

Recent Developments: Nonconforming Goods Under the CISG—What’s a Buyer to Do?

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I. Introduction

After nearly ten years, an international jurisprudence of the United Nations Convention on Contracts for the International Sale of Goods (CISG)¹ has begun to develop, impacting courts and practitioners in the United States and abroad.² Increasingly, foreign courts are interpreting the CISG in ways which are unfamiliar to their American counterparts, forming an important and nuanced jurisprudence. Where previously courts and practitioners could look to merely the text of the CISG, supplemented with the work of eminent scholars, now practitioners and domestic courts are increasingly forced to consider how foreign jurisdictions have applied the CISG. Clearly, the foreign courts have begun to better define the contours of the CISG’s model of commercial transactions. As a *sui generis* entity, the CISG is neither wholly of the Civil Law nor of the Common Law, but borrows from both—and yet is also something entirely distinct. The CISG is conscious of vast differences in language, tradition, and distant geography. It grants contracting parties the primary responsibility

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1. United Nations Convention on Contracts for the International Sale of Goods, U.N. GAOR, U.N. Doc. A/CONF.97/18 (1980), reprinted in 19 I.L.M. 671 (1980) and 15 U.S.C.A. Appendix [hereinafter “CISG”].

2. For a good introduction to the CISG, see Peter Winship, *Changing Contract Principles in Light of the United Nations Convention: A Guide for Practitioners*, 29 INT’L LAW. 525 (1995) [hereinafter Winship, *A Guide*]. See also Franco Ferrari, *Recent Development: CISG: Specific Topics of the CISG in Light of Judicial Application and Scholarly Writing*, 15 J.L. & COM. 1 (1995); Peter Winship, *The U.N. Sales Convention: A Bibliography of English Language Publications*, 28 INT’L LAW. 401 (1994) [hereinafter Winship, *A Bibliography*]. The principal treatise on the CISG is JOHN HONNOLD, *UNIFORM LAW FOR INTERNATIONAL SALES* (2d ed. 1995).

to define contract terms, but because of the vast differences encountered in international trade, *pacta sunt servanda* is strongly presumed, and aggrieved parties are likely to get remedies other than damages. While some of these principles are explicit in the convention, they have become increasingly apparent in actual cases interpreting the CISG.

Nowhere is this more apparent than for buyers who wish to protect themselves from nonconforming goods. The trend among foreign judicial decisions is increasingly unfavorable, forcing buyers to protect themselves with contract provisions rather than relying upon interpretation of the international sales law. Almost universally, the unfavorable outcomes could have been prevented if adequate planning had taken place during contract negotiation.

In examining the emerging trends, this Article will consider the viewpoint of a buyer purchasing goods in a CISG contract, from the inception of the contract through the remedies available upon breach. Therefore this Article will address issues chronologically, including when and what kind of examination of goods must take place, and when and what notice is required.

A. *Does the CISG Apply?*

First, this Article should address how foreign jurisdictions have dealt with the critical preliminary issue—the determination of whether the CISG applies at all.³ The *lex mercatoria* character of the CISG encourages parties to specify their own terms—sometimes leading to difficult issues of contract interpretation.⁴ There are

3. The mistake of counsel in not knowing that the CISG is the governing law at all is illustrated by the recent case of *GPL Treatment, Ltd. v. Louisiana-Pacific Corp.*, 894 P.2d 470 (Or. Ct. App. 1995), *aff'd*, 914 P.2d 682 (Ore. 1995). This case is discussed in detail in Harry M. Flechtner, *Recent Development: CISG: Another CISG Case in U.S. Courts: Pitfalls for the Practitioner and the Potential for Regionalized Interpretations*, 15 J.L. & COM. 127 (1995). *GPL Treatment, Ltd.* turned upon an issue which is easily resolved under the CISG, but which was litigated all the way up to the Oregon Supreme Court on a far more tenuous U.C.C. theory, because trial counsel did not realize the CISG was the governing law in a timely fashion. The plaintiff was estopped from asserting the governing law, which was clear, and was forced to proceed on a tenuous U.C.C. theory. See *GPL Treatment, Ltd.* 894 P.2d at 477 n.4. Unfortunately, this is not the only reported case where a party did not realize that the CISG was the governing law in a timely fashion. See *Attorney's Trust v. CMC Magnetics Corp.*, No. 95-55410, 1996 U.S. App. LEXIS 21792, at *6 (9th Cir. Jul. 11, 1996).

4. Generally, the CISG applies to contracts for the sale of goods between parties whose countries are contracting states. See CISG, Art. 1. While this is generally true, there are detailed rules regarding when the CISG is the applicable law. For a more detailed discussion, see John Honnold, *The Sales Convention:*

two trends in this area. First, courts have treated the issue of whether the CISG is the governing law as a simple matter of contract interpretation, in which domestic law governs until it is found that the contract is instead governed by the CISG. In this regard, the principle that courts should give effect to the intent of the parties is alive and well. Thankfully, this permits planners to specify desired derogations (or adherences) specifically within the contract. More important, however, has been the judiciary's willingness to find derogations from the CISG in the contracts at issue before them.

B. Derogations from the CISG

Practitioners considering a contract governed by the CISG should be forewarned that while courts enforce explicit derogations as a matter of course,⁵ it is not unusual for courts also to find derogations by operation of contract.⁶ In other words, without specific reference to the CISG, a court may find a derogation from the CISG which was unexpected by the contracting parties.⁷

Background, Status, Application, 8 J.L. & COM. 1, 6-9 (1988). Major nations which have neither signed nor ratified the CISG include Japan and the United Kingdom. See *Journal of Law and Commerce CISG Contracting States and Declarations Table*, 14 J.L. & COM. 235 (1995). Additionally, there may be issues of application for those nations which signed or ratified the CISG while under Communist governments which were thereafter overthrown.

5. See [Germany] 05-07-1995, 9 U 81/94, OLG Frankfurt am Main; full text available on Unilex, Section E.1995-17.4. In that case, the buyer gave notice of nonconformity outside the contracted-for time and was therefore unable to recover. Many of the foreign cases are available on an electronic database called Unilex. The citation system used is as follows: [Country] date, identifying number, court; availability on Unilex; foreign publication (if any).

6. Derogation from the CISG is granted by Art. 6. For a discussion regarding model clauses varying application of the convention, see Winship, *A Guide, supra* note 3, at 538-39. Also, the CISG permits parties to contract into the CISG independently of the CISG's applicability provisions, and it also permits parties to contract for the application of a particular forum's law to supplement the CISG. See JOSEPH LOOKOFKY, *UNDERSTANDING THE CISG IN THE USA* 15-16 (1995).

7. In one case, a court held that a contract provision which mandated that the seller would guarantee the functioning of the machinery no more than eighteen months from the date of delivery constituted a derogation. ICC Court of Arbitration, 23-08-1994; 7660/JK, full text available on Unilex, Section E.1994-20. Article 39 permits—at the outside—a maximum of two years for such notice. Clearly, the approach the courts have taken has been very deferential to the intent of the parties, allowing parties who wish to avoid such risks to make their wishes explicit. Note that only contracts for the sale of goods, and not for services, are governed by the CISG.

More significantly, however, a derogation may also be implied through the CISG's battle of the forms provision—a provision which essentially adopts the old common law's "Last Shot" approach.⁸ The danger is especially keen with important terms of the contract, such as examination and notice, since a seller can alter those terms with a Last Shot form.⁹ Under the CISG, such changes may be considered a nonmaterial modification—and thus alter those terms which afford the buyer the greatest protection.¹⁰ For instance, a buyer sends an order to a seller, and the seller replies with a confirmation containing a provision stating that the buyer must give notice of any defects within thirty days after the date of the invoice. Under these circumstances, a court ruled that the seller's reply was a nonmaterial modification of the buyer's offer, and therefore a contract existed with the additional term.¹¹ Thus a seller can shorten the time period within which the buyer can examine the goods and give notice. This is a critical matter for buyers, since notice is the only way for them to retain any remedies in the event they receive defective goods.

It is interesting to note that the CISG does offer a safe harbor provision for sellers. The seller is protected against a buyer, even one who specifically limits the offer, if the buyer does not give notice of protest after accepting the goods.¹² This lack of protection for buyers, even those who specifically limit their offers to the specific terms in the offer, combined with the high standard for establishing a material change to an offer, places an especially

8. The CISG approach to the battle of the forms is contained in Articles 18 and 19. For further reference, see Henry D. Gabriel, *The Battle of the Forms: A Comparison of the United Nations Convention for the International Sale of Goods and the Uniform Commercial Code: The Common Law and the Uniform Commercial Code*, 49 BUS. LAW. 1053 (1994).

9. See *id.* at 1054.

10. *Id.* at 1061-64.

11. [Germany] 14-08-1991, 4 0 113/90, LG Baden-Baden; full text available on Unilex, Section E.1991-7; RECHT DER INTERNATIONALEN WIRTSCHAFT (RIW) 62 (1992).

12. The buyer has the right to protest a nonmatching acceptance under Art. 19(2).

Article 19 provides as follows:

(2). However, a reply to an offer which purports to be an acceptance but contains additional or different terms which do not materially alter the terms of the offer constitutes an acceptance, unless the offeror, without undue delay, objects orally to the discrepancy or dispatches a notice to that effect. If he does not so object, the terms of the contract are the terms of the offer with the modifications contained in the acceptance.

CISG Art. 19(2).

heavy burden on the buyer's primary protection—notice. Buyers must be vigilant in preserving their right to give notice of nonconformity within a time that is reasonable from their standpoint. Unfortunately, in this regard, the CISG's approach to the problem of the battle of the forms invites a kind of strategic behavior which does injustice to the CISG's model of commercial transactions.

II. Examination of the Goods

The moment the goods reach their destination, the buyer is forced to contemplate a series of considerations: when to inspect the goods, how to examine them, determining whether the goods conform to the contract, and how to inform the seller in the event that the goods are nonconforming. In this section, we will deal with when and how the goods should be examined. The recent jurisprudence in this area reflects the strong influence of the CISG's unique model of commercial transactions, with an emphasis on communication, as well as the strong unwillingness of the courts to permit parties to avoid contracts.

A. *When Must the Examination Be Made?*

A buyer who receives goods has a duty to examine them, which is governed by Article 38(1). The proper application of the examination procedure is of critical importance to the buyer who wishes to retain all available remedies.¹³ Failure to conduct a proper examination can result in a buyer sending a notice of nonconformity which is late or ambiguous, and thus ineffective. In either case, the buyer is unable to rely upon the nonconformity for any remedy. Article 38 mandates that the buyer examine the goods in "as short a period of time as is practicable under the circumstances."¹⁴ Since the CISG's emphasis on specific perfor-

13. These remedies include the right to avoid the contract, the right to demand cure, and the right to a price reduction. CISG Art.'s 49, 46, and 50, respectively.

14. CISG Art. 38(1).

Article 38 states as follows:

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

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

(3) If the goods are redirected in transit or redispached by the buyer without a reasonable opportunity for examination by him and at the time of the conclusion of the contract the seller knew or ought to have known of the possibility of such redirection or redispach, examination may be

mance has been sharpened by the recent jurisprudence, the duty on the buyer has become particularly heavy.¹⁵ In fact, some observers have interpreted Article 38 as requiring inspection *immediately*.¹⁶ On the other hand, a separate line of scholars has argued that the requirement to inspect is better read in conjunction with the duty to give notice of nonconformity within a reasonable time.¹⁷ The latter interpretation is better, since the seller suffers no injury if the examination is late but the notice is seasonable—with the possible caveat that timely inspection guarantees that the goods are actually nonconforming at the time of delivery and have not become defective in the meantime.¹⁸ In other words, a timely examination is generally a necessary precondition for timely notice of nonconformity. This interpretation of the examination period leads to a framework for the examination of goods which is flexible, by taking into consideration the surrounding circumstances.¹⁹

Nevertheless, it is likely that courts considering the issue will attempt to reconcile the two vantage points, rather than choose

deferred until after the goods have arrived at the new destination.

Id.

15. The U.C.C. speaks of notice being given in a "seasonable" fashion. U.C.C. §2-602(1) (1996). This language arguably implies that the buyer may have more time under the U.C.C. than under the CISG. The CISG requires inspection within as short a time as is practicable and the notice thereafter to be within a reasonable time of that inspection. CISG Art. 38(1). One scholar has interpreted the U.C.C. approach to notice and the CISG approach as consistent, at least among developed nations. See Lisa M. Ryan, *The Convention On Contracts For The International Sale Of Goods: Divergent Interpretations*, 4 TUL. J. INT'L & COMP. L. 99, 109-12 (1995). Lisa M. Ryan suggests, however, that for social and economic reasons, developing nations will interpret the inspection and notice requirements more loosely than developed nations. *Id.* at 110-11. There is no reported case law which has espoused such a view, although problems of infrastructure and lack of knowledge regarding technology are bound to impact notice and inspection requirements.

16. See Ferrari, *supra* note 2, at 105.

17. For instance, one scholar has stated that a buyer may not lose his rights where no examination takes place, but the inspection would not have uncovered the defect. See Ferrari, *supra* note 2, at 105. Likewise, a buyer who discovers a defect without examination must give notice. See *id.*; see also Honnold, *supra* note 4, at 328-30.

18. While courts have discussed late inspection in the abstract, it would seem incongruous for a court to permit a remedy against a buyer whose notice was timely but who did not give a timely examination of the goods, since the seller is generally not prejudiced.

19. For a discussion of what circumstances ought to be relevant see Ferrari, *supra* note 2, at 100-03. See also C.M. BIANCA, *Conformity in the Goods*, in COMMENTARY ON THE INTERNATIONAL SALES LAW 268, 299 (C.M. Bianca & M.J. Bonell eds., 1980).

between the two. One court has already done so, by first upholding the principle of flexibility, on the basis that the proper timetable for inspection is determined by reference to the time needed for reasonable notice of nonconformity.²⁰ However, the court then noted with approval those scholars who interpret Article 38(1) as imposing a duty to inspect goods within a few working days.²¹ In other words, while the timetable for examination is logically related to the time to give notice of nonconformity, this court also demonstrated its strong preference for quick inspection. When flexibility conflicted with quick notice, quick notice won.

Naturally, there is a tension between performing a quick, timely inspection and performing a thorough inspection. In a case involving engines that had very specific technical requirements, the buyer conducted his own examination and determined that the machines did not meet the contracted-for terms.²² The buyer then sent the engines to a university to confirm his initial diagnosis.²³ This delayed notice for four months, which the court found unreasonable, despite the heightened care in inspection required by the highly technical nature of the goods.²⁴ This not only illustrates the foreign jurisdictions' antipathy for avoidance and emphasis on quick notice, but it also reinforces the principle that it is the contract itself, rather than the CISG as governing law, that will give buyers their greatest protection.

More importantly, however, this raises a practical issue which is not addressed in the scholarly commentary or the cases. What should a buyer do if the buyer is suspicious but not certain of the nonconformity? This is especially pertinent in cases where highly sophisticated and expensive equipment is the subject of the contract. On the one hand, the buyer could give notice to the seller that the buyer is suspicious of the nonconformity and is enlisting a third party expert to determine if such a nonconformity exists. This has the advantage of demonstrating good faith and gives the seller an opportunity to be informed as to the status of the goods and, if the seller wishes, to respond.²⁵ However, such

20. [Germany] 23-6-1994, 31 O 231/94, LG Düsseldorf; full text available on Unilex, Section D.1994-16.

21. *Id.*

22. *Id.*

23. *Id.*

24. *Id.*

25. This would be consistent with Honnold's list of factors regarding the reasonableness of time for notice of nonconformity, which includes a consideration for the need for an independent, third party examination. See Honnold, *supra*

a notice is probably incapable of giving the seller notice which is usually considered sufficient for later reliance.²⁶ Therefore, it is not clear whether the dual-notice approach (notice of suspicion immediately and of nonconformity when confirmed) will buy any extra time. On the other hand, if the buyer gives notice of the nonconformity even if the buyer is unsure, subsequently pursues an independent, third-party examination, and later withdraws such a notification if it is determined that there is no nonconformity, is there any remedy against the buyer by the seller? The buyer would face the prospect of appearing to act in bad faith, and the seller could incur costs, particularly in reliance upon the notice, but it is not certain what remedies are available to the seller. While no answer is immediately apparent, it is clear that the strict adherence to form that has been the pattern in the cases can lead to unfair results. A flexible, more equitable approach is called for. The paucity of cases in common-law countries, who are more used to explicit considerations of equity and attention to the facts of the particular case at hand, is unfortunate, for here their expertise is most needed.

One workable solution would be to permit a buyer a longer time to inspect if the buyer can demonstrate diligence in inspection (keeping in mind the nature of the goods). This is particularly true for highly technical goods, such as engines. However, since courts seem to have been rather unforgiving in this regard,²⁷ the only way a buyer can reduce his exposure to such risk is through contract provisions.

B. How Detailed Must the Examination Be?

Nowhere is the formalism and strictness of the recent CISG jurisprudence more apparent than in how detailed the examination and the resulting notice must be. The text of Article 39 states that a buyer loses the right to rely upon a nonconformity if the buyer does not give notice "specifying the nature of the defect" within a

note 4, at 336.

26. This notice is not capable of acting as a notice of nonconformity because it is not complete and does not inform the seller as to whether the seller must institute any action. Arguably, however, it could foster policies underlying the notice requirement by affording the seller the opportunity to search for documents which would verify the condition of the goods and prepare it for the possibility of litigation. Therefore, depending upon the circumstances, some of the purposes behind the notice provisions may be served.

27. See, e.g., [Germany] 23-6-1994, 31 O 231/94, LG Düsseldorf; full text available on Unilex, Section D.1994-16.

reasonable time of discovering it.²⁸ The paramount example of this formalism is a case where a German firm purchased frozen bacon shortly before the Christmas holiday.²⁹ It received complaints from its customers, whereupon it informed the seller that the bacon was rancid and refused to pay for the bacon.³⁰ Twenty days later, the buyer appointed an expert to examine the goods and four months later offered restitution of the goods.³¹ The buyer argued that examining the bacon was not possible until its customers had defrosted it.³² The court held that twenty days to appoint an expert was too long, even considering that the time of year was near the Christmas holiday and notwithstanding the frozen condition of the bacon.³³ Furthermore, it held that the notice given to the seller was ambiguous since it did not specify whether the alleged defects related to all the delivered goods or only part of them—even though the order was for ten *tons* of bacon.³⁴ Thus, the notice failed both because it was not timely and because it was insufficiently detailed. The notion that this approach may not have been commercially practicable does not seem to have been a concern for this court, but the ruling is consistent with the larger pattern of formalism in the cases.

This pattern is only broken when, pursuant to Article 40, the seller could not have been unaware of the defect.³⁵ This is illustrated by the case in which a buyer of Italian wine discovered

28. CISG Art. 39.

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

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

Id.

29. [Germany] 20-03-1995, 10 HK 2375/94, LG München; full text available on Unilex, Section D.1995-1.

30. *Id.*

31. *Id.*

32. *Id.*

33. *Id.*

34. [Germany] 20-03-1995, 10 HK 2375/94, LG München; full text available on Unilex, Section D.1995-1.

35. Article 40 provides that the “seller is not entitled to rely upon the provisions of article 38 and 39 if the lack of conformity relates to facts of which he knew or could not have been unaware and which he did not disclose to buyer.” CISG Article 40.

that the seller had watered down the wine, in violation of European Community law.³⁶ The court held that the buyer had the right to rely on the nonconformity.³⁷ The court reasoned that the buyer was not bound to have the wine inspected for water additions, as it was not customary practice to make such an inspection, and the wine examination took place only one day after delivery.

Thus it may be that the generally agreed view that the inspection ought to be as detailed as a reasonable person in the trade would make it is the exception in the cases, rather than the rule.³⁸ This is the same interpretation put forth at the Conference. The commentary to a similar previous draft of Article 38 states that the examination requires the buyer to make an inspection which is:

reasonable in the circumstances. The buyer is normally not required to make an examination which would reveal every possible defect. That which is reasonable in the circumstances will be determined by the individual contract and by usage in trade and will depend on such factors as the type of goods and the nature of the parties.³⁹

While the prevailing view among scholars as well as the drafters is more favorable to buyers,⁴⁰ it is apparent from the rancid bacon case that this standard has either been ignored or has been interpreted in a fashion unfavorable to buyers.

36. [Germany] 12-10-1995, 7 HO 78/95, LG Trier; full text available on Unilex, Section D.1995-28; NEU JURISTICHE WOCHENSCHRIFT—RECHTSPRECHUNGS REPORT (NJW-RR) 564-65 (1996).

37. *Id.*

38. See Ferrari, *supra* note 2, at 107.

39. See Commentary on the Draft Convention on Contracts for the International Sale of Goods, Prepared by the Secretariat, reprinted in OFFICIAL RECORDS OF THE UNITED NATIONS CONFERENCE ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS, U.N. Doc. A/CONF.97/5 (1981), at 34.

40. The commentary also states that the type and scope of examination should be made in light of international usages. Whether this means that the standard ought to be uniform, or emphasize the understanding of the parties is not clear. Additionally, it is not clear what role special knowledge has upon a party's duty to examine, although it seems clear that those without that knowledge are not held to it. See *id.* See also Ferrari, *supra* note 2, at 107-08. At least one court, however, has held that the standard is raised when a buyer has special knowledge. See [Germany] 31-08-1989, KfH O 97, LG Stuttgart II; full text available on Unilex, Section D.1989-5. See also Appendix: Survey of Previous Decisions by German Courts Applying the CISG: Selected Passages, 14 J.L. & COM. 225 (1995).

C. *Lessons for Buyers*

The two most important lessons the evolving foreign jurisprudence teaches buyers is that there is a critical link between the duty to examine and the duty to give notice of nonconformity, and that courts have construed both the time and the scope of examination duties very strictly.⁴¹ Buyers of perishable or technical goods have an enhanced incentive to contract for a specific time and scope of examination. They may even wish to include a provision regarding the need for third-party experts. Buyers are cautioned, however, that if the present trend continues, any time limitation is likely to be construed strictly by the courts, even against defects not discoverable after a reasonable examination.⁴²

III. Are the Goods Nonconforming?

One of the most interesting developments in recent cases has been how courts have dealt with a classic problem: are goods nonconforming if they are within the legal requirements of the seller's country, but not within the requirements of the buyer's country? While this is an emerging issue with which courts are still struggling, the preliminary outlook is not protective of buyers.

Overall, courts have stated consistently that the necessary preliminary issue is whether the public law requirements are relevant. In fact, one court went so far as to imply that the public law requirements of the buyer's state are almost never applicable, although that stance was moderated slightly on appeal.⁴³ That case concerned a German firm that purchased New Zealand mussels containing cadmium in excess of the level recommended by

41. It is not yet clear how standardized trade terms, such as C.I.F. and F.O.B. are affected by recent CISG jurisprudence, with the exception that courts are likely to maintain their formalism. See [Germany] 01-08-1993, 17 U82/92, OLGZ Dusseldorf; full text available on Unilex, Section D.1993-2; RECHT DER INTERNATIONALEN WIRTSCHAFT (RIW) 325 (1993). See *Appendix: Survey of Previous Decisions by German Courts Applying the CISG: Selected Passages*, *supra* note 40.

42. The risk to buyers who allocate risk by contract is uncertain where the notice or examination was slightly defective. As of yet, there has been no development of a doctrine such as "substantial performance" or "material breach" regarding notice or examination.

43. [Germany] 20-04-1994, 13 U 51/93, Oberlandesgericht Frankfurt am Main; full text available on Unilex, Section D.1994-10; RECHT DER INTERNATIONALEN WIRTSCHAFT (RIW) 593 (1994). Confirmed by the Supreme Court, [Germany] 08-03-1995, No. VIII ZR 159/94, Bundesgerichtof; full text available on Unilex, Section D.1995-9.

the German Federal Health Department.⁴⁴ Despite the dangerously high level of cadmium, the lower court held that the mussels were goods which were within Article 35(2)(a) and were fit for the purposes for which goods of the same description would ordinarily be used.⁴⁵ While the directives of the German Federal Health Department are advisory even within Germany, the court emphasized that even had they been mandatory, its reasoning would have been the same.⁴⁶ First, the court determined that the public law health and safety requirements were not relevant.⁴⁷ It reasoned that only by disregarding the public law of the buyer's country can Article 35 be interpreted uniformly in accordance with Article 7(1).⁴⁸ In other words, the principle of uniformity—that the international sales law ought to be equally applied and interpreted—forced the court to find that a good was conforming even if it was illegal and dangerous to public health for the buyer to re-sell it.

On appeal, the German Supreme Court upheld the lower court's decision, but elaborated on when the public law requirements are relevant.⁴⁹ The Supreme Court held that the seller cannot be held to the legal requirements of the buyer's state unless the same rules are in effect in the seller's state or the buyer brings its domestic requirements to the attention of the seller.⁵⁰ This elaboration moderated the lower court's position and brought the standard to a more case-specific analysis.

In a case handed down during the same month, a German lower court faced similar facts, and also rejected the strict approach

44. *Id.*

45. *Id.*

46. *Id.*

47. *Id.*

48. *Id.*

49. [Germany] 08-03-1995, VIII ZR 159/94, Bundesgerichtsof; full text available on Unilex, Section D.1995-9. This case generated an unusual amount of attention and has been published in several different sources and commented upon in several journals. In German it is published in RECHT DER INTERNATIONALEN WIRTSCHAFT (RIW) 595-97 (1995); EUROPÄISCHE ZEITSCHRIFT FÜR WIRTSCHAFTSRECHT (EuZW) 447-50 (1995); Lindenmaier-Möhring (ed.), DAS NACHLAGEWERK DES BUNDESGERICHTSHOFS IN ZIVILSACHEN (LM) 1735-38 (1995); JURISTISCHE RUNDSCHAU (JR) 23-27 (1996). Published in Italian (trans.) in IL FORO ITALIANO IV 140-44 (1996). It also generated commentaries. B. Piltz, EuZW 450-51 (1995); U. Magnus, LM 1738-40 (1995); P. Schlechtreim, VERTRAGMÄßIGKEIT DER WARE ALS FRAGE DER BESCHAFFENHEITSVEREINBARUNG, IPrax, 12 (1996); M. Karollus, JR 27-28 (1996).

50. [Germany] 08-03-1995, VIII ZR 159/94, Bundesgerichtsof; full text available on Unilex, Section D.1995-9.

enunciated by the earlier lower court.⁵¹ Here, a buyer had determined that it had received paprika which had a dangerous level of toxins.⁵² Like the previously mentioned cases, the buyer needed to establish that the public law requirements were relevant. The court found that because of a previous, longstanding, commercial relationship, the parties had an implied agreement that the goods should conform to German public law.⁵³ Therefore, any goods which did not conform to German law were nonconforming. This reasoning seems incongruent with the stance of the Supreme Court, which stated that the public law requirement was irrelevant unless the requirement was of the seller's country or the seller was notified of the requirement.

Obviously, in an environment of this kind, buyers who wish to protect themselves must do so by contract and cannot rely upon the mere fact that a good cannot be legally resold or used by the buyer to demonstrate that the good is nonconforming. While it seems unlikely that the faulty reasoning of the lower court in the tainted mussels case will prevail, buyers cannot be assured that dangerous food will be declared nonconforming unless they point out the public regulations to the sellers or otherwise assign the risk in the contract elsewhere.

IV. Notice

The key protection for buyers in CISG contracts is notice. The notice requirements are mandated by the text of the CISG, inherent in its model commercial transaction, and repeatedly emphasized by courts. Since the outcome of a case so often turns upon the adequacy of the notice, it has been the subject of a great deal of litigation, and this growing body of jurisprudence provides an essential resource for all buyers in CISG contracts.

Notice is required in two related scenarios. One kind of notice occurs after a buyer receives defective goods and wishes to inform the seller of the nonconformity.⁵⁴ This is the notice requirement which has been the subject of the most litigation, and is the principle area that will be addressed in this Article. Another type of notice occurs when a party seeks to inform its opponent what remedy it is seeking, whether it is avoidance, a price reduction, or

51. [Germany] 21-08-1995, 1 KfH O 32/95, Landgericht Ellwangen; full text available on Unilex, Section D.1995-20.

52. *Id.*

53. *Id.*

54. *See* CISG Art. 39.

specific performance.⁵⁵ Analytically, these two notice provisions are distinct because they may occur at different times and different interests are protected. Obviously, however, they can occur at the same time, and it may often be desirable for them to occur simultaneously from the standpoint of both parties. At least one court, however, has confused the two provisions, and required both notices to occur at the same time.⁵⁶ This case cautions buyers that to preserve their rights under the contract, both forms of notice must be timely.⁵⁷

A. *What If No Notice Is Given?*

The buyer who fails to give proper notice loses a host of rights. Under Article 39, a buyer who fails to give proper notice of nonconforming goods loses the right to rely upon the lack of conformity.⁵⁸ This means the buyer loses the right to claim

55. See CISG Art. 49.

56. The court in that case held that notice that a party would seek avoidance was governed by Art. 39(1)—the notice of nonconformity provision. [Switzerland] 26-04-1995, HG 9206707, Handelsgericht Zürich; full text available on Unilex, Section D.1995-15.1; excerpted in German in SCHWEIZERISCHE ZEITSCHRIFT FÜR INTERNATIONALES UND EUROPÄISCHES RECHT (SZEIR) 51-53 (1996). The court obviously contemplated that the buyer ought to tell the seller what remedy he was seeking when the buyer gave notice of the nonconformity. *Id.* Not only did the court confuse the two notice provisions, but it also mistakenly found a violation of Article 49(2)(b)(ii), which states that after a seller has not delivered the goods, a buyer may avoid the contract after the expiration of the extra time period fixed by the buyer under the *Nachfrist* procedure of Art. 47. CISG Art. 49(2)(b)(ii). However, in this case the *Nachfrist* procedure of Art. 47 was not used. [Switzerland] 26-04-1995, HG 9206707, Handelsgericht Zürich; full text available on Unilex, Section D.1995-15.1. Instead, the violation would be more properly categorized as that of Art. 49(2)(b)(i), which provides that a buyer may not avoid after the breach if it was or ought to have been known by the buyer. CISG Art. 49(2)(b)(i).

57. Nevertheless, the conceptual and practical focal point is the notice of nonconformity, which gives the purchaser its best means of protection.

58. Art. 39 provides as follows :

(1) The buyer loses the right to rely on a lack of a nonconformity 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 or ought to have discovered it.

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

CISG Art. 39.

damages under Article 45(1)⁵⁹ and Articles 74-77,⁶⁰ the right to demand performance by the seller under Article 46, the right to avoid the contract under Article 49, and the right to reduce the purchase price under Article 50.⁶¹ In addition, Article 39 sets forth a kind of statute of limitations, after which the buyer may not rely upon a nonconformity at all: the buyer cannot rely on the nonconformity if no notice has been given within two years after the receipt of the goods even if the nonconformity was not reasonably discoverable within the two-year period.⁶² An obvious exception to this is set forth in Article 39(2), which permits courts to interpret this time limit in light of the contract.⁶³ For example, if a contract guarantees the performance of computers for five years, this provision would override Article 39's two-year limit.⁶⁴ A careful drafter may wish to avoid any potential ambiguity by making this kind of derogation from the CISG explicit.⁶⁵

59. Art. 45 provides as follows:

(1) If the seller fails to perform any of his obligations under the contract or this Convention, the buyer may:

- (a) exercise the rights provided in articles 46 to 52;
- (b) claim damages as provided in articles 74-77.

(2) The buyer is not deprived of any right he may have to claim damages by exercising his right to other remedies.

(3) No period of grace may be granted to the seller by a court or arbitral tribunal when the buyer resorts to a remedy for breach of contract.

CISG Art. 45.

60. Article 74 includes a damages provision which permits damages of a loss, including loss of profits, up to the amount of damages which were foreseeable under the circumstances. CISG Art. 75. Article 75 permits a buyer to recover the difference in price for the goods in the event the buyer properly covers. *Id.* Article 76, while a more complicated provision, essentially permits a buyer who has not covered, but where there is a current price for the goods, to recover the difference between the contract price and the price at avoidance. CISG Art. 76. Article 77 states that a buyer who relies upon a nonconformity must take reasonable measures to mitigate the loss. CISG Art. 77.

61. See Honnold, *supra* note 4, at 337. See also Ferrari, *supra* note 2, at 99-100.

62. CISG Art. 39(1).

63. CISG Art. 39(2).

64. Article 6 permits parties to derogate from any CISG provision, subject to Article 12's limitations. CISG Art. 6, 12.

65. At issue in interpreting contracts has been the substance of the contract, rather than an attempt to determine what CISG provisions the parties intended to be bound by. This stems from the contracts which have been at issue in the cases, which have largely been silent as to the CISG. This analysis could be altered, however, once parties mention which provisions of the CISG are adopted or rejected.

In the event that no notice is given, or the notice given is insufficient, the buyer still may have some remedy left. Article 44, which is discussed in Section IV (F), limits this harsh two-year limit and permits a buyer to reduce the price or claim damages, except loss of profit, if the buyer can show a reasonable excuse for his failure to give notice.⁶⁶ Article 44, however, is a last resort provision and provides little shelter for a buyer.

B. What Must Be in the Notice?

Under Article 38 and Article 39, the notice must be given within a reasonable time and must specify the nature of the defects.⁶⁷ While the principle reason for this is to allow the seller to cure the defect, one commentator suggested that it also serves to allow the seller to gather evidence regarding the condition of the goods.⁶⁸ The courts have generally been quite strict in the content required, although there may be more leniency where the buyer requests a price reduction as opposed to avoidance of the entire contract.⁶⁹ As an example of such strictness, one German court held that even where a buyer had purchased only one item from a seller, the notice had to refer not only to the type of good, but also the specific item in question by the delivery date and serial number so that the seller might precisely identify the item without having to read all the sales documents.⁷⁰ The courts seem to be enforcing one of the basic policies of the CISG, which is to cause the buyer to inform the seller what the seller can do to remedy the defect. Clearly, when the buyer purchases only a single item, the buyer knows what precise item is in controversy, and a rule that mandates that the buyer in these circumstances has a duty to be very specific provides for the most efficient outcome. Another court was equally strict where the buyer of the bacon gave notice that the bacon was rancid; the court held that the notice was defective for failing to specify whether the lack of conformity related to some or all of the bacon, even though the order was for ten tons of bacon.⁷¹ Strictness applies not only to quantity, but also to the character of

66. This is discussed *infra* at notes 96-106 and accompanying text.

67. CISG Art. 38, 39.

68. See Honnold, *supra* note 4, at 334.

69. See cases cited *infra* notes 70-72.

70. [Germany] 12-12-1995, 2 O 246/95, LG Margurb; full text available on Unilex, Section D.1995-32; NEUE JURISTISCHE WOCHENSCHRIFT (NJW) 760 (1996).

71. [Germany] 20-03-1995, 10 HKO 2375/94, LG Munchen.; full text available on Unilex, Section D.1995-1; PRAXIS DES INTERNATIONALEN PRIVAT UND VERFAHRENSRECHTS (IPRax) 31-33 (1996).

the defect. In a case where a buyer of clothing gave notice of nonconformity, alleging poor workmanship and improper fit, the court held that this was ambiguous and therefore the notice was insufficient.⁷²

The first lesson for buyers is that notice to the seller must be very specific as to the nature of the defect. Clearly, the content of the notice must indicate very specific references, such as inferior grade of leather, improper stitching, or wrong sizes. Second, the notice ought to be as specific as possible regarding the portion of the delivered goods which suffers from the nonconformity. It is not clear how far courts will extend the latter requirement, for it seems unreasonable to mandate that buyers must always thoroughly examine all of the goods that they receive, but as some cases show, individual courts have viewed this as a heavy obligation for the buyer.

C. *What Is a Reasonable Time Within Which to Give Notice?*

Whether the buyer gave the seller notice within a reasonable time may well be the single most important issue courts and lawyers face in CISG contracts. It is at this juncture that the policies underlying the CISG are most intertwined. On the one hand, the policy of mandating quick notice implies that the time period ought to be especially short so that parties can understand what actions will be taken against them and make the appropriate preparations. A short notice period is also consistent with the courts' policies that contracts should not be avoided unless necessary. The formalism displayed in other areas is less prominent here, as some courts have paid closer attention to commercial practicability and equity. In obvious tension with quick notice—and noticeable by its absence in the cases—is the principle of uniformity and the concern for the international character of the CISG, although at least one scholar suggests that this may change.⁷³

72. [Germany] 03-07-1989, 17 HKO 3726, LG Munchen I; full text available on Unilex, Section D.1989-2; PRAXIS DES INTERNATIONALEN PRIVAT UND VERFAHRENSRECHTS (IPRax) 316 (1990). See also *Appendix: Survey of Previous Decisions by German Courts Applying the CISG: Selected Passages*, *supra* note 40.

73. Ryan, *supra* note 15, at 190-212, speculates that developing nations may very well interpret the notice requirement differently than developed nations, postulating that technological superiority in developed nations shortens the time permitted. Whether the principle of uniformity inhibits such a development has yet to be seen in the case law.

1. *How Do We Decide What a Reasonable Time Is?*—Whether the buyer gave the seller notice within a reasonable time after he discovered or should have discovered the nonconformity is an issue that has plagued courts.⁷⁴ While the CISG is not instructive as to the factors that courts ought to use in determining whether the notice came within a reasonable time, one scholar has suggested that several factors ought to be considered by courts: the perishability of the goods, the need for impartial sampling by an independent third party in the examination of the goods, and the potential for cure of the defect by the seller.⁷⁵ Other factors include the remedy the buyer will pursue and the ease of examining the goods.⁷⁶ For instance, where the buyer wants a price reduction under Article 50, courts tend to be more lenient with notice formalities than where the buyer seeks avoidance.⁷⁷ This is illustrated by a dispute over furniture, where the buyer received complaints from a customer and shortly thereafter gave notice to the seller of the nonconformity.⁷⁸ The buyer then refused the seller's offer to repair the goods, and instead declared the contract avoided.⁷⁹ The buyer gave notice of nonconformity on a second order of furniture, and upon the seller's refusal to repair the nonconformity, requested a refund of repair costs.⁸⁰ The court held that since both parties were merchants, the buyer should have examined the goods upon delivery and thereupon given immediate notice.⁸¹ However, the failure of the original notice did not preclude the buyer from reducing the price in accordance with Article 50.⁸² The court seems to have taken a compromise position, taking into account the remedy sought by the buyer, and thus construing the notice requirements less strictly for parties not wishing to avoid the contract. This leads to the conclusion that even where the goods are not perishable nor closely related to a season, buyers must nonetheless give notice in a very short period of time if they wish to rely upon the nonconformity in order to

74. See CISG Art. 39(1).

75. See Honnold, *supra* note 4, at 336.

76. *Id.*

77. See [Germany] 03-04-1990, 41 O 198/89, LG Aachen, full text available on Unilex, Section D.1990-3; RECHT DER INTERNATIONALEN WIRTSCHAFT (RIW) 491 (1990).

78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.*

82. *Id.*

avoid the contract. On the other hand, courts have shown leniency towards buyers who have not sought avoidance, demonstrating that foreign courts have strongly favored finding a binding agreement.

The close tie between ease of examination and the time required for notice to be reasonable is illustrated by a case that concerned the sale of sporting goods where the seller delivered goods in larger French sizes rather than the smaller Italian sizes.⁸³ The buyer gave notice to the seller twenty-three days after delivery.⁸⁴ The court held that when defects are easy to discover by prompt examination, the time required for notice is therefore reduced, and the buyer in the instant case had failed to give timely notice.⁸⁵ Obviously, the court believed that since the difference between French sizes and Italian sizes was readily apparent, the buyer ought to have discovered the defect very quickly. If courts were to adopt Honnold's factors, the more complex a delivered good is (particularly those that required independent inspection by an expert), the more time ought to be available for inspection. Not all courts have been this friendly to buyers, however, as the rancid bacon case and other cases discussed earlier illustrate.

2. *The Reasonable Time Required Is Short.*—In typical fashion, the German courts have interpreted the time requirement strictly. For instance, in a case dealing with the nonconformity of ham, a German court stated that although it was around the Christmas holidays, the buyer had a duty to examine the goods and give notice of the nonconformity within three days.⁸⁶ The period of time considered reasonable for foodstuffs is consequently shorter than the period of time considered reasonable for nonperishable goods. Likewise, fashion goods that are closely related to a particular season are in a category somewhere between foodstuffs and nonperishable goods.⁸⁷

83. [Italy] 31-01-1996, 45/96, Trib., sez. un.; full text available on Unilex, Section D.1996-3.

84. *Id.*

85. *Id.*

86. [Germany] 21-10-1994, 2 C 395/93, Amtsgericht Riedlingen; full text available on Unilex, Section D.1994-25.

87. Where a buyer faxed a notice to the seller six weeks after discovering a defect, the court held that the time was not reasonable, emphasizing that the clothes were related to a particular season. [Germany] 06-10-1995, 3 C 925/93, Amtsgericht Kehl; full text available on Unilex, Section D.1995-26; NEUE JURISTISCHE WOCHENSCHRIFT—RECHTSPRECHUNGS REPORT (NJW-RR) 565-66 (1996).

Some courts have followed a more equity-oriented approach, interpreting the reasonableness requirement less strictly. In contrast to the foodstuff cases discussed above, a French decision was more lenient upon a buyer.⁸⁸ Where a French buyer of cheese gave notice of the nonconformity within one month, the court held that the notice of the nonconformity was reasonable within Article 39(1).⁸⁹ This was despite the fact that the food was put in packaging that violated French law and the defect was more readily discoverable than the rancid frozen bacon discussed earlier, which the German court had found apparent to the buyer.⁹⁰ The contrast between the two cases could not be more stark, but the French decision stands out as an exception to the overall pattern.

E. The Waiver of the Defense of Failure of Notice

Even where a buyer has lost the right to rely upon the nonconformity because the buyer has failed to give proper notice, in some circumstances a court will hold that for policy reasons, the seller may not have the right to use failure of notice as a defense. In at least one case, an arbitrator found that fairness concerns outweighed the failure to adhere to the formal requirements of the CISG.⁹¹ In this case, the parties had contracted that notice of nonconformity was required immediately after delivery.⁹² About six months after delivery, the buyer gave notice of nonconformity, but the arbitrator held that the seller had waived its defense of failure to notify because the seller had continued to ask for information regarding the status of the complaints and about the goods, and pursued a settlement, thus leading the buyer to believe that the seller would not pursue its right for timely notification.⁹³ The court held that the doctrine of estoppel⁹⁴ is a fundamental principle of the CISG, and that the seller was estopped from asserting that the buyer had failed to give notice.⁹⁵ While not much of a hook upon which to hitch a case, this decision aids

88. [France] 13-09-1995, 48992, CA Cass. Com., Grenoble; full text available on Unilex, Section D.1995-24.

89. *Id.*

90. *See supra* text accompanying notes 29-35, 71.

91. [Arbitral Award] 15-06-1994, SCH-4318, Internationales Schiedsgericht der Bundeskammer der gewerblichen Wirtschaft- Wien; full text available on Unilex, Section D.1994-13.

92. *Id.*

93. *Id.*

94. The court based its decision upon *venire contra factum proprium*. *Id.*

95. *Id.*

buyers, especially those who have had a considerable course of dealing or longstanding relationship with the seller in question.

This is one of the few exceptions to the observation that courts have evaded equitable doctrines in interpreting the CISG, preferring instead a formalistic approach. As common law courts increasingly consider the CISG, it may be that they will follow a more equity-oriented approach, rather than the more formalistic, civil law approach that presently dominates CISG jurisprudence.

F. The Last Resort—Reasonable Excuse Where the Buyer Fails to Give Notice

Unfortunately, the buyer may face a situation in which either no notice was given, or where the notice given is not sufficient. While Article 39 might lead a buyer to believe that all remedies have been lost in such a case, Article 44 permits the buyer who has not given proper notice to retain some remedy if the buyer can prove that there is a reasonable excuse for the failure.⁹⁶ Article 44 is meant to balance the buyer's interest against the seller's interest that would suffer in the event notice were inadequate.⁹⁷ In any case, the buyer who fails to give the required notice loses the right to avoid the contract, the right to demand cure from the seller, and the right to claim damages for loss of profit.⁹⁸ If Article 44 applies, however, the buyer does retain the right to reduce the price paid and to claim damages other than loss of profit.⁹⁹ This provision may be particularly tricky. For instance, a claim for damages by the buyer may conflict with the seller's claim that the seller has suffered some injury due to the lack of notice.¹⁰⁰ These problems caused one commentator to pronounce that "the chance of the buyer's success under Article 44 would in fact be good only in exceptional circumstances."¹⁰¹

This prediction has some truth to it, as exemplified by a complex German case concerning a firm that purchased doors from a seller who shipped the goods to the buyer in tightly wrapped

96. Article 44 reads: "Notwithstanding the provisions of paragraph (1) of article 39 and paragraph (1) of article 43, the buyer may reduce the price in accordance with article 50 or claim damages, except for loss of profit, if he has a reasonable excuse for his failure to give the required notice." CISG Art. 44.

97. *See id.*

98. *See* CISG Art. 39; *see also* text accompanying *supra* notes 59-66.

99. *See* CISG Art. 44.

100. *See* K. Sono, *Failure to Notify*, in COMMENTARY ON THE INTERNATIONAL SALES LAW, *supra* note 19, at 324, 327-28.

101. *Id.*

plastic sheets, making immediate inspection impossible.¹⁰² The buyer gave notice of the nonconformity two months later, which the court held was too late, because it was outside the contracted-for notice time period.¹⁰³ The court reasoned that an examination of all of the goods immediately was not necessary when a sample would have been sufficient.¹⁰⁴ Therefore, the court ruled against the buyer's Article 44 argument.¹⁰⁵ Interestingly, this holding does not seem consistent with the rule discussed above that required a stricter inspection standard upon the buyer.¹⁰⁶

G. Conclusions

As this Article has detailed, the right to give notice of nonconformity is the buyer's principle means of protection under the CISG. When this protection is lost, the buyer loses most of the usual remedies available to him, and can attain only lesser equitable remedies under the tenuous rubric of reasonable excuse created by Article 44. Foreign courts have been eager to find inadequate notice by buyers, particularly from parties who wish to avoid the contract rather than seeking less drastic remedies. The cases demonstrate that very specific references to the type of defect may be necessary, as well as the identification of precisely what goods are defective—even if those goods are numerous or highly technical. Additionally, the time period which a buyer has to give notice of nonconformity is relatively short. Some consideration has been merited by the time sensitiveness of the goods in question, thus giving the shortest notice periods to buyers of nonconforming foodstuffs. Nevertheless, the pattern in the cases clearly warns buyers to protect themselves by contract rather than by relying on a court's interpretation of the CISG. Foreign courts clearly leave the buyer little haven.

102. [Germany] 13-01-1993, 1 U 69/92, OLG Saarbrücken; full text available on Unilex, Section D.1993-2.1.

103. *Id.*

104. *Id.*

105. *Id.*

106. Cf. [Germany] 20-03-1995, 10 HKO 2375/94, LG München; full text available on Unilex, Section D.1995-1; PRAXIS DES INTERNATIONALEN PRIVAT UND VERFAHRENSRECHTS (IPRax) 31-33 (1996); *see also* notes 28-40 and accompanying text.

V. Conclusion

Buyers wishing to protect themselves in CISG contracts must keep two key principles in mind: first, those courts which have begun to construe the CISG have done so with the lenses of formalistic civil law principles firmly in place; second, the buyer's interests are best protected by contract and not by the operation of the CISG.

It should be of no surprise that the civil law jurisdictions have interpreted the CISG in a way which minimizes a party's ability to evade a contract, since civil law countries have a long history of preferring specific performance and disdaining damages. That tendency has led those courts to interpret the duty to examine strictly against the buyer, both in terms of the scope and the timing of the examination. More importantly, it has led civil law courts to construe the duty to give notice of nonconformity strictly against the buyer as well.

The buyer's greatest protections come from contract rights elaborating upon the buyer's rights and duties for notice and examination of the goods. For buyers of highly perishable or technical goods, these contract provisions are critical. Similarly, buyers of consumer goods have strong incentives for requiring conformity with public health and safety requirements of the buyer's jurisdiction, since it is not at all clear that even tainted goods will be declared nonconforming by a court.

While the cases which have been surveyed from civil law jurisdictions do not have the precedential weight of their common law counterparts, there is no doubt that the emerging patterns in the foreign caselaw are strong and consistent. Buyers who wish to protect themselves cannot ignore these trends, which are evolving largely against their interests.