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UNIFORM INTERPRETATION: NOTICE OF NONCONFORMITY

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UNIFORM INTERPRETATION: NOTICE OF NONCONFORMITY

*Francesco G. Mazzotta**

This Article is about uniform interpretation as it pertains to the nonconformity notices under CISG Article 39.¹ Article 39, which is one of the most heavily-litigated provisions of the CISG, provides in relevant part:²

The buyer loses the right to rely on a lack of conformity of the goods if he does not give notice to the seller specifying the nature of the lack of conformity within a reasonable time after he has discovered it or ought to have discovered it.

I will focus chiefly on two aspects of Article 39(1): (1) what constitutes a “reasonable time” within which buyers must notify sellers of a “lack of conformity” and (2) what level of specification is required to establish “the nature of the lack of conformity.”

I. REASONABLE TIME

It is well-established that all the circumstances of a particular case, including, but not limited to, nature of the goods, trade usages, and practices between the parties must be considered in determining reasonable time.³

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¹ While my focus is mainly on CISG Article 39, it should be acknowledged that Articles 40 and 44 are equally important in the context of buyer’s obligation to notify seller of lack of conformity of goods, as they set forth exceptions to the general rule of Article 39.

² United Nations Convention on Contracts for the International Sale of Goods art. 39(1), Apr. 11, 1980, 14 U.N.T.S. 3.

³ See, e.g., Tribunale [District Court] di Rimini, Italy, 26 Nov. 2002, <http://cisgw3.law.pace.edu/cases/021126i3.html> (It.); Tribunale [District Court] di Vigevano, 12 Luglio 2000, No. 405, <http://cisgw3.law.pace.edu/cases/000712i3.html> (It.); see also JOHN O. HONNOLD, UNIFORM LAW FOR INTERNATIONAL SALES UNDER THE 1980 UNITED NATIONS CONVENTION 369 (4th ed. 2009); HERBERT BERNSTEIN & JOSEPH LOOKOFKY, UNDERSTANDING THE CISG IN EUROPE 89 (2d ed. 2003); CISG Advisory Council Opinion No. 2, *Examination of the Goods and Notice of Non-Conformity Articles 38 and 39*, 16 PACE INT’L L. REV. (2004) [hereinafter CISG-AC Opinion No. 2]; Ingeborg Schwenzer, *National Preconceptions that Endanger Uniformity*, 19 PACE INT’L L. REV. 103, 120–22 (2007); PETER

Early cases (mostly German), presumably consistent with domestic law, set very short time limits for the notice.⁴

More recent cases, however, breaking from their domestic traditions, have adopted more generous approaches. One approach in particular has drawn a great deal of interest: the “Noble Month.” “The concept of a ‘Noble Month’ is not to be taken too literally as always being one month. It is intended as a yardstick, an outer framework of one month notification, which can be altered depending on the specific factors concerning the goods.”⁵

One benefit of the noble month approach is increased predictability in the application of Article 39(1). Another benefit is the “amalgamation of timeframes to stop an increasing diversification in setting of timeframes under Article 39 transnationally,” otherwise known as “homeward trend.”

While I wholeheartedly believe that predictability and uniformity are of the utmost importance, I have some reservations with setting presumptive periods of reasonableness.

First, since the noble month is not a strict rule but a presumption, one must necessarily assume that it is a rebuttable one, meaning that the party fighting the presumption must overcome it. Apart from “burden of proof” issues,⁶ I do not see how shifting burdens can improve predictability or uniformity given that it will not change how courts determine reasonableness.

Second, the Convention does not define what “within a reasonable time” means, and the choice of not defining the term is deliberate.⁷

HUBER & ALASTAIR MULLIS, *THE CISG: A NEW TEXTBOOK FOR STUDENTS AND PRACTITIONERS* 159–61 (2007); PETER SCHLECHTRIEM & PETRA BUTLER, *UN LAW ON INTERNATIONAL SALES* 127 (2009); see, e.g., Albert H. Kritzer, *Reasonableness*, <https://cisgw3.law.pace.edu/cisg/text/reason.html> (regarding the reasonableness standard) (“What is ‘reasonable’ can appropriately be determined by ascertaining [*inter alia*] what is normal and acceptable in the relevant trade.”).

⁴ See THE DRAFT UNCITRAL DIGEST AND BEYOND: CASES, ANALYSIS AND UNRESOLVED ISSUES IN THE U.N. SALES CONVENTION 379 (Franco Ferrari, Harry Flechtner & Ronald A. Brand eds., 2004).

⁵ Camilla B. Andersen, *Article 39 of the CISG and its “Noble Month” for Notice-Giving: A (Gracefully) Ageing Doctrine?* 30 J.L. & COM. 185, 187 (2012).

⁶ BERNSTEIN & LOOKOFKY, *supra* note 3, at 88; see also UNCITRAL DIGEST OF CASE LAW ON THE UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS 172 (2016) [hereinafter UNCITRAL DIGEST].

⁷ Professor Honnold summarized the legislative history of CISG Articles 39, 40 and 44 as follows: These three articles embody a delicate compromise of views that were vigorously pressed during UNCITRAL proceedings and at the 1980 Diplomatic Conference. Indeed, this is one of the few points where perceptions of differing regional and economic interests came to the

[The Convention drafters] could easily have included a presumptive period in Article 39(1), and the process of negotiating the Convention's text would have been the proper milieu for arriving at an internationally-accepted compromise. The drafters, however, eschewed reference to any specific period and chose a radically flexible standard—a “reasonable time”—designed to vary with the facts of each situation. Instituting a presumptive “reasonable time” for Article 39(1) notice invades the function of the Convention's drafters and the sovereign prerogatives of the Contracting States.⁸

Indeed, the German Supreme Court, after initially adopting the noble month approach,⁹ more recently seems to have backed away from the idea of a presumptive reasonable time under Article 39(1).¹⁰

Finally, even if we, commentators, were all to agree that noble month is the way to go, that would not prevent the courts (especially from certain jurisdictions), from disregarding it.

In her analysis of the status of the noble month doctrine, Professor Andersen noted:

A search of all reported CISG cases on Article 39 from the United States has failed to turn up a single one referring to the “Noble Month” or a comparable reasoning that strikes a compromise with other legal systems. The Anglo-American mentality as demonstrated here, is clearly not embracing a comparative approach, or attempting to formulate a more predictable guideline for this notice.¹¹

fore. Representatives of several industrial States, primarily of the Continent of Europe, stressed the importance of maintaining strict notice requirements embodied in their domestic rules. This position was opposed primarily by representatives of developing States. This opposition reflected fears that defects in heavy machinery might appear long after the machinery is delivered and put into use and that purchasers might be unaware of the drastic effects of delay in giving notice.

HONNOLD, *supra* note 3, at 365. See also CISG-AC Opinion No. 2, *supra* note 3, at 381–83; HARRY M. FLECHTNER, *Buyer's Obligation to Give Notice of Lack of Conformity*, in *THE DRAFT UNCITRAL DIGEST AND BEYOND: CASES, ANALYSIS AND UNRESOLVED ISSUES IN THE U.N. SALES CONVENTION 377, 377–79* (Franco Ferrari, Harry Flechtner & Ronald A. Brand eds., 2004).

⁸ HONNOLD, *supra* note 3, at 372 (footnote omitted); see also BERNSTEIN & LOOKOFKY, *supra* note 3, at 90–91 (“[T]he concept of a ‘standard’ notification period seems out of tune with the letter and spirit of the flexible Convention rules.”).

⁹ CLOUT Case No. 123 [Bundesgerichtshof (Federal Court of Justice), Germany, Mar. 8, 1995]; CLOUT Case No. 319 [Bundesgerichtshof (Federal Court of Justice), Germany Nov. 3, 1999] [hereinafter BGH]; see also Andersen, *supra* note 5, at 187–88.

¹⁰ CLOUT Case No. 822 [Bundesgerichtshof (Federal Court of Justice), Germany Jan. 11, 2006]; see also Andersen, *supra* note 5, at 189; Flechtner, *supra* note 7, at 372.

¹¹ Andersen, *supra* note 5, at 200.

Unfortunately, that is not the only case or the last one showing a strong homeward trend. Consider this more recent gem. In *Shantou Real Lingerie Manufacturing Co., Ltd. v. Native Group International, Ltd.*, the district court stated:¹²

Although the text of Article 39 refers only to a “lack of conformity of the goods,” see CISG art. 39(1) (emphasis added), at least one court has extended Article 39 to other breaches of contract, such as late deliveries[.] [citing a U.S. CISG case] *The analogous provision of the UCC, section 2-607, also has been interpreted as extending to late deliveries. See Sara Corp. v. Sainty Int’l Am., Inc.*, No. 05 Civ. 2944 (JCF), 2008 WL 2944862, at *8 (S.D.N.Y. Aug. 1, 2008); see also *Delchi Carrier SpA v. Rotorex Corp.*, 71 F.3d 1024, 1028 (2d Cir. 1995) (“Caselaw interpreting analogous provisions of Article 2 of the [UCC], may also inform a court where the language of the relevant CISG provisions tracks that of the UCC.”). To be sure, section 2-607, which requires buyers to inform sellers of “any breach” of contract, is more susceptible to this interpretation. See UCC § 2-607 (emphasis added). Nevertheless, this reading is a logical extension of Article 39, requiring minimal effort from buyers, while providing the seller both the opportunity to remedy an alleged defect promptly and some finality for transactions in which the goods are accepted.

However, the situation is not as bleak as it would otherwise appear. Consider what the United States Court of Appeals for the Second Circuit¹³ stated in a recent summary order¹⁴:

On February 4, 2016, an arbitration panel of The Cocoa Merchants’ Association of America, Inc. (“CMAA”) ruled that Cooperativa Agraria Industrial Naranjillo Ltda. (“Naranjillo”) had defaulted on its contractual obligations to deliver cocoa butter to Transmar. It ordered Naranjillo to pay Transmar \$2,606,626.60. The award was based on six nearly identical contracts Naranjillo and Transmar entered into on August 30, 2012 for delivery of UTZ Certified cocoa butter over the course of six months in 2013.

The district court vacated the CMAA’s award by order of September 22, 2016. *Cooperativa Agraria Industrial Naranjillo Ltda. v. Transmar Commodity Group Ltd.*, No. 16-cv-3356, 2016 WL 5334984 (S.D.N.Y. Sept. 22, 2016) (“Naranjillo”). . . . The district court relied on Section 10(a)(4), which allows for *vacatur*, in relevant part, “where the arbitrators exceeded their powers.” It found that Naranjillo and Transmar had not actually agreed to arbitrate their disputes

¹² *Shantou Real Lingerie Mfg. Co., Ltd. v. Native Grp. Int’l, Ltd.*, No. 14cv10246-FM, 2016 WL 4532911, at *4 n.6 (S.D.N.Y. Aug. 23, 2016) (emphasis added).

¹³ The same Court of Appeal that authored *Delchi* in 1995.

¹⁴ *Transmar Commodity Grp. Ltd. v. Cooperativa Agraria Industrial Naranjillo Ltda.*, 721 F.App’x. 88, 89–90 (2d Cir. 2018) (emphasis added) (showing the U.S. courts are capable of curtailing homeward trends).

before the CMAA or anywhere else, so the CMAA did not have any power to rule on their dispute. *Id.* at *4–6.

In coming to this conclusion, the district court applied New York law. *Naranjillo*, 2016 WL 5334984, at *4. It did so in error. As a contract between the United States and Peru, it is governed by the United Nations Convention on Contracts for the International Sale of Goods (“CISG”). “Generally, the CISG governs sales contracts between parties from different signatory countries” unless the parties clearly indicate an intent to be bound by an alternative source of law. *Delchi Carrier SpA v. Rotorex Corp.*, 71 F.3d 1024, 1027 n.1 (2d Cir. 1995) (“The CISG . . . is a self-executing agreement between the United States and other signatories. . . .”); Status, United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980), http://www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG_status.html (showing that Peru is a signatory country). Although the CMAA’s standard contract contains a choice-of-law provision designating New York law, the parties dispute whether that document is part of these contracts at all. The CMAA’s choice of law provision therein therefore cannot guide us.

Even if the district court is correct that the “caselaw interpreting the CISG is relatively sparse,” Naranjillo, 2016 WL 5334984, at *4 (quoting *Hanwha Corp. v. Cedar Petrochemicals, Inc.*, 760 F.Supp.2d 426, 430 (S.D.N.Y. 2011)), *that fact alone does not warrant substituting New York law for the CISG*. In fact, we have specifically [stated] that “[b]ecause there is virtually no case law under the [CISG, at least as of 1995], we look to its language and to ‘the general principles’ upon which it is based.” *Delchi*, 71 F.3d at 1027. *Moreover, New York law differs from the CISG in several important respects*. In particular, Article 8(3) requires courts to give “due consideration” to extrinsic evidence of the reasonable expectations of the parties if their subjective intent is at odds. *See* U.N.C.I.S.G. Art. 8(3), available at <http://www.uncitral.org/pdf/english/texts/sales/cisg/V1056997-CISG-e-book.pdf>; *MCC-Marble Ceramic Center, Inc. v. Ceramica Nuova d’Agostino, S.p.A.*, 144 F.3d 1384, 1389 (11th Cir. 1998) (calling Article 8(3) “a clear instruction to admit and consider parol evidence. . . .”). *Moreover, Article 9(2) evinces “a strong preference for enforcing obligations and representations customarily relied upon by others in the industry,”* which, of course, cannot but be demonstrated through extrinsic evidence. *Geneva Pharmaceuticals Technology Corp. v. Barr Laboratories, Inc.*, 201 F. Supp. 2d 236, 281 (S.D.N.Y. 2002), *rev’d in part on other grounds*, 386 F.3d 485 (2d Cir. 2004); U.N.C.I.S.G. Art. 9(2). New York law, by contrast, has long applied the “four corners rule” that prohibits extrinsic evidence unless the face of the document is ambiguous. *See Kass v. Kass*, 91 N.Y.2d 554, 566-67, 673 N.Y.S.2d 350, 696 N.E.2d 174 (1998).

The district court erred as a matter of law by relying primarily on the face of the contract and the document allegedly incorporated by reference. It should have also considered extrinsic evidence concerning “all relevant circumstances of the case including the negotiations, any practices which the parties have established between themselves, usages and any subsequent conduct of the parties,” U.N.C.I.S.G. Art. 8(3), and “a usage of which the parties knew or ought to have

known and which in international trade is widely known to, and regularly observed by, parties to contracts of the type” at issue here. U.N.C.I.S.G. Art. 9(2). Because additional fact-finding will be required in order to adduce such evidence, the district court abused its discretion in failing to allow discovery, hold an evidentiary hearing, or both. *See Kolel Beth Yechiel Mechil of Tartikov, Inc. v. YLL Irrevocable Tr.*, 729 F.3d 99, 103 (2d Cir. 2013) (“We review a decision to deny an evidentiary hearing for abuse of discretion.”). Of course, we express no view as to whether such extrinsic evidence should lead to the same or a different result.

As I said, there is some hope that the U.S. courts’ at times deeply ingrained homeward trend is countered with good examples of how CISG should be applied.

Professor Andersen (echoing Professor Schwenger) does not hide her disappointment with the way the Advisory Council handled the noble month doctrine. According to Professor Andersen, “[t]he ‘Noble Month’ was rejected by the CISG Advisory Council because it was perceived as an absolute fixed timeframe. The main culprit for this perception was the 1999 [German] Supreme Court Case . . . , which applied the benchmark as a mathematical and inflexible doctrine.”¹⁵

Obviously, Professor Bergsten does not see favorably a fixed period of reasonableness.¹⁶ However, he does so not because he misunderstood the noble month doctrine. Rather, he believes that a mechanical application of the rule without consideration of the circumstances of the case, as attempted by the German Supreme Court in 1999, was an error.¹⁷

It seems to me, therefore, that Professors Schwenger, Bergsten, and Andersen all agree that timeliness of the notice under Article 39 must be determined under the totality of the circumstances, not based on a standard, rigid timeframe.¹⁸ They also all disagree with the approach taken by the German Supreme Court in 1999.¹⁹

In the end, even if there is not an acknowledgment of the noble month or similar doctrines in U.S. case law, and even if U.S. courts often cite or

¹⁵ Andersen, *supra* note 5, at 199.

¹⁶ CISG-AC Opinion No. 2, *supra* note 3, at 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.”) (emphasis added).

¹⁷ Indeed, even Professors Andersen and Schwenger have reservations with the 1999 decision. *See* Andersen, *supra* note 5, at 188; Schwenger, *supra* note 3, at 112–13.

¹⁸ *See generally* Andersen, *supra* note 5, at 188.

¹⁹ *See supra* note 17.

even rely on the principles of domestic statutes or case law, the analysis and the conclusions reached by U.S. courts appear to be correct because they are generally based on a review of the totality of the circumstances, which, under the CISG, is the only uniform standard that should be employed.

I am not suggesting that failure to consider, or even acknowledge, case law from other jurisdictions is acceptable. U.S. courts should acknowledge the existence of non-binding decisions and should clearly state why they are disregarding them, which, in my opinion, in the context of Article 39, is relatively easy to articulate. Thus, while I am blaming U.S. courts to the extent that they do not acknowledge or discuss foreign decisions, or even worse, cite domestic law to interpret the CISG, I feel less inclined to blame U.S. courts for not following other jurisdictions' acceptance of presumptive periods of reasonableness. Indeed, the text of the Convention and its legislative history are clear on this matter.²⁰ Timeliness of notice under Article 39(1) is to be determined on a case-by-case basis, based on the totality of the circumstances.

Additionally, while the approach taken by the German and Swiss courts are to be commended for not importing their domestic rules into the CISG, their approach still presents homeward overtures. Indeed, a fixed period of time is typical under their domestic rules. The only difference is that under domestic rules this period is much shorter than under the CISG. In a way, U.S. treatment of the matter is much closer to the text of the CISG than the German, Austrian, and Swiss approach.

Fifteen years later, I reach the same conclusion Professor Bergsten reached in 2004:

While many of the decisions that have been reported to date are unobjectionable on their facts, there has been a tendency on the part of some courts to interpret CISG articles 38 and 39 in the light of the analogous provisions in their domestic law. This has been most overt where the CISG text is similar to that in the domestic law. While the method of interpreting in the light of domestic law that also requires notice to be given in a reasonable time does not accord with the requirement of CISG article 7(1), since it does not give due regard to the international character of the Convention, the results in the individual cases are difficult to criticize.²¹

²⁰ BERNSTEIN & LOOKOFSKY, *supra* note 3, at 90–91 (“[T]he concept of a ‘standard’ notification period seems out of tune with the letter and spirit of the flexible Convention rules.”).

²¹ CISG-AC Opinion No. 2, *supra* note 3, at 384–85 (footnotes omitted).

II. SPECIFICITY

As noted, CISG Article 39 requires the buyer to give notice “specifying the nature of the lack of conformity.” “Beyond the specificity requirement . . . , [the] CISG does not further define the contents of the notice required by [A]rticle 39(1).”²² Some early decisions, particularly from certain jurisdictions, were overly demanding in the amount of detail necessary to meet the standard.²³ The trend in more recent cases, however, is less demanding.²⁴

Courts essentially agree that notices must identify the particular nonconforming good.²⁵ Additionally, notices “must provide a sufficiently detailed notice;”²⁶ however, “the requirements for specifying a lack of conformity should not be exaggerated.”²⁷ Notices “framed in quite general terms (‘not in order,’ ‘defective quality or delivery of wrong goods,’ ‘inferior and poor quality,’ ‘second rate,’ ‘poor workmanship,’ ‘machine must be repaired,’ ‘there’s been a complaint’) or general expression of dissatisfaction (‘not as we expected/requested’) are generally insufficient for the purposes of the CISG.”²⁸

Based on the extensive case law on this matter, commentators agree that specificity depends on the purposes of the notice under Article 39(1), the parties’ statements and conduct, and the underlying transaction itself.²⁹ Courts, similarly, determine specificity based on the circumstances of the case.

²² UNCITRAL DIGEST, *supra* note 6, at 176.

²³ HUBER & MULLIS, *supra* note 3, at 158.

²⁴ See HONNOLD, *supra* note 3, at 368; see also BGH, Nov. 3, 1999, *supra* note 9; Tribunale di Vigevano, *supra* note 3.

²⁵ UNCITRAL DIGEST, *supra* note 6, at 174.

²⁶ HUBER & MULLIS, *supra* note 3, at 158.

²⁷ INGEBORD SCHWENZER, COMMENTARY ON THE UN CONVENTION ON THE INTERNATIONAL SALE OF GOODS 462 (4th ed. 2016); Franco Ferrari, *Tribunale di Vigevano: Specific Aspects of the CISG Uniformly Dealt With*, 20 J.L. & COM. 225, 235–36 (2001).

²⁸ SCHWENZER, *supra* note 27, at 463 (footnotes omitted); Ferrari, *supra* note 27, at 235. See also HONNOLD, *supra* note 3, at 368; UNCITRAL DIGEST, *supra* note 6, at 174–76.

²⁹ UNCITRAL DIGEST, *supra* note 6, at 174–76. See HONNOLD, *supra* note 3, at 368. SCHWENZER, *supra* note 27, at 462–65; HUBER & MULLIS, *supra* note 3, at 157–58.

III. CONCLUSIONS

I do not believe presumptive reasonable periods for purposes of Article 39(1) are consistent with the Convention and its legislative history. Additionally, I do not believe that failure to adopt such doctrines undermines predictability and/or uniformity in the application of the Convention. Finally, despite some homeward trend, the results are consistent with the Convention. Regarding specificity, more recent cases apply less strict approaches, which is consistent with the “reasonable” standard adopted in Article 39(1).

