

THE SCOPE OF ARTICLE 44 CISG

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Article 44 deals with the only remedy possible when the buyer has delayed his communication to the seller by more than the reasonable time limits stated in Articles 39 and 43. Article 44 states: “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.”¹

This article is divided into four parts: The scope of Article 44, its legislative history and scholarly opinions about the scope of Article 44; the utility of Article 44 and its relationship with Articles 38, 39 and 40;² an analysis of the term “reasonable excuse” and finally, some conclusions. I will take into account the guidelines given in the Digest of UNCITRAL,³ the legislative history, some academic opinions (specifically, I will consider the CISG-Advisory Council), and international case law.

1. THE LEGISLATIVE HISTORY: THE COMPROMISE BETWEEN THE STRICT TIME LIMIT PROVISION OF ARTICLE 39 (AND 43), AND THE CORRECTIVE OF ARTICLE 44

Commentators and judges forget that in order to interpret the CISG it is fundamental to remember its origin. This is especially true in the analysis of Article 44. Legislative history of the CISG gives us some essential clues necessary to reach a correct interpretation of this article.

The Draft of UNCITRAL of 1978 did not foresee the exemption of Article 44. In fact, the Commentary of Article 37 of the Draft (precedent of Article 39 CISG) stated that the lack of notice of the non-conformity of the

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1. United Nations Convention on Contracts for the International Sale of Goods art. 44, U.N. Doc. A/CONF.97/18, Annex 1 (Apr. 11, 1980) [hereinafter CISG].

2. The analysis of the relationship between Articles 41, 42 and 43 CISG and Article 44 follows the same structure as the relationship between Article 39 and 44, and, for reasons of time, I will not specify it in this article.

3. UNCITRAL Digest of Case Law on the United Nations Convention on the International Sale of Goods art. 44, U.N. Doc. A/CN.9/SER.C/DIGEST/CISG/44 (8 June 2004) [hereinafter Digest].

goods within a reasonable time would imply the impossibility of claiming for damages, avoiding the contract or claiming for price reduction. The consequence of the lack of *denuntiatio* was particularly harmful to buyers of complex machinery. These buyers could not have enough time to denounce the non-conformity within a reasonable time, or within the maximum term of two years established in Article 37(2) of the Draft (Article 39(2) CISG).⁴

This two-year limit was too drastic for developing countries. Buyers from these countries often buy machinery and lack the technical knowledge needed for an immediate examination of these complex goods.

The joint proposal of a new Article 40 (now Article 44 CISG) (proposed by Finland, Ghana, Kenya, Nigeria, Pakistan and Sweden, and explicitly supported by United Kingdom) tried to solve this problem maintaining the balance between the rights of seller and buyer, taking into account the particular position of parties from developing countries.⁵ Some statements were fixed through the discussion of this article:

- Notice of non-conformity in a reasonable time must be given by the buyer to the seller in order to give the seller time to repair or substitute the goods or to have time for assembling evidences that may be lost or more difficult to achieve later.⁶
- The buyer must have “residual rights” if he has a reasonable excuse for failure to give notice within a reasonable time, or if this notice is insufficient (including in this concept the institution of legal proceedings or the refusal to pay the price fixed in the contract).⁷

4. These arguments were repeated during the Conference: “Two years was too long in the case of perishable goods and too short in the case of items such as machinery.” 1980 Vienna Diplomatic Conference, March 25, 1980, *Summary Records of Meetings of the First Committee*, 21st Meeting, ¶ 42 (Ghestin), U.N. Doc. A/CONF.97/5, available at <http://cisgw3.law.pace.edu/cisg/firstcommittee/Meeting21.html> [hereinafter 21st Meeting].

The compromise proposal adopted earlier in the meeting was a package and that it was part of that arrangement that paragraph 2, with its two-year limit, should remain unchanged. The point was of great importance to developing countries, which frequently bought complex machinery. It would be unreasonable to expect a buyer of machinery in a developing country to notify the seller of a defect within one year when machinery not infrequently waited for more than a year before it could be installed.

Id. ¶ 49 (Date-Bah).

5. 1980 Vienna Diplomatic Conference, *Chronological Record of Proceedings*, available at <http://www.cisg.law.pace.edu/cisg/chronology/chrono44.html>. Summoned in Luca G. Castellani, *Il contributo dei paesi in via di sviluppo al diritto uniforme: una quantità négligeable?*, in *DIRITTO DEL COMMERCIO INTERNAZIONALE* 103, 107-09 (2001).

6. 21st Meeting, *supra* note 4, ¶ 2 (Date-Bah).

7. *Id.* ¶¶ 2, 4 (Date-Bah, Loewe).

- These “residual rights” must be “financial remedies”: damages or limited costs, against which could be offset any foreseeable financial loss on the part of the seller caused by the buyer’s failure to give notice.⁸
- The buyer’s claim for damages could not include loss of profit, in order to discourage fictitious claims.⁹

The solution of Article 44 is the result of a compromise to balance both seller’s and buyer’s interests. It protects the fair buyer from the loss of all his remedies for non-conformity due to the lack of timely and adequate notice, but deprives him from important remedies to protect the seller’s rights to legal certainty.¹⁰

Specifically, the buyer who gives late or insufficient notice to the seller with reasonable excuse will lose the right to avoid the contract or to claim substitution or reparation of the goods, but will retain the right to damages, minus loss of profit, and the right to reduce the price, deducting the value of the defect.

2. UTILITY OF ARTICLE 44 AND ITS RELATIONSHIP WITH ARTICLES 38, 39 AND 40

It is an extended opinion among scholars of different legal families that Article 44 lacks clarity in the term “reasonable excuse.” It is difficult to interpret reasonable when applied to “time” and “excuse.” In fact, some authors qualify this article as useless,¹¹ for a “reasonable time to notice” might take into account the possibility of a “reasonable excuse.” This doctrine was afraid that the text would be a fruitful source of litigation. A risk of litigation that can also come from the remissions to Article 50 CISG, from confusing the excuse of Article 40 and Article 44, from the application of the time limit of two years to Article 44, and from the application of Article 77 to the facts

8. *Id.* ¶ 2 (Date-Bah).

9. *Id.* ¶ 2 (Date-Bah).

10. The intention of negotiators in the Conference was to offer the negligent buyer a way out not only to the cases of lack of notice but also to the cases of late or defective notice due to objective causes. Castellani, *supra* note 5, at 109.

11. 21st Meeting, *supra* note 4, ¶ 15 (Ghestin).

under Article 44.¹² Perhaps this is the reason why we cannot find a similar provision in the UNIDROIT Principles.

Nevertheless, Article 44 exists, has its effects and its existence has a finality, to avoid the unfair total loss of a buyer's remedies when an examination of the goods and notice has been carried out within a reasonable period of time, that is not strictly considered to be "short."¹³

Part of the doctrine affirms the lack of utility of Article 44 CISG. CISG-Advisory Council has admitted indirectly that Article 44 was not really necessary. As stated in the Second Advisory Opinion, "[i]t may be questioned whether article 44 added anything to the notice regime, since both article 38 and article 39 contain language that can fairly be interpreted to reach any result that article 44 was intended to reach."¹⁴

In fact, the risk of unfairness that Article 44 seeks to remove from the CISG was, apparently, already removed in Articles 38, 39 and 40:

- Article 38 CISG obliges the buyer to examine the goods or cause them to be examined, within "as short a period as is practicable in the circumstances." And these circumstances can be diverse in every country and every case. The consideration of these circumstances will be of judicial discretion.¹⁵
- Article 39 CISG deals with the obligation of the buyer to give the seller specified notice of the lack of conformity "within a reasonable time after he has discovered it or ought to have discovered it." When a buyer ought to have discovered the non-conformity depends again on the circumstances of the case, and give the judges and arbitrators a wide range of discretion, always within the two year cut-off time limit of Article 39(2) CISG.¹⁶
- Finally, Article 40 introduces a general exemption of the time limits imposed on the buyer in Articles 38 and 39, where a seller "knew or

12. Castellani affirms that Article 44 permits the buyer to mitigate the effects of the lack of notification to the seller about the *rei vindicatio* tried by third parties ex Article 43 CISG. Article 44 offers the buyer the possibility of reducing the price or to claim damages (except *lucrum caesans*), when there is a reasonable excuse. Castellani, *supra* note 5, at 109. This author does not mention the consequences of the relationship between Articles 44 and 77. See also Alejandro Garro, *Reconciliation of Legal Traditions*, 23 INTERNATIONAL LAWYER 450-52 (1989).

13. 21st Meeting, *supra* note 4, ¶ 2 (Date-Bah).

14. CISG-AC opinion no. 2, Examination of the Goods and Notice of Non-Conformity: Articles 38 and 39, ¶ 4.3, 7 June 2004, Rapporteur: Professor Eric E. Bergsten, Emeritus, Pace University School of Law, New York.

15. CISG art. 38(1).

16. CISG art. 39(1).

could not have been unaware” of the facts which created the lack of conformity. Once again, this article includes a clause open to interpretation by judges and arbitrators, to permit them to adapt the exemption to the circumstances of the case.¹⁷

As a result, there seems to be no reason to apply Article 44. The very redaction of Articles 38, 39 and 40 allow a fair buyer to exercise all the remedies derived from a lack of conformity of the goods if he has examined the goods as soon as circumstances had permitted him and has immediately communicated the non-conformity, or he pleads that the seller could not have been unaware of this lack of conformity. This would be true, and Article 44 would be unnecessary, if these articles were interpreted in a wide manner. But case law interpreted these articles narrowly in the majority of cases.¹⁸

In this context, Article 44 apparently becomes an instrument that permits a flexible interpretation of Articles 38, 39 and 40. Article 44 exempts the buyer with a “reasonable excuse,” which can be interpreted in a similar manner as “in the circumstances,” “reasonable time,” “ought to have discovered” or “could not have been unaware,” according to the actual case being judged.

But Article 44 is more than this. It was created to be interpreted in a broader manner than Articles 38, 39 and 40. In fact, international legislators have given different effects to Article 44. It recognizes a minimum number of remedies to the fair buyer. Article 44 gives the buyer some actions that can be used if a plea based in Articles 38, 39 and 40 is not granted. If legislators thought that Article 44 was a mere interpretation of these articles, the actions given would have been the same, without restrictions. It is a fact that Article 44 does not sustain all the CISG remedies favorable to the buyer, but only price reduction and claim for damages (limited to *damnum emmergens*).

3. ANALYSIS OF THE TERM: “REASONABLE EXCUSE”

Article 44 is useful when the circumstances of delay of notice are not objective, but subjective. While Articles 38, 39 and 40 fix their attention in

17. CISG art. 40. Article 40 is a sanction imposed to the seller who acts in bad faith (*actio doli*) or whose behavior was seriously negligent. FRANCO FERRARI, *LA COMPRAVENTA INTERNACIONAL. APLICABILIDAD Y APLICACIONES DE LA CONVENCIÓN DE VIENA DE 1980*, at 259 (1999).

18. ANSELMO MARTÍNEZ CAÑELLAS, *LA INTERPRETACIÓN Y LA INTEGRACIÓN DE LA CONVENCIÓN DE VIENA SOBRE COMPRAVENTA INTERNACIONAL DE MERCADERÍAS*, DE 11 DE ABRIL DE 1980, at 243-45 (2004). Camilla Baasch Andersen, *Reasonable Time in Article 39(1) of the CISG—Is Article 39(1) Truly a Uniform Provision?*, in *REVIEW OF THE CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS (CISG) 1998*, at 63 (Pace Int'l Law Review ed., 1999).

delays of notice from an objective point of view, Article 44 is the article of subjectivity.¹⁹ The term “reasonable excuse” in Article 44 must be interpreted in a broad manner, including objective and subjective reasons for the “lack of care” in examination and notice of the non-conformity. Otherwise, there would not be any scope for Article 44.²⁰ Obviously, this is a controversial opinion that goes against the general effort of the CISG drafters, who sought to remove subjective criteria from the Convention.

This unwritten guideline was followed by the international legislators when they rejected the proposal of Norway which suggested changing the final wording of Article 44, proposing one more abstract: “if he could not reasonably be expected to give the required notice because of a circumstance beyond his control or another good ground,” instead of “if he has a reasonable excuse for his failure to give the required notice.”²¹

Scholars have provided some subjective examples:

- Date-Bah (in what we can call an quasi authentic interpretation) gave the example of the buyer of machinery (Xerox) of a developing country who is generally illiterate and needs to call foreign experts to carry out the examination, what means delays of month in the examination of the goods in comparison to deliveries carried out in developed countries.²²
- Huber mentioned circumstances to be taken into account:²³
 - The degree of the lack of conformity,
 - The way of examination of the goods,
 - If the buyer gave notice, but it was considered insufficient because of the lack of specification of the non-conformity,

19. Although this does not preclude the judge about taking into account subjective factors known to the seller, or which he should have been aware, such as the lack of experience of the buyer, his infrastructure for a proper examination . . . in the interpretation of the period of examination of Article 38. “The only matters which are of no relevance are purely subjective factors with which the seller does not need to reckon, such as the buyer’s illness.” Ingeborg Schwenzer, *Analysis of Articles 35-43, in COMMENTARY ON THE UN CONVENTION ON THE INTERNATIONAL SALE OF GOODS (CISG) 305-06* (Peter Schlechtriem ed., Geoffrey Thomas trans., 1998).

20. Garro, *supra* note 12, at 443-83 nn.119, 129 (Date-Bah examples); in the same direction, see Ulrich Huber, *Article 44, in COMMENTARY ON THE UN CONVENTION ON THE INTERNATIONAL SALE OF GOODS (CISG) 350* (Peter Schlechtriem ed., Geoffrey Thomas trans., 1998). Article 44 permits judges to take into account “more individualized considerations than would otherwise be relevant under article 39.1.” JOHN O. HONNOLD, *UNIFORM LAW FOR INTERNATIONAL SALES UNDER THE 1980 UNITED NATIONS CONVENTION* 339 (1982).

21. 1980 Vienna Diplomatic Conference, *M. Proposals and Amendments Submitted to the Plenary Conference*, U.N. Doc. A/CONF.97, available at <http://www.cisg.law.pace.edu/cisg/mproposal.html>.

22. 21st Meeting, *supra* note 4, ¶ 49 (Date-Bah).

23. Huber, *supra* note 20, at 380.

- The type of the buyer's business (more comprehensive with sole traders, farmers, craftsmen and liberal professionals),
- Nature of the goods.
- Ferrari adds:²⁴
 - The type of non-conformity.
 - The damage that non-conformity causes to the buyer.
 - The interest of the seller to be informed about the defect of conformity.
- Audit cited the lack of technical means of the buyer, or the lack of sufficient legal assistance.²⁵

Unfortunately, case law has not treated Article 44 CISG well. It is an article not infrequently alleged, but few tribunals have considered any circumstances sufficient to merit the exemption. Cases of accepted reasonable excuses:

- The International Court of Commercial Arbitration (ICCA) of the Chamber of Commerce and Industry of the Russian Federation,²⁶ affirmed, that, an inspection of the goods at the port of shipment (as well as upon loading on board the vessel) was, evidently, technically and economically unreasonable, so the postponement of the inspection of the quality of the goods until their arrival at the port of destination or at the consumers' enterprises in the country of destination must be recognised as reasonable. Taking into consideration the fact that there were no concrete time limits for the inspection of the goods in the contract, the ICCA deemed it possible to apply the principles used in Article 38 of the CISG, in order to approach this issue. The ICCA concluded that the buyer had a reasonable justification of why he had not notified the seller within the period fixed by the contract for bringing forward the claims.²⁷

24. FERRARI, *supra* note 17, at 264.

25. Bernard Audit, *La vente internationale de marchandises, Convention des Nations Unies du 11 avril 1980*, LIBRAIRIE GÉNÉRALE DE DROIT ET DE JURISPRUDENCE 107-08 (1990).

26. CLOUT Case No. 474 [Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, 24 Jan. 2000].

27. At the same time, the ICCA did not deem it possible to agree with the buyer in that Article 40 of the Vienna Convention 1980, which bars the seller's right to rely on Articles 38 and 39 of the Convention when non-conformity of the goods is connected with the facts of which he knew or could not have been unaware and of which he did not inform the buyer, applied in the present case. As follows from the materials of the case and the results of their consideration by the ICCA, the fact of the presence of the defects in itself, the nature of the defects, the volume of the defective production and its evaluation, applied by the parties, cannot lead to the conclusion, suggested by the buyer, that the seller "deliberately did not indicate the presence of the defects in the documents of title." *Id.*

- The Court of Arbitration of the International Chamber of Commerce, in Award No. 9187,²⁸ stated that, in order to decide whether there was a reasonable excuse for not notifying the seller in due time (Article 44 CISG) a tribunal has to consider the extent of the violation of the seller's duty, the importance of the loss of seller's legal remedies and the buyer's interest in receiving prompt and exact information. It also affirms that there is a reasonable excuse in cases where a national inspection body incorrectly examines the goods and, the buyer approves and takes delivery of them, trusting that inspection. With respect to the buyer's defence, the Tribunal first held that the buyer could not rely on Article 50 CISG claiming lack of conformity of goods delivered, since the alleged defectiveness referred to deliveries different than those whose payment was claimed by the sellers. But he could recover damages for a lack of conformity, despite his failure to notify the seller properly, less damages derived from loss of profit.
- In CLOUT Case No. 192,²⁹ the tribunal considered that the small size of the buyer's operation did not permit it to spare an employee full time to examine the goods, so it was a reasonable excuse. But it also stated that this reasonable excuse did not justify a too long time period of notice (three months in this case).

These decisions demonstrate a practical conclusion: The more time for notice that has passed, the less probability of convincing the judge to apply the reasonable excuse of Article 44.

Cases where reasonable excuses were not accepted:

- The Dutch tribunal of appeals, in the decision of 15 December 1997,³⁰ stated that Article 38 CISG does not contain a duty for the buyer to examine the goods, but an omission of examination deprives the buyer of the right to rely on a lack of non-conformity of the goods if the buyer did not have a reasonable excuse for its failure to give the required notice. Considering that the buyer could have had the goods examined earlier because an expert could have taken a sample at the moment of delivery, and taking into account the existing means of communication, the Court found that the buyer did not have a reasonable excuse.

28. Court of Arbitration of the International Chamber of Commerce, Award No. 9187, June 1999.

29. CLOUT Case No. 192 [Obergericht des Kantons Luzern, Switzerland, 8 Jan. 1997].

30. Hof's-Hertogenbosch, Netherlands, 15 Dec. 1997.

- In CLOUT Case No. 280,³¹ the Court affirmed that an official veterinary report that reported that live fish were not ill was not enough to justify the exemption if the buyer could have immediately inspected the goods himself and have informed the seller within eight days.
- CLOUT Case No. 167³² shows us possible applications of Article 44. The Court stated that the buyer of Polypropylen-Plastic granulate,³³ used to quick decisions and prompt market, had no reasonable excuse for its failure to give a timely notice. *Sensu contrario*, the Court noted that in taking into account the relevant circumstances and equitable considerations, it would be easier to allow such an excuse to a single trader, a craftsman, or a professional.
- The Oberlandesgericht München, in the decision of 13 November 2002,³⁴ affirmed that the lack of a certificate proving the organic origins of the product (organic barley), as required by European Regulations in order to process and sell it to the ultimate customer, was not a reasonable excuse for delaying a notice of non-conformity, but a non-conformity in itself, which the buyer should have notified the seller of without having to wait for a formal declaration by the competent authority.
- In CLOUT Case No. 292,³⁵ the Court held that the packaging of the goods is not a reasonable excuse for the late examination of the goods (more than two and a half months) and the late notice, if examination of the goods immediately after delivery was not impossible, as the defects were repetitive and easily recognisable by examining samples of the goods.

In the same way, the Sø og Handelsretten of Denmark, in its decision of 31 January 2002,³⁶ held a reasonable excuse cannot exist in the sense of Article 44 if buyer does not examine samples of the

31. CLOUT Case No. 280 [Oberlandesgericht Jena, Germany, 26 May 1998].

32. CLOUT Case No. 167 [Oberlandesgericht München, Germany, 8 Feb. 1995].

33. The Court held that under normal circumstances in a sale of durable non season-dependent goods eight days is a reasonable time of notice. As a matter of fact, the buyer who causes the goods to be examined must also carry the burden of a delay in the examination (Article 38(1) CISG). In any case, the buyer had notified the seller two months after receipt of the notice from the Danish company. In the Court's opinion, this period of time was undoubtedly unreasonable.

34. Oberlandesgericht München, Germany, 13 Nov. 2002.

35. CLOUT Case No. 292 [Oberlandesgericht Saarbrücken, Germany, 13 Jan. 1993].

36. Sø og Handelsretten, Denmark, 31 Jan. 2002.

goods when this examination would be enough to determine the lack of conformity of the goods.

- In CLOUT Case No. 378,³⁷ the Tribunal considers an insufficient notice of non-conformity caused by a lack of specifying the nature of the defects, not cured by Article 44.
- The decision of Tribunale di Rimini of 26 November 2002,³⁸ cites Article 44 in the same manner as the previous decision. It refers to a case of late notice, and affirms that, in some cases, Articles 40 and 44 permit the buyer to be excused from the late notice or the lack thereof. Both sentences do not mention any reasonable excuse but assert that the buyer has the burden of proof of the existence of any excuse.
- The German Bundesgerichtshof, in its decision of 30 June 2004,³⁹ held that an untimely notice of the buyer can not be cured since the buyer knew the lack of conformity of the goods and gave late and insufficient notice of this, but did not present any excuse within the meaning of Article 44. The Court stated that the buyer has the burden of proof of the reasonableness of the excuse.
- Finally, CLOUT Case No. 285⁴⁰ is the clearest example of the difficulty of application of Article 44. A buyer from Morocco examined and gave notice of defects after three weeks from delivery, because of the retention of the goods in customs and the delay in installation of the machinery bought. The Court stated that the buyer must act with the care and diligence required under the circumstances (subjective approach), but applied a developed country's criterion to judge the behavior of the buyer. It said that the examination should have been done in one week and the notice given within one additional week. This solution can be appropriate in Germany but not for a small enterprise in Morocco. On the other hand, there is no mention of the origin of Article 44, created precisely to prevent these cases.⁴¹

37. CLOUT Case No. 378 [Tribunale di Vigevano, Italy, 12 July 2000].

38. Tribunale di Rimini, Italy, 26 Nov. 2002.

39. Bundesgerichtshof, Germany, 30 June 2004.

40. CLOUT Case No. 285 [Oberlandesgericht Koblenz, Germany, 11 Sept. 1998].

41. Castellani, *supra* note 5, at 115.

4. CONCLUSIONS

Although a part of the international doctrine has stated that Article 44 has no special utility, it can be affirmed that Article 44 has its own scope, different from Articles 38, 39 and 40. These articles allow the buyer to use different remedies, and it would be nonsense to include Article 44 for covering necessities already regulated by other articles.

Article 44 was included in the CISG to achieve a balance between the parties, when there are special facts that make the application of Articles 38, 39 and 40 unfair. For example, Article 44 pretends to avoid unfair total loss of buyer's remedies when an examination of the goods and notice has been done within a reasonable period of time, not strictly "short." And the length of this period is justified by subjective circumstances such as the origin of the buyer, the type of buyer's business or the type of non-conformity.

Article 44 is also useful when the *denuntiatio* of the buyer is doubtfully insufficient from an objective point of view, but sufficient if we take into account subjective elements of interpretation, such as the way the goods are examined or the interest of the seller to be informed about the defect of the conformity.

Of course, there is a connection between the application of Article 44 and Articles 38, 39 and 40. The buyer will prefer to allege Articles 38, 39 and 40 because they allow a fair buyer to exercise all the remedies derived from a lack of conformity of the goods. He can also use Article 44 only if it is not clear that Articles 38, 39 and 40 can be applied to the case.

Nevertheless the practice of the courts and tribunals is disappointing. Judges and arbitrators do not apply Article 44, perhaps for different reasons: first, the majority of decisions come from developed countries; second, there is a trend to objective interpretation and Article 44 includes a subjective test; third, buyers are not interested in Article 44 due to its restriction on remedies; and fourth, there is a slow but progressive trend towards a broader interpretation of Articles 38, 39 and 40 that reduces the practical scope of Article 44.