized by CISG; the phrase used by Article 38/1 "*within as short a period as is practicable in the circumstances*" is *per se* flexible enough to allow divergence(171). Thus, the case law has set different examination periods ranging from one day to one month after delivery(172). By contrast, examination has been found to be untimely in many

itself – contrary to Article 39 CISG – does not provide that the buyer who fails to examine loses his right to rely on the lack of conformity, (Flechtner, *supra* note 162, 19).

(167) Schlechtriem / Schwenzer, Schwenzer, *supra* note 14, 554; Honsell, Magnus, *supra* note 15, 412.

(168) Honsell, Magnus, *supra* note 15, 412.

(169) Schwenzer, Ingeborg, "The Noble Month (Articles 38, 39 CISG) – The Story Behind the Scenery", 7 *Eur. J. L. Reform* 2005, pp. 353-366, 355.

(170) *Ibid*.

(171) Ferrari, *supra* note 20, 481; Shafik, *supra* note 41, 152.

(172) See, for instance: Decision of Landgericht Aachen - Germany, No. 41 O 198/89, dated 03.04.1990: (the same day of delivery); Decision of CIETAC China International Economic and Trade Arbitration Commission, dated 00.00.1995: (few days); Decision of Schweizerisches Bundesgericht, No. 4C.144/2004, dated 07.07.2004: (three days); Decision of, Decision of Oberlandesgericht Schleswig – Germany, No. 11 U 40/01, dated 22.08.2002: (3-4 days); Decision of Oberlandesgericht Koblenz – Germany, No. 2 U 1556 / 98, dated 18.11.1999: (one weak); Decision of Cour de Cassation – France, No.

situations, for instance: four months after the delivery of the second of two engines (20 months after the delivery of the first engine)(173); beyond one week following delivery(174); after three or four days following delivery(175); after the day of arrival at the port of destination(176); and any time later than immediately following delivery(177).

Having said that, I suggest that one month could be a reasonable period of time for examination of the goods by the buyer. This period can be lengthened or shortened in light of the given circumstances(178). Though CISG itself does not provide for a precise period of examination, this one month period can be taken as a starting point. It is worth noting that the seller will normally suffer no significant prejudice from the buyer's failure to examine the goods timely, and the buyer shall, by contrast, lose all remedies if he is held not to have complied

994 D, dated 26.05.1999: (two weaks); Decision of Oberlandesgericht Köln – Germany, No. 18 U 121/96, dated 21.08.1997: (one month).

(173) Decision of Landgericht Düsseldorf - Germany, No. 31 O 231/94, dated 23.06.1994.

(174) Decision of Oberlandesgericht Koblenz - Germany, No. 2 U 580/96, dated 11.09.1998.

(175) Decision of Oberlandesgericht Karlsruhe - Germany, No. 1 U 280/96, dated 25.06.1997.

(176) Arbitral Award of ICC Court of Arbitration, No. 8247, dated 00.06.1996.

(177) Decision of Oberlandesgericht Düsseldorf - Germany, No. 6 U 32/93, dated 10.02.1994.

(178) Decision of Oberster Gerichtshof – Austria, No. 1 Ob 223/99x, dated 27.08.1999, (the examination period has to be adapted according to the objective and subjective circumstances of the concrete case. It can depend on the size of the buyer's company, its personal and business situation, the characteristic features and the quantity of the goods to be examined, the efforts necessary for an examination, the type of the chosen legal remedy selected); Decision of Oberlandesgericht Saarbrücken - Germany, No. 1 U 703/97, dated 03.06.1998, (perishable goods have to be immediately examined by the buyer); Decision of Landgericht Düsseldorf - Germany, No. 31 O 231/94, dated 23.06.1994, (in order to discover possible defects, the buyer necessarily had first to install the engines and put them into operation, which required more than a few days). CISG-AC Opinion no 2, *supra* note 162, Article 38 para. 2 (at p. 378): "*whether and when it is practicable, and not just possible, to examine the goods depends on all the circumstances of the case. It is often commercially practicable to examine the goods immediately upon receipt. This would normally be the case with perishables. In other cases, such as complicated machinery, it may not be commercially practicable to examine the goods except for externally visible damage or other non-conformity until, for example, they can be used in the way intended. If the goods are to be re-sold, the examination will often be conducted by the sub-purchaser. Another example is dealt with in article 38(3)*". Schwenzer, *supra* note 169, 364-365; Abd-Elaziz, *supa* note 15, 176.

with his duty to examine the goods and to give notice in the appropriate time. Unless the courts and arbitral tribunals have a starting or vantage point with regard to the period of examination, the parties would otherwise likely exclude applicability of Article 38 CISG and – according to Article 6 CISG – incorporate into the contract a clause determining the period in which the buyer has to examine the goods.

As far as the Unidroit Principles are concerned, they do not particularly regulate the buyer's duty to examine the goods because they govern all types of international commercial contracts, including the contracts of service. In the Official Illustration No. 7 to Article 1.7/1 however, it is made clear that the buyer should give notice to the seller specifying the nature of the defect in the machine sold without undue delay after he has discovered or ought to have discovered the defect(179). This implicitly implies that the buyer must also examine the goods within as short a period as is practicable in the circumstances. In addition, Article 7.2.2-e UP obliges the aggrieved party (e.g. the buyer) to "*require performance within a reasonable time after it has, or ought to have, become aware of the non-performance*", which clearly implies that the buyer should, in case of a defective performance, examine the goods delivered(180). The Arrondissementsrechtbank Zwolle (Netherlands), interpreted the words of Article 39/1 CISG "*or ought to have discovered*" by reference to the concept of good faith adopted in the UNIDROIT Principles (as well as in Article 7(1) CISG) and concluded that the buyer ought to have examined the goods more carefully, which would have permitted timely discovery of the defects(181).

(179) This Illustration explicitly says: "*Under a contract for the sale of high-technology equipment the purchaser loses the right to rely on any defect in the goods if it does not give notice to the seller specifying the nature of the defect without undue delay after it has discovered or ought to have discovered the defect*".

(180) Schelhaas, Harriet, Chapter 7: Non-performance, Section 2: Right to Performance, in: Vogenauer, Stefan / Kleinheisterkamp, Jan (Eds.), "Commentary on the Unidroit Principles on International Commercial Contracts (PICC)", Oxford University Press, 2009, Article 7.2.2 para. 50.

(181) Decision No. HA ZA 95-640, dated 05.03.1997, available at: http://www.unilex.info/case.cfm?pid=1&do=case&id=332&step=Abstract and in: Unif. L. Rev. 1999-4, p. 1012.

Under the Unidroit Principles too, the period of examination depends on the circumstances of the individual case, including the nature of the defect and goods involved(182): With regard to perishable goods, or goods for immediate use, examination shall follow immediately upon receipt(183). If the goods are durable however, such as machines, the buyer's duty to examine the goods may extend over weeks or even months(184).

In Palestine, either party may ask the judge of summary matters to inspect the goods or to appoint an expert to inspect them(185). PCLD itself clearly provides for a precise pre-determined period of time for giving notice by the buyer to the seller of the non-conformity or defects in the goods(186), namely 15 days after actual delivery of the goods sold(187), and not for instance from the time of contracting(188) or the time of notice(189), since it is normally possible for the buyer to examine the goods after delivery only(190). Given the shortness of this period, one can reasonably conclude that examination of the goods by the buyer should happen quickly. Thus, taking into consideration the variability of the period of time for the examination of the goods recognized by Article 38 CISG, the preference of this innovative and flexible solution over the rigid and short period rule of PCLD is tenable. Interestingly the Palestinian Civil Law Draft adopts a flexible standard for the examination of the thing sold: According to Article 470/1 the buyer who takes delivery of the thing sold must ascertain its condition as soon as he is able to do so in accordance with common usage(191). Though this standard is clearly in accord with CISG, it is unfortunately not followed by PCLD.

(182) Vogenauer / Kleinheisterkamp, Schelhaas, *supra* note 180, Article 7.2.2 para. 52.
(183) *Ibid*.
(184) *Ibid*.
(185) Shawarbi, *supra* note 24, 485.
(186) Article 102/2 thereof.
(187) *Ibid*.
(188) Shawarbi, *supra* note 24, 488.
(189) Al-Manshawi, *supra* note 25, 89.
(190) Shawarbi, *supra* note 24, 488.
(191) It should also be mentioned that Mejella, i.e. the civil law in force in Palestine, eventually allows for a relatively long period of examination of the goods sold in order to discover the hidden defects.

Under CISG, this period of examination begins to run upon delivery of the goods(192), which generally corresponds to the time risk of loss passes to the buyer(193). PCLD clearly provides that the 15-day period of notice, and thus the examination period, starts with the (actual) physical possession of the goods by the buyer. The Official Illustration No. 7 to Article 1.7 UP, mentioned above, also implies the delivery of the goods as the starting point for examination by the buyer.

Under CISG, special consideration shall however be given to all latent defects which could be discovered only later(194) (e.g. after putting the goods into operation(195)). Article 102 PCLD clearly deals with manifest defects(196), i.e. defects that could be discovered by a normal examination of the goods(197); with regard to latent defects, by contrast, the general rules of contract shall apply according to which the buyer should give notice to the seller of latent defects when they become apparent(198).

If the goods are delivered before the date for delivery(199) (e.g. before the exact time or the period during which delivery is due), the buyer shall not examine the goods before the date of delivery is due(200). If the goods are

(192) Decision of Landgericht Berlin – Germany, No. 103 O 213/02, dated 21.03.2003; Decision of Tribunale di Vigevano – Italy, No. 405, dated 12.07.2000; Decision of Arrondissementsrechtbank Zwolle – Netherlands, No. HA ZA 95-640, dated 05.03.1997; Decision of Landgericht Hannover – Germany, No. 22 O 107/9301.12.1993.

(193) Article 69 CISG.

(194) Decision of Oberster Gerichtshof – Austria, No. 7 Ob 301/01t, dated 14.01.2002; Decision of Bundesgerichtshof – Germany, No. VIII ZR 287/98, dated 03.11.1999; Decision of Tribunale di Vigevano – Spain, No. 405, dated 12.07.2000; CISG-AC Opinion no 2, *supra* note 162, Article 38 para. 3 (at p. 378): "*The period for examining for latent defects commences when signs of the lack of conformity become evident*". Kruisinga, *supra* note 32, 27.

(195) Veneziano, *supra* note 15, 50; Abd-Elaziz, *supa* note 15, 177-178.

(196) Article 102/1 PCLD clearly reads: "*If, after taking over the goods, it becomes clear to the buyer that the goods sold are … defective*".

(197) Article 470/2 of the Palestinian Civil Law Draft.

(198) Id.

(199) See Articles 37 & 52 CISG.

(200) Schlechtriem / Schwenzer, Schwenzer, *supra* note 14, 569; Abd-Elaziz, *supa* note 15, 180.

delivered however during the period agreed upon by the parties, the period of examination starts with the actual delivery of the goods(201). Needless to say, under all three instruments the parties may agree upon the period during which the buyer must examine the goods(202).

The general rule of Article 38/1 CISG, as far as the period of examination is concerned, applies to contracts involving carriage of the goods and to goods redirected or redispached by the buyer(203). The period of examination starts to run however with the arrival of the goods at their (final) destination (Article 38/2-3 CISG), i.e. when the goods within the buyer's sphere of influence. Yet, in case of redirection or redispach of the goods, the seller at the time of the conclusion of the contract ought to have known of the possibility of such redirection or redispatch and the buyer did not have a reasonable opportunity for examination before redirection or redispatch. 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 have postponed examination until the goods arrived at Abu Dhabi even though the contract provided for delivery FOB Tallinn(204). Similarly, it is held that the buyer, who redirects the wood sold to his end customer with the seller's knowledge, may postpone examination until the goods arrive to that customer(205). In another case, a Swiss court decided that the buyer could not have deferred examination because he had immediately redispatched only a small quantity of the delivered goods, keeping the rest in its warehouse for a certain period of time; examination can be deferred only if all the goods to be delivered are redirected or redispatched(206). This last decision clearly implies that the buyer had a real opportunity to

(201) *Ibid*.
(202) Article 6 CISG; Articles 1.1 & 1.5 UP; Article 102/4 PCLD.
(203) Honnold, *supra* note 19, 273; Abd-Elaziz, *supa* note 15, 190.
(204) Decision of Helsinki Court of Appeal – Finland, No. S 96/1129, dated 29.01.1998. See also: Decision of Landgericht Landshut – Germany, No. 54 O 644/94, dated 05.04.1995; Decision of Landgericht Berlin – Germany, No. 102.0.181/98, dated 25.05.1999; Decision of Tribunale di Appello di Lugano, seconda camera civile – Switzerland, No. 12.97.00193, dated 15.01.1998; Decision of Audiencia Provincial de Granada, No. 143/2000, dated 02.03.2000.
(205) Decision of Oberlandesgericht Köln - Germany, No. 22 U 202/93, dated 22.02.1994.
(206) Decision of Obergericht Kanton Luzern, No. 11 95 123/357, dated 08.01.1997.

examine the goods as from the time of delivery, and he should have examined the goods before being redirected or redispatched.

Pursuant to their sphere of application, neither the Unidroit Principles nor PCLD explicitly address the situations governed by Article 38/2-3 CISG. Thus, the general rule of examination according to both instruments would apply.

As for the method of examination, the parties may – according to all three instruments - agree to whatever method they want(207). Examination may also happen according to usages or practices established between the parties(208). In all events, examination shall not be very expensive(209). That is to say, it shall be reasonable in the given circumstances of each case(210), including the size and structure of the buyer's firm(211), the characteristic features and quantity of the

(207) Article 6 CISG; Articles 1.1, 1.3, 1.5 UP; Article 2 PCLD.

(208) Decision of Oberster Gerichtshof – Austria, No. 1 Ob 223/99x, dated 27.08.1999, (the Court found that, in the absence of a specific agreement between the parties, the required manner of examination can be inferred from trade usages and practices); Decision of Landgericht Trier – Germany, No. 7 HO 78/95, dated 12.10.1995, (the court found that the buyer is not bound to have the wine examined with respect to possible water additions, since this kind of examination is not included among the ones generally undertaken in the wine branch); Honsell, Magnus, *supra* note 15, 413; Schlechtriem / Schwenzer, Schwenzer, *supra* note 14, 565; Bianca, C. M., Examination of goods, in: Bianca, C. M. / Bonell, M. J. (Eds.), "*Commentary on the International Sales Law*", Giuffrè: Milan (1987) {Commentaries by J. Barrera Graf , H.T. Bennett , C.M. Bianca , M.J. Bonell , G. Eörsi , M. Evans , E.A. Farnsworth , W. Khoo , V. Knapp , O. Lando , D. Maskow , B. Nicholas , J. Rajski , K. Sono , D. Tallon , M. Will}, 297-298; Shafik, *supra* note 41, p. 152; Musa, supra note 83, 184; Abd-Elaziz, *supa* note 15, 192.

(209) Decision of Oberster Gerichtshof – Austria, No. 1 Ob 223/99x, dated 27.08.1999; Decision of Landgericht Paderborn – Germany, No. 7 O 147/94, dated 25.06.1995; Honsell, Magnus, *supra* note 15, 414.

(210) Schlechtriem / Schwenzer, Schwenzer, *supra* note 14, 565-566; Honsell, Magnus, *supra* note 15, 414; Bianca / Bonell, Bianca, *supra* note 208, 298; Az-Zuqrod, *supra* note 103, p. 180; Abd-Elaziz, *supa* note 15, 192.

(211) Decision of Oberlandesgericht Karlsruhe – Germany, No. 1 U 280/96, dated 25.06.1997; Decision of Bundesgerichtshof – Germany, No. VIII ZR 259/97, dated 25.11.1998; Musa, supra note 83, 184.

goods to be examined(212), the efforts necessary for their examination(213), and the type of the legal remedy selected(214).

C-2: Giving notice of the non-conformity

If the buyer takes delivery of the goods(215), he should give notice to the seller of the lack of conformity, Article 39/1 CISG. After delivery, the seller generally has no way to learn of any lack of conformity of the goods that becomes apparent thereafter unless the buyer notifies the seller(216). This duty to notify applies to all cases of non-conformity in the meaning of Article 35 CISG(217) whether fundamental or not(218). It does not only cover the original delivery of the goods, but also the delivery by the seller of substitute goods, delivery of the missing part of the goods and remedy of the lack of conformity by repair(219). Frankly speaking, notice of the non-conformity was one of the most disputed matters in the preparation of CISG(220). Besides, most legal disputes involving lack of conformity under CISG are not related to the lack of

(212) Schlechtriem / Schwenzer, Schwenzer, *supra* note 14, 566; Bianca / Bonell, Bianca, *supra* note 208, 298. Az-Zuqrod, *supra* note 103, 180.
(213) Schlechtriem / Schwenzer, Schwenzer, *supra* note 14, 566.
(214) Decision of Oberster Gerichtshof, No. 7 Ob 301/01t, dated 14.01.2002, available at: http://www.unilex.info/case.cfm?pid=1&do=case&id=858&step=Abstract.
(215) Arbitral Award of Netherlands Arbitration Institute, No. 2319, dated 15.10.2002.
(216) Reitz, John C., "A History of Cutoff Rules as a Form of *Caveat Emptor*: Part I - The 1980 U.N. Convention on the International Sale of Goods", 36 *Am. J. Comp. L.* 1988, pp. 437-472, 444.
(217) Honnold, *supra* note 19, 278.
(218) Honsell, Magnus, *supra* note 15, 425.
(219) Schlechtriem / Schwenzer, Schwenzer, *supra* note 14, 564, 575; Decision of Landgericht Oldenburg – Germany, No. 12 O 674/93, dated 09.11.1994, (a failed repair represents another non- performance of the contract, so that the exercise of remedies of the buyer for breach of contract by the seller requires another notice).
(220) CISG-AC Opinion no 2, *supra* note 162, Comment no 1; Schlechtriem, *supra* note 19, 116. Baasch Andersen, Camilla, "Reasonable Time in Article 39(1) of the CISG – Is Article 39(1) Truly a Uniform Provision?" 16 *Pace Int'l L. Rev.* Vol. 16 (2004), pp. 63-176, 93; Reitz, *supra* note 216, 441.

conformity, but rather to the satisfaction of the formal duty to give notice thereof(221).

Each claimed lack of conformity must be specifically described (222); the notice of one defect does not mean that other defects need not to be reported to the seller. In one case, it is therefore decided that the fact that the goods were delivered without the required certificate was in itself a case of non conformity which the buyer should have notified to the seller without having to wait for a formal declaration by the competent authority that the goods cannot be further processed and resold(223).

As far as the textual requirement of the notice is concerned, it should first of all be noted that notice in general terms that the goods are lacking conformity will not suffice(224). Notice shall rather name the nature and extent of the lack of conformity(225) so that each possible misleading can be avoided(226): It should therefore define whether and to which extent the alleged lack of conformity is missing or excessive part of the goods, lack in quality or delivery of a different kind of goods.

Similarly, the notice should identify the particular goods claimed to be non-conforming(227) and convey the results of the buyer's examination(228). However,

(221) Günther, Klaus, "Requirement for a textual precise notice of lack of conformity under Art. 39(1) CISG as interpreted by the German courts", *International Sales* No. 24, 1999, pp. 4-7, 4; Baasch Andersen, *supra* note 220, 77; Schwenzer, *supra* note 169, 366.

(222) Schlechtriem / Schwenzer, Schwenzer, *supra* note 14, 577; Baasch Andersen, *supra* note 220, 82.

(223) Decision of Oberlandesgericht München, No. U346/02, dated 13.11.2002. See also: Decision of Landgericht Oldenburg – Germany, No. 12 O 674/93, dated 09.11.1994.

(224) Honsell, Magnus, *supra* note 15, 426; Honnold, *supra* note 19, 279; Günther, *supra* note 221, 5; Abd-Elaziz, *supa* note 15, 208.

(225) Decision of Landgericht Bochum – Germany, dated 24.01.1996. Shafik, *supra* note 41, 154.

(226) Günther, *supra* note 221, 5.

(227) Decision of Bundesgerichtshof – Germany, No. VIII ZR 287/98, dated 03.11.1999; Decision of Oberlandesgericht Koblenz – Germany, No. 2 U 31/96, dated 31.01.1997. Kruisinga, *supra* note 32, 90.

(228) Decision of Landgericht Erfurt – Germany, No. 3 HKO 43/98, dated 29.07.1998; Schlechtriem / Schwenzer, Schwenzer, *supra* note 14, 577; Abd-Elaziz, *supa* note 15, 211.

this textual requirement of the notice should not be understood too strictly: the rationale of the notice is merely to inform the seller, so that he will be able to take the appropriate steps(229) (e.g. to examine the goods and arrange for a substitute delivery or otherwise remedy the lack of conformity) or to find the necessary evidence(230), and not to shift the risk of the non-conformity to the buyer(231). It should not be forgotten that the seller, and not the buyer, is the party who breached the contract when delivering non-conforming goods(232). Therefore, one cannot agree(233) with the German court that decided, even if the buyer has bought a single item of a certain kind, the notice of non-conformity given by him should specify the item in question precisely (i.e. in terms of serial number and date of delivery) (234). The reasoning by the court that the seller should not read all sales documents in order to identify the allegedly non-conforming goods is not convincing since it results in shifting the risk of non-conformity to the buyer. Of course, in time of electronic communications, the seller can ask the buyer for more information if he pleases to do so(235).

(229) Decision of Landgericht Erfurt – Germany, No. 3 HKO 43/98, dated 29.7.1998; Decision of Oberlandesgericht Karlsruhe – Germany, No. U 179/02, dated 06.03.2003, available at: http://cisgw3.law.pace.edu/cases/030306g1.html; Decision of Bundesgerichtshof – Germany, No. VIII ZR 306/95, dated 04.12.1996; Schlechtriem / Schwenzer, Schwenzer, *supra* note 14, 575; Kruisinga, *supra* note 32, 89..

(230) Veneziano, *supra* note 15, 40; Reitz, *supra* note 216, 446; Decision of U.S. District Court, North. District, Illinois, East. Div., dated 21.05.2004, (the Court stated that the objective of CISG in requiring inspection in as short a period of time as practicable, and notice promptly thereafter, is to avoid controversies where because of the passage of time the condition of the goods at the time of transfer can no longer be reliably established).

(231) Decision of Schweizerisches Bundesgericht, No. 4C.395/2001/rnd, dated 28.05.2002; Honsell, Magnus, *supra* note 15, 426.

(232) Günther, *supra* note 221, 5.

(233) Ferrari, *supra* note 20, 488.

(234) Decision of Landgericht Marburg, No. 2 O 246/95, dated 12.12.1995.

(235) Decision of Bundesgericht – Switzerland, No. 4C.198/2003/grl, dated 13.11.2003, available at: http://www.globalsaleslaw.com/content/api/cisg/urteile/840.pdf, "*Eine präzisere Umschreibung verlangt der Wortlaut* von *Art. 39 Abs. 1 CISG nicht. Dies ist auch nicht erforderlich, da dem Verkäufer im Zeitalter der elektronischen Kommunikation ohne weiteres zumutbar ist, Rückfragen zu stellen, wenn er vom Käufer genauere Angaben haben möchte*".

Whether the notice is sufficiently specified or not will depend upon the circumstances of the given case(236), including the category of goods involved, the alleged lack of conformity and the relative commercial positions of the buyer and the seller(237) - for instance, the notice given by an expert shall be much more detailed than the one given by a non-expert(238), and "a buyer of machinery and technical equipment needs to give a notice only of the symptoms, not an explanation of the underlying causes"(239). The Official Illustration No. 7 of Article 1.7 of the Unidroit Principles clearly differentiates in this regard between two situations: whether the high-technology equipment sold to a buyer operates in a country where such equipment is commonly used or not. In the first case, the buyer must precisely specify the nature of the defect he discovers; otherwise, he will lose the right to rely on this defect. In the latter

(236) Günther, *supra* note 221, 5.

(237) According to the case law, the following descriptions of a lack of conformity are sufficiently specific under Article 39/1 CISG: notice that floor tiles suffered from serious premature wear and discoloration (Decision of Hoge Raad – Netherlands, No. 16.442, dated 20.02.1998); and 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 (Decision of Bundesgerichtshof – Germany, No. VIII ZR 287/98, dated 03.11.1999).
By contrast, the following descriptions of a lack of conformity are not sufficiently specific under Article 39/1 CISG: notice that cotton cloth was of bad quality (Decision of Rechtbank van Koophandel, Kortrjik – Belgium, No. 8336, dated 16.12.1996); notice that failed to specify that cheese was infested with maggots (Decision of Arrondissementsrechtbank Roermond – Netherlands, No. 900336, dated 19.12.1991); notice referring to the final customers' complaints without specifying the defects (Decision of Landgericht Saarbrücken – Germany, No. 8 O 49/02, dated 02.07.2002); and notice that frozen bacon was rancid, but which did not specify whether all or only a part of the goods were spoiled (Decision of Landgericht München, No. 10 HKO 2375/94, dated 20.03.1995).

(238) Günther, *supra* note 221, 5; Kruisinga, *supra* note 32, 90; Decision of Landgericht Erfurt - Germany, No. 3 HKO 43/98, dated 29.07.1998, "*Von einem Fachmann kann unter Umständen eine genauere Bezeichnung der Vertragswidrigkeit der Ware erwartet werden als von einem Fachunkundigen*".

(239) CISG-AC Opinion no 2, *supra* note 162, Comment no 5.14. See also: Decision of Tribunale di Busto Arsizio – Italy, dated 13.12.2001; Decision of Oberlandesgericht Koblenz - Germany, No. 2 U 923/06, dated 14.12.2006. Schlechtriem, *supra* note 19, 120.

case, i.e. where the buyer operates in a country where the type of equipment sold is so far almost unknown, he will not lose his right to rely on the defect because the seller, being aware of the buyer's lack of technical knowledge, cannot reasonably expect the buyer to properly identify the nature of the defect(240).

According to CISG and the Unidroit Principles, the notice of non-conformity shall be given within a reasonable time after the buyer has discovered it or ought to have discovered it(241). The moment in which the buyer should have discovered the defect is closely connected with the period of examination(242). Special consideration shall also be given to the latent defect. According to the prevailing opinion, notice period of such defect begins with the moment in which it is actually discovered(243) or ought to have been discovered(244). Likewise, it has been decided that, with respect to the defects the buyer could discover upon examination of the goods immediately after delivery, notice was given within the required time limit of 8 days, while with respect to all latent defects which could be discovered only later the time limit for notice was a "*reasonable time"* after discovery in accordance with Articles 38 and 39 CISG(245).

(240) Article 1.7 UP, Official Illustration, No. 8.

(241) Article 39/1 CISG; Article 1.7 UP, Official Illustration, No. 7, first sentence; Decision Arrondissementsrechtbank Zwolle – Netherlands, No. HA ZA 95-640, dated 05.03.1997, available at: http://www.unilex.info/case.cfm?pid=1&do=case&id=332&step=Abstract and in: Unif. L. Rev. 1999-4, p. 1012.

(242) Decision Arrondissementsrechtbank Zwolle – Netherlands, No. HA ZA 95-640, dated 05.03.1997, available at: http://www.unilex.info/case.cfm?pid=1&do=case&id=332&step=Abstract and in: Unif. L. Rev. 1999-4, p. 1012; Decision of U.S. District Court, North. District, Illinois, East. Div., dated 21.05.2004; Decision of Landgericht Berlin – Germany, 103 O 213/02, dated 21.03.2003; Decision of Oberster Gerichtshof – Austria, No. 7 Ob 301/01t, dated 14.01.2002; Decision of So -og Handelsretten (The Maritime and Commercial Court of Copenhagen), No. H-0126-98, dated 31.01.2002; Decision of Oberlandesgericht Schleswig, No. 11 U 40/01, dated 22.08.2002; Decision of Hof van Beroep, Gent – Belgium, No. 1997/AR/384, dated 02.12.2002; Honnold, *supra* note 19, 275; Bianca / Bonell, Bianca, *supra* note 208, 296-297; Veneziano, *supra* note 15, 48, 51.

(243) Honnold, *supra* note 19, 280. Honsell, Magnus, *supra* note 15, 429.

(244) Schlechtriem / Schwenzer, Schwenzer, *supra* note 14, 582; Shafik, *supra* note 41, 155.

(245) Decision of Oberster Gerichtshof – Austria, No. 7 Ob 301/01t, dated 14.01.2002.

Under PCLD, by contrast, the period of notice of non-conformity (i.e. 15 days) begins with the moment in which the buyer physically takes delivery of the goods sold. This implies that he has to act very quickly.

The flexibility of the period within which the buyer must give notice of the non-conformity is widely recognized by CISG(246). such period may be defined in light of the circumstances of each case(247), including whether the lack of conformity is easily discovered(248), nature of the goods(249) (whether

(246) Decision of Tribunale Civile di Cuneo, Sez. I – Italy, No. 45/96, dated 31.01.1996; Decision of Audiencia Provincial de Castellon – Spain, No. 310/2000, dated 16.06.2000, (the court oserved that, with respect to the fixed term of 30 days allowed by Spanish domestic law for notification of defects, Article 39 CISG contained a "laxer wording" to establish the obligation of the buyer to send notice of lack of conformity of the delivered goods); Schlechtriem / Schwenzer, Schwenzer, *supra* note 14, 579; Shafik, *supra* note 41, p. 155; Abd-Elaziz, *supa* note 15, 197.

(247) Decision of Cour de Cassation – France, No. 994 D, dated 26.05.1999; Decision of Oberster Gerichtshof - Austria, No. 7 Ob 301/01t, dated 14.01.2002; Decision of Tribunale di Vigevano – Italy, No. 405, dated 12.07.2000; Decision of Tribunale Civile di Cuneo, Sez. I – Italy, No. 45/96, dated 31.01.1996; Decision of Oberlandesgericht Düsseldorf – Germany, No. 6 U 32/93, dated 10.02.1994; Decision of Oberlandesgericht Düsseldorf – Germany, No. 17 U 136/92, dated 12.03.1993; Decision of Tribunale di Rimini – Italy, No. 3095, dated 26.11.2002; Ferrari, *supra* note 20, 489; Canellas, Anselmo Martinez, "The Scope of Article 44 CISG", 25 *J.L. & Com.* 261 (2005-2006), pp. 261-272, 264; CISG-AC Opinion no 2, *supra* note 162, Comment no 3.3; Abd-Elaziz, *supa* note 15, 198.

(248) Decision of Rechtbank van Koophandel, Kortrijk – Belgium, No. 8336, dated 16.12.1996, (a period of approximately two months after delivery was not reasonable, taking into account that the defects were easily noticeable and that in the trade concerned the goods are usually processed or sold quickly). See also: Decision of Bundesgerichtshof – Germany, No. VIII ZR 321/03, dated 30.06.2004; Decision of Oberlandesgericht Düsseldorf – Germany, No. U 136/92, dated 12.03.1993; Decision of Oberlandesgericht Köln – Germany, No. 18 U 121/96, dated 21.08.1997; Decision of Landgericht Berlin – Germany, No. 99 O 29/93, dated 16.09.1992; Schwenzer, *supra* note 169, 364.

(249) Decision of Tribunale di Vigevano – Italy, No. 405, dated 12.07.2000; Decision of Pretura di Torino – Italy, dated 30.01.1997; Decision of Tribunale di Rimini – Italy, No. 3095, dated 26.11.2002; Decision of U.S. District Court, S.D., Michigan, No. 1:01-CV-691, dated 17.12.2001; Schlechtriem, *supra* note 19, 117; Schwenzer, *supra* note 169, 364. Kruisinga, *supra* note 32, 79.

perishable(250), seasonal(251) or living animals(252) - with such kinds of goods the notice period should be shorter than if they were durable goods(253)), quantity of the goods(254) and the size and structure of the buyer's firm(255), the remedy chosen – where the buyer chooses to declare the contract avoided, the seller will need more time to take care of his goods, while damages or price reduction will not place so much pressure on the buyer(256), etc. The flexible language of Article 39/1 CISG "*within a reasonable time*" does *per se* allow divergent interpretations(257).

Thus, the case law has set different notice periods ranging from the immediate time following the installation of the machine sold(258) or the

(250) Decision of Oberlandesgericht München – Germany, No. 7 U 3758/94, dated 08.02.1995, (the Court held that under normal circumstances in a sale of durable non season-dependent goods eight days is a reasonable time of notice). See also: Decision of Rechtbank Arnhem – Netherlands, No. 172920/HA ZA 08-1228, dated 11.02.2009; Decision of Tribunale di Vigevano – Italy, No. 405, dated 12.07.2000; Decision of Oberlandesgericht Karlsruhe – Germany, No. 12 U 179/02, dated 06.03.2003, available at: http://cisgw3.law.pace.edu/cases/030306g1.html; Honsell, Magnus, *supra* note 15, 430; Honnold, *supra* note 19, 280; Schlechtriem / Schwenzer, Schwenzer, *supra* note 14, 579.

(251) Decision of Amtsgericht Augsburg – Germany, No. 11 C 4004/95, dated 29.01.1996, available at: http://cisgw3.law.pace.edu/cases/960129g1.html, (the maximum period of time considered reasonable for the pupose of Article 39(1) was one month after discovery, and that certain factors -- such as the seasonal nature of the goods, which in the present case concerned fashion wear for a particular season -- would necessitate that the buyer give notice even sooner). See also: Decision of Oberster Gerichtshof – Austria, No. 1 Ob 223/99x, dated 27.08.1999; Decision of Oberlandesgericht München – Germany, No. 7 U 3758/94, dated 08.02.1995; Schlechtriem / Schwenzer, Schwenzer, *supra* note 14, 579.

(252) Decision of Landesgericht Flensburg – Germany, No. 4 O 369/99, dated 19.01.2001, (the buyer had examined the sheep within the time required for in Article 38/1 CISG, but could not prove that he had given timely notice concerning the lack of conformity).

(253) Schwenzer, *supra* note 169, 364-365. Kruisinga, *supra* note 32, 79.

(254) Decision of Oberster Gerichtshof – Austria, No. 7 Ob 301/01t, dated 14.01.2002.

(255) Decision of Oberster Gerichtshof – Austria, No. 7 Ob 301/01t, dated 14.01.2002.

(256) Girsberger, Daniel, "The Time Limits of Article 39 CISG", 25 *J. L. & Com.* 2005-2006, pp. 241-251, 242; Schwenzer, *supra* note 169, 365. Kruisinga, *supra* note 32, 76-77.

(257) Ferrari, *supra* note 20, 488.

(258) Decision of Schweizerisches Bundesgericht, No. 4A_68/2009, dated 18.05.2009, (sale of a packaging machine).

examination of the goods(259) to two months after such examination(260) or delivery of the goods sold(261). By contrast, notice of non-conformity has been found to be untimely in periods ranging from seven days(262) to seven months from the moment in which the non-conformity was discovered or ought to have been discovered(263), and from four days(264) to three years after delivery of the goods(265). Having said that, and for the sake of minimizing discrepancies in international practice(266), I argue that one month could be a reasonable period for giving the notice of non-conformity by the buyer to the seller(267), which can

(259) Decision of Tribunale di Forlì – Italy, No. 2280/2007, dated 11.12.2008, (purchase of several different models of shoes).

(260) Decision of Cour d'Appel de Colmar – France, dated 24.10.2000, (sale of a determined amount of glue).

(261) Decision of U.S. District Court, Southern District of New York, No. 00 Civ. 5189 (RCC), dated 23.08.2006, (contract to build a production system for the box used in packaging cassettes).

(262) Decision of Hof van Beroep, Gent – Belgium, No. 1999A/2160, dated 23.05.2001, (sale of textiles).

(263) Decision of Pretura di Torino – Italy, dated 30.01.1997, (sale of cotton fabric).

(264) Decision of Landesgericht Flensburg – Germany, No. 4 O 369/99, dated 19.01.2001, (sale of living sheep delivered for slaughter).

(265) Decision of Oberlandesgericht Düsseldorf – Germany, No. 17 U 82/92, dated 08.01.1993, (sale of tinned cucumbers).

(266) Baasch Andersen, *supra* note 220, 97; Schwenzer, *supra* note 169, 365.

(267) Notably, such a period is already suggested by some high level courts in different countries, e.g.: Decision of Obergericht Kanton Luzern – Switzerland, No. 11 95 123/357, dated 08.01.1997, "*Deutsche Autoren wollen tendenziell einen Zeitraum* von *acht Tagen zugrunde legen. Auch die ersten deutschen Entscheidungen zum CISG weisen in diese Richtung. Wo aufgrund langjähriger Tradition im nationalen Recht auch eine Rüge erst mehrere Monate nach Entdeckung des Mangels als noch innerhalb angemessener Frist erhoben gilt - wie namentlich im US-amerikanischen Recht - dürfte diese Sichtweise auf die Auslegung des CISG durchschlagen. Will man allzugroîen Auslegungsdivergenzen vorbeugen, erscheint eine Annäherung der Standpunkte unabdingbar. Als grobem Mittelwert sollte man deshalb* von *ca. wenigstens einem Monat ausgehen*"; Decision of Bundesgerichtshof – Germany, No. VIII ZR 287/98, dated 03.11.1999, "*die regelmäßige einmonatige Rügefrist nach Art. 39 Abs. 1 CISG*"; Decision of Bundesgerichtshof – Germany, No. VIII ZR 159/94, dated 08.03.1995, "*Selbst wenn man insoweit - nach Auffassung des erkennenden Senats sehr großzügig - wegen der unterschiedlichen nationalen Rechtstraditionen* von *einem ‚groben Mittelwert'* von *etwa einem Monat ausgehen wollte …, war die Rügefrist vor dem 3. März 1992*

however be adjusted according to the given circumstances of the case at issue(268),(269). Though CISG itself does not provide for a precise notice period,

abgelaufen"; Decision of Oberlandesgericht Stuttgart – Germany, No. 5 U 195/94, dated 21.08.1995, "*Denn auf diesen Mangel kann sich die Beklagte wegen Art.39 CISG nicht mehr berufen. Hiernach verliert der Käufer das Recht, eine Vertragswidrigkeit der Ware geltend zu machen, wenn er diese nicht spezifiziert rügt innerhalb angemessener Frist, nachdem er sie festgestellt hat bzw. nachdem er sie gem. Art. 38 CISG hätte feststellen müssen, Diese Frist beträgt im Rahmen des CISG im Hinblick auf die unterschiedlichen nationalen Rechtstraditionen etwa einen Monat*"; Decision of Cour d'Appel de Grenoble – France, No. 48992, dated 13.09.1995; Decision of Oberster Gerichtshof – Austria, No. 5 Ob 538/95, dated 27.05.1997, available at: http://www.cisg.at/5_53895.htm, (Insbesondere wurden Rügen nach mehr als einem Monat ausnahmslos als verspätet angesehen), it is worth noting however, that the Oberster Gerichtshof – Austria changed its opinion later, see for instance: Decision of Oberster Gerichtshof – Austria, No. 1 Ob 223/99x, dated 27.08.1999, (the court suggested a period of approximately fourteen (14) days for notice is to be considered reasonable).

Likewise, the arbitral tribunals also suggest the one-month period of notice, see for instance: Arbitral Award of the ICC Court of Arbitration, No. 8962, dated 00.09.1997: "*It is apparent that the buyer was able to find the deficiencies already at the delivery (besides it was not even found whether the Defendant has provided satisfactory evidence of the deficiencies). In such a case, a period of time which is longer than one month cannot be considered to be reasonable such a period must (be) considerably shorter*"; Arbitral Award of the Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, No. 256/1996, dated 04.06.1997, available at: http://cisgw3.law.pace.edu/cases/970604r1.html, "*the Tribunal found that the [Buyer] failed to file the claim according to the requirements [agreed by the parties] {i.e.* 30 days following delivery*}, and therefore, by virtue of CISG Art. 39, lost his right to rely on the non-conformity of the goods to the requirements of the contract*"; Arbitral Award of the ICC Court of Arbitration – Paris, No. 7331/1994, dated 00.00.1994, (the contractual notice period of one month was reasonable, particularily since the defective nature of the goods was easy to discover).

In addition, some other writers also advocate such a period, see, for instance: Schwenzer, *supra* note 169, 358-359; Baasch Andersen, *supra* note 220, 161. Contra however: CISG-AC Opinion no 2, *supra* note 162, Article 39 para. 3 (at p. 379): "*No fixed period whether 14 days, one month or otherwise, should be considered as reasonable in the abstract without taking into account the circumstances of the case*".

(268) CISG-AC Opinion no 2, *supra* note 162, Comment no 5.12: "*One month or even longer to give notice might be reasonable under the particular facts of the case*"; Decision of Oberster Gerichtshof – Austria, No. 1 Ob 223/99x, dated 27.08.1999, (the court suggested a period of approximately fourteen (14) days for notice is to be considered

this one month period can be taken as a starting point. One shall not forget that the seller will normally suffer no ill consequences from failing to receive the notice from the buyer quickly(270), and the buyer will suffer essential consequences, namely loss of all remedies, if he is considered not to notify the seller timely. Thus, the buyer has an overall rough average period of two months for examination and notice(271), which may however be adjusted according to the circumstances of the individual case. In all events, the buyer should not lose his remedies merely because he did not examine the goods on time unless such failure also results in a late notice(272). What matters here is clearly the time of notice: whether it is given "*within a reasonable time after he … ought to have discovered*" the lack of conformity of the goods or not(273). In

reasonable, insofar as no specific circumstances suggest otherwise); Baasch Andersen, *supra* note 220, 160-161.

(269) Girsberger (*supra* note 256, 247) goes in the same direction and suggests "that a fixed notice period, depending on the type of goods sold, would serve as a starting or vantage point, upon which certain groups of situations should be distinguished".

(270) Reitz, *supra* note 216, 443-451, who rejected all arguments for the cut-off period for notice, i.e. the possible loss by the seller of evidence, the seller's ability to avoid some costs of his breach by offering cure, and the seller's ability to claim against his supplier or carrier before time of prescription lapses. In addition, it is worth mentioning here that the amended section 2-607/3-a UCC adopts an obvious buyer-friendly rule, whereby buyer's recovery is precluded only to the extent that the seller can establish that it was prejudiced by the failure to receive timely notice.

(271) CISG-AC Opinion no 2, *supra* note 162, Article 39 para. 2 (at p. 379): "*Unless the lack of conformity was evident without examination of the goods, the total amount of time available to give notice after delivery of the goods consists of two separate periods, the period for examination of the goods under article 38 and the period for giving notice under article 39. The Convention requires these two periods to be distinguished and kept separate, even when the facts of the case would permit them to be combined into a single period for giving notice*". Schlechtriem, *supra* note 19, 119; Schlechtriem / Schwenzer, Schwenzer, *supra* note 14, 579.

(272) CISG-AC Opinion no 2, *supra* note 162, Article 38 para. 1 (at p. 378): "*Although a buyer must examine the goods, or cause them to be examined, within as short a period as is practicable in the circumstances, there is no independent sanction for failure to do so. However, if the buyer fails to do so and there is a lack of conformity of the goods that an examination would have revealed, the notice period in article 39 commences from the time the buyer "ought to have discovered it"*".

(273) Flechtner, *supra* note 162, 19.

principle, "the buyer "ought to have discovered" the lack of conformity upon the expiration of the period for examination of the goods under article 38", but exceptionally this could also be the time of delivery "where the lack of conformity was evident without examination"(274). Needless to say, the parties may agree on a specific period of time for notice of the lack of conformity(275). Usages can also define this period(276).

Under the Unidroit Principles, the buyer shall give notice of non-conformity(277) to the seller "*without undue delay"* after he has discovered or ought to have discovered it(278). The extent of such period might be shorter under the Unidroit Principles than under CISG. With regard to PCLD, it clearly stipulates a precise period of fifteen days during which the notice shall be given(279).

Nevertheless, it seems that a USA court equated the period of examination with the notice period (Schwenzer, *supra* note 169, 363) when saying that Buyer could have and should have discovered the bad condition of the goods much earlier than it actually had, if only it had opened some of the boxes containing the frozen ribs. Since no such inspection had in fact taken place and the defects were discovered only 9 days after delivery when the processing of the ribs began, the notice of non-conformity, though given to Seller immediately after discovery of the defects, under the circumstances was no longer given timely, Decision of U.S. District Court, North. District, Illinois, East. Div., dated 21.05.2004.

(274) CISG-AC Opinion no 2, *supra* note 162, Article 39 para. 1 (at p. 378).

(275) Girsberger, *supra* note 256, 242; Abd-Elaziz, *supa* note 15, 199.

(276) Girsberger, *supra* note 256, 242; Decision of Oberster Gerichtshof – Austria, No. 10 Ob 344/99g, dated 21.03.2000, (as seller and buyer had previously concluded contracts on the supply of wood, and as the seller had clearly referred to the local usage in its order form, the Court found that the buyer ought to have known of the local German usage. The usage then prevails over the provisions of CISG, including Article 39).

(277) Vogenauer, Stefan, Chapter 4: Interpretation, in: Vogenauer**,** Stefan / Kleinheisterkamp, Jan, "Commentary on the Unidroit Principles on International Commercial Contracts (PICC)", Oxford University Press, 2009, Article 4.2 para. 1; Vogenauer / Kleinheisterkamp, Huber, *supra* note 116, Article 7.3.2 para. 10.

(278) Article 1.7 UP, Official Illustration, No. 7, first sentence (emphasis added).

(279) Article 102/2 PCLD. According to Article 470/1 of the Palestinian Civil Law Draft however, the buyer must give notice of the defects he discovers in the thing sold to the seller within a reasonable time, and in the case of defects that cannot be discovered by means of normal inspection, the buyer shall, upon the discovery of the defect, at once give notice thereof to the seller. In cases of guarantee however, the buyer must –

Unless the parties agree on a specific form of the notice(280), the buyer is free under CISG to give any kind of notice of non-conformity and by any means: It can be in writing(281) (e.g. through a service of process(282), or by means of fax, telefax or telegram(283)) or orally(284) (e.g. via telephone(285)). Since the oral notice may raise crucial problems of evidence(286), it is recommended that the oral notice be confirmed in writing(287). In all events, however, the notice must be given to the seller or the person authorized by him(288). Whereas such notice

according to Article 481 of the Palestinian Civil Law Draft - give notice to the seller within one month from the date of the appearance of the defect.

(280) Decision of Landgericht Baden-Baden, Germany, No. 4 O 113/90, dated 14.08.1991; Decision of Oberlandesgericht Karlsruhe – Germany, No. 1 U 280/96, dated 25.06.1997.

(281) Decision of Cour d'Appel de Versailles, 12ème chambre, 1ère section – France, No. 56, dated 29.01.1998.

(282) Decision of U.S. District Court, Eastern District of Kentucky, No. 07-161-JBT, dated 18.03.2008; Decision of Cour d'Appel de Versailles, 12ème chambre, 1ère section – France, No. 56, dated 29.01.1998, (Article 39 CISG does not require that the notice be given by means of a service of process).

(283) Schlechtriem / Schwenzer, Schwenzer, *supra* note 14, 578; Veneziano, *supra* note 15, 51.

(284) Decision of Oberlandesgericht Karlsruhe – Germany, No. 12 U 179/02, dated 06.03.2003, available at: http://cisgw3.law.pace.edu/cases/030306g1.html; Schlechtriem / Schwenzer, Schwenzer, *supra* note 14, 578; Abd-Elaziz, *supa* note 15, 206; Musa, supra note 83, 185.

(285) Decision of Schweizerisches Bundesgericht – Switzerland, No. 4C.144/2004, dated 07.07.2004; Decision of Landgericht Frankfurt am Main – Germany, No. 3/3 O 37/92, dated 09.12.1992; Honsell, Magnus, *supra* note 15, 432; Schlechtriem / Schwenzer, Schwenzer, *supra* note 14, 578.

(286) Decision of Landesgericht Flensburg – Germany, No. 4 O 369/99, dated 19.01.2001; Decision of Landgericht Stuttgart – Germany, No. 3 KfH 0 97/89, dated 31.08.1989; Decision of Landgericht Marburg – Germany, No. 2 O 246/95, dated 12.12.1995; Decision of Amtsgericht Kehl – Germany, 3 C 925/93, dated 06.10.1995; Decision of Landgericht Frankfurt am Main – Germany, No. 3/13 O 3/94, dated 13.07.1994; Honsell, Magnus, *supra* note 15, 432; Veneziano, *supra* note 15, 51.

(287) Honsell, Magnus, *supra* note 15, 432; Schlechtriem / Schwenzer, Schwenzer, *supra* note 14, 578; Veneziano, *supra* note 15, 51.

(288) Decision of Hoge Raad – Netherlands, No. C04/007HR, dated 04.02.2005, (the seller could not have been unaware of the notice sent on time to the Belgian company, since there was clear evidence that the seller and the Belgian company shared responsibility for the sale (being the former responsible for the execution and the latter for the

is effective under CISG on dispatch, it is effective according to Article 1.10 UP only when it reaches the seller.

PCLD provides that any notice given to the debtor, including the notice of non-conformity, must be officially summoned or sent by a registered letter. In cases of emergency however, it can be sent via fax, telefax, telegram or any other new means of communication(289). It goes without saying that the parties may agree otherwise: the buyer may be allowed by agreement to give oral notice of non-conformity(290). Thus, whereas CISG does not require any form for the notice of non-conformity unless the parties agree otherwise, PCLD says that such notice shall be given in a specific form unless the parties agree otherwise. Likewise, giving the notice through the electronic communication means is recognized by CISG as a principle, whereas it is accepted by the PCLD as an exception in cases of emergency only.

Under Article 39/2, the buyer must in any event report to the seller the notice of non-conformity, including hidden defects(291) at the latest within a period of two years from the date on which the goods are actually handed over to the buyer; otherwise, he loses the right to rely on the non-conformity of the goods. The reason behind this time-limit rule is the safeguard of international commercial contracts: it would be harmful to both parties if the buyer indefinitely retained the right to rely on the lack of conformity against the seller.

administration)). See also: Decision of Landesgericht Köln – Germany, No. 89 o 20/99, dated 30.11.1999, (the Court found that the buyer did not bring sufficient evidence that it gave a specific notice of non-conformity to the seller or its representative); Decision of Kantonsgericht Nidwalden – Switzerland, No. 15/96 Z, dated 03.12.1997, (the Court held that the correspondence between the buyer and its customers, in which the latter complained about some defects in the resold furniture, could not be considered a proper notice of non conformity under Article 39/1 CISG as such correspondence was external to the contractual relationships between the seller and the buyer).

(289) Article 65 PCLD.

(290) Article 2/1 PCLD provides: "*The parties' agreement governs commercial matters unless it contradicts with the public policy*".

(291) Veneziano, *supra* note 15, 40; Poikela, *supra* note 15, 18; Abd-Elaziz, *supa* note 15, 216.

Article 102/3 PCLD provides that the buyer should start his action in court within a time limit of six months from the delivery(292). Taking into consideration the sphere of application of the Unidroit Principles, they do not include such a rule. Thus, where the Unidroit Principles apply to the contract of sale at issue, such matter will be decided according to the otherwise applicable domestic or uniform law(293).

Under both CISG and PCLD, the parties may agree to shorten or lengthen this period of limitation(294). It may also be derogated by usage(295). Under the Unidroit Principles, the parties may agree upon such a period(296). A usage may also define this period according to Article 1.9 thereof.

If the buyer gives the seller the proper notice, he can claim any applicable remedy. Since CISG (or the Unidroit Principles) does not regulate the prescription of such remedies, recourse will be made to the applicable domestic

(292) See also Article 478 of the Palestinian Civil Law Draft, according to which an action on a warranty is prescribed in six months from the time of delivery of the thing sold unless the seller agrees to be bound by the warranty for a longer period. The seller, however, cannot avail himself of the prescription of six months if it is proved that he has fraudulently concealed the defect from the buyer.
Notably, this domestic cut-off period of notice will never conflict with Article 39 CISG, since the former– according to Article 89/2 PCLD – addresses domestic sale of goods contracts only, to which CISG actually does not apply.

(293) Article 1.6/2 UP.

(294) With regard to CISG, see: Article 6. Article 39/2 CISG also ends with saying "*unless this time-limit is inconsistent with a contractual period of guarantee*". See also: Decision of Cour d'Appel de Paris, No. 03/21335, dated 25.05.2005; Arbitral Award of ICC Court of Arbitration – Paris, No. 7660/JK, dated 23.08.1994; Schlechtriem, *supra* note 19, 123; Veneziano, *supra* note 15, 52-53.
Concerning PCLD, see: Articles 2 & 102/4, the later clearly provides: "*The parties may amend the periods stipulated in this Article or exempt the buyer from complying with them*". See also Article 479 of the Palestinian Civil Law Draft, according to which the contracting parties may, by specific agreement, increase, restrict or abolish the warranty. Nevertheless, any clause abolishing or restricting the warranty is null and void if the seller intentionally and fraudulently conceals the defects of the thing sold.

(295) Article 2/3 PCLD; Article 9 CISG; Veneziano, *supra* note 15, 53.

(296) Articles 1.1 & 1.5 thereof.

law or related international convention(297). PCLD stipulates that rights of merchants vis-à-vis each other generally prescribe after seven years from being due(298).

D: Legal effects of non-conformity:

This paper will tackle here the remedies the buyer normally has in cases of non-conformity of the goods and the extent to which the seller can, by a second tender, deal with the lack of conformity.

D-1: Buyer's remedies in cases of non-conformity:

Under CISG, the seller will breach one of his obligations if he does not deliver to the buyer goods conforming to the contract(299). Likewise, according to Article 7.1.1 of the Unidroit Principles "*non-performance is failure by a party to perform any of its obligations under the contract, including defective performance or late performance*". Also, under Article 102 PCLD the seller will commit a breach of the contract if he delivers defective or otherwise non-conforming goods(300).

Unless the provision of Article 35/3 CISG(301) applies, the buyer can invoke any of his remedies under CISG(302), provided that the requirements set forth for

(297) The 1974 Uncitral Convention on the Limitation Period in the International Sale of Goods, as amended by a Protocol adopted in 1980 by the diplomatic conference that adopted the CISG, provides that "*the limitation period shall be four years*" (Article 8), begins with "*the date of which the claim accrues*" (Article 9/1); "*a claim arising from a defect or other lack of conformity shall accrue on the date on which the goods are actually handed over to, or their tender is refused by, the buyer*" (Article 10/2).

(298) Article 74 thereof.

(299) Decision of Landgericht Paderborn – Germany, No. 7 O 147/94, dated 25.06.1996. Ferrari, *supra* note 20, 474.

(300) See also Article 468/1 of the Palestinian Civil Law Draft according to which the seller is answerable for the defects in the thing sold, even if he was ignorant of their existence. Likewise, Article 340 of Mejella considers the accent defect a good ground for rescission.

(301) According to this provision, the seller will not be responsible if the buyer at the time of the conclusion of the contract knew or could not have been unaware of the lack of conformity, such as when the price corresponds to the price generally paid for poor quality goods or when the seller had in the past sold to the buyers goods of poor quality without complaints. This means that the buyer, under such conditions, does not deserve

each of them are satisfied(303). Thus, the buyer may claim specific performance(304), including delivery of substitute goods and remedy of the lack of conformity by repair(305) (Articles 45/1-a & 46)(306), fixing an additional period of time of reasonable length for performance by the seller of his obligation (Articles 45/1-a & 47)(307), declaring the contract avoided (Articles

the protection of the rules stipulated in Article 35/2 CISG; the buyer will lose all his remedies. Likewise, Article 468/2 of the Palestinian Civil Law Draft provides that the seller is not answerable for the defects of which the buyer was aware at the time of the sale or which he could have discovered himself had he examined the thing sold with the care of a reasonable person (see also Articles 341 and 343 Mejella). Notably, while Article 35/3 CISG expressly refers only to the objective criteria stipulated in Article 35/2 CISG, it seems that Article 468/2 of the Palestinian Civil Law Draft refer to all cases of seller's liability, including when, at the time of delivery, the thing sold does not possess the qualities the existence of which he guaranteed to the buyer. This means that, in Palestine, the buyer's knowledge at the time of conclusion of the absence of an agreed-upon specification of the goods would preclude the seller's liability, but under CISG could not.

(302) Decision of Landgericht Paderborn – Germany, No. 7 O 147/94, dated 25.06.1996.

(303) Poikela, *supra* note 15, 18.

(304) According to Article 46/1 CISG, the buyer requiring performance may not resort to a remedy which is inconsistent with this requirement, e.g. price reduction or avoidance of the contract.

(305) Repair of the lack of conformity may always be required by the buyer unless it is unreasonable to do so; in case the lack of conformity is in the form of delivery of a different kind of goods or of wrong quality, the buyer may require performance, i.e. substitute goods, only if the lack of conformity represents a fundamental breach; in case the seller delivers insufficient quantity of the goods, the buyer may claim delivery of the missing quantity (Articles 51/1 & 46/1 CISG).

(306) Notably, the right to require performance under CISG is a discretionary one: Under Article 28 CISG, "*a court is not bound to enter a judgement for specific performance unless the court would do so under its own law in respect of similar contracts of sale*".

(307) Article 47 CISG explicitly allows the buyer to fix an additional period of time for performance of any obligation the seller has not performed, including the seller's obligation to deliver goods conforming to the contract. Unfortunately however, Article 49/1-b CISG, by addressing avoidance in cases of additional period of time with regard of the delivery obligation only, limits the allowance of such additional period of time as an effective remedy.

In any event, if the buyer fixes an additional period of time for performance, he may not resort to other remedies during that period, although he retains the right to claim damages for delay in performance that occurs during the period. This prohibition is intended to

45/1-a & 49)(308) if the lack of conformity amounts to a fundamental breach in the meaning of Article 25 CISG(309), or reducing the price (Articles 45/1-a & 50)(310). Besides, the buyer can claim damages (Articles 45/1-b & 74 to 77)(311)

protect the defaulting seller who, in response to the buyer's notice fixing an additional period for performance, may as a result prepare the performance during that period, perhaps at significant expense (Piliounis, Peter A., "The Remedies of Specific Performance, Price Reduction and Additional Time (*Nachfrist*) Under the CISG: Are These Worthwhile Changes or Additions to English Sales Law?" 12 *Pace Int'l L Rev.* 2000, pp. 1-46, 22). Under these conditions, the buyer will most likely not invoke this remedy; even if he wishes to preserve the contract, the buyer may claim delivery of substitute goods or remedy of the lack of conformity by repair. In certain special circumstance however, the buyer might fix an additional period of time for performance by the seller of his obligation to deliver conforming goods if he wants to avoid the costly and time-consuming litigation and to keep a good relationship with the seller.

(308) Pursuant to Article 51 CISG however, the contract may be partially avoided if the lack of conformity relates to one part of the goods only. Accordingly, partial avoidance of the contract has been granted when the lack of conformity related to an independent piece of equipment of the machinery sold, which was indeed a replaceable part without prejudice to the workability of the machinery as a whole and to the continuation of the contract, Arbitral Award of ICC Court of Arbitration – Paris, No. 7660/JK, dated 23.08.1994.

(309) It was held that the high cost of the goods sold would have required a high quality manufacture, and since this lack of conformity constituted a fundamental breach of contract by the seller the buyer is entitled to declare the contract avoided, (Decision of Oberlandesgericht Oldenburg, No. 11 U 64/94, dated 01.02.1995). It should be remembered that avoidance is considered under CISG as a last resort with regard to other remedies available to the buyer, e.g. price reduction or damages; hence, if the buyer can still make use of the goods or resell them in the usual commercial relationships without incurring any unreasonable difficulties, then there is no fundamental breach by the seller and thus no right to avoid the contract by the buyer, (Decision of Bundesgerichtshof – Germany, No. VIII ZR 51/95, dated 03.04.1996. See also: Decision of Oberlandesgericht Frankfurt am Main, No. 5 U 15/93, dated 18.01.1994, (the lack of conformity shall not amount to a fundamental breach of the contract, when the defects do not prevent the buyer from making all the same a reasonable use of the goods)). Similarly, if the lack of conformity can easily be repaired, this lack of conformity does not amount to a fundamental breach, (Decision of Handelsgericht Zürich – Switzerland, No. HG920670, dated 26.04.1995).

(310) It was held, for instance, that the Buyer is entitled to a reduction of the agreed purchase price in the amount of EUR 800.00 due to the fact that the delivered turf has not been in conformity with the contractual stipulations as regards quality, (Decision of Landgericht Stuttgart – Germany, No. 25 O 99/09, dated 29.10.2009, available at: http://cisgw3.law.pace.edu/cases/091029g1.html). Also, it is ruled that the buyer who

whether exclusively or in conjunction with any other remedies (Article 45/2).Further, the buyer may claim interest on damages for non-conformity of the goods(312). In addition, Articles 51 and 52 CISG include special rules for certain cases of non-conformity (shortfall quantity, discrepancy in quality of only one part of the goods and excess quantity)(313).

acted in conformity with the obligations set out in Articles 38 and 39 CISG had the right to reduce the price in accordance with Article 50 CISG. However, the court found that the buyer could not arbitrarily reduce the price and the reduction should have been by one third rather than by half, in the same proportion as the value of the goods actually delivered had at the time of the delivery bears to the value that conforming goods would have had at that time. The seller was therefore entitled to the difference between what he received (one half of the price) and what he should have received (two thirds of the price), (Decision of Landgericht Aachen – Germany, No. 41 O 198/89, dated 03.04.1990).

(311) The case law has awarded damages to the buyer who had made reasonable expenditures for different purposes, such as: inspection of non-conforming goods (Award of Arbitration Institute of the Stockholm Chamber of Commerce, No. 107/1997, dated 00.00.1998); shipping and customs costs incurred when returning the goods (Decision of U.S. Bankruptcy Court for the District of Oregon, No. 02-66975-fra11, dated 29.03.2004); hiring a third party to process goods (Decision of Oberlandesgericht Köln – Germany, No. 27 U 58/95, dated 18.01.1997), reimbursing sub-buyers on account of non-conforming goods (Decision of Oberlandesgericht Köln, No. 22 U 4/96, dated 21.05.1996); handling and storing non-conforming goods (Award of Arbitration Institute of the Stockholm Chamber of Commerce, No. 107/1997, dated 00.00.1998); and delivering and taking back the non-conforming goods to and from a sub-buyer (Decision of U.S. Court of Appeals, 2nd Circuit, No. 95-7182, 95-7186, dated 06.12.1995).

(312) Article 78 CISG only provides for the right of the aggrieved party to interest in general; it does stipulate the rate of interest. Nevertheless, the case law clearly recognizes the right of interest on damages for non-performance (see, for instance: Decision of Kantonsgericht des Kantons Zug - Switzerland, No. A 3 1997 61, dated 21.10.1999; Decision of Handelsgericht Zürich- Switzerland, No. HG 95 0347, dated 05.02.1997; Decision of Tribunal de Grande Instance de Strasbourg - France, dated 22.12.2006) on a rate to be determined – according to the prevailing view - by the applicable domestic law (see, for instance: Decision of Obergericht des Kantons Appenzell Ausserrhoden-Switzerland, No. O1Z 08 1, dated 18.08.2008; Decision of Oberlandesgericht Köln – Germany, No. 16 U 17/05, dated 03.04.2006; Decision of Rechtbank van Koophandel, Hasselt – Belgium, No. A.R: 04/79, dated 25.02.2004).

(313) According to Article 51 CISG, "*(1) If the seller delivers only a part of the goods or if only a part of the goods delivered is in conformity with the contract, articles 46 to 50 apply in respect of the part which is missing or which does not conform. (2) The buyer*

Under the Unidroit Principles, the buyer may withhold performance until the seller tenders its performance (Article 7.1.3)(314), regardless of whether the seller's defective performance is fundamental or not(315), (316); by notice to the seller, allowing an additional period of time for performance (Article 7.1.5)(317)- lapsing of which without proper performance by the seller will allow the buyer to terminate the contract unless such defective performance relates to minor parts only(318); claim specific performance (Articles 7.2.2 – 7.2.5)(319), including repair or replacement of the defective performance(320) "within a reasonable

may declare the contract avoided in its entirety only if the failure to make delivery completely or in conformity with the contract amounts to a fundamental breach of the contract". Article 52 CISG says: "*(1) If the seller delivers the goods before the date fixed, the buyer may take delivery or refuse to take delivery. (2) If the seller delivers a quantity of goods greater than that provided for in the contract, the buyer may take delivery or refuse to take delivery of the excess quantity. If the buyer takes delivery of all or part of the excess quantity, he must pay for it at the contract rate*".

(314) Reading Article 7.1.3 UP (which refers to performance in general) and Article 7.1.1 (which defines non-performance) together, it follows that the suspension of obligations by the buyer is also permitted in cases of defective performance, Vogenauer / Kleinheisterkamp, Schelhaas, Harriet, Chapter 7: Non-performance, Section 2: Right to Performance, in: Vogenauer, Stefan / Kleinheisterkamp, Jan (Eds.), "Commentary on the Unidroit Principles on International Commercial Contracts (PICC)", Oxford University Press, 2009, Article 7.1.3 para. 8.

(315) *Ibid*, Article 7.1.3 para. 13.

(316) However, if the non-performance (e.g. non-conformity of the goods) is only of minor importance, the buyer's right to withhold may be precluded by the principle of good faith. With regard to the partial performance, the Official Commentary on Article 7.1.3 UP illustrates further by saying: "*The text does not explicitly address the question which arises where one party performs in part but does not perform completely. In such a case the party entitled to receive performance may be entitled to withhold performance but only where in normal circumstances this is consonant with good faith (Art. 1.7)*".

(317) Contrary to CISG, Article 7.1.5 of the Unidroit Principles does not limit the innocent party to cases of non-delivery only before he can avoid the contract.

(318) Article 7.1.5/3-4 UP; Vogenauer / Kleinheisterkamp, Schelhaas, *supra* note 314, Article 7.1.5 para. 25.

(319) Contrary to CISG, specific performance under the Unidroit Principles is not a discretionary remedy; it is rather recognized as a rule so that the court must award it unless one of the stipulated exceptions in Article 7.2.2 thereof is met.

(320) Vogenauer / Kleinheisterkamp, Schelhaas, *supra* note 180, Article 7.2.2 para. 9; Vogenauer / Kleinheisterkamp, Schelhaas, *supra* note 314, Article 7.1.4 para. 13; Article

time, without significant inconvenience and free of charge"[321]; terminate the contract (Article 7.3.1)[322]; or claim damages either exclusively or in conjunction with any other remedies (Articles 7.4.1 – 7.4.8)[323] and interest on damages for non-performance (Article 7.4.10)[324]. In addition, Article 6.1.3 UP provides that the obliged (e.g. the buyer) is entitled to the right to "*reject an offer to perform in part at the time performance is due whether or not such offer is coupled with an assurance as to the balance of the performance unless the obligee has no legitimate interest in so doing*", which also applies by way of analogy to defective performance[325] and excessive performance[326].

7.1.4 UP, Official Comment, No. 6, which goes further to say: "*Repairs constitute cure only when they leave no evidence of the prior nonperformance and do not threaten the value or the quality of the product as a whole*".

(321) Vogenauer / Kleinheisterkamp, Schelhaas, *supra* note 180, Article 7.2.3 para. 3. See also: Vogenauer / Kleinheisterkamp, Schelhaas, *supra* note 314, Article 7.1.4 para. 13.

(322) Termination may not however be granted unless the lack of conformity amounts to a fundamental breach. In the case that involved an agreement between two Spanish parties for the sale of an apartment plus a parking space, the Audiencia Provincial de Cádiz (Sección 2ª) in Spain, in its decision No. 25/2009, dated 19.01.2009, rejected the request for termination of the contract because the assignment of the first parking space (that does not meet the contractually agreed specifications) did not amount to a fundamental breach; instead the court ordered the assignment of a new parking space that meets the contractually agreed specifications, see: http://www.unilex.info/case.cfm?pid=2&do=case&id=1469&step=Abstract

(323) In its arbitral award No. T-9/07, dated 23.01.2008, the Foreign Trade Court of Arbitration attached to the Serbian Chamber of Commerce ruled that the seller's failure to deliver the certificate of origin of the goods as requested by the contract (i.e. crystal sugar of Serbian origin) clearly amounted to a non-(conforming) performance of the contract according to Articles 35/1, 36/1 and 45/1-b CISG, and hence the buyer has the right to damages according to, inter alia, Articles 7.4.1 and 7.4.4 of the UNIDROIT Principles, see: http://www.unilex.info/case.cfm?pid=2&do=case&id=1442&step=Abstract

(324) Contrary to CISG, Article 7.4.9/2 of the Unidroit Principles explicitly defines the rate of interest, that is to say "*the average bank short-term lending rate to prime borrowers prevailing for the currency of payment at the place for payment, or where no such rate exists at that place, then the same rate in the State of the currency of payment. In the absence of such a rate at either place the rate of interest shall be the appropriate rate fixed by the law of the State of the currency of payment*".

(325) Atamer, Yesim, Chapter 6: Performance, Section 1, Performance in General, in: Vogenauer**,** Stefan / Kleinheisterkamp, Jan, "Commentary on the Unidroit Principles on

Obviously, CISG explicitly provides for the price reduction whereas this remedy is not even mentioned by the Unidroit Principles. This could be explained by reference to the scope of application of each instrument: Since the Unidroit Principles do not only govern international sale of goods, but also all other international commercial contracts. They possibly find damages as a sufficient remedy readily available. But since CISG is a *lex specialis*, it has to include such remedy, which is crucial for the buyer in certain cases (e.g. when the buyer has difficulty in proving its loss, or when the seller is exempted from paying damages under Article 79 CISG(327)).

As far as the right of the buyer to withhold performance is concerned, it is also obvious that, whereas the Unidroit Principles explicitly provide for it, CISG includes no explicit provision in this regard. According to the prevailing view, however, such a right is recognized as a general principle underlying CISG pursuant to Article 7/2(328): The buyer may retain his own performance for a reasonable time (Article 49/2-b CISG) or the additional period of time fixed by him (Article 47 CISG) when demanding a cure according to Article 46 CISG(329). It is also decided that, in accordance with the principle of simultaneous exchange of performances underlying Articles 71, 58, 86 CISG, the buyer requesting substitute delivery or repairs under Article 46 CISG would be allowed to withhold payment until the seller had performed in conformity with the contract(330). It is worth mentioning that the parties, under both instruments, may choose certain remedy or remedies within their contract(331).

Under PCLD, the buyer may under certain conditions claim rescission of the contract or, otherwise, reduction of the price. In either case, he may also claim

International Commercial Contracts (PICC)", Oxford University Press, 2009, Article 6.1.3 para. 23.

(326) Vogenauer / Kleinheisterkamp, Atamer, *supra* note 325, Article 6.1.3 para. 24.

(327) Piliounis, *supra* note 307, 33-34.

(328) Schlechtriem, P., "Subsequent Performance and Delivery Deadlines – Avoidance of CISG Sales Contracts Due to Non-Conformity of the Goods", 18 *Pace Int'l L Rev.* 2006, pp. 83-98, 92.

(329) Schlectriem, *supra* noe 328, 93.

(330) Decision of Oberster Gerichtshof – Austria, No. 4 Ob 179/05k, dated 08.11.2005.

(331) Piliounis, *supra* note 307, 8.

damages (Article 102/1)(332). Contrary to CISG and the Unidroit Principles, rescission may not be declared by the buyer through a notice sent to the seller unless the contract includes an express resolution clause (*lex commissoria*)(333). The buyer must rather claim rescission before the court, which may only grant it when the defect, the lack of quantity or the lack of conformity makes the goods sold unsalable or unusable for the declared purpose(334) unless the parties' agreement or usages indicate otherwise(335). It also goes without saying that the buyer may – under the general rules of contract(336) – claim specific performance(337), including replacement of the thing sold by buying a similar thing at the seller's expense with the permission of the court, or even without such permission in cases of emergency(338). Neither the Commercial Law Draft nor the Civil Law Draft in Palestine provides for the so-called *Nachfrist*, i.e.

(332) This rule is in accord with Article 473 of the Palestinian Civil Law Draft. However, Article 337 Mejella only gives the buyer the right to choose either to rescind the contract and return the thing sold to the seller or to continue with the contract and accept the defective thing sold with the named-price; the buyer may not therefore retains the thing sold and claim compensation. Yet, if the defect happened in the possession of the buyer and he learns afterwards that there was another defect which existed beforehand while the thing sold was in the possession of the seller, the buyer may not rescind the contract and return the thing sold to the seller; he can only retains the thing sold and reduces the price. For instance, where the thing sold is cloth and the buyer discovers a defect only after the cloth has been cut, the buyer may only reduce the price, Article 345 Mejella.

(333) Article 170/2 of the Palestinian Civil Law Draft says: "*The parties may agree that in case of non-performance of the obligations flowing from the contract, the contract will be deemed to have been rescinded ipso facto without a court order. Such an agreement does not release the parties from the obligation of serving a formal summons unless the parties expressly agree that such a summons will be dispensed with*".

(334) Under Article 170/2 of the Palestinian Civil Law Draft, the court may also reject an application for rescission when the part of the contract which the debtor has failed to perform is of little importance in comparison with the obligation in its entirety.

(335) Shawarbi, *supra* note 24, 484.

(336) Article 225 of the Palestinian Civil Law Draft, according to which the debtor shall be compelled, upon being summoned to do so, specifically to perform his obligation, if such performance is possible. When, however, specific performance is too onerous for the debtor, he may limit performance to payment of a sum of money as indemnity, provided that this method of performance does not seriously prejudice the creditor.

(337) Shawarbi, *supra* note 24, 485.

(338) Al-Manshawi, *supra* note 25, 89.

allowance by the creditor of an additional period of time for performance by the debtor. Thus, taking into consideration the enlargement of remedies the buyer has in case of non-conformity under CISG (and the Unidriot Principles), CISG is more suitable than PCLD to solve problems arising out of non-conformity.

It should be noted in this regard that the rules of CISG on non-conformity supersede or exhaust conflicting national rules on validity (e.g. mistake in the quality or characteristics of the goods(339)). Though CISG does not address the question of contract validity (Article 4/a), it regulates the same facts involving such mistake comprehensively and exclusively(340). The buyer cannot therefore get around the rules of Articles 38 & 39(341): If he does not examine the goods according to Article 38 CISG, nor give a notice to the buyer of non-conformity within the period prescribed in Article 39 CISG, he may not avoid the contract on the ground of mistake in the characteristic or quality of the goods according to national law even if the statutory limitation period of such a right has not lapsed yet. However, this does not apply to other questions of validity, like deceit(342), or even other kinds of mistakes that do not conflict with conformity of goods(343). The latter questions of validity shall obviously be settled according to the applicable domestic law (Article 4/a CISG).

With regard to the Unidroit Principles, Article 3.2.4 thereof expressly provides: "*A party is not entitled to avoid the contract on the ground of mistake*

(339) Honnold, *supra* note 19, 262-263; Honsell, Magnus, *supra* note 15, 381; Schlechtriem / Schwenzer, Schwenzer, *supra* note 14, 545; Henshel, Ibid, p. 172.

(340) Decision of Oberster Gerichtshof – Austria, No. 2 Ob 100/00 w, dated 13.04.2000: "*Über die im Übereinkommen geregelten Ansprüche hinausgehende, im nationalen Recht vorgesehene Ansprüche könnten nicht geltend gemacht werden. Dies gelte trotz Art 4 lit a UN-K auch für die Irrtumsanfechtung*"; Decision of Landgericht Aachen – Germany, No. 43 O 136/92, dated 14.05.1993: "*Ob aufgrund der fehlenden Marktgängigkeit der Geräte die Anwendung der Regeln über den Wegfall der Geschäftsgrundlage oder die Anfechtung wegen Irrtums über eine verkehrswesentliche Eigenschaft der gekauften Sache nach nationalem Recht in Betracht kommt, kann offengelassen werden, da diese Rechtsinstitute durch die Regelung des CISG verdrängt werden*"; Schlechtriem / Schwenzer, Schwenzer, *supra* note 14, 545; Henschel, *supra* note 14, 5.

(341) Henshel, Ibid, p. 172.

(342) Schlechtriem / Schwenzer, Schwenzer, *supra* note 14, 545.

(343) Henshel, Ibid, p. 172; Honnold, *supra* note 19, 262-263; Veneziano, *supra* note 15, 62.

if the circumstances on which that party relies afford, or could have afforded, a remedy for non-performance". The Official comment on this Article goes further to illustrate: "*A, a farmer, who finds a rusty cup on the land sells it to B, an art dealer, for 10,000 Euros. The high price is based upon the assumption of both parties that the cup is made of silver (other silver objects had previously been found on the land). It subsequently turns out that the object in question is an ordinary iron cup worth only 1,000 Euros. B refuses to accept the cup and to pay for it on the ground that it lacks the assumed quality. B also avoids the contract on the ground of mistake as to the quality of the cup. B is entitled only to the remedies for non-performance"*. Like CISG, the Unidroit Principles obviously maintain the principle of the exhaustion of rights(344). This clearly coincides with the principle underlying the Unidroit Principles of preservation of the contract as far as possible, i.e. allowance of termination of the contract only as a last resort(345). Giving the aggrieved party (e.g. the buyer) the right to choose between the remedies of mistake and the remedies of non-performance would necessarily have circumvented the fundamental breach doctrine since avoidance for mistake is not subject to this requirement(346). In order to apply the rule of Article 3.2.4 UP, it is not necessary that the aggrieved party (e.g. the buyer) actually succeeds in invoking one of the remedies of non- performance (e.g. non-conformity) stipulated in the UP Chapter Seven(347). It rather suffices that this party could have been afforded a remedy for non-performance.

As far as the PCLD is concerned, one writer argues that the buyer can choose to avoid the contract due to mistake or to relying on the non-conformity of the goods(348),(349) reasoning that, while mistake is a sociological situation, non

(344) Vogenauer / Kleinheisterkamp, Huber, *supra* note 116, Article 3.7 para. 3; Henshel, Ibid, p. 173.
(345) Vogenauer / Kleinheisterkamp, Huber, *supra* note 116, Article 3.7 para. 4.
(346) *Ibid*.
(347) *Ibid*, Article 3.7 para. 7.
(348) Shawarbi, *supra* note 24, 485. See also: Decision of the court of cassation, Egypt, No. 2567 for judicial year 61, dated 30.6.1999, available in the Arab Legal Information Network at: http://www.eastlaws.com/Ahkam/AhkamSearch.aspx.
(349) Notably, this opinion is also adopted by the European Principles of Contract Law: Article 4:119 thereof explicitly says: "*A party who is entitled to a remedy under this Chapter (on*

conformity is a material one(350). It follows that the buyer's claim of avoidance collapses after three years(351) whereas his rights based on non-conformity forfeit after six months(352). However, this opinion overlooks the fact that both non-conformity and mistake in the characteristic or quality of the goods involve the same operating facts. Thus, at least with relation to CISG, the Palestinian validity rules on mistake shall be superseded by non-conformity rule because the latter rules are considered *lex specialis*.

D-2: Seller's right to cure the non-conformity:

CISG deals with the seller's right to cure the lack of conformity in three Articles: Article 48 tackles the seller's right to cure after the date for delivery; Article 37 deals with the same right before the date for delivery; Article 34, as a *lex specialis*, regulates the seller's right to cure any lack of conformity in the documents before the date for delivery. In case the seller has to deliver within a period of time, he may cure any lack of non-conformity till the end of this period of time(353).

The seller's right to cure is limited by the "*unreasonable inconvenience*" or "*unreasonable expense*" (Articles 34 & 37) / "*uncertainty of reimbursement by the seller of expenses advanced by the buyer*" (Article 48). In all events, remedy by the seller of the lack of conformity shall be at his own expense(354). In

validity) in circumstances which afford that party a remedy for non-performance may pursue either remedy".

(350) Shawarbi, *supra* note 24, 485.

(351) Article 145 of the Palestinian Civil Law Draft.

(352) Article 102/3 PCLD.

(353) Schlechtriem / Schwenzer, Schwenzer, *supra* note 14, 556-557; Honnold, *supra* note 19, 270; Keller, Bertram, "Early delivery and the seller's right to cure lack of conformity: Comparison between the provisions of Articles 37 CISG and the counterpart provisions of the Unidroit Principles", in: Felemegas, John (Ed.), *An International Approach to the Interpretation of the United Nations Convention on Contracts for the International Sale of Goods (1980) as Uniform Sales Law*, Cambridge University Press, 2007, pp. 174-179, 175.

(354) Honsell, Magnus, *supra* note 15, 405; Bianca, C. M., Cure before date for delivery, in: Bianca, C. M. / Bonell, M. J. (Eds.), "*Commentary on the International Sales Law*", Giuffrè: Milan (1987) {Commentaries by J. Barrera Graf , H.T. Bennett , C.M. Bianca , M.J. Bonell , G. Eörsi , M. Evans , E.A. Farnsworth , W. Khoo , V. Knapp , O. Lando ,

addition, the buyer is retained the right to damages(355). CISG does not however explicitly limit the seller's right to cure by giving notice thereof to the buyer. Yet, any attempt by the seller to cure without notice will likely cause unreasonable inconvenience(356). According to Article 27 CISG, notice shall be effective upon dispatch.

CISG does not also explicitly define the consequences of the buyer's groundless refusal of seller's cure. Nevertheless, taking into account the provision of Article 80 CISG(357), the buyer shall not rely on the lack of conformity in such cases(358).

With regard to cure after the date of delivery, there is a discrepancy in opinion about which right has priority over the other: the seller's right to cure or the buyer's right to avoid the contract when the non-conformity represents a fundamental breach. Taking the explicit formulation of Article 48/1 CISG into account however, the buyer's right to avoid the contract is an independent one unaffected by the seller's intention to cure(359). This conclusion is also supported

D. Maskow , B. Nicholas , J. Rajski , K. Sono , D. Tallon , M. Will}, 293; Keller, *supra* note 354, 178.

(355) Decision of Oberster Gerichtshof – Austria, No. 7 Ob 301/01t, dated 14.01.2002, (only reliance damages).

(356) Schlechtriem / Schwenzer, Schwenzer, *supra* note 14, 558.

(357) Schlechtriem / Schwenzer, Schwenzer, *supra* note 14, 559.

(358) Honsell, Magnus, *supra* note 15, 406; Bianca / Bonell, Bianca, *supra* note 354, 294; Keller, *supra* note 354, 179.

(359) Kee, Christopher, **"**Cure after date for delivery: Remarks on the manner in which the Unidroit Principles may be used to interpret or supplement Article 48 of the CISG", in: Felemegas, John (Ed.), *An International Approach to the Interpretation of the United Nations Convention on Contracts for the International Sale of Goods (1980) as Uniform Sales Law*, Cambridge University Press, 2007, pp. 189-192, 190, 191; Award of ICC Court of Arbitration – Paris, No. 7531/1994, dated 00.00.1994, (on the ground of the fundamental character of the breach by the seller the buyer was entitled to avoid the contract acoording to Article 49/1 CISG. The seller was not entitled to remedy by supplying substitute goods in accordance with Article 48/1 CISG, since in the opinion of the sole arbitrator the seller's right to cure after the date for delivery is dependent on the consent of the buyer).
Contra: Schlectriem, *supra* noe 328, 89, who argues that "a realistic offer of the seller to cure "prevents" immediate avoidance, …(provided) the offer to cure must be performed within the fixed delivery time, or in any case within a reasonable time".

by Article 48/2 CISG(360): Had the seller's right to cure taken preference over the buyer's right to avoid the contract, then this buyer's right to avoid would have been automatically suspended during curative period specified in the seller's request.

Contrary to CISG, Article 7.1.4 of the Unidroit Principles recognizes a general right for the "non-performing party" to cure (e.g. seller or buyer(361) whether before or after the date of performance). This right to cure is obviously supported by the principle of preserving contracts(362), the principle of mitigating damages(363) and the principle of good faith(364)- all underlying CISG and the Unidroit Principles.

Article 7.1.4 of the Unidroit Principles is better formulated than the counterpart articles in CISG: It explicitly provides, for instance, for the seller's duty to give notice to the buyer indicating the proposed manner and timing of the cure (which is effective upon receipt, Article 1.9 UP); the right of the aggrieved party (e.g. the buyer) to refuse cure only if he has a legitimate interest(365),(366); and the preference of the non-performing party's (e.g. the

(360) It says: "*If the seller requests the buyer to make known whether he will accept performance and the buyer does not comply with the request within a reasonable time, the seller may perform within the time indicated in his request. The buyer may not, during that period of time, resort to any remedy which is inconsistent with performance by the seller*".

(361) Keller, *supra* note 354, 175; Kee, *supra* note 359, 190.

(362) Kee, *supra* note 359, 189.

(363) Keller, *supra* note 354, 175.

(364) Article 7.1.4 UP, Official Comment, No. 1: "*This article thus favours the preservation of the contract. It also reflects the policy of minimizing economic waste, as incorporated in Art. 7.4.8 (Mitigation of harm), and the basic principle of good faith stated in Art. 1.7*".

(365) Like under CISG, the agreived party (e.g. the buyer) may refuse cure if he has to pay costs in advance, Vogenauer / Kleinheisterkamp, Schelhaas, *supra* note 314, Article 7.1.4 para. 18.

(366) Vogenauer / Kleinheisterkamp, Schelhaas, *supra* note 314, Article 7.1.4 para. 27; Article 7.1.4, Official Comment, No. 10, which clearly says: "*Once the aggrieved party receives effective notice of cure, it must permit cure and, as provided in Art. 5.1.3, cooperate with the non-performing party. For example, the aggrieved party must permit any inspection that is reasonably necessary for the non-performing party to effect cure. If the aggrieved party refuses to permit cure when required to do so, any notice of termination is*

seller's) right to cure over the aggrieved party's (e.g. the buyer's) right to declare the contract avoided(367).

PCLD, like other civil law legal systems, does not recognize the seller's right to tender a second time since the seller gives the goods autonomously outside his disposal power. At best, the court would take any reasonable offer of cure by the seller into account in assessing damages claimed by the buyer. Thus, taking into consideration the possibility of preserving the contract by means of cure through the seller under CISG (and the Unidriot Principles), CISG is more suitable than PCLD in solving problems arising out of non-conformity.

E: Legal Effects of the buyer's failure to respect his duties:

As a rule the buyer will lose all remedies based on the lack of conformity if he does not conduct a proper and timely examination of the goods, and as a result fails to give notice to the seller of such lack of conformity. Nevertheless, if the lack of conformity relates to facts of which the seller knew or could not have been unaware of and which he did not disclose to the buyer, the buyer could rely on the lack of conformity though he did not examine the goods or give notice to the seller of such lack of conformity (Article 40 CISG). Likewise, if the buyer has a reasonable excuse for his failure to give notice to the seller of the non-conformity, he may still claim some remedies under Article 44 CISG. Obviously, the special provisions of Articles 40 & 44 CISG are exceptions to the general rule laid down in Article 39 CISG(368). Besides, the case law developed a third exception, namely where the seller waives his right to invoke

ineffective. Moreover, the aggrieved party may not seek remedies for any non-performance that could have been cured".

(367) Article 7.1.4, Official Comment, No. 8, according to which "*If the aggrieved party has rightfully terminated the contract pursuant to Arts. 7.3.1(1) and 7.3.2(1), the effects of termination (Art. 7.3.5) are also suspended by an effective notice of cure. If the non-performance is cured, the notice of termination is inoperative. On the other hand, termination takes effect if the time for cure has expired and any fundamental non-performance has not been cured*".

(368) Honnold, *supra* note 19, 275, 282; Poikela, *supra* note 15, 18; Decision of Oberlandesgericht Celle, No. 7 U 147/03, dated 10.03.2004, available at: http://cisgw3.law.pace.edu/cases/040310g1.html

that the notice of non-conformity was late(369). Each question will be examined in turn.

E-1: General Rule: Buyer's loss of all remedies:

First of all, the non-compliance by the buyer with his duty to examine the goods, or to give notice to the seller of any defect therein, shall not result in remedies for the seller. This applies to the three instruments under consideration: CISG(370), the Unidroit Principles(371) and PCLD(372).

Indeed, if the buyer did not give notice to the seller of the lack of conformity(373), or such notice did not satisfy the legal requirements(374), the buyer may not rely on the lack of conformity(375) under CISG: the buyer would rather be considered as accepting the goods delivered though they do not actually match with the contract(376). Accordingly, the buyer may not claim specific performance, fix an additional period of time of reasonable length for performance by the seller of his obligation, declare the contract avoided, reduce the price or claim damages. It makes no difference in this regard whether the time of prescription of such rights under the applicable domestic law has lapsed or not(377).

Particularly, in cases of missing parts of the goods, the buyer shall pay the whole price if he does not give notice of this lack of conformity(378). If the seller

(369) Günther, *supra* note 221, 4.
(370) Bianca / Bonell, Bianca, *supra* note 208, 296-297.
(371) Article 1.7 UP, Official Illustration, No. 7; Vogenauer / Kleinheisterkamp, Schelhaas, *supra* note 180, Article 7.2.2 para. 50, "the agreived party is not legally required to inspect the goods …, but its legal position weakens if it fails to do so".
(372) Article 101 thereof. See also Articles 470 and 471 of the Palestinian Civil Law Draft.
(373) It should not be forgotten that the buyer's failure to properly examine the goods does not *per se*result in the loss of his right to rely on the lack pf conformity. Indeed, the buyer will only lose his remedies if – as a result of his failure to properly examine the goods – he also fails to give notice according to Article 39 CISG.
(374) Schlechtriem / Schwenzer, Schwenzer, *supra* note 14, 585.
(375) *Ibid*.
(376) Günther, *supra* note 221, 4.
(377) Honnold, *supra* note 19, 285.
(378) Honsell, Magnus, *supra* note 15, 433; Schlechtriem / Schwenzer, Schwenzer, *supra* note 14, 585-586.

delivers a quantity of goods greater than that provided for in the contract according to Article 52/2, and the buyer does not give notice of this lack on conformity, the buyer may not refuse to take delivery of the excess quantity. He must pay for this excess quantity at the contract rate. The same rule applies to the delivery of goods of higher quality than agreed upon if the buyer does not give notice to the seller thereof(379).

Notably, in contracts for the delivery of goods in installments, if the buyer does not notify the seller of the lack of conformity of one installment, the buyer shall not rely on the lack of conformity with regard to this installment only. In a decision made in Switzerland in 1992, the court, with respect to the first set of furniture, held that the buyer was not entitled to declare the contract avoided, as it had not examined the goods and given notice of the non-conformity in accordance with Articles 38 and 39 CISG; with respect to the second set of furniture however, the court found that the buyer was entitled to a reduction of the price(380).

In Palestine too, the buyer will lose his right to rely on the lack of conformity if he does not give the seller proper notice thereof(381). Accordingly, the buyer may not, in such a case, demand rescission of the contract or reduction of the price or damages.

As far as the Unidroit Principles are concerned, the buyer will – according to Article 7.2.2 thereof – lose his right to require performance. It however seems that, contrary to CISG and PCLD, the buyer's right to claim damages remains unaffected(382); but his right to terminate the contract will generally be lost on the ground of the limitation to a reasonable time in Article 7.3.2 UP(383).

(379) Honsell, Magnus, *supra* note 15, 433.
(380) Decision of Pretura di Locarno-Campagna, No. 6252, dated 27.04.1992.
(381) Article 102/2 PCLD. See also: Article 470 of the Palestinian Civil Law Draft, (if the buyer fails to give notice of the defect, he will be deemed to have accepted the thing sold with its defect).
(382) Vogenauer / Kleinheisterkamp, Schelhaas, *supra* note 180, Article 7.2.2 para. 58.
(383) Vogenauer / Kleinheisterkamp, Schelhaas, *supra* note 180, Article 7.2.2 para. 58.

E-2: Exception 1: Bad Faith of the Seller:

In cases of bad faith of the seller, the buyer may rely on lack of conformity though he did not examine the goods or give notice to the seller of such lack of conformity. According to Article 40 CISG, the seller's bad faith means that the lack of conformity relates to facts of which the seller knew or could not have been unaware and which he did not disclose to the buyer. The term "*could not have been unaware of*" requires at least gross negligence of the seller(384). That is to say, Article 40 CISG covers not only conduct amounting to fraud, similar cases of bad faith or gross negligence but also cases when the seller consciously disregards facts that meet the eye and are of evident relevance to the non-conformity(385). It also suffices in this regard that such facts are known by the seller's employees or any other person authorized by him to perform the contract(386). Thus, Article 40 CISG somehow imposes on the seller a duty to examine and notify, thought it is not as strong as that imposed on the buyer by Articles 38 and 39 CISG(387).

(384) Decision of Oberlandesgericht Celle, No. 7 U 147/03, dated 10.03.2004, available at: http://cisgw3.law.pace.edu/cases/040310g1.html. See also: Decision of Bundesgerichtshof – Germany, No. VIII ZR 321/03, dated 30.06.2004. Schlechtriem, *supra* note 19, 121; Kruisinga, *supra* note 32, 53; Abd-Elaziz, *supa* note 15, 321.

(385) Award of the Arbitration Institute of the Stockholm Chamber of Commerce - Stockholm, Sweden, dated 05.06.1998: "*There is, not unexpectedly, general consensus that fraud and similar cases of bad faith will make Article 40 applicable. But some authors are of the opinion that also what can be described as gross negligence or even ordinary negligence suffices, while others indicate that slightly more than gross negligence (approaching deliberate negligence) is required. As a clear case of the requisite awareness has been mentioned a situation where the non-conformity has already resulted in accidents in similar or identical goods sold by the seller and been made known to him or to the relevant branch of the industry. But also in the absence of such relatively clear cases awareness may be considered to be at hand if the facts relating to the non-conformity are easily apparent or detected. Some authors indicate that the seller is not under an obligation to investigate possible instances of non-conformity but others say that he must not ignore clues and some go so far as to suggest that the seller, at least in certain cases, has an obligation to examine the goods to ascertain their conformity*".

(386) Honsell, Magnus, *supra* note 15, 440. Schlechtriem / Schwenzer, Schwenzer, *supra* note 14, 591.

(387) Reitz, *supra* note 216, 464.

The provision of Article 40 CISG normally applies when the seller delivers different goods(388) or greater quantity of the goods than what was provided for in the contract(389). Similarly, "*the seller who knows, from complaints received from other customers in the context of previous sales of similar goods, that the goods lack conformity cannot rely on the fact that the buyer did not give notice within the time limit of Article 39 CISG*"(390). Also, the seller could not rely on Articles 38 and 39 CISG, pursuant to Art. 40 CISG, since the addition of water to the wine constituted a defect that the seller could not be unaware of, being necessarily the result of an intentional behavior(391). It is also held that, pursuant to Art. 40 CISG, the seller had lost his right to rely on Articles 38 and 39 CISG, since he was not only the vendor but also the manufacturer of the metal parts, and therefore could not have been unaware of the defects, all the more so because the non-conformity of part of the goods was due both to an excessive quantity of carbon and a mixture of components during the pouring and casting process of the metal(392).

According to the prevailing view, the lack of conformity should relate to facts of which the seller knew or could not have been unaware at the time in which the goods are put at the buyer's disposal(393) (e.g. the time of delivery(394)). The seller will surely lose his right to rely on Articles 38 and 39

(388) Decision of Oberlandesgericht Zweibrücken – Germany, No. 7 U 4/03, dated 02.02.2004, available at: http://cisgw3.law.pace.edu/cases/040202g1.html. Honsell, Magnus, *supra* note 15, 438.

(389) Schlechtriem / Schwenzer, Schwenzer, *supra* note 14, 590; Leisinger, *supra* note 17, 10.

(390) Arbitral Award of ICC Court of Arbitration – Paris, No. 11333, dated 00.00.2002.

(391) Decision of Landgericht Trier, No. 7 HO 78/95, dated 12.10.1995: "*Im übrigen kann die Klägerin sich gemäß Art. 40 vorliegend nicht auf die Art. CISG 38 und 39 CISG berufen, weil die Vertragswidrigkeit auf Tatsachen beruht, die sie kannte oder über die sie nicht in Unkenntnis sein konnte und die sie der Käuferin nicht offenbart hat; die Lieferung eines mit Wasser versetzten Weines, der nicht verkehrsfähig ist, stellt nämlich ein arglistiges Verhalten dar*".

(392) Decision of Cour de Cassation, No. 1303 FS-P+B, dated 04.10.2005.

(393) Honsell, Magnus, *supra* note 15, 439.

(394) Decision of Landgericht Landshut – Germany, No. 54 O 644/94, dated 05.04.1995
Contra: Schlechtriem / Schwenzer, Schwenzer, *supra* note 14, 591, (the moment in which the notice period ends should be taken into consideration); Abd-Elaziz, *supa* note 15, 221-222.

CISG if he admits that he was aware of the lack of conformity of the goods before they were delivered to the buyer(395), or he knows or should have known the existence of the non-conformity else how(396). Nevertheless, the buyer shall not rely on the lack of conformity if the seller discloses to him, at the time of conclusion of the contract(397) or later(398), the facts to which such lack of conformity relates(399).

Obviously, "*the provision of Article 40 is intended to be a "safety valve" for preserving the buyer's remedies for non-conformity in cases where the seller has himself forfeited the right of protection, granted by provisions on the buyer's timely examination and notice, against claims for such remedies*"(400). It should also be noted that the rules of Article 40 CISG apply even if the 2-year time limit of notice under Article 39/2 CISG has lapsed(401); in such a case, the seller can only rely on the general prescription rules under applicable domestic laws or possible international conventions, such as the 1974 United Nations Convention on the Limitation Period in the International Sale of Goods(402).

Notably, Article 40 CISG does not explicitly provide for the case in which the seller fraudulently concealed the lack of conformity. According to the good faith principle stipulated in Article 7/1 CISG however, the buyer who is unaware of the lack of conformity on account of his gross negligence seems to be more worthy of protection than the seller who purposely sets out to deceive

(395) Decision of Landgericht Landshut – Germany, No. 54 O 644/94, dated 05.04.1995.
(396) Veneziano, *supra* note 15, 55.
(397) Decision of Cour d'Appel de Paris, No. 03/21335, dated 25.02.2004.
(398) Schlechtriem / Schwenzer, Schwenzer, *supra* note 14, 591.
(399) Arbitral Award of Bulgarska turgosko-promishlena palata (Bulgarian Chamber of Commerce and Industry), No. 56/1995, dated 24.04.1996.
(400) Award of Arbitration Institute of the Stockholm Chamber of Commerce - Stockholm, Sweden, dated 05.06.1998.
(401) Schlechtriem / Schwenzer, Schwenzer, *supra* note 14, 592; Sono, K., Seller's knowledge of lack of conformity, in: Bianca, C. M. / Bonell, M. J. (Eds.), "*Commentary on the International Sales Law*", Giuffrè: Milan (1987) (Commentaries by J. Barrera Graf , H.T. Bennett , C.M. Bianca , M.J. Bonell , G. Eörsi , M. Evans , E.A. Farnsworth , W. Khoo , V. Knapp , O. Lando , D. Maskow , B. Nicholas , J. Rajski , K. Sono , D. Tallon , M. Will), 314; Shafik, *supra* note 41, 159.
(402) Award of the Arbitration Institute of the Stockholm Chamber of Commerce - Stockholm, Sweden, dated 05.06.1998.

the buyer(403). To put it in the words of the Provisional Appellate Court of Köln – Germany, "*Selbst der grob fahrlässig unwissende Käufer erscheint schutzwürdiger als der arglistig handelnde Verkäufer*"(404), i.e. even a very negligent buyer deserves more protection than a fraudulent seller.

Also, under Article 341 Mejella the seller will not be liable for the defects in the thing sold if the buyer knowing the defects accepts the sale. Contrary to CISG, this provision does not also consider the case in which the seller could not have been unaware of the defect. Thus, Article 468/2 of the Palestinian Civil Law Draft is better formulated than Article 341 Mejella: It clearly makes the seller not answerable for the defects of which the buyer was aware at the time of the sale or which he could have discovered himself had he examined the thing sold with the care of a reasonable person unless the buyer proves that the seller has affirmed to him the absence of these defects or fraudulently concealed them from him(405). The first sentence coincides with Article 40 CISG, and the second sentence goes further and explicitly addresses the case in which the seller fraudulently conceals the defects in the thing sold. Moreover, in harmony with the rules of CISG, Article 478 of the Palestinian Civil Law Draft prevents the seller from availing himself of the prescription of six months (i.e. the absolute cut-off period) if it is proved that he has fraudulently concealed the defect from the buyer.

The Unidroit Principles, by contrast, do not include any explicit provision in this regard. However, the principle of good faith and fair dealing in international trade (Article 7.1/1) would play here an important role.

E-3: Exception 2: Buyer's Failure to Give Notice Due to a Reasonable Excuse:

According to Article 44 CISG, the buyer who has "*a reasonable excuse*" for his failure to give the notice of lack of conformity may retain some of the remedies he has legally had if he had satisfied his notice duty, namely reduction

(403) Poikela, *supra* note 15, 52.

(404) Decision of Oberlandesgericht Köln, No. 22 U 4/96, dated 21.05.1996.

(405) See also Article 479 of the Palestinian Civil Law Draft, according to which the parties may agree to increase, restrict or abolish the warranty unless such agreement is null and void since the seller intentionally and fraudulently conceals the defects of the thing sold.

of the price(406) or damages(407), except for loss of profit (in order to discourage fictitious claims(408)). The buyer will therefore lose all other remedies even if he has "*a reasonable excuse*" for failing to give the proper notice according to Article 39/1 CISG(409). It should also be noted that Article 44 does not exempt the buyer from the rules of Article 39/2 CISG(410): the buyer shall in all events give the seller the notice of the lack of conformity within the two years period(411).

In this regard, the cause of failing by the buyer to give notice of non-conformity does not matter whether it "*was that the buyer did not know of the lack of conformity, though he ought to have known of it, or whether the buyer failed to give notice of a lack of conformity of which he did know*"(412).

This rule of Article 44 CISG is aimed at balancing the rules of examination and notice under Articles 38 and 39 CISG(413). It takes into account the interest of buyers in the developing counties(414) in which the technological gap might render the examination and notice requirements too hard to satisfy(415). It clearly safeguards the buyer from the loss of all his remedies if he does not give the

(406) See also: Award of Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce, dated 24.01.2000.
(407) Award of ICC Court of Arbitration, No. 9187, dated 00.06.1999.
(408) Canellas, *supra* note 247, 263.
(409) That is to say, specific performance, fixing an additional period of time of reasonable length for performance by the seller of his obligation and avoidance of the contract.
(410) Reitz, *supra* note 216, 460. Schlechtriem / Schwenzer, Schwenzer, *supra* note 14, 619-620; Abd-Elaziz, *supa* note 15, 218.
(411) Sono, K., Failure to notify, in: Bianca, C. M. / Bonell, M. J. (Eds.), "*Commentary on the International Sales Law*", Giuffrè: Milan (1987) (Commentaries by J. Barrera Graf , H.T. Bennett , C.M. Bianca , M.J. Bonell , G. Eörsi , M. Evans , E.A. Farnsworth , W. Khoo , V. Knapp , O. Lando , D. Maskow , B. Nicholas , J. Rajski , K. Sono , D. Tallon , M. Will), 328; Honnold, *supra* note 19, 281; Shafik, supra note 41, 156-157; Decision of Oberlandesgericht Celle - Germany, No. 7 U 147/03, dated 10.03.2004, available at: http://cisgw3.law.pace.edu/cases/040310g1.html
(412) CISG-AC Opinion no 2, *supra* note 162, Comment no 4.2. See also: Schlechtriem / Schwenzer, Schwenzer, *supra* note 14, 621.
(413) Veneziano, *supra* note 15, 54; Schwenzer, *supra* note 169, 356.
(414) Flechtner, *supra* note 162, 22; Reitz, *supra* note 216, 441; CISG-AC Opinion no 2, *supra* note 162, Comment no 3.3.
(415) Canellas, *supra* note 247, 262; Sono, in: Bianca / Bonell, *supra* note 411, 308, 324.

seller the proper notice of lack of conformity due to a reasonable excuse, but at the same time deprives him from other important remedies, including avoidance of the contract, in order to protect the seller's interest in legal certainty(416).

Thus, it is the buyer who bears the burden of proving the reasonable excuse(417); otherwise, he should not rely at all on the non-conformity of goods for the lack of notice. Normally, there shall be a reasonable excuse when a reasonable person of the same kind as the buyer would not have notified the seller in the same circumstances(418). Related circumstances could include objective (e.g. type of the goods involved, kind and degree of non-conformity, the way of examination and the specifity of the notice(419)) and subjective factors(420) (e.g. the origin of the buyer and his level of experience(421)). Such a reasonable excuse would therefore be easily accepted in the case of buyer with less experience such as a single trader, an artisan or a free professional. Thus because the buyer is a large company which requires immediate decisions and actions and involves a great degree of commercial experience, he may not have a reasonable excuse(422). Likewise, the fact that the buyer's deficient organization caused delay in installing and putting the machinery into operation did not constitute a reasonable excuse but was well within the buyer's sphere of

(416) Canellas, *supra* note 247, 263. Schlechtriem / Schwenzer, Schwenzer, *supra* note 14, 621.

(417) Decision of Oberlandesgericht Koblenz – Germany, No. 2 U 580/96, dated 11.09.1998; Decision of Oberlandesgericht Saarbrücken – Germany, No. 1 U 69/92, dated 13.01.1993; Honsell, Magnus, *supra* note 15, 471. Veneziano, *supra* note 15, 54; Abd-Elaziz, *supa* note 15, 219.

(418) Honsell, Magnus, *supra* note 15, 466-467.

(419) Canellas, *supra* note 247, 266-267.

(420) *Ibid*, 265-266.

(421) Decision of Oberlandesgericht München - Germany, No. 7 U 3758/94, dated 08.02.1995: "*Eine wesentliche Rolle spielen dabei das Gewicht des Pflichtverstoßes, die Art der Ware und die Art des Mangels sowie eine etwa mangelnde Erfahrung des Käufers*".

(422) Decision of Oberlandesgericht München - Germany, No. 7 U 3758/94, dated 08.02.1995: "*Die Vorschrift greift insbesondere Platz bei Käufern, die ein Einzelhandelsgewerbe, ein Handwerk, einen landwirtschaftlichen Betrieb oder einen freien Beruf betreiben, während größere Betriebe wie die Firma PCD, deren Geschäft auf rasche und pünktliche Abwicklung eingerichtet sein muß, sich in der Regel an ihrem Pflichtverstoß werden festhalten lassen müssen*".

control(423). Also, the buyer cannot rely on his notice of the "wrong" delivery as a reasonable excuse for his failure to give notice of other non-conformities(424).

By contrast, the small size of the buyer's operation, which did not allow him to spare an employee full time to examine the goods, would be a reasonable excuse, but could not justify a notice after three months(425). Likewise, the buyer shall be excused pursuant to Article 44 CISG if he cannot be held responsible for the incorrect examination of goods by the independent inspection body appointed jointly by both parties, which results in the buyer's failure to give timely notice of the non-conformity to the seller(426). Also, recalling the principle of reasonableness set out in Article 8 CISG, an arbitral tribunal stated that, although the contract provided that the buyer would inspect the goods at the port of shipment or on loading on board, the postponement of the inspection of the first instalment till the arrival at the port of destination was reasonable due to the technical difficulties incurred by the buyer. As a result, the tribunal found that the buyer had a reasonable excuse according to Article 44 CISG for not having made the claim for lack of conformity within the time-limit agreed in the contract(427).

Noteworthy however, the district court of Frankfurt did not consider the expenses the Ugandan buyer wanted to avoid by not examining the goods at Mombasa, i.e. the original port of arrival, as an excuse for the late notice of non-conformity(428). As the buyer waited a short time to examine the goods after their arrival in Uganda, the court should actually have taken into consideration the purpose standing behind Article 44 CISG: namely the interest of buyers in

(423) Decision of Oberlandesgericht Koblenz, No. 2 U 580/96, dated 11.09.1998.

(424) Decision of Oberlandesgericht Celle – Germany, No. 7 U 147/03, dated 10.03.2004, available at: http://cisgw3.law.pace.edu/cases/040310g1.html

(425) Decision of Obergericht Kanton Luzern - Switzerland, No. 11 95 123/357, dated 08.01.1997, "… *vermögen die* von *der Klägerin angeführten Gründe, wie namentlich, dass sie einen Kleinbetrieb führe und für die Untersuchung der Ware nicht eine volle Arbeitskraft einsetze könne, die (verspätete) mehr als drei Monate nach Erhalt der Ware erhobene Rüge nicht zu entschuldigen*".

(426) Arbitral Award of ICC Court of Arbitration, No. 9187, dated 00/06.1999.

(427) Award of the Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce, dated 24.01.2000.

(428) Decision of Landgericht Frankfurt – Germany, No. 12/26 O 264/04, dated 11.04.2005, available at: http://cisgw3.law.pace.edu/cases/050411g1.html

the developing counties who, like the Ugandan buyer here, might be faced with difficult circumstances to examine the goods at their original port of arrival(429).

It should finally be mentioned that, neither the Unidroit Principles, nor PCLD, include a provision similar to the provision of Article 44 CISG. Contrary to CISG, both instruments were not in need to have compromise solutions to meet the interests of different legal systems. Indeed, the general principle of good faith would suffice in this respect(430). Even under CISG itself, some writers already argued that the principle of reasonableness underlying the examination and notice periods according to Articles 38 and 39 CISG might take into consideration the possibility of the existence of a reasonable excuse, which would mean that Article 44 CISG is unnecessary(431).

E-4: Exception 3: Seller's waiver of his right to invoke that the notice was late:

The seller might waive his right to set up the defense that the notice is not timely(432). This waiver can be explicit or - in certain circumstances – implicit(433). Implicit waiver may be decided according to the criteria of interpretation under Article 8 CISG. Thus, such waiver can be assumed when the seller takes back the goods or recognizes the defect in the goods without any

(429) Flechtner, *supra* note 162, 23-24; Schwenzer, *supra* note 169, 360-361.

(430) Article 1.7/1 UP, according to which "*each party must act in accordance with good faith and fair dealing in international trade*"; Article 148/1 of the Palestinian Civil Law Draft, according to which "*a contract must be performed in accordance with its contents and in compliance with the requirements of good faith*".

(431) See, for instance: CISG-AC Opinion no 2, *supra* note 162, Comment no 4.3, according to which "*it may be questioned whether article 44 added anything to the notice regime, since both article 38 and article 39 contain language that can fairly be interpreted to reach any result that article 44 was intended to reach. Furthermore, some courts interpreting ULIS had escaped the strict requirements of articles 38 and 39 by interpreting article 40 to hold that a seller who delivered defective goods "could not have been unaware" of the defects, thereby permitting the buyer to rely upon a late or defective notification of a lack of conformity. The same result could be achieved under CISG article 40, which is identical to ULIS article 40 in all essentials*".

(432) Honsell, Magnus, *supra* note 15, 435.

(433) Schlechtriem / Schwenzer, Schwenzer, *supra* note 14, 586; Günther, *supra* note 221, 4.

reservation(434). It is also ruled that, although the mere availability of the seller to an amicable settlement does not in principle constitute such a waiver(435), the negotiations between the parties for almost 15 months on the determination of damages for non conformity, without the seller expressly or implicitly reserving the defense that notice of lack of conformity had not been timely, could only be reasonably interpreted by the buyer as an implied waiver of the defense(436).

Similarly, the seller was held to have waived the right to set up the defense that the notice of lack of conformity was not timely given, by declaring that it would be liable for present or future justified complaints regarding the conformity of the goods(437). Also, the fact that the seller had several times attempted to repair the boiler after having been notified of the defects by the final customer was interpreted as a waiver by him of the requirement of timely notice(438).

In the same direction, the case law had also considered the seller – under certain circumstances – to have lost his defense that notice is not timely: When the seller, after receiving the late notice of non-conformity, had continued to ask the buyer information on the status of his customers' complaints, s/he had behaved in such a way that the buyer was led to believe the seller would not raise the defense, and thus the seller was estopped from setting up the defense that the notice was not timely since estoppel "*venire contra factum proprium*" – according to Article 7/2 CISG - is a general principle underlying CISG as witnessed by Articles 16/2-b on revocation of offer and 29/2 CISG on modification of contract(439).

(434) Günther, *supra* note 221, 4.

(435) It should also be noted that the mere fact that the seller is willing to carry on an examination of the goods upon receiving the buyer's claim of non-conformity could not per se mean that the seller had actually waived his right to assert the defense that notice of non conformity was not timely given, see: Decision of Oberlandesgericht Düsseldorf – Germany, No. 17 U 136/92, dated 12.03.1993.

(436) Decision of Bundesgerichtshof - Germany, No. VIII ZR 259/97, dated 25.11.1998.

(437) Decision of Bundesgerichtshof - Germany, No. VIII ZR 300/96, dated 25.06.1997.

(438) Decision of Oberster Gerichtshof – Austria, No. 8 Ob 125/08b, dated 02.04.2009.

(439) Decision of Internationales Schiedsgericht der Bundeskammer der gewerblichen Wirtschaft - Wien, Austria, No. SCH-4318, dated 5.06.1994.

Since the Unidroit Principles address the non-conformity of goods in general terms only, the rules of chapter four thereof on interpretation (i.e. Articles 4.1 - 4.8) could lead to the same result. In Palestine, Articles 159 – 168 of the Palestinian Civil Law Draft (Interpretation of Contract) would also be helpful in this regard. To sum up, whereas the explicit waiver might raise no problem under both instruments, the implicit one could be deduced from their general rules on interpretation.

F: Conclusion:

It is obvious that PCLD directly deals with domestic sale contracts. According to Article 89, PCLD international sale of goods contract shall, in contrast, be governed by related international conventions, and the interpretations of the terms in international trade prepared by international organizations (e.g. incoterms) if the contract refers to them. It should however be noted that Palestine is not yet a contracting party to CISG. Nevertheless, CISG (particularly, the non-conformity rules) may be applied in Palestine: According to its Article 1/1-b, CISG may apply in countries to which the contract involved has no connection; it rather suffices that the parties to the contract have their places of business in different States and that the rules of private international law of the court before which the dispute is brought lead to the application of the law of a contracting state.

Theoretically speaking, it is therefore wiser for Palestine to officially adopt CISG and make the business community familiar with it than going against the mainstream. As Palestine is not yet a state recognized by the international community, this solution is however excluded. Yet, there is the other way around, namely the enactment of PCLD whose article 89/2 invites the international commercial usages (including CISG and the Unidroit Principles(440)) to apply to international sale of goods contracts. This invitation has to be highly appreciated. Nevertheless, in order to make this invitation meaningful, the Palestinian courts ought to openly implement Article 89/2

(440) CISG and the Unidroit Principles are widely recognized today as an expression of international commercial usages, see, for instance: Arbitral Award of ICC Court of Arbitration, No. 9474, dated 00.02.1999: "*it is generally recognized that (CISG) embodies universal principles applicable in international contracts …. There are other recent documents that express the general standards and rules of commercial law, in particular … the Unidroit Principles of Commercial Contracts*". See also: Arbitral Award of ICC Court of Arbitration – Milan, No. 8908, dated 00.12.1998; Arbitral Award of ICC Court of Arbitration – Paris, No. 8817, dated 00.12.1997; Arbitral Award of ICC Court of Arbitration – Paris, No. 8502, dated 00.11.1996; Decision of Audiencia Provincial de Barcelona – Spain, dated 04.02.1997; Decision of Court of Appeal - New Zealand, No. 2000 NZCA 350, dated 27.11.2000.

PCLD (when enacted) and, thus, to actually apply the above mentioned international uniform law instruments.

In order to bring the Palestinian law in line with these international instruments, PCLD could also be reviewed once more: It can certainly be improved by importing from CISG and the Unidroit Principles some new legal ideas to Palestine. With regard to the non-conformity of goods discussed in this paper, PCLD can include new provisions on certain questions, particularly:

- Since PCLD does not explicitly regulate the buyer's special purpose of use and packaging of the goods, it can benefit from the provision of Article 35/2-b & d.
- Taking into consideration the enlargement of remedies the buyer has in case of non-conformity under CISG (and the Unidriot Principles), CISG is more suitable than PCLD to solve problems arising out of non-conformity. PCLD might therefore include the seller's right to cure (as part of international restatement of contract law): Article 7.1.4 UP does encourage the worldwide acceptance of a general right to cure.

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عدم مطابقة البضائع في ظل اتفاقية فينا للبيوع الدولية

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ملخص البحث

يتناول هذا البحث عدم مطابقة البضائع في ظل اتفاقية فينا للبيوع الدولية، من حيث: مفهومها، ومعايير تحديدها، والوقت الواجب توافرها فيه، وكذلك الواجبات الملقاة على عاتق المشتري لدى تسلمه البضائع، سواء فيما يتعلق بفحصها أو إخطار البائع بالعيب في مطابقتها. كما ويتناول هذا البحث الآثار القانونية التي تترتب على عدم مطابقة البضائع، سواء فيما يتعلق بالحقوق التي يستطيع أن يتمسك بها المشتري في هذه الحالة، أو حق البائع في إصلاح الخلل في مطابقة البضائع التي تم تسليمها، وكذلك الآثار القانونية التي تترتب على عدم قيام المشتري بالواجبات الملقاة على عاتقه، والمتمثلة بخسارة كل حقوقه الناتجة عن عدم المطابقة والاستثناءات الواردة على ذلك. ويتناول البحث كل هذه المسائل مقارنة بالحلول الواردة في هذا الخصوص في مبادئ الينيدروا لعقود التجارة الدولية وفي مشروع القانون التجاري الفلسطيني والقوانين الأخرى ذات العلاقة النافذة في فلسطين.