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TIME-LIMITATIONS LIMITING UNIFORMITY UNDER CISG EVEN FOR THE CUT-OFF-TERM OF ARTICLE 39(2)

Johan Erauw



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TIME-LIMITATIONS LIMITING UNIFORMITY UNDER CISG EVEN
FOR THE CUT-OFF-TERM OF ARTICLE 39(2)

*Johan Erauw**

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I. INTRODUCTION

The CISG¹ does not contain time limitations with regard to actions between buyers and sellers.

Statutory time-bars must be sought in the domestic laws of member states. The applicable law for limitations might be the procedural law of the country in which a claim is brought before a court, or it might be the substantive law applicable to the sales agreement, because the national law governing the sales agreement provides all complementary rules in the margin of the rules of the CISG. This is a well-known distinction based on the different qualifications that national systems of law give to time-limitations as being either of a procedural or substantive nature.

In any case the CISG does offer one term that resembles a statute of limitation, namely the cut-off date for any notification based on non-conformity of the delivered goods imposed by Article 39(2) of the CISG.

The observations that follow, are directed towards underlining this evident fact; *viz.* to demonstrate that differences in national approaches and domestic terms in statutes of limitations lack uniformity bringing an element of disunity for CISG's application throughout member states, including in the relationship with the two-year cut-off for notification of non-conformity. I will illustrate the difficulties when parties must rely on domestic time-limitation rules in envisaging to enforce their rights under the CISG through the courts (or arbitration).

The makers of the Vienna Convention were aware of the need for a more uniform application of the CISG. They endeavored to add the limitation rules in a separate convention of the same date as the CISG, namely the United Nations Convention on Time-Limitations in the International Sale of Goods, on April 11, 1980.² I will discuss this treaty. Sadly, CISG-member states have not understood well enough the need for this compliment. Not all member states of the CISG have ratified it. That leaves parties to sales contracts with domestic law worries and surprises in practice.

¹ The U.N. Convention for the International Sale of Goods (CISG), U.N., Jan. 1, 1980, 19 I.L.M. 668 (1980). *See also International Sale of Goods and Related Transactions*, UNCITRAL.UN.ORG, <https://uncitral.un.org/en/texts/salegoods> (last visited Mar. 16, 2020) (listing all information regarding the CISG, including a status of ratifications, and detailing that 89 countries had ratified on January 15, 2019).

² *See Convention on the Limitation Period in the International Sales of Goods*, UNCITRAL.UN.ORG, https://uncitral.un.org/en/texts/salegoods/conventions/limitation_period_international_sale_of_goods (last visited Mar. 16, 2020).

The drafters of the CISG saw the urgency to add a uniform time-bar for foreseeably the most common cause of dispute—namely, buyers’ complaints over non-conforming delivery. Article 39 of the CISG is clear-cut and strict; it imposes notification within reasonable time of discovery of a defect and brings a two-year limit for notification (after handing over) of any defect whatsoever, patent or latent, to maintain buyer’s right for relief. This draws disputes away from domestic time-bars. My following contention is, however, that the exception to the diligent notification obligation, written in Article 40 of the CISG, not just weakens this cut-off term as an escape valve, but ultimately may invite the buyer to enter a legal claim, whence domestic prescription rules loom, to largely distract from the sought uniformity. I will analyze the dynamics of Articles 39 and 40 of the CISG.

Lastly, I wish to illustrate the difficulties when a buyer chooses to sue, by explaining a recent decision of the Ontario Superior Court of Justice, in which the Court made the effort to work out two different approaches (one under Belgian law and one under Canadian law) in one case.³

II. TIME-BARS DO NOT COME UNDER CISG

The time-bar to sue, or time-periods for statutes of limitations that cause prescription of rights to claim under the CISG—again—are not determined by the CISG. Neither were they in the predecessor convention ULIS (1964).⁴

The hiatus is understandable; knowing the difficulty of resolving the theoretical split in approach to the issue of time-bars over the countries that participated in the preparation of the uniform sales law.

The first drafters of uniform international sales law acknowledged the importance of time limitations, because the existing differences in national rules were too big and could cause diverse solutions. They moreover risked entrapping any practitioner in problems with characterization. In civil-law tradition, statutes of limitation would be left to the law applicable to the

³ *Sofina Foods Inc. v. Meyn Canada Inc.*, 2017 ONSC 6957 (2017).

⁴ The Uniform Law on the International Sale of Goods (ULIS), U.N., Jan. 1, 1980, <http://www.unidroit.org/instruments/international-sales/international-sales-ulis-1964> (The first uniform sales law applied only to six states: Belgium, Germany, Israel, Italy, Luxemburg and The Netherlands (effective from 18 August 1972) and, on condition of agreement by parties, also for Gambia and United Kingdom. This convention makes the attached ULIS constitutive part of national contract law for the international cases. ULIS was replaced by CISG.).

contractual relationship itself. In a common-law-approach the procedural law would say when the deadline to sue was drawn, as a bar to commencing court action. The first difficulty in reasoning about limitation periods is indeed the divergent qualification. This may already cause confusion.⁵

The schism in characterization seems, however, to be narrowing. In the U.S. a trend is signaled when more and more states accept that a limitation period shall be qualified as substantive law, coming under the domestic laws applicable to the substance of a dispute—not the procedural rules of the court addressed.⁶ Whereas in general, under the UCC, the statute of four years would apply to a claim under sales law, the statute Uniform Conflicts of Law—Limitation Act (UCLLA) was, as of 2012, introduced in seven states.⁷ This names time-bars as a substantial matter; if a claim were substantively based on a non-forum state’s law, the rule of that other state governs as applicable law (not forum procedural rules) and this comprises accrual rules and tolling rules. A judge is however able to escape—to go back to forum law if the applicable material law would be substantially different and not offer a fair opportunity to sue or would impose an unfair burden in defending against a claim. Procedural qualifications did recently still apply to allow claims as timely under local law, in the courts of Tennessee and Illinois, where the claims under the applicable substantive non-state laws were

⁵ It is well-known that the “discovery” of the problem of characterization in itself has been illustrated with the example of a late claim over a bill of exchange, introduced before a European forum (country “A”) of which the rules of contract law imposed a time-limit of one year for entering claims, whilst under the conflicts law of that same forum an international contract—as an example—was governed by the law of a state in the U.S. (country “B”); where the law on bills of exchange, when duly consulted, bode no term in contract law but did, under the procedural law of that said country “B,” hold a limitation period to sue, of 18 months. In accommodating to this foreign qualification of the limitation period as procedural by nature, the forum accepted the referral back and consulted its own law—this being the law for the procedural issues . . . where, this time, there was no procedural time-limit present. As a result, a late contractual claim that would be barred under both the domestic laws “A” and the foreign contract law “B” disappeared, after erasing both the periods of limitation through qualification and re-qualification.

⁶ Symeon Symeonides, *Choice-of-law in the American Courts in 2015: 29th Annual survey*, 64 A.J.C.L. 1 (2016) (noting nearly half of U.S. states have abandoned the procedural qualification).

⁷ See Symeon Symeonides, *Choice-of-law in the American Courts in 2012: 26th Annual survey*, 61 A.J.C.L. 75 (2013) (listing Colorado, Minnesota, Montana, Nebraska, North Dakota, Oregon, Washington—probably Arkansas, since 2017).

untimely.⁸ A California court, on a claim of a Delaware bank against a Californian domiciliary, considered the time-limitation substantive law, so the law of Delaware was applied—hence a short prescription made the bank’s claim untimely; but in deciding so, the California court denied application of an extension under the Delaware rule that tolled the statute of limitations when the debtor was outside the state and could not be served with process in a timely manner . . . (a procedural notion it would seem, indeed).⁹ Hence, the continued disparities.

The line between substance and procedure remains difficult to draw and differences in the length of time-limitations abound.

Some continental systems of law (the “Germanic” systems—notably Germany and Switzerland) had a time-limitation for protest of non-conforming delivery of one year after handing over the goods, when the CISG was negotiated. But that very short term is not to apply to cases of bad faith of the seller, where a German author finds a three-year term.¹⁰ The prescription periods are summed up by Schwenger: Spain and Austria—six months; Switzerland and Italy—one year; Germany—two years from delivery; Netherlands—five years; China—four years after knowing a defect; England—six years. We find under Article 1648 of the *Code civil* in French law, the same article in Belgian law, a “short delay” or *bref délai*, interpreted as being about one year and no longer than two years after discovery of the defect, in Belgium; and between two and three years for France—without there being an obligation to make notification. Those terms would apply to claims against a seller who was shown to have been aware of a non-conformity but kept silent about this; to be applied on an *ad hoc*-basis.¹¹

⁸ Symeon Symeonides, *Choice-of-law in the American Courts in 2018: 32nd Annual survey*, 67 A.J.C.L. 37 (2019) (citing *Sun Trust Bank v. Ritter*, 2018 WL 674000 (Tenn. Ct. App. 2018) and *NewSpin Sports, LLC v. Arrow Electronics Inc.*, 910 F.3d 293 (7th Cir. 2018)).

⁹ *Id.* at 39 (citing the case *Professional Collection Consultants v. Lujan*, 3d 211 Cal. App. (2018)).

¹⁰ BURGHARD PILTZ, *INTERNATIONALES KAUFRECHT—DAS UN KAUFRECHT IN PRAXISORIENTIERTER DARSTELLUNG* 278 (Beck, 2d ed. 2006).

¹¹ See INGBORG SCHWENZER & PETER SCHLECHTRIEM, *KOMMENTAR ZUM EINHEITLICHEN KAUFRECHT*, 365 (Beck, 2d ed. 1995); INGBORG SCHWENZER & PETER SCHLECHTRIEM, *COMMENTARY ON THE UN CONVENTION ON THE INTERNATIONAL SALE OF GOODS (CISG)* 637 (Oxford U. Press, 3d ed. 2010) [hereinafter UN COMMENTARY]. See also STEFAN KROELL, LOUKAS MISTELIS AND PILAR PERALES VISCASILLAS, *UN CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS (CISG)* 616 (Beck, 2d ed. 2018).

III. THE U.N. CONVENTION ON TIME-LIMITS IN INTERNATIONAL SALES OF GOODS

The Convention on the Limitation Period,¹² which applies to commercial sale of goods was adopted in 1974 and amended by a Protocol adopted in 1980 in order to harmonize its text with the scope of application of the CISG and to align it with the basic international sales law, in regard to admissible state declarations. The U.N. introduction states that this Limitation Convention “*may be functionally seen as a part of the CISG and, as such, considered as an important step towards a comprehensive standardization of international sales law.*”

There was from the early beginnings of uniform sales law¹³—and there still is—cause for further efforts towards unification; the same U.N. text accompanying the Convention stresses:

*[N]umerous disparities exist among legal systems with respect to the conceptual basis for [preventing the institution of legal proceedings at a late date], resulting in significant variations in the length of the limitation period and in the rules governing the claims after that period. Those differences may create difficulties in the enforcement of claims arising from international sales transactions.*¹⁴

The Convention has been ratified by just 30 states and of those, only 23 have also ratified the Protocol of April 11, 1980, aligning it closer with the CISG.¹⁵ Compared to the table of ratifying countries for the CISG, this is a poor showing. This remarkable fact causes practical complications and is one more cause of diversity or lack of uniformity for many cases handled under CISG-rules.

¹² *Convention on the Limitation Period in the International Sales of Goods*, UNCITRAL.ORG, http://www.uncitral.org/pdf/english/texts/sales/limit/limit_conv_E_Ebook.pdf (last visited Mar. 17, 2020) (noting the convention was signed at New York on June 4, 1974 and an amending Protocol was agreed on April 11, 1980; with its first entry into force on August 1, 1988, followed by later adhesions).

¹³ See JOHN O. HONNOLD & HARRY M. FLECHTNER, *UNIFORM LAW FOR INTERNATIONAL SALES UNDER THE 1980 U.N. CONVENTION 383* (Wolters Kluwer, 4th ed. 2009) (making an early decision to prepare rules of limitation).

¹⁴ *Supra* note 12.

¹⁵ *United Nations Commission on International Trade Law*, UNCITRAL.UN.ORG, http://www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1974Convention_status.html (last visited Mar. 17, 2020) (Only four countries ratified in the last ten years: Dominican Republic (2010), Benin and Montenegro (2012) and Côte d’Ivoire (2016)).

The Limitation Convention, just as the CISG, introduced substantive law into the national law of a ratifying country. Sitting there, it determines its own application in a geographical space—in a manner parallel to the CISG,¹⁶ meaning, it calls for its application if both buyer and seller reside in a member state. This, however, does not eliminate the need for a conflicts rule to decide whether this convention applies: in the first place the Convention may be called to apply through such a rule of private international law, in the case of a member state, through declaration, requires its application as soon as the conflicts rule points to a national law of a state that has introduced the Limitation Convention, even though just one party is domiciled in a member state. Secondly, because not all countries have ratified the Convention and even if they did, this might not answer all questions of law.

The Convention circumscribes the subject of time-limits for actions by way of a definition as a time-bar to exercising an action, which should avoid qualification issues as either a “limitation of proceedings” (the common law primary approach that uses a procedural qualification) or as a “prescription of rights” (the civil law qualification of what is deemed a substantive law issue). Article 1(1) states:

This Convention shall determine when claims of a buyer and a seller against each other arising from a contract of international sale of goods or relating to its breach, termination or invalidity can no longer be exercised by reason of the expiration of a period of time. Such a period of time is hereinafter referred to as “the limitation period.”

The Convention introduces a uniform limitation period for all claims under sales law, of four years (Article 8).¹⁷ But having determined the rule of four years, there are more difficulties—especially absent uniform rules. One must consider the entire mechanism or dogmatic structure. The Convention determines when a time-period commences, the running and eventual interruption of time, being either its tolling, cessation or recommencing plus termination of a term-limit.

¹⁶ The material field of application is also virtually identical—only minor differences are to be found in Article 5 and 6.1 Limitation Convention.

¹⁷ U.N. Convention for the International Sale of Goods (CISG), art. 23 (1980) (It further introduces an absolute limitation by which the period shall in any event expire *not later than ten years* from the date on which it commenced to run.)

The details are: A claim arising from a breach of contract shall accrue on the date on which such breach occurs. 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. A claim based on fraud committed before or at the time of the conclusion of the contract or during its performance shall accrue on the date on which the fraud was or reasonably could have been discovered (Article 10, Sections 1–3).

The limitation period shall cease to run when the creditor to a claim commences judicial proceedings against the debtor or asserts his claim in proceedings already instituted against the debtor, for the purpose of obtaining satisfaction or recognition of his claim (Article 13); similarly, when either party commences arbitral proceedings, if that was agreed—and then on the date on which a request thereto is validly delivered (Article 14). Any counterclaim shall be deemed to have been performed on the same date as the act performed in relation to the claim, on the condition that both the claim and counterclaim relate to the same contract or were concluded in the course of the same transaction (Article 16). The United Nations factsheet underlines a few neighboring complications, which are elaborated in the Convention Articles 17 and 18: “The Limitation Convention further provides rules on the cessation and extension of the limitation period.”¹⁸

It is somewhat disconcerting to note, that Article 19 of the Convention contains an odd reversal to national law, and also specifically what triggers recommencing a new term.

If a debtor acknowledges in writing his obligation to the creditor or would partially perform, a new limitation period of four years shall commence to run from the date of such acknowledgement (Article 21). If a creditor has been prevented by *force majeure* from causing the limitation period to cease to run, the limitation period shall be extended so as not to expire another year from the date on which the relevant circumstance ceased to exist (Article 22).

¹⁸ U.N. Convention for the International Sale of Goods (CISG), art. 17 (1980) (The fact-sheet on the convention states: “The period ceases when the claimant commences judicial or arbitral proceedings or when it asserts claims in an existing process. If the proceedings end without a binding decision on the merits, it is deemed that the limitation period continued to run during the proceedings. However, if the period has expired during the proceedings or has less than one year to run, the claimant is granted an additional year to commence new proceedings.”).

Parties to an agreement may exclude the application of the Limitation Convention. But, when it applies it is of a mandatory nature, so parties are not allowed to modify or affect the time-periods—except when a debtor would prolong a running time-limit in writing (Article 22). This principle was created to protect persons from developing countries against more powerful parties.

Under the U.N. Convention a judge may not *ex officio* apply a time-limitation; a party must request this—except . . . if a ratifying state made a reservation in this regard (Article 24 and 36). As to the consequence of a time-limit: when a party requested the time-bar, the lapsed right is not recognized (Article 25(1)). There is an exception to this, because a party could namely rely on his (lapsed) claim by way of defense or for the purpose of set-off against a claim asserted by the other party (for the latter, under circumstances—see Article 25(2)).

After this brief mention of technicalities, it must be clear where we would be confronted by national rules on such issues, in the absence of an application of the Limitation Convention (for some countries in the version of 1974, for other countries the amended 1980 variant), i.e., potentially for numerous cases, we will be in muddied waters.

IV. ARTICLES 39 AND 40 OF THE CISG—SPECIAL TERMS FOR NOTIFICATION OF NON-CONFORMITY

A. Article 39 of the CISG and Its Two-Year Cut-Off

In regards to the choice not to prescribe time-limits, even in a minimalistic approach, ULIS (1964) did make the particular exceptions in Articles 38 and 39. In the “new” 1980 Convention, Article 38 of the CISG requires the buyer to examine the goods . . . “in as short a period as is practicable” and Article 39 says the right to rely on the lack of conformity is lost after a *second* term, namely, “if he does not give notice . . . of the lack of conformity within a reasonable time after he has discovered it or ought to have discovered it.” For the all-important notification, Article 39(2) introduces a *uniform absolute cut-off date* for the buyer if a breach of seller’s obligation to deliver conforming goods is not “quickly” found out.¹⁹

¹⁹ See John C. Reitz, *A History of Cut-off Rules as a Form of Caveat Emptor: Part I—The 1980 U.N. Convention on the International Sale of Goods*, 37 AM. J. COMP. L. 437, 441–45 (1989).

The text on time-bars of Article 39 *ULIS/second sentence* is identical in Article 39(2) of the CISG, which states:

In any event, the buyer shall lose the right to rely on a lack of conformity of the goods if he has not given notice thereof to the seller within a period of two years from the date on which the goods were handed over, unless the lack of conformity constituted a breach of a guarantee covering a longer period.

Article 39 as a whole was one of the most discussed items in the diplomatic negotiations leading to the new CISG.²⁰ Its first subsection still requires notice to be given within “a reasonable time after” (in lieu of the 1964 wording “promptly after”)—which was considered more lenient than the text of ULIS (1964). The second sentence contains the absolute cap of two years for such notification, similar to ULIS, and remained undisputed during the drafting of the CISG.²¹ A cut-off period of two years was considered equitable for *international* sales.

This provision allows an easy application for those cases where the notification of lack of conformity comes later than two years after delivery; whence a court can easily conclude for the denial of such late claims, avoiding all practical difficulties. It shall reasonably safeguard the seller that the risk for deterioration or loss of the goods or for damage they might cause, will pass to the buyer. This applies to defects visible at the examination of the goods after delivery, (Article 38) as well as to hidden defects (“latent defects”).

A court is to control the timeliness of the notification under Article 39 of the CISG. The first issue is, that the term of two years for notification runs after handing over the goods—not two years after the moment of discovery of the defect.²² Absent notification of a defect, more than two years after that date, the use of remedies for defective delivery of goods is disallowed to the buyer in all instances; he can no longer rely on such lack of conformity.

One thing must be clear: as to the legal nature and consequences of the two-year cut-off date, the obligation to *give timely notice* is distinct from the possession or the introduction of an actionable claim under the law, before a

²⁰ See KROELL ET AL., *supra* note 11, at 586–617.

²¹ See Reitz, *supra* note 19, at 257–58; see also KROELL ET AL., *supra* note 11, at 588.

²² HONNOLD & FLECHTNER, *supra* note 13, at 374 (noting an eventual prolongation of the dispositive time-limit of two years could, under the 1964 ULIS, be drawn out over a maximum of one additional year *in which to commence legal action*).

court, an administrative adjudicator or an arbitrator. Whilst the strict notification requirement was introduced uniformly and will be controlled before the courts under the aegis of the CISG, this *cut-off date* is not determinative of the question of whether a claim before a court is time-barred. Rather, time-limitations are left to national law.²³ This may be confusing, because the text of the CISG states that the buyer “loses the right to rely on a lack of conformity. . . .”

The period of two years *for giving notice* after “handing over,” is thus not effected by the Convention on time-limitation (1974–1980) and is also not subject to the rules on the running (such as interrupting or tolling) of a statute of limitation; nor does any cause for suspension or barring of the running of this time-period apply. This characterization also affects the burden of proof regarding the running of the two-year cut-off term: this time-bar clearly lays the burden on the buyer to prove he made a *timely notification*, even when the two-year-cap is called as a defense by the seller.²⁴

The term of Article 39 of the CISG is dispositive; parties to the sales agreement may, by way of a guarantee, contract to prolong the cut-off term or may also shorten it. One German author compared the frequent use of shorter time-caps in standard delivery terms, this two-year period in Article 39 was too long. Its supplemental nature, however, allows correction, so a vigilant seller can have it shortened by agreement.²⁵

Where the buyer, after buying, resold to its own customers (such as to retailers), he would be subject to Article 39 requirements for his protest, if the defect relates to conformity. The cut-off date was formulated because professionals buy and resell in the international business cycle. Precisely for that reason, the term for notification of protest is so strict, to protect a seller. When the intermediary is informed by its buyer of a defect in the goods, when

²³ SCHWENZER & SCHLECHTRIEM, *supra* note 11, at 637 (The clear wording of Article 39 of the ULIS thus avoids issues of characterization for the international cases.); *see also* Peter Hay, *Kommentar zum Einheitlichen Kaufrecht—Die Hager Kaufrechtsübereinkommen vom 1. Juli 1964*, 72 AM. J. INT’L L. 436 (1976) (referencing Article 39, No. 6 and noting that national law generally determines at which point in time a cause of action is terminated).

²⁴ Under the ULIS there was one more disposition with a cut-off date, namely Article 49 of the ULIS. This introduced a sort of estoppel, with loss of buyer’s “right to rely on lack of conformity, one year after he has given notice as provided in Article 39.” The Uniform Law on the International Sale of Goods (ULIS), art. 49 (1980). It had the purpose of limiting delays in procedures after a valid notification—and was not taken up in CISG.

²⁵ *See* Hay, *supra* note 23, at 288.

the intermediary “buyer” learns of the previously hidden non-conformity, the short term for giving notice to the first seller begins (if within two years after delivery to him).²⁶

Further, time-limits for remedies against seller’s breach for *other* obligations, are quite naturally filled in by the domestic law that governs the sales relationship.²⁷ The same is true for an eventual claim based on a tort in regard to the sale (then under the domestic law applicable to the tort).

B. Commencing Judicial Proceedings in a Timely Manner Over the Issue of Timely Notification

A judge who does not reject a time-barred action by a buyer for a remedy based on non-conform delivery, and hence accepts jurisdiction, checks the timely notification, under Article 39 of the CISG, and eventually would sanction late notification with loss of all remedies. But, the judicial limitation period for the actionable claim as to conformity/non-conformity, or as to time of discovery of the defect, will have been sought in domestic law of the applicable national contract law—or in the forum’s procedural law, (see above) or in the U.N. Limitation Convention.

When the U.N. Limitation Convention in the International Sale of Goods (1974) is applicable, contractual claims in general, including a claim for non-conform delivery, would be prescribed after four years from the date of handing over the goods. Technicalities as to the running of that term would be covered by that text (above). The variant case, where a buyer sold on to a “sub-purchaser,” is covered by Article 18(2) of the U.N. Limitation Convention, which rules that: the buyer must inform the seller of the commencement of a procedure *while the limitation period runs*, in order to interrupt its running. The limitation period is not in suspension as long as the

²⁶ See *CISG Case Presentation*, LAW.PACE.EDU, <http://cisgw3.law.pace.edu/cases/980220n1.html> (last updated Jan. 16, 2009) (describing a case in which states that over the application of the short term of examination in Article 38, with notification under Article 39; it illustrates that goods resold are still covered by the notice requirement: “since the buyer was informed by its customer that they did not conform, . . . but did not inform the seller of their lack of conformity . . . of the tiles within a reasonable time of discovery, as required. . . .”

²⁷ For an obligation of seller that is *outside the scope of CISG*, such as the obligation of buyer to carry the costs of servicing its own clients, the notice requirement of Article 39 of the CISG does not apply to the counterclaim for extra compensation for such services rendered.

buyer was not informed by a sub-purchaser of a non-conformity.²⁸ Article 23 states, “. . . a limitation period *shall in any event expire not later than ten years* from the date on which it commenced to run under Article 9, 10, 11 and 12 of this Convention.”

One can imagine frictions arising between the two-year term of Article 39 and the other limitation period under domestic law. If the prescription leaves four years, this is good time to proceed before courts over the timeliness or other disputes in respect to the notification of a defect. In the rare case where a domestic prescription may lapse before the end of the notification term—such as for a Swiss contract of sale—it is suggested the convention term prevails and the one-year time-bar for an action falls away.²⁹ Otherwise, the interesting questions are: when the prescription period commences, how is it extended or ceased? What are the consequences of its ending? If the domestic time-limitation starts running at the time of handing over, (or legal “delivery”) then it should be applied. If, however, the time-period runs only from the time of discovery of the non-conformity, I think we may insist on a modicum of respect for the CISG-Convention’s notification cut-off at the two-year term (I expand below). So, I suggest, the rule should be that such a domestic term starts running at notification, or no later than when the time notification was ultimately due under Article 39 of the CISG. This means that it can start no later than two years after handing over the goods.

There are numerous cases reported where a buyer is cut-off from all remedies if notification is after two years.³⁰

²⁸ *Convention on the Limitation Period in the International Sales of Goods*, UNCITRAL.ORG, https://www.uncitral.org/pdf/english/texts/sales/limit/limit_conv_E_Ebook.pdf (last visited Mar. 17, 2020) (see Article 18 noting that “[w]here legal proceedings have been commenced by a sub-purchaser against the buyer, the limitation period prescribed in this Convention shall cease to run in relation to the buyer’s claim over against the seller, if the buyer informs the seller in writing within that period that the proceedings have been commenced”).

²⁹ CHRISTIANA FOUNTOLAKIS, INGEBOG SCHWENZER & MARIEL DIMSEY, *INTERNATIONAL SALES LAW* 332–33 (Oxford, 2d ed. 2012).

³⁰ See *United Nations Commission on International Trade Law*, UNCITRAL.UN.ORG, http://www.uncitral.org/uncitral/en/case_law.html?lf=899&lng=en (last visited Mar. 17, 2020); see also *United Nations Commission on International Trade Law, UNCITRAL Digest of Case Law on the United Nations Convention on Contracts for the International Sale of Goods*, UNCITRAL.ORG, http://www.uncitral.org/pdf/english/clout/CISG_Digest_2016.pdf (last visited Mar. 17, 2020).

C. Eventual Mitigation Under Article 40 of the CISG

There is, however, a possible cause for mitigation of the application of Article 39's strict cut-off. This could occur in certain cases too harsh for the buyer, based on Article 40. For such mitigation to apply, a buyer would have a heavy burden to prove that the seller knew of the non-conformity. The text of the 1964 ULIS-uniform law was very similar.

Article 40 [ULIS]/CISG states:

[t]he seller [shall not be] is not entitled to rely on the provisions of articles 38 and 39 if the lack of conformity relates to facts of which he knew, or [of which he][. . .] could not have been unaware, and which he did not disclose [. . .] to the buyer.

Under this article the courts can subsume the normal responsibility or liability of a professional seller, to *not knowingly* sell goods that are not in conformity with the contract.³¹ The seller must act in good faith. If he did not, he would not warrant relief. The exemption banks on the notion that a seller who knew or could not have been unaware of a non-conformity, does not need protection against a buyer. It would be contrary to good faith to allow a seller to rely on the buyer's failure to comply with obligations of notification under Articles 38 and 39.³²

Article 40 of the CISG brings a tempering influence on the strict term and harsh sanctions under Article 39. But it was not intended to unwittingly take away the well-intended protection introduced for the seller; nor to disturb the balance of rights in that regard. Informing the seller that Article 40 is invoked, must still be speedy in order to not disallow his own action against his predecessors in the commercial chain.

The exception opens only a defense for cases of seller's gross negligence as well as the presence of bad faith—apparent by the text. This includes a second condition for exemption, the seller's intent and action not to disclose his prior knowledge. That is essential to understand there is bad faith.

³¹ Uniform Law on the International Sale of Goods (ULIS), art. 13 (1980) (“*[f]or the purposes of the present Law, the expression ‘a party knew or ought to have known’ or any similar expression, refers to what should have been known to a reasonable person in the same situation*”).

³² KROELL ET AL., *supra* note 11, at 618–25.

A few German cases applied Article 40 as it was in the *ULIS* (1964). This gave courts a measure of interpretation as to whether and how the seller “knew” or “ought to have known” of the non-conformity. The mitigation at that time risked being used rather generally by courts weighing the positions of seller and buyer. If they felt the absence of notification by buyer was sanctioned too harshly in the particular case—resulting, perhaps, in a readily available corrective.³³

For the 1980 CISG Convention, the effective uniform world law on sales, we find more numerous applications of Article 40 as an exceptional mitigation mechanism to Article 39. Several decisions are known that apply the principle laid down in Article 40 and which is based on the good-faith obligation and as such linked to the general principles of CISG (Article 7(2)).³⁴ The CISG-database provides the information and the UNCITRAL Digest mentions 37 cases where the exception under Article 40 was invoked, in 16 of which an appeal for relief was granted and buyer could as yet call on remedies; and in 19 cases of which buyer’s invocation was rejected.³⁵

The CISG-text indeed introduces its own wording and criteria—and those shall be interpreted in a manner to enhance uniform application.

The court must decide whether the seller knew of the fact or could not be unaware and did not inform the buyer about the goods infringing the contractual conditions as agreed under Article 35 of the CISG quality prescriptions. Such knowledge would amount to a breach of good faith. Express knowing is required and buyer has the burden to prove this. Actual, as well as constructive, knowledge can suffice; which would depend on the

³³ *Uniform Sales Law in the Decisions of the Bundegerichtshof*, LAW.PACE.EDU, <http://www.cisg.law.pace.edu/cisg/biblio/schlechtriem3.html#iv> (last updated Apr. 15, 2002) (noting courts risked to make “an extreme exception” into a “corrective measure in practice.” The author cited the decision of Bundesgerichtshof, July 5, 1989 holding that for Article 40 *ULIS* seller’s grossly negligent unawareness would already be enough to exclude a claim of failure to give notice; in a case where a German buyer bought machines in Italy, destined in part for resale in the U.S. for which market the machines’ voltage tension was evidently not suitable; the Supreme Court remanded the case back to appeals for further factual analysis as to that knowledge).

³⁴ Alejandro M. Garro, *The Buyer’s “Safety Valve” Under Article 40: What is the Seller Supposed to Know and When?*, 25 J.L. & COM. 254 (2005–2006).

³⁵ See *United Nations Commission on International Trade Law, UNCITRAL Digest of Case Law on the United Nations Convention on Contracts for the International Sale of Goods*, UNCITRAL.UN.ORG, https://www.uncitral.org/pdf/english/clout/CISG_Digest_2016.pdf (last visited Mar. 17, 2020); see also KROELL ET AL., *supra* note 11, at 620–23 (who refers to very many decisions by courts and arbitrators).

type of non-conformity and on the role of the seller in the overall transaction; certainly encompassing gross negligence on the part of seller.³⁶ Courts will not easily be convinced that a buyer may still apply for remedies against the seller after the two-year cut-off term; except if buyer can prove seller was in bad faith withholding information he possessed at the time of contracting or of delivery (see below). Under the CISG there certainly is no presumption that works in the direction that the seller was considered grossly negligent if he did not know of the lack of conformity. On the contrary, it refers to and is predicated on the seller's advance knowledge of facts in relation to buyer's specific claim of non-conformity. Although, for requirements as to proof thereof, several cases show that in fact professional criteria of what is the normal and demonstrable expertise knowledge of the seller were considered. Ultimately, circumstances may bring a judge to presume knowledge, such as when the product had caused complaints by other buyers.³⁷

As to the time of not-knowing or of being-not-unaware: the Convention does not fix the time to consider for the seller's reproachable knowledge of non-conformity. It could be, that seller could not have been unaware (of the later to be revealed breach of conformity) at the moment of handing over the goods, especially as the cut-off term of Article 39 of the CISG (same under the 1964 ULIS) starts running then.³⁸

³⁶ KROELL ET AL., *supra* note 11, at 8–21.

³⁷ *CISG Case Presentation*, LAW.PACE.EDU, <http://cisgw3.law.pace.edu/cases/010627b1.html> (last updated Nov. 9, 2004) (In *S.r.l. R.C. v. BV BA R.T.*, the Belgian Appellate Court Antwerp decided Article 40 of the CISG was said to disallow seller's defense on the time-limitation, but only as a complementary consideration: Appellate Court Antwerp June 27, 2001 (not-frost-resistant floor-tiles); the court added mention of Article 40 of the CISG, in an obiter dictum: "because there had been earlier complaints about seller's tiles in which he had made a settlement through paying damages; so he knew of the defect and he violated the principle of good faith by concluding the contract of sale."). See also *CISG Case Presentation*, LAW.PACE.EDU, <http://cisgw3.law.pace.edu/cases/070416b1.html> (last updated Nov. 7, 2008) (In *Dat-Schaub International a/s v. Kipco Damaco N.V.*, the Belgium Appellate Court Ghent, on April 16, 2007, decided, that regarding Article 39 of the CISG notification "within a reasonable period"—the Art.[Article] 40 CISG exception was not admissible; as the latter Article aims either at bad faith or at gross negligence; neither are assumed; buyer has the burden of proof and neither could be withheld in the case cited.).

³⁸ Hay, *supra* note 23, at 291 (point 3 under Article 40).

D. The Statute of Limitation for the Buyer to Call on the Exception from the Cut-Off Term

We must find the time-bar for commencing judicial proceedings against the seller and for proving therein that the seller knew or was not unaware of the defect and did not disclose this knowledge. This prescription period is not written in the CISG and remains to be determined. The time allowed is determined by the U.N. Limitation Convention or otherwise by divergent domestic statutes. This threatens the effort to bring uniformity in this crucial matter of non-conformity, once the fight before court is on, making uncertain the balance this article strikes with the core disposition of Article 39 CISG.

I found no explicit study of this issue nor clear reasoning over this. One author wrote that the domestic German Limitation period would prescribe only after three years, the action was based on Article 40 to overcome Article 39(2).³⁹

One well-motivated decision mentions the issue: An arbitration panel deciding over damage to a heavy metal rail-press delivered in China, indicated:

*[T]he dramatic weakening of the position of the seller occurs when the seller loses his absolute defenses based on the relatively short-term time-limits for the buyer's examination and notice of non-conformity, instead is faced with the risk of claims only precluded by the general prescription rules under applicable domestic rules or possible international conventions (such as the 1974 Convention on the Limitation Period in the International Sale of Goods).*⁴⁰

The U.N. Limitation Convention (1974) is not all that often applicable, but may be informative. Its general rule in Article 10(2) as shown above, lets claims arising from a non-conformity “accrue on the date on which the goods are actually handed over to [. . .] the buyer.” Four years onwards, an action would be time-barred, also for invoking Article 40 . . . Article 10(3), for “a claim based on fraud,” allows four years to sue *after discovery of the fraud*—but never longer than ten years. In my mind, it is not easy to imagine the facts for which Article 40 would be invoked, for a seller would have to have known

³⁹ PILTZ, *supra* note 10, at 278 (refers to § 438, § 3 BGB).

⁴⁰ *CISG Case Presentation*, LAW.PACE.EDU, <http://cisgw3.law.pace.edu/cases/980605s5.html> (last updated Feb. 16, 2007) (presenting the 1998 decision of the Arbitration Institute of Chamber of Commerce of Stockholm, *Beijing Light Automobile Co. Ltd. v. Connell Ltd.*, where the tribunal sought exceptional circumstances).

or not been-unaware of specifically a non-conformity in the goods, with a view to remedies summed up in that regard, to constitute “fraud.” Such a claim would in practice go to a claim for invalidity—which arises out of CISG Article 4. This convention offers us another important insight to brake excessive extensions of time. Article 17(1) states, “When a claim has been asserted in legal proceedings within the limitation period [in accordance . . .] but such proceedings have ended without a decision binding on the merits of the claim, the limitation period shall be deemed to have continued to run.” Such implies that an action before an incompetent court or an action dropped or time-barred in itself, would not interrupt the timeclock.

The seller’s “knowing” or not-being-unaware, must be timed at the expiration of the “reasonable time” to give notice. That is what the excellent commentators Schwenger, Kröll and Garro find.⁴¹ The reason therefore is, that the obligation to notify seller of the non-conformity serves the interest of the seller to receive such information; thus, according to its legal purpose, in case seller already would know or be-not-unaware of the defect, *he needs no longer to be notified*. Those authors do not pronounce on the date of commencement nor the duration of the limitation period to invoke Article 40 in proceedings. I am presuming, that because the “knowing” must, for them, fall inside the two-year cut-off, they would just as well see merit in requiring the limitation period for proving such “knowing” to start running inside that same restricted time of Article 39. As a result, we shall add the time-limitation for serving process, onto the term of Article 39 for notification and its cap in 39(2). This would leave us considering the two-year cut-off and adding the maximum four-year prescription term—if we apply the U.N. Limitation Convention on top of that.

The domestic prescription-periods which I briefly mentioned above, run anywhere between one year to six years, and are to be considered with their variations as to the time of commencement (especially if seller were to be in bad faith), their running and interruption, resp. extension and the way they expire.

French and Belgian law allow a “short delay” to commence judicial proceedings against the seller, as a rule specific for latent non-conformity in

⁴¹ SCHWENZER & SCHLECHTRIEM, *supra* note 11, at 369 (1995); SCHWENZER & SCHLECHTRIEM, *supra* note 11, at 637 (2010); KROELL ET AL., *supra* note 11, at 23; *see also* Garro, *supra* note 34, at 256 (“before the goods are handed over or in any event before expiration of the period to give notice of defects”).

sales (the Article 1648 of their respective Civil Codes). All circumstances to be considered are mostly within one year, never more than two years. The special rule deviates from the prescription ten years after a claim accrues, for contractual claims in general. This short delay is a term much like the two-year cut-off of Article 39(2)—that is not a normal limitation period. It is a strict (short) term not subject to the rules of extension or cessation of limitation periods—says the Belgian Supreme Court.⁴²

This short delay starts to run at the moment the buyer is informed of the non-conformity—possibly of the damage it caused. Under such a rule that extends any running of time until the discovery of the hidden defect, we could see the prescription drawn out very long. But the general limitation of ten years shall apply, not allowing the “short delay” to cease running past that time. For a case where the buyer resold the goods and is confronted with the non-conformity, later on, when its own customer (sub-purchaser) commences legal proceedings, the short delay-period of limitation starts to run against the buyer when the sub-purchaser commences proceedings—only then is he clearly warned of the legal claim. The Appeals Court of Ghent (Belgium), decision on November 14th, 2008, applied the rule on the “short delay” and allowed for protest under Belgian law. This occurred after the buyer—having himself resold—was informed by its customer.⁴³

I do think it is equitable to respect a national set of limitation-rules if they show leniency to a buyer when the seller knew or could not-be-unaware of a non-conformity. The exception was surely introduced to be favorable to the buyer. But how far does the pendulum swing? A time-cap on invoking Article 40 in proceedings is the logical restoration of balance for the seller. This means the domestic prescription periods that bring restraint when a buyer calls on Article 40 of the CISG, must be understood in the international sales law context. We may not completely hollow out the two-year cut-off.

If we let the time allowed to the buyer, to run only from the instance of his becoming formally informed, we stretch too far. What is special about the

⁴² Cour de Cassation [Cass.] [Supreme Court for judicial matters] 12 civ., Nov. 29, 2013, No.C.12.0443.F (Fr.); PIETER BRULEZ ET AL., BIJZONDERE OVEREENKOMSTEN 102 (Themis Cahier 2014-2015).

⁴³ *CISG Case Presentation*, LAW.PACE.EDU, <http://www.cisg.law.pace.edu/cisg/wais/db/cases2/081114b1.html> (last updated Oct. 19, 2009) (discussing the Belgium Appellate Court Ghent 2008 decision, *Volamri Werner v. Isocab NV*, where a German seller sold a freezing chamber to a Belgian buyer who resold and let it be installed in a client’s bakery, where defects showed up, were repaired by the intermediary, but continued defect was later signaled to the first buyer).

international sales law of ULIS/CISG, is that *the drafters introduced the cut-off which must apply to hidden defects*. It is important we maintain a cap. Article 40 does not give a term for notification but it does refer to Article 39. It is read in narrow conjunction with the obligation mentioned there and thus any legal proceeding over lifting the notification restrictions does refer to the time-capped obligation under Article 39. Article 40 is a mitigation of the rules in Article 39 and is all about the time-limit in there. The issue is the disputed non-conformity and the article refers explicitly to Articles 38 and 39. There is no doubt about this.

Article 39, with the prescribed “reasonable time” for notification after buyer became informed of the non-conformity and the maximum period of two years after delivery of the goods, shall, in my opinion, have effect. The moment when the buyer becomes informed and no later than within the time of two years, is the time the prescription period starts to run. That means for Belgian and French law, for example, two years (Article 39) plus again the running of one-to-two years (Article 1648 CC), capping off at a maximum of four years after the time of handing over the goods.

I conclude, that for domestic limitation periods, the clock on liberating prescription that shall protect the seller from the legal action of a buyer seeking to make exception, under Article 40 conditions, from the notification obligation, starts to run at the time when the buyer’s obligation to notify the breach accrues under Article 39 and not later than two years after the handing over of the goods to the buyer.

V. A PARTICULARLY ILLUSTRATIVE RECENT CASE—ONTARIO SUPERIOR COURT

A. The Facts and Procedural Antecedents

The Ontario Superior Court of Justice, on November 22, 2017, decided on a motion for summary judgment to dismiss a cross-claim relating to an international sale of goods.⁴⁴ Being only a summary judgment the substantive issue of EMK’s eventual bad faith under Article 40 is not yet decided (awaiting judgment, on the merits, in the main proceedings). The matter concerned a buyer who several years after a sale and delivery of an appliance

⁴⁴ *Sofina Foods Inc. v. Meyn Canada Inc.*, 2017 ONSC 6957 (2017) (I disclose that I functioned as court expert on Belgian law and the ULIS, on request of the defendant.).

argued the seller was in bad faith—having known of the defect in the delivered good and having hidden this.

A dispute has been ongoing many years before two courts. Sofina Foods (formerly named Lilydale), introduced claims against a company Meyn-Can Equipment Ltd. of Canada (“Meyn”), a subsidiary of a Dutch corporation, in Alberta and in Ontario. These claims were for a large sum as compensation for the burning down of a food-processing factory in Edmonton, Canada. The fire was allegedly caused after Meyn Canada (together with “Allied” another Canadian company active in the installation of the cooking system), allegedly made a faulty construction of a fryer and oven combination for processing poultry. The major fire occurred on January 29th, 2004, which was ten years after the installation. Based on the fire expert’s findings, a letter was sent to Meyn on February 29th, 2004, informing it of the report that found a metal plug originally welded inside tubing linked to the manifold of the boiler—causing restrictions in flow. Lilydale introduced a statement of claim based on tort against Meyn in an Alberta court in December 2004, then with an Ontario court in March 2006. The claims alleged the boiler was the cause. Subsequently, claimant Lilydale, in May 2006, sued EMK,⁴⁵ a Belgian company, that had sold the boiler unit to Meyn, similarly based on tort.

The defendant Meyn Canada, in its turn, also addressed EMK in the Alberta court, in a third party claim or cross-claim, for indemnity and contribution, based on the delivery of a thermal oil boiler with a motor and pump, by EMK to Meyn, destined for the facility in Canada. The delivery of the boiler was done on the 23rd of December, 1993, *ex works* in Belgium—ten years before the fire. A limited one-year contractual guarantee term was agreed.⁴⁶ The Belgian EMK has indicated that it bought the boiler from a German manufacturer.

All tort claims among defendants and third parties in Alberta were discontinued in July 2009; they were dropped when the judge decided, by order in October 2013, that Alberta law was applicable to tort and all claims were statute-barred. From May 2006 onwards the Ontario procedure ran, the court accepted jurisdiction and Meyn as well as EMK counterclaimed against

⁴⁵ Lilydale Cooperative Limited v. Meyn Canada Inc., 2015 ONCA 281 (2015).

⁴⁶ The referenced general delivery terms were in Dutch and French. A contractual choice-of-court clause in the standard terms gave exclusive jurisdiction to a court in Belgium (but was disregarded). The Dutch mother company had concluded prior purchases of similar boilers. But, the judge decided it was not proven that the standard terms had been communicated to the affiliated Canadian company in English.

Allied, the company that installed the boiler into the system. Both Meyn and EMK by way of crossclaim also called the German company Weishaupt, manufacturer of another boiler delivered to Meyn. The two third-party claims of Meyn and EMK were then, on July 9, 2010, dismissed on the basis that the claims were outside the two-year limitation period for contribution and indemnity of Ontario's "Limitation Act (2002)."

The case was quite strong on time-bars.

On May 22nd, 2008, Meyn introduced the crossclaim against EMK based on the breach of contract as a cause of action.

B. Under the Terms of the ULIS

The Ontario court found that Belgian law applies to the sale-of-goods contract, based on Canadian rules of private international law [Obs. No. 76]. This meant the law as it was applicable to a sale contract concluded back in December 1993. The rules of the ULIS (1964) were applicable as the then substantive provisions for an international sale under Belgian law. Time restrictions for bringing claims for an alleged non-conform delivery under the contract of December 1993 had to be answered by looking into the notification requirement that applied under the uniform law. Articles 39 in conjunction with Article 40, stood center stage (see the texts above); plus, the relative statutes of limitations for court actions.

The two-year term of Article 39 in this particular case, started running from the date of effective "handing over"—which was *ex works* December 23, 1993. The shortened contractual guarantee term—explicitly—also ran from the date of handing over the goods. So, therefore, the latest date for notification of an alleged non-conformity passed on December 22, 1994, or the default two-year legal term for notification under Article 39 of the ULIS ran out on December 22, 1995. It has not been stated that the first communication to Meyn as buyer and reseller, about the fire in the processing facility of the ultimate buyer Lilydale, was by letter on February 20, 2004—in which it said that a plug welded inside the pipes had caused the fire,

making this the ground for a claim in tort—this was at that time also directed at EMK.⁴⁷

Defendant EMK called on the limitations in regard to notification under Article 39 and the cross-claimant invoked the Article 40 exception. The merits of the latter issue (did EMK know of the welded plug or should it have known and did it obfuscate that fact) were not discussed, but the timeliness of the defense, to set the notification obligations aside, was.

C. The Decision—Belgian Limitation Period

Meyn had not provided evidence that EMK knew or must have known of the metal plug in a coil of the boiler. Hence there was no genuine issue whether Meyn could rely on Article 40 of the CISG. EMK argued the appeal on Article 40 must be refuted, as factually unfounded and as untimely, so the cap for time to notify (Article 39(2)) should apply. But the Ontario court refrained from judging over the facts, in the context of the litigation as a whole, because the intermediary Meyn risked to be disadvantaged in its very much intertwined main action vis-à-vis its sub-purchaser Sofina, over why the installed pipes of the boiler were caused to be fractured. The court for that reason dismissed the factual part of the motion of EMK.⁴⁸ It did not decide whether or not Article 40 of the ULIS applied.

The judge then considered [No. 113]: “Even if the court were to conclude that the exception in ULIS Article 40 applies, a buyer’s claim can be barred under another provision in Belgian law, Article 1648 of the *Belgian*

⁴⁷ The claim that started out as a tort claim was time-barred by the Edmonton court. It was changed into a contractual claim. It is not clear to me, whether Meyn, in its onward sale to Lilydale, required a contractual short term for notification of an eventual defect, similar to the term of its sale contract with EMK. In any case, the allegation that seller was in bad faith, knowing the defect and intentionally not informing buyer, could set aside contractual notification terms.

⁴⁸ This case brings the complication that Meyn is squeezed in between the claimant company Sofina, owner of the production plant, and EMK that sold the boiler part of the cooking system, installed by yet others. A good part of the decision expresses the worries over the predicament of the intermediary. The Belgian party defending on the cross-claim argued the claim about its knowledge and intent to sell a defective boiler was evidently unfounded. Based on Canadian precedents the court firstly decided not to accept the motion for summary judgment. The court was unwilling to judge the facts and so that could not reach a fair and just determination of the merits; the reason being, if it did pronounce on that motion, over an interlocutory issue, could bring the party in the middle into jeopardy. A summary decision on the facts might be binding as to the merits in the main claim of Sofina against Meyn. That having been the base for the decision to reject of the motion, the court nevertheless proceeded to look into the issue of timeliness of the defense under Article 40 . . . not hampered by even a summary weighing the seriousness of the defense and indeed creating precedent on the issue of jurisdiction—as the court was aware.

Civil Code.” [No. 114]: “Belgian law has a general limitation period for claims based on contractual obligations of ten years, Belgian law also has a special time period for claims based on non-conformity of goods where such non-conformity is based on a latent defect that is of a fundamental nature.”

Belgian Article 1648, which is identical to the terms of the French Civil Code, holds that “*Proceedings resulting from actionable defects must be instituted by the buyer within a short delay, depending on the nature of the defects and customary practice in the place where the sale was made.*” [My translation]

I submit, that for the time allowed to commence a claim before a court, in a case with the complicated procedural antecedents I just indicated; this is where we are going to test the effects of Article 40 of the ULIS or CISG.

It is of consequence, that in Belgian doctrine and court decisions, the short time allowed in Article 1648 Cc is not a true limitation period, so that period is not subject to the rules of tolling or cessation and renewal, as with prescription periods. It is also clear that the “short delay” within which a buyer must introduce his claim against the seller, in the case where this buyer became intermediary by reselling to a sub-purchaser, only starts to run when the sub-purchaser commences proceedings against the buyer so triggering the claim over non-conformity. Meyn, informed in February of 2004, was sued by Lilydale on March 10, 2006; it served process on EMK in a cross-claim on May 12, 2006. That would be a “delay” of just two months. The sub-purchaser began the proceedings more than 12 years after the delivery of the boiler.

Furthermore, if the rules of extension of the prescription periods were to be applied, then introduction of a lawsuit before an incompetent judge would not interrupt the time; and the Ontario court did apply a lengthy extension based thereon. But in my opinion, they do not apply.⁴⁹ The first court action against the Belgian seller was introduced before the Queen’s Bench in Alberta, based on tort—a claim later judged to be time-barred and dropped. But the Ontario court notes that Meyn claimed indemnity and contribution (time-barred) while mentioning in its statement of claim the allegations of defects in design, fabrication and inspection; noting just as well, that the first Alberta claim did not refer to the factual requirements of

⁴⁹ Cour de Cassation [Cass.] [Supreme Court for judicial matters] 12 civ., Nov. 29, 2013, No.C.12.0443.F (Fr.).

Article 40. That first claim did not call on the contractual breach for a latent non-conformity that is now alleged. The court noted this action broadly gave the required notice of claim that Meyn was making. This Alberta action was only discontinued in July 2009 whilst on May 22, 2008, Meyn had introduced proceedings in Toronto and was pleading a new cause of action based on contract—which was said to not affect the continuation of the court actions.⁵⁰

EMK argued that the claim made under Article 40 was time-barred as even having been outside the general Belgian prescription term of 10 years after the claim accrued; the court did not elaborate on this.

The Ontario Superior Court of Justice decided [Cons. No. 133]—and I cite: “*Article 1648 does not refer to ULIS Article 40. ULIS Article 40 itself does not provide any time restriction for a claim that this exception applies. These are two separate requirements.*” It decided EMK was not entitled to summary judgment because Meyn did not satisfy the requirements in Article 1648 of the Belgian Civil Code.

It is true that Article 40 does not provide a time-limitation of itself. This very neatly formulates the issue: Is it the case that Article 40 of the CISG does not hold any time-limitation? Is it only the applicable national law (of the contract) that shall decide over the prescription of a claim under Article 40, or must we, for a sale under the CISG apply limitation periods to make exception from Article 39 in consideration of the content and goal of that article? (Would Belgian prescription rules have been correctly applied if the first claim against EMK came 12 years into the contract and the contractual crossclaim where Article 40 was invoked came several years later?)

D. Deciding Once More—Canadian Domestic Limitation Rule Applied in the Alternative

For the sake of completeness, the judge in Ontario took the effort of analyzing the alternative case—where under conflicts principles, not Belgian law, but perhaps Canadian contract law could hypothetically have been the domestic law applicable to the sales agreement of December 1993 between

⁵⁰ The Convention on the Limitation Period in the International Sales of Goods, art. 18(3) (1980) (“*Where the legal proceedings referred to in paragraphs 1 and 2 of this Article have ended, the limitation period in respect of the claim of the creditor or the buyer against the party jointly and severally liable or against the seller shall be deemed not to have ceased running by virtue of paragraphs 1 and 2 of this Article, but the creditor or the buyer shall be entitled to an additional year from the date on which the legal proceedings ended, if at that time the limitation period had expired or had less than one year to run.*”)

EMK and Meyn (which the judge, earlier, decided against). I too expand, for the sake of completeness.

The court stated the substantially identical terms of Article 39(2) and 40 would apply because Canada had adhered to the CISG (effective since May 1992). The court said the burden would be with Meyn to provide proof to establish the exception of Article 40—where ordinary negligence is not good enough. It then reasoned that, as with Article 39 of the ULIS, under Article 39 of the CISG, “there is no evidence that Meyn provided to EMK notification of the alleged lack of conformity that is now relied upon within the time prescribed by CISG Article 39.”

Looking deeper into EMK’s motion for summary dismissal, if the Canadian law of contracts were to decide, for the reason given above, the court would not venture into the facts for fear of prejudging on the same facts in dispute in the main claim (see above)—and thus not deciding on the issues of timely notice under Article 39 of the CISG and not on whether EMK had the requisite knowledge of the alleged defect in the boiler for Article 40 to apply [Cons. No. 145].

Then comes the interesting point where the court looks into the eventual domestic time-bar of an action (Meyn’s third party claim for contribution and indemnity) based on the bad faith of EMK sanctioned by Article 40 of the CISG, so it may not rely on all remedies being taken from the buyer. The court stated, for this odd but revealing exercise of considering the *contract hypothetically covered by Canadian law*, the Canadian Limitations Act (2002) would apply. This statute says, as a general rule, proceedings shall not be commenced after the second anniversary of the day on which the claim was discovered. The relevant subsections then clarify that in fixing that date, Section 18 of the Act in relevant part states:

[I]n the case of a claim by one alleged wrongdoer against another for contribution and indemnity, the day on which the first alleged wrongdoer was served with the claim in respect of which contribution and indemnity is sought shall be deemed to be the day the act or omission on which the alleged wrongdoer’s claim is based took place.

Then, it follows the very important observation that in earlier proceedings introduced by Meyn (and EMK). Judge D. Wilson had decided the very issue definitively for the third-party claim against Allied (see above) in which case the same question was raised. The decision was that the claim came more than two years after the action by Lilydale; that it had not been reasonable for Meyn to wait for the determination of the motion to stay the

Ontario proceedings. The Ontario Superior Court concluded Meyn was bound by that earlier decision in respect of the same right and was precluded from re-litigating that issue before court [Cons. No. 155]. EMK was also bound by the earlier decision.

The claim for that application of Article 40 was in this alternative hypothetical approach dismissed, based on the Ontario time-bar. EMK's motion for summary dismissal could hence, theoretically, have been allowed—as to the time-limitation on invoking Article 40 as defense for the buyer.

VI. BY WAY OF—REPEAT—CONCLUSION

I explained, that a statute of limitations must be sought in domestic law to eventually disallow a buyer or seller from entering court proceedings for a cause regarding the timeliness of a notification. For a buyer to commence court proceedings to overturn the time-limitation imposed on him for notifying seller of a breach in his obligation to deliver conform goods (Article 40) we must, similarly, apply a domestic time-bar to block the buyer from invoking that right with too much delay.

I explained that the U.N. Limitation Convention for international sales law (1974) imposes a four-year term for all actions. The four years for an action against the breach of the obligation to deliver in conformity with the contract, start to run at the time of handing over the goods. When this convention is not applicable, the national law applicable to the sale agreement provides the prescription term—except in those countries where time-bars are qualified as procedural matter, when forum law would be consulted. I did not do the comparative law research; I simply gave sparse data to repeat what others agree upon, namely this is a very diverse and complex matter—because of the technicalities involved in the running of time restrictions; so, certainly disrupting a uniform application of sales law.

I analyzed the dynamics of Articles 39 and 40 of the CISG to demonstrate how they reflect a balance of rights of both the buyer and seller. For cases where a buyer re-sells the goods to a sub-purchaser, there is no exception to the running of the notification time allowed to him in Article 39, capped at two years, for that protest to his seller. It would seem, some issues could be decided with more precision, notably, in regard to Article 40, the point in time at which the seller shall be proven to have known or not-to-have-been-unaware of a defect. I could note that authoritative authors did

write, that such time should be when the notice of non-conformity was due, after discovering the hidden defect, or no later than within the two years ultimately allowed for notification.

For all proceedings that go on over CISG-uniform law relative to Articles 39 and 40, we must add the domestic statutes of limitation. But how?

I looked for the precedents and worked out my proposal for the prescription rule when the buyer in an international sale of goods seeks relief under the conditions of Article 40, to not let seller rely on the cut-off term, when the buyer did not notify in time, especially after the hidden defect came to light late, and the two years of Article 39(2) slipped by. For a guide to construct the limitation-time on top of Article 39 and for the use of Article 40, we have a few connecting factors. For the contractual claim we saw that domestic prescriptions may run two, four (U.N. Limitation Convention), six or more years after the contract's conclusion or after the handing over of the goods. Ten years would mostly be the absolute time-bar. I accept the argument that for a claim in regard to the seller "knowing of the non-conformity" we start counting only from the discovery, but this discovery shall fall *within* the time constraint of Article 39. That is where the link is made; meaning that Article 40 refers to a time-limit of CISG. I surmise the link must be made and other authors make it. To the CISG cap of two years the limitation-time must be added (*e.g.*, two plus four years under the U.N. Limitation Convention; or . . . two plus ten years as a maximum in most jurisdictions). In that way, for a case where the defect remains undiscovered for many years, the limit does not stretch too far. For a dispute over the notification obligation in Article 39, buyer or seller shall sue within the time of the two-year cut-off plus the applicable prescription-time and then prove the timely notification. For relief of the buyer under Article 40, he must start proceedings in that same time-span (two years plus the prescription time) and prove that seller "knew or was not unaware" of the defect, within the time allowed under Article 39, and did not disclose the fact.

I found food for thought for all the above, in the illustrative case decided before the Ontario Superior Court on November 22, 2017, on which I reported at length.⁵¹ In the Province of Alberta, a fire had laid waste to a food-processing facility. It was allegedly caused by a defect in an industrial boiler

⁵¹ I disclosed that, in that case, I had been expert witness for the court, to advise objectively on the application of the ULIS (1964) and the CISG and on Belgian prescription rules in connection with that.

delivered by a Belgian seller to a Canadian buyer, who resold it to the Canadian processing company and installed it—with another installer. The delivery of the boiler was on December 23, 1993, under a contract for sale to which the court declared Belgian law applicable and thus the sales law of ULIS (attached to the 1964 U.N. Convention, with identical terms as in CISG). The fire occurred on January 29, 2004, ten years after the sale. The Canadian intermediary was informed of the fire one month later. Only two years after that date the company was sued in Alberta based on a tort committed; and shortly after, in Ontario for that same tort-action. The Belgian seller received summons from the food-processor in March of 2006 based on tortious conduct causing damage and was further called into the lawsuit by way of a crossclaim from its buyer, who claimed compensation in May 2006, still based on tort;—being respectively 12 and 14 years after the sale. In May 2008 the buyer called the Belgian seller before an Ontario court on the basis of a crossclaim under contract law—in which proceedings, later, the relief under Article 40 ULIS/CISG was invoked.

Under the Canadian rules of time-limitation, the tort action was dismissed as time-barred in Alberta; then the same claim was declared time-barred in Ontario. Another case, against the party that helped install the boiler, was based on Canadian contract law; it was also dismissed as time-barred. In this new contractual dispute, decided November 22, 2017, the Canadian buyer pursued its claim in contract against the Belgian seller. The latter entered a motion for summary judgment. On the point of its request for outright, summary rejection of buyer's claim for relief under Article 40 ULIS/CISG, because the action was hugely untimely, the seller was rejected. The Ontario court interpreted the Belgian domestic limitation period in Article 1648 civil code, as allowing to proceed; the reason given, being that the buyer had sued seller within a short delay of buyer's formal "discovery" of the defect, namely two months after the buyer was himself sued by the sub-purchaser. The proceedings on the tort-claim were however started by the sub-purchaser 12 years after the sale and installation of the boiler and did not lead to a decision on the merits. On the contrary, that claim was time-barred. Buyer's contractual claim was said to have been introduced while the tort cases were pending before a judge lacking competence; all be it, the time to serve summons was further extended. The court decided to further assert jurisdiction. This decision not to find a time-bar in Belgian prescription law against invoking Article 40 of the ULIS or CISG, came with the complimentary, slightly awkward excursion, that *if* the Ontario court had

indeed decided to apply Canadian law to the contract of sale, CISG would be the applicable text (identical) and its own domestic limitation-period would be applicable. The court decided that this hypothetical handling of the contractual claim under Canadian time-limitation rules, had been decided in an earlier court decision—which was opposable as *res judicata* to the buyer Meyn involved in the earlier proceedings as well as in the present case, on the same cause of action. So then, Meyn was barred from re-litigating and the court re-iterated, the much disputed contract claim is, in that approach, time-barred because two years have passed. While the Belgian Limitation statute in fact imposes a shorter time than that.

This shows how, by a simple turn of the hand, in the matter of prescription rules, it switches from thumbs up to thumbs down.