

Article 38

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

(2) If the contract involves carriage of the 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 deferred until after the goods have arrived at the new destination.

OVERVIEW

1. Article 38 directs a buyer to whom goods have been delivered to examine them or cause them to be examined. Where a buyer accepted delivered goods without any examination, choosing to rely on the seller's sales manager—who had previously been employed by the buyer's previous supplier—to deliver goods of the same kind and quality as those provided by the previous supplier, the court found that the buyer failed to comply with article 38.¹ Much of the text of article 38 focuses on the time when this examination should take place. Thus article 38 (1) specifies the general rule that the examination must occur “within as short a period as is practicable in the circumstances.” Article 38 (2) provides a special rule for cases involving carriage of goods, permitting the examination to be deferred until the goods arrive at their destination. With respect to the relationship between articles 38 (1) and 38 (2), one court has explained that normally the place of examination is the place where the seller's delivery obligation is performed under article 31 of the Convention, but if the contract involves carriage of the goods the examination may be deferred until the goods reach their destination.² Where the buyer actually examined goods at their point of origin, however, it has been held that article 38 (2) does not apply.³ Article 38 (3) contains another special rule, applicable if the buyer redirects goods while they are in transit or redispaches goods before having a reasonable opportunity to examine them: in such cases, examination may be deferred until after the goods arrive at their “new destination,” provided the seller was on notice of the possibility of such redirection or redispach when the contract was concluded. Where the buyer reasonably could have examined the goods while they were in the buyer's possession before being redispached to the buyer's customer, however, it has been held that article 38 (3) was inapplicable.⁴

2. As the Secretariat Commentary relating to article 38⁵ and numerous cases⁶ aver, the time when a buyer is required to conduct an examination of the goods under article 38 is intimately connected to the time when the buyer “ought to have discovered” a lack of conformity under article 39—an occurrence that starts the clock running on the buyer's obligation to give notice of the non-conformity under the latter provision. The examination obligation imposed by

article 38, therefore, can have very serious consequences: if a buyer fails to detect a lack of conformity because it did not conduct a proper and timely examination, and as a result fails to give the notice required by article 39, the buyer will lose remedies—quite possibly all remedies—for the lack of conformity.⁷ On the other hand, where the buyer could not detect the lack of conformity during an examination of the goods following delivery, its reasonable time for giving notice of lack of conformity under article 39 (1) does not begin to run at that time.⁸ It has been stated that failure to examine the goods as required by article 38 has no consequences when an examination would not have revealed the lack of conformity in question; but where the lack of conformity might have been detected by a reasonable examination, and the buyer failed to conduct any examination before accepting the goods, the buyer lost its right to rely on the lack of conformity for failing to give timely notice under article 39, even though it was possible that a proper article 38 examination (through sampling of goods delivered in large quantities) might not have detected the defect.⁹ And if a buyer gives timely article 39 notice despite having failed to conduct a proper article 38 examination, it has been stated that “it is irrelevant whether the examination has taken place within a reasonable time and in a reasonable form.”¹⁰

3. The obligation to examine under article 38 (and to give notice of lack of conformity under article 39) applies to non-conformities under CISG article 35, including defects in both quantity and quality,¹¹ and also to non-conformities under contractual provisions that derogate from article 35.¹² Where the seller, following the buyer's initial complaints, attempted to repair non-conforming goods, article 38 (1) has been held to require examination of the repaired goods to determine if the repair was effective.¹³ The examination mandated by article 38, furthermore, should ascertain not only that the quality, quantity, capabilities and features of the goods conform to the seller's obligations, but also that the goods are accompanied by documentation required by the contract.¹⁴ On the other hand, it has been held that the buyer had no duty to examine video screen machinery to determine whether they lacked basic electrical safety features.¹⁵

4. Decisions have stated that the purpose of the article 38 examination obligation, in conjunction with the notice

requirement imposed by article 39, is to make it clear, in an expeditious fashion, whether the seller has properly performed the contract;¹⁶ to prevent disputes over whether the goods changed condition after delivery¹⁷ and “to enable the parties to take appropriate measures”;¹⁸ and “to put the buyer in a position to check whether or not the acquired goods are in conformity with the contract. . . , to prepare for a notification and to rectify asymmetric levels of information between buyer and seller.”¹⁹ In this regard, article 38 is similar to rules commonly found in domestic sales law; indeed, article 38 has been applied as a matter of “international trade usage” even though the States of neither the buyer nor the seller had, at the time of the transaction, ratified the Convention²⁰ article 38, however, is a provision of international uniform law distinct from similar domestic rules,²¹ and is to be interpreted (pursuant to article 7 (1)) from an international perspective and with a view to promoting uniformity in its application.²² It has been asserted that the requirements of article 38 are to be strictly applied.²³

ARTICLE 38 (1) IN GENERAL

5. Article 38 (1) mandates that the buyer “examine the goods, or cause them to be examined, within as short a period as is practicable in the circumstances.” The meaning of the phrase specifying the time within which the examination must be conducted—“as short a period as is practicable in the circumstances”—has been addressed in many decisions.²⁴ The text of article 38 (1) does not expressly specify the type or method of examination required, and this issue has also generated substantial comment in the cases.²⁵ It has been stated that the circumstances of the particular case determine both the time within which the buyer must examine the goods and the type of examination that must be conducted.²⁶ It has also been asserted: “The extent required for an examination will be determined by the goods and their proposed use, and also by the buyer itself and by the general circumstances at the place where the examination takes place. The actual examination may take from a couple of hours up to several months and can vary between a mere visual check and an in-depth inspection by expert personnel.”²⁷

6. Under article 6 of the Convention, the parties can derogate from or vary the effect of any provision of the CISG. This principle has been applied to article 38, and an agreement concerning the time and/or manner of the examination of goods (the existence of which, it has been held, the buyer bears the burden of proving²⁸) has been found to supersede the usual rules of article 38.²⁹ An agreement by a seller to reimburse the buyer for services provided to its customers, to the extent such services related to defective goods exceeding a specified percentage of those sold to the buyer, was held to constitute an agreement to derogate from article 38, and to eliminate the buyer’s obligation to examine the goods under that provision.³⁰ It was also held by a Supreme Court that, in a longstanding business relationship, the buyer can rely on tests (strength of seat belts) which the seller regularly conducts for each belt with protocols for the buyer; at least where the buyer examines some of the belts himself, this suffices.³¹ On the other hand, it has been found that contractual provisions addressing the terms and duration of warranties, the buyer’s obligation to give notice of defects occurring

after delivery, and the buyer’s rights if the seller did not cure defects, did not displace the provisions of article 38.³² It has also been held that a buyer’s unilateral decision to delay a certain type of examination until after it had conducted other tests did not constitute a derogation from article 38 and did not bind the seller.³³ Derogation from article 38 can also occur by trade usage,³⁴ although the express terms of the agreement may negate the applicability of a usage.³⁵

7. After the goods have been delivered, the seller may waive its right to object to the propriety of the buyer’s examination of the goods,³⁶ or it may be estopped from asserting such right.³⁷ On the other side, it has been asserted that a buyer may lose its rights to object to a lack of conformity if the buyer takes actions indicating acceptance of the goods without complaining of defects that it had discovered or should have discovered in its examination.³⁸

8. Evidentiary questions can play a crucial role in determining whether a buyer has met its obligations under article 38 (1). A number of decisions have asserted that the buyer bears the burden of proving that it conducted a proper examination³⁹ and that the alleged lack of conformity was not reasonably discoverable in such an examination.⁴⁰ In determining whether an adequate examination was conducted, furthermore, it has been asserted that a tribunal should consider both “objective” and “subjective” factors, including the buyer’s “personal and business situation.”⁴¹ Some decisions appear in fact to take into account the buyer’s subjective circumstances in judging the adequacy of an examination, at least where such considerations suggest a high standard for the examination.⁴² Other decisions, however, have refused to consider the buyer’s particular situation when it was invoked to argue for a low standard for the examination.⁴³

METHOD OF EXAMINATION

9. By stating that the buyer must either examine the goods or “cause them to be examined,” article 38 (1) implies that the buyer need not personally carry out the examination. One court stated: “The examination pursuant to article 38 CISG may be conducted by the buyer himself, its employees, or others. The buyer and the seller may examine the goods together, or may agree to leave the examination to an institution suitable for inspections of that kind.”⁴⁴ In a number of cases, examinations were (or should have been) conducted by a person or entity other than the buyer, including the buyer’s customer,⁴⁵ subcontractor,⁴⁶ an expert appointed by the buyer,⁴⁷ or proper public authorities.⁴⁸ It has also been held, however, that the buyer bears ultimate responsibility under article 38 for examinations carried out by others.⁴⁹

10. Except for implying that the examination need not be carried out by the buyer personally, article 38 (1) is silent about the method the buyer should employ in examining the goods. In general, it has been asserted, the manner of inspection will depend on the parties’ agreement, trade usages and practices;⁵⁰ in the absence of such indicators, a “reasonable” examination,⁵¹ “thorough and professional”, is required, although “costly and expensive examinations are unreasonable.”⁵² It has also been asserted that the extent and intensity of the examination are determined by the type of goods,⁵³ packaging and the capabilities of the typical buyer;⁵⁴ that the

examination “should concern all aspects of conformity of the goods and be such as to reveal all non-conformities that a buyer should discover”;⁵⁵ and that in the case of generic goods the buyer has an obligation “to randomly inspect and analyse the goods.”⁵⁶ Issues relating to the method or manner of examination that have been addressed in decisions include: whether a simple visual examination was adequate⁵⁷ or required;⁵⁸ the impact of the buyer’s expertise on the level of examination required;⁵⁹ the impact of a risk of large foreseeable consequential damages on the level of examination required;⁶⁰ the impact of preliminary testing suggesting that the goods may not conform;⁶¹ whether spot or random testing or “sampling” is required⁶² (particularly where the examination would alter the goods or render them unfit for their uses),⁶³ or whether such testing is adequate;⁶⁴ the effect of the packaging or shipping condition of the goods on the type of examination the buyer should conduct;⁶⁵ whether goods to be used in production processes must be subject to a test run;⁶⁶ whether an outside expert can or must be utilized;⁶⁷ and whether the presence or absence of defects in earlier deliveries or transactions should affect the manner of examination.⁶⁸

TIME PERIOD FOR EXAMINATION

11. Article 38 (1) states that the buyer must examine the goods “within as short a period as is practicable in the circumstances”—a standard that has been described as a “factual” one that “depends on the circumstances of the case.”⁶⁹ It has been asserted that the purpose of the article 38 (1) deadline for examination is to allow the buyer an opportunity to discover defects before the buyer resells,⁷⁰ and to permit prompt clarification of whether the buyer accepts the goods as conforming;⁷¹ the period for examination, however, has been interpreted in a fashion that serves other purposes—for example, to mandate examination before the condition of the goods so changes that the opportunity to determine if the seller is responsible for a lack of conformity is lost.⁷²

12. Except where the contract involves carriage of the goods (a situation governed by article 38 (2), discussed below) or where the goods are redirected in transit or redispached (circumstances addressed in article 38 (3), discussed below), the time for the buyer’s examination as a rule begins to run upon delivery of the goods⁷³—which in general corresponds to the time risk of loss passes to the buyer.⁷⁴ Requiring the buyer to conduct an examination after delivery, therefore, is consistent with article 36 (1) of the Convention, which establishes the seller’s liability for any lack of conformity existing when the risk passes. Where the goods are delivered in instalments, it has been stated that the buyer has an obligation to examine each instalment delivery separately;⁷⁵ although where an initial delivery was insufficient for the buyer to begin producing complete products using the goods, it has been held that the buyer could postpone examination until a sufficient quantity of goods had been delivered to begin using them in production.⁷⁶ If the seller is obligated to install delivered goods, the time for examination of the goods has been held to commence when installation is complete.⁷⁷ Where the lack of conformity is a hidden or latent one not reasonably discoverable in the initial examination, however, decisions have indicated that the period for conducting an examination to ascertain the defect does not begin to run until the

defects reveal (or should reveal) themselves. Thus where a buyer alleged a lack of conformity in a grinding device that suffered a complete failure approximately two weeks after being put into service (approximately three weeks after delivery), one court indicated that the period for examining the goods with respect to this defect began to run at the time of the failure.⁷⁸

13. The mandate in article 38 (1) to examine the goods “within as short a period as is practicable” has indeed been applied in a strict fashion in several cases.⁷⁹ It has also been asserted that the phrase is to be strictly interpreted,⁸⁰ although this has also been denied in more recent cases.⁸¹ In light of the requirement in article 38 (1) that the time period for examination must be “practicable in the circumstances,” however, decisions have also recognized that the standard is a flexible one, and that the period for examination will vary with the facts of each case.⁸² According to one court, the short period for the examination depends on the size of the buyer’s company, the type of the goods to be examined, their complexity or perishability or their character as seasonal goods, the amount in question, the efforts necessary for an examination, etc. Furthermore, the objective and subjective circumstances of the concrete case must be considered—in particular the buyer’s personal and business situation, the features of the goods, the quantity of goods delivered, and the chosen legal remedy.⁸³

14. As the aforementioned statement indicates, the perishable⁸⁴ or seasonal⁸⁵ nature of goods is a factor that tribunals have considered in determining the period for examination. Other factors that the decisions recognize as relevant include the professionalism and/or expertise of the buyer;⁸⁶ the buyer’s reasonable opportunity (and the availability of necessary facilities) to examine the goods;⁸⁷ the timing and nature of the buyer’s expected use or resale of the goods;⁸⁸ the buyer’s knowledge of the seller’s need for speedy notice of lack of conformity;⁸⁹ whether the goods had passed a pre-delivery inspection;⁹⁰ whether there were non-business days during the period for examination;⁹¹ the complexity of the goods;⁹² the difficulty of conducting an examination;⁹³ whether there were defects in prior deliveries;⁹⁴ the fact that the buyer had requested expedited delivery of the goods;⁹⁵ the obviousness (or non-obviousness) of the lack of conformity;⁹⁶ the volume of goods delivered by the seller;⁹⁷ the risk that the goods would be mixed up with those from other suppliers unless examined immediately after delivery;⁹⁸ “cultural differences”;⁹⁹ whether examining the goods would entail disassembling them or removing them from packaging;¹⁰⁰ and whether the goods are subject to major fluctuations in price¹⁰¹ or rapid change in condition.¹⁰² On the other hand, the fact that deliveries arrived while the buyer was still examining an earlier shipment of the goods did not delay the buyer’s obligation to examine the later deliveries; the court explained that “[in the international context, diligence is the first duty of all involved.”¹⁰³

15. Although the flexibility and variability of the period within which the buyer must examine the goods is widely recognized, several decisions have attempted to establish presumptive time periods for the buyer’s examination. Thus some opinions have asserted that the general base-line period for examination (which might be lengthened or shortened by particular circumstances) is one week after delivery.¹⁰⁴ Other

decisions have set presumptive examination periods ranging from three or four days¹⁰⁵ to two weeks,¹⁰⁶ to two to three weeks,¹⁰⁷ to a month.¹⁰⁸ It has been stated that perishable and generic goods must be examined immediately upon delivery or within the next days.¹⁰⁹

16. Based on the facts of the particular case, examinations have been found timely when they were conducted at the following times: within one month after delivery;¹¹⁰ within approximately two weeks of the first delivery under the contract;¹¹¹ within one week after delivery;¹¹² within a few days after delivery at the port of destination;¹¹³ within three days after the goods were handed over to the buyer;¹¹⁴ within two days after delivery;¹¹⁵ and on the day of delivery.¹¹⁶ An examination by an expert was also deemed timely when it was conducted and completed at an unspecified time following delivery, but where arrangements to have the expert examine the goods were initiated before the goods arrived at their destination.¹¹⁷

17. Examinations in the following periods have been found to be untimely in the particular circumstances: more than two years after delivery of non-perishable goods (suggesting that an examination slightly over one year after delivery would also have been too late);¹¹⁸ five and one-half months after delivery;¹¹⁹ four months after delivery;¹²⁰ over two months after delivery, which was almost two months after the buyer had a particular opportunity to examine the goods;¹²¹ two months after delivery;¹²² seven weeks after delivery;¹²³ one month or longer after delivery in the case of perishable goods;¹²⁴ three weeks after delivery of uncomplicated goods where a visual examination of a sample would have detected the lack of conformity and where examination did not require difficult technical processes or destruction of packaging;¹²⁵ two weeks after delivery of perishable foodstuffs;¹²⁶ more than 10 days following delivery;¹²⁷ beyond one week to 10 days after delivery;¹²⁸ nine days after delivery;¹²⁹ beyond one week following delivery;¹³⁰ more than six days after delivery (where there was a risk that the goods would become confused with those from other suppliers unless the goods were examined immediately after delivery);¹³¹ more than a few days after delivery;¹³² after three or four days following delivery;¹³³ beyond three days after delivery;¹³⁴ after the day of arrival at the port of destination;¹³⁵ any time later than immediately following delivery.¹³⁶ Where the buyer failed to examine the goods at the port of destination, and the goods were not properly examined until they were resold and shipped to the buyer's customer, it was held that the buyer failed to comply with article 38.¹³⁷

LATENT LACK OF CONFORMITY

18. The issue of the buyer's obligation to examine the goods for a hidden or latent lack of conformity not discernible during an initial inspection¹³⁸ is an important one: article 39 (1) of the Convention requires the buyer to give notice of a lack of conformity "within a reasonable time after [the buyer] discovered or ought to have discovered it" (emphasis added). It has been held that the buyer had no duty to examine video screen machinery to determine whether they lacked basic electrical safety features.¹³⁹ Tribunals have adopted different approaches to examination for latent defects, apparently varying with the view taken of the nature

of the examination required by article 38. Some decisions appear to conceive of the article 38 examination as an ongoing or repeated process involving a continuous search for all non-conformities, including latent ones.¹⁴⁰ Such decisions seem to treat the question of when the buyer ought to have found any defect, including a latent one not discoverable in an initial examination, as an issue governed by article 38, on the apparent assumption that article 38 requires the buyer to continue examining the goods until all defects are revealed. Thus some decisions indicate that the period for an article 38 examination for latent defects does not begin to run until such defects should reveal themselves,¹⁴¹ whereas the period for examination of obvious defects begins to run immediately upon delivery.¹⁴² These opinions apparently contemplate multiple or continuous examinations under article 38. Other decisions appear to conceive of the examination required by article 38 as a single discrete event to occur shortly after delivery. For tribunals adopting this approach, the question of when latent defects should be discovered if they are not reasonably discernible in the initial article 38 examination is an issue beyond the scope of article 38.¹⁴³

19. Illustrating this approach, one decision has emphasized that the article 38 examination occurs upon delivery of the goods, and failure to discern a lack of conformity that was not discoverable at the time does not violate article 38.¹⁴⁴ It has been held that the buyer bears the burden of proving that a lack of conformity constituted a latent defect.¹⁴⁵

ARTICLE 38 (2)

20. As was noted previously, under article 38 (1) the period for the buyer to examine the goods as a rule begins to run upon delivery of the goods.¹⁴⁶ Where such delivery is to occur, in turn, is governed by the sales contract or, in the absence of a contractual provision addressing this question, by the default rules stated in article 31.¹⁴⁷ In many transactions in which the goods will be delivered to the buyer by means of a third-party carrier, the place of delivery will be where the seller hands over the goods to the carrier for transportation.¹⁴⁸ In such cases, it will often not be convenient or even possible for the buyer to examine the goods at the point of delivery, and thus in fairness the period for examination should not begin running at that point. For this reason, in transactions involving "carriage of goods" (i.e., transportation by third-party carrier), article 38 (2) permits the buyer to defer the examination "until after the goods have arrived at their destination,"¹⁴⁹ and the buyer's period for examining the goods begins to run when it receives the goods there.¹⁵⁰ The goal of this provision, it has been asserted, is "to give the buyer the opportunity to carefully inspect the goods,"¹⁵¹ and where the buyer actually examined goods at their point of origin, it has been held that article 38 (2) does not apply.¹⁵² In one transaction involving goods to be transported from Tallinn, Estonia to Abu Dhabi in the United Arab Emirates, the court found that the buyer could postpone examination until the goods arrived at Abu Dhabi even though the contract provided for delivery FOB Tallinn.¹⁵³ Another decision held that, where the sales contract included a "C & F Shanghai" term, the buyer was entitled under article 38 (2) to rely on an inspection certificate issued at the goods' final destination, and was not required to examine the goods in Shanghai because examination at that place would have

been impracticable and a waste of money.¹⁵⁴ On the other hand, article 38 (2) is subject to the contrary agreement of the parties.¹⁵⁵ Thus where a contract between a seller and a buyer provided that the goods were to be delivered “free on refrigerated truck Turkish loading berth (Torbali)” and from there to be shipped to the buyer’s country by carrier, the court found that the parties’ agreement had excluded article 38 (2) and the buyer was required to conduct the article 38 examination in Turkey rather than at the place of arrival, because the contract contemplated that a representative of the buyer would inspect the goods at the Turkish loading dock and the buyer was responsible for making arrangements for transporting the goods to its country.¹⁵⁶ If in accordance with article 31 (b) the goods have to be placed at a specific place at the disposal of the buyer, the time of examination starts to run then. Examination cannot be deferred until the buyer brought the goods home.¹⁵⁷

ARTICLE 38 (3)

21. Article 38 (3) permits a buyer in certain circumstances to defer examination of the goods until after the time that the period for examination would otherwise have commenced.¹⁵⁸ Specifically, where the goods are “redirected in transit” or “redispached by the buyer¹⁵⁹ without a reasonable opportunity for examination by him,”¹⁶⁰ article 38 (3) permits examination to be deferred “until after the goods have arrived at the new destination,” provided the seller “knew or ought to have known of the possibility of such redirection or redispach” when the contract was concluded.¹⁶¹ Analysis in

decisions suggests that, in order to invoke article 38 (3), the buyer bears the burden of proving that the seller was aware of the possibility that the goods would be redirected in transit¹⁶² and that the buyer did not have a reasonable opportunity to examine the goods before they were redispached.¹⁶³

22. Under article 38 (3), an examination of a delivery of rare hard woods that the buyer (with the seller’s knowledge) redispached to the buyer’s customer could be deferred until the goods arrived at the customer’s facilities.¹⁶⁴ And where the seller knew that the buyer was a mere trading company, lacking facilities of its own to receive, store, or transport the goods, it was held that the seller knew or ought to have known that the goods would be redirected or redispached, and thus article 38 (3) applied.¹⁶⁵ Where a buyer conducted a simple visual examination when the goods were delivered to the buyer, it has been held that article 38 (3) permitted the buyer to defer a more thorough examination until the goods were delivered to the buyer’s customer.¹⁶⁶ Several decisions have strictly construed the requirements for article 38 (3) to apply. Thus it has been stated that the provision only applies if the goods are delivered directly from the seller to the end customer or if the buyer acts simply as an intermediary between the seller and the end customer, and the provision was held inapplicable where the buyer received and stored the goods in its own warehouse without knowing in advance whether and when they would be resold.¹⁶⁷ It has also been stated that article 38 (3) allows a deferred examination only if all (rather than just a part) of a delivery of goods is redispached, or redirected in transit, and then only if the buyer does not have a reasonable opportunity to examine the delivery.¹⁶⁸

Notes

¹ Landgericht Aschaffenburg, Germany, 20 April 2006, English translation available on the Internet at www.cisg.law.pace.edu.

² Landgericht Landshut, Germany, 5 April 1995. See also CLOUT case No. 1203 [Rechtbank Breda, Netherlands, 16 January 2009], English translation available on the Internet at www.cisg.law.pace.edu (where the contract of sale did not involve carriage of the goods, article 38 (2) was inapplicable and article 38 (1) determined when the buyer was obligated to examine the goods).

³ CLOUT case No. 802 [Tribunal Supremo, Spain, 17 January 2008] (see full text of decision).

⁴ Oberlandesgericht Dresden, Germany, 8 November 2007, English translation available on the Internet at www.cisg.law.pace.edu (buyer had reasonable opportunity to examine goods during three months they were in buyer’s possession before being redispached; article 38 (3), therefore, was inapplicable); Rechtbank van Koophandel Hasselt, Belgium, 6 January 2004, English translation available on the Internet at www.cisg.law.pace.edu (buyer had ample time to examine the goods during the six weeks they were in its possession before being redispached to its customer, although whether buyer had reasonable opportunity to examine them before redispach depends on whether examination would require removing packaging, or seals or other proof of authenticity, necessary for transport to its customer; because buyer failed to prove that removal of such items was required, buyer could not invoke article 38 (3)).

⁵ Secretariat Commentary to draft counterpart to final article 38, p. 34, paragraph 2.

⁶ For example, Tribunale di Forlì, Italy, 16 February 2009, English translation available on the Internet at www.cisg.law.pace.edu; CLOUT case No. 1203 [Rechtbank Breda, Netherlands, 16 January 2009], English translation available on the Internet at www.cisg.law.pace.edu; CLOUT case No. 867 [Tribunale di Forlì, Italy, 11 December 2008], English translation available on the Internet at www.cisg.law.pace.edu; CLOUT case No. 828 [Gerechthof ’s-Hertogenbosch, the Netherlands, 2 January 2007]; Landgericht Hamburg, Germany, 6 September 2004, English translation available on the Internet at www.cisg.law.pace.edu; CLOUT case No. 773 [Bundesgerichtshof, Germany, 30 June 2004] (see full text of the decision); CLOUT case No. 590 [Landgericht Saarbrücken, Germany, 1 June 2004] (see full text of the decision); U.S. District Court, Northern District of Illinois, United States, 21 May 2004 (Chicago Prime Packers, Inc. v. Northam Food Trading Co.), available on the Internet at www.cisg.law.pace.edu; Landgericht Bielefeld, Germany, 15 August 2003, English translation available on the Internet at www.cisg.law.pace.edu; CLOUT case No. 608 [Tribunale Rimini, Italy, 26 November 2002] (see full text of the decision); Landgericht Saarbrücken, Germany, 2 July 2002, English translation available on the Internet at www.cisg.law.pace.edu; Rechtbank van Koophandel Hasselt, Belgium, 6 March 2002 (Roelants Europrint v. Beltronic Engineering International), UNILEX; Landgericht München, Germany, 27 February 2002, English translation available on the Internet at www.cisg.law.pace.edu; Kantonsgericht Schaffhausen, Switzerland, 25 February 2002, English translation available on the Internet at www.cisg.law.pace.edu; CLOUT case No. 997 [Sø og Handelsretten, Denmark, 31 January 2002]; CLOUT case No. 123 [Bundesgerichtshof, Germany, 8 March 1995]; CLOUT case No. 378 [Tribunale di Vigevano, Italy, 12 July 2000]; Arbitration Court of the International Chamber of Commerce, June 1996 (Arbitral award No. 8247), *International Court of Arbitration Bulletin*, vol. 11, p. 53 (2000); CLOUT case No. 81 [Oberlandesgericht Düsseldorf, Germany, 10 February 1994]; CLOUT

case No. 48 [Oberlandesgericht Düsseldorf, Germany, 8 January 1993]. See also CLOUT case No. 944 [Gerechtshof 's-Hertogenbosch, the Netherlands, 11 October 2005] (see full text of the decision) (buyer is obliged to examine separately each instalment delivery in an instalment contract; the reasonable time for buyer to give notice of lack of conformity under article 39 (1) began to run from the time buyer ought to have discovered the lack of conformity in an instalment delivery, not from the time the seller had completed all deliveries under the contract).

⁷ See, for example, CLOUT case No. 1057 [Oberster Gerichtshof, Austria, 2 April 2009], English translation available on the Internet at www.cisg.law.pace.edu; CLOUT case No. 802 [Tribunal Supremo, Spain, 17 January 2008] (see full text of decision); Landgericht Aschaffenburg, Germany, 20 April 2006, English translation available on the Internet at www.cisg.law.pace.edu; CLOUT case No. 775 [Landgericht Frankfurt, Germany, 11 April 2005] (see full text of the decision); CLOUT case No. 634 [Landgericht Berlin, Germany 21 March 2003]; CLOUT case No. 4 [Landgericht Stuttgart, Germany, 31 August 1989]; CLOUT case No. 833 [Hoge Raad, the Netherlands, 20 February 1998]; CLOUT case No. 364 [Landgericht Köln, Germany 30 November 1999]; CLOUT case No. 56 [Canton of Ticino Pretore di Locarno Campagna, Switzerland, 27 April 1992] (see full text of the decision). For further information concerning the effect of failure to give timely notice, see the Digests for articles 39, 40 and 44.

⁸ Regional Court Zilina, Slovakia, 25 October 2007, English translation available on the Internet at www.cisg.law.pace.edu.

⁹ Landgericht Aschaffenburg, Germany, 20 April 2006, English translation available on the Internet at www.cisg.law.pace.edu.

¹⁰ Landgericht München, Germany, 29 November 2005, English translation available on the Internet at www.cisg.law.pace.edu. Accord, CLOUT case No. 608 [Tribunale Rimini, Italy, 26 November 2002] (see full text of the decision).

¹¹ Handelsgericht St. Gallen, Switzerland, 11 February 2003, English translation available on the Internet at www.cisg.law.pace.edu.

¹² CLOUT case No. 237 [Arbitration Institute of the Stockholm Chamber of Commerce, Sweden, 5 June 1998].

¹³ Hof van Beroep Ghent, Belgium, 14 November 2008 (Volmari Werner v. Isocab NV), English translation available on the Internet at www.cisg.law.pace.edu.

¹⁴ Gerechtshof Arnhem, the Netherlands, 17 June 1997, Unilex.

¹⁵ Landgericht München, Germany, 27 February 2002, English translation available on the Internet at www.cisg.law.pace.edu.

¹⁶ CLOUT case No. 538 [Oberlandesgericht Innsbruck, Austria, 26 April 2002]; CLOUT case No. 423 [Oberster Gerichtshof, Austria, 27 August 1999], also available on the Internet at www.cisg.at; CLOUT case No. 284 [Oberlandesgericht Köln, Germany, 21 August 1997] (see full text of the decision). The buyer's obligation to examine goods under article 38 has also been linked to the principle of good faith in the performance of international sales contracts. Arrondissementsrechtbank Zwolle, the Netherlands, 5 March 1997, Unilex.

¹⁷ Oberlandesgericht Köln, Germany, 31 August 2006, English translation available on the Internet at www.cisg.law.pace.edu; U.S. District Court, Northern District of Illinois, United States, 21 May 2004 (Chicago Prime Packers, Inc. v. Northam Food Trading Co.), available on the Internet at www.cisg.law.pace.edu. Compare Oberlandesgericht Schleswig, Germany, 22 August 2002, English translation available on the Internet at www.cisg.law.pace.edu (livestock had to be examined immediately after delivery because of the possibility of rapid change in their condition).

¹⁸ Oberlandesgericht Köln, Germany, 31 August 2006, English translation available on the Internet at www.cisg.law.pace.edu.

¹⁹ Appellationshof Bern, Switzerland, 11 February 2004, English translation available on the Internet at www.cisg.law.pace.edu, reasoning upheld in CLOUT case No. 894 [Bundesgericht, Switzerland, 7 July 2004] (see full text of the decision).

²⁰ CLOUT case No. 45 [Arbitration Court of the International Chamber of Commerce, 1989 (Arbitral award No. 5713)].

²¹ CLOUT case No. 230 [Oberlandesgericht Karlsruhe, Germany, 25 June 1997] (see full text of the decision).

²² CLOUT case No. 284 [Oberlandesgericht Köln, Germany 21 August 1997] (see full text of the decision).

²³ Rechtbank van Koophandel Hasselt, Belgium, 6 March 2002 (Roelants Eurosprint v. Beltronic Engineering International), UNILEX; CLOUT case No. 81 [Oberlandesgericht Düsseldorf, Germany, 10 February 1994] (see full text of the decision).

²⁴ See the discussion in paragraphs 11–14 *infra*. The time frame specified in article 38 (1) is subject to articles 38(2) and 38(3), which state special rules applicable to particular situations. See paragraphs 20–23 *infra*. See also the discussion of latent defects in paragraph 18 *infra*.

²⁵ See the discussion in paragraphs 9–10 *infra*.

²⁶ Oberlandesgericht Köln, Germany, 12 January 2007, English translation available on the Internet at www.cisg.law.pace.edu. See also CLOUT case No. 828 [Gerechtshof 's-Hertogenbosch, the Netherlands, 2 January 2007] (“The length of the reasonable time depends on the circumstances of the case and the nature of the delivered goods”).

²⁷ Appellationshof Bern, Switzerland, 11 February 2004, English translation available on the Internet at www.cisg.law.pace.edu, reasoning upheld in CLOUT case No. 894 [Bundesgericht, Switzerland, 7 July 2004] (see full text of the decision).

²⁸ CLOUT case No. 944 [Gerechtshof 's-Hertogenbosch, Netherlands, 11 October 2005] (see full text of the decision).

²⁹ Rechtbank Arnhem, the Netherlands 11 February 2009, UNILEX; CLOUT case No. 1057 [Oberster Gerichtshof, Austria, 2 April 2009], English translation available on the Internet at www.cisg.law.pace.edu; Judicial Board of Szeged, Hungary, 5 December 2008, English translation available on the Internet at www.cisg.law.pace.edu; CLOUT case No. 94 [Internationales Schiedsgericht der Bundeskammer der gewerblichen Wirtschaft—Wien, Austria, 15 June 1994] (agreement as to time and manner of examination); CLOUT case No. 423 [Oberster Gerichtshof, Austria, 27 August 1999], also available on the Internet at www.cisg.at; Arrondissementsrechtbank Zwolle, the Netherlands, 5 March 1997, Unilex (agreement as to time).

³⁰ CLOUT case No. 591 [Oberlandesgericht Düsseldorf, Germany, 28 May 2004].

³¹ Oberster Gerichtshof, Austria, 28 June 2012, *Internationales Handelsrecht* 2013, 25 = CISG-online No. 2569.

³² CLOUT case No. 229 [Bundesgerichtshof, Germany, 4 December 1996].

³³ Hof van Beroep Ghent, Belgium, 16 April 2007, English translation available on the Internet at www.cisg.law.pace.edu.

³⁴ Helsinki Court of Appeal, Finland, 29 January 1998, available on the Internet at www.utu.fi; CLOUT case No. 423 [Oberster Gerichtshof, Austria, 27 August 1999], also available on the Internet at www.cisg.at; Arrondissementsrechtbank Zwolle, the Netherlands, 5 March 1997, Unilex; CLOUT case No. 170 [Landgericht Trier, Germany, 12 October 1995] (see full text of the decision); CLOUT case No. 290 [Oberlandesgericht Saarbrücken, Germany, 3 June 1998].

³⁵ CLOUT case No. 292 [Oberlandesgericht Saarbrücken, Germany, 13 January 1993].

³⁶ CLOUT case No. 541 [Oberster Gerichtshof, Austria, 14 January 2002] (approving analysis of lower appeals court that held the seller waived its right to object that buyer had not immediately examined the goods when it accepted late notice of lack of conformity and offered a remedy) (see full text of the decision); CLOUT case No. 270 [Bundesgerichtshof, Germany, 25 November 1998] (seller impliedly waived its rights because it had negotiated for a period of 15 months over the amount of damages for non-conforming goods without reserving the right to rely on articles 38 and 39, it had paid for an expert at buyer's request, and it had offered damages amounting to seven times the price of the goods); CLOUT case No. 235 [Bundesgerichtshof, Germany, 25 June 1997], (seller waived rights by agreeing to give a credit for goods that the buyer showed were non-conforming). But see CLOUT case No. 94 [Internationales Schiedsgericht der Bundeskammer der gewerblichen Wirtschaft, Wien, Austria, 15 June 1994] (seller had not waived its rights under articles 38 and 39 merely by failing to object immediately to the timeliness of buyer's notice; the seller's intention to waive must be clearly established); CLOUT case No. 251 [Handelsgericht des Kantons Zürich, Switzerland, 30 November 1998] (the fact that seller, at the buyer's request, examined goods that the buyer claimed were non-conforming did not mean that seller waived its right to claim late notice of the non-conformity).

³⁷ CLOUT case No. 94 [Arbitration, Internationales Schiedsgericht der Bundeskammer der gewerblichen Wirtschaft, Wien, Austria, 15 June 1994] (seller was estopped from asserting its rights under articles 38 and 39 because (1) it engaged in conduct that the buyer could justifiably interpret as indicating the seller accepted the validity of buyer's complaint of lack of conformity, and (2) buyer relied upon the indication that seller would not raise a defence based on articles 38 or 39).

³⁸ CLOUT case No. 343 [Landgericht Darmstadt, Germany, 9 May 2000]; CLOUT case No. 337 [Landgericht Saarbrücken, Germany, 26 March 1996]. But see CLOUT case No. 253 [Cantone del Ticino Tribunale d'appello, Switzerland, 15 January 1998] (acceptance of pre-shipment certificate showing proper quality of cocoa beans, for purposes of drawing on letter of credit, did not deprive the buyer of right to examine goods after delivery and to contest their quality) (see full text of the decision).

³⁹ Polimeles Protodikio Athinon, Greece, 2009 (docket No. 4505/2009), English editorial analysis available on the Internet at www.cisg.law.pace.edu; Oberlandesgericht Köln, Germany, 12 January 2007, English translation available on the Internet at www.cisg.law.pace.edu; Appellationshof Bern, Switzerland, 11 February 2004, English translation available on the Internet at www.cisg.law.pace.edu, reasoning upheld in CLOUT case No. 894 [Bundesgericht, Switzerland, 7 July 2004] (see full text of the decision); U.S. District Court, Northern District of Illinois, United States, 21 May 2004 (Chicago Prime Packers, Inc. v. Northam Food Trading Co.), available on the Internet at www.cisg.law.pace.edu; CLOUT case No. 251 [Handelsgericht des Kantons Zürich, Switzerland, 30 November 1998]; CLOUT case No. 97 [Handelsgericht des Kantons Zürich, Switzerland, 9 September 1993]; CLOUT case No. 378 [Tribunale di Vigevano, Italy, 12 July 2000]; CLOUT case No. 423 [Oberster Gerichtshof, Austria, 27 August 1999] also available on the Internet at www.cisg.at. See also CLOUT case No. 828 [Gerechtshof 's-Hertogenbosch, the Netherlands, 2 January 2007] (rejecting buyer's argument that a lack of conformity could not have been discovered during initial examination because buyer failed to support it with evidence); Landgericht Duisburg, Germany, 17 April 1996, Unilex (holding in favour of seller because buyer had not produced evidence of timely examination of goods and timely notice of defect).

⁴⁰ CLOUT case No. 590 [Landgericht Saarbrücken, Germany, 1 June 2004] (see full text of the decision).

⁴¹ CLOUT case No. 423 [Oberster Gerichtshof, Austria, 27 August 1999], also available on the Internet at www.cisg.at.

⁴² CLOUT case No. 232 [Oberlandesgericht München, Germany, 11 March 1998] (because buyer was an experienced merchant, it should have conducted an expert examination and detected defects) (see full text of the decision); CLOUT case No. 4 [Landgericht Stuttgart, Germany, 31 August 1989] (in light of its expertise and the fact that it had found defects in the first delivery, buyer should have conducted a more thorough examination).

⁴³ CLOUT case No. 833 [Hoge Raad, the Netherlands, 20 February 1998] (despite buyer's summer vacation, it should not have delayed examining the goods when its customer complained in July); CLOUT case No. 285 [Oberlandesgericht Koblenz, Germany, 11 September 1998] (fact that buyer's manufacturing facilities were still under construction and that buyer was disorganized should not be considered in determining whether the buyer conducted a proper examination).

⁴⁴ Landgericht Aschaffenburg, Germany, 20 April 2006, English translation available on the Internet at www.cisg.law.pace.edu.

⁴⁵ Regional Court Zilina, Slovakia, 25 October 2007, English translation available on the Internet at www.cisg.law.pace.edu; Obergericht des Kantons Appenzell Auserrhoden, Switzerland, 18 August 2008, UNILEX (examination by buyer's customers); Oberlandesgericht Düsseldorf, Germany, 23 January 2004, English translation available on the Internet at www.cisg.law.pace.edu; CLOUT case No. 167 [Oberlandesgericht München, Germany, 8 February 1995] (buyer's customer should have examined goods and discovered defect sooner than it did); CLOUT case No. 120 [Oberlandesgericht Köln, Germany, 22 February 1994] (examination by buyer's customer, to whom the goods had been transhipped, was timely and proper) (see full text of the decision). See also Landgericht München, Germany, 29 November 2005, English translation available on the Internet at www.cisg.law.pace.edu (leading doctrine suggests that article 38 examination may be conducted by a third party, but it was unnecessary to determine whether examination by the buyer's customer satisfied article 38 because in any event the buyer gave timely article 39 notice lack of conformity).

⁴⁶ CLOUT case No. 359 [Oberlandesgericht Koblenz, Germany, 18 November 1999] (third party to whom buyer transferred the goods (fibreglass fabrics) for processing was supposed to conduct the article 38 examination; because buyer unjustifiably delayed transferring the goods to the third party, the examination was late).

⁴⁷ CLOUT case No. 538 [Oberlandesgericht Innsbruck, Austria, 26 April 2002]; CLOUT case No. 319 [Bundesgerichtshof, Germany, 3 November 1999]; CLOUT case No. 423 [Oberster Gerichtshof, Austria, 27 August 1999]. See also CLOUT case No. 541 [Oberster Gerichtshof, Austria, 14 January 2002] (approving approach of lower appeals court which stated that use of experts to examine technically complicated goods may be required) (see full text of the decision).

⁴⁸ Supreme Court, Israel, 17 March 2009 (Pamesa Cerámica v. Yisrael Mendelson Ltd), available on the Internet at www.cisg.law.pace.edu.

⁴⁹ Oberlandesgericht Düsseldorf, Germany, 23 January 2004, English translation available on the Internet at www.cisg.law.pace.edu; CLOUT case No. 167 [Oberlandesgericht München, Germany, 8 February 1995].

⁵⁰ CLOUT case No. 892 [Kantonsgericht Schaffhausen, Switzerland, 27 January 2004] (see full text of the decision); CLOUT case No. 423 [Oberster Gerichtshof, Austria, 27 August 1999], also available on the Internet at www.cisg.at. For discussion of contractual provisions and usages relating to examination, see paragraph 6 *supra*.

⁵¹ High People's Court of Fujian Province, People's Republic of China, 20 December 2014, (Cugranca Safety SL v. Fujian Quanzhou Dongba Shoes & Clothes Ltd), (2014) *Min Min Zhong Zi* No. 1454 Civil Judgment, available on the Internet at www.ccmt.org.cn; CLOUT case No. 892 [Kantonsgericht Schaffhausen, Switzerland, 27 January 2004] (see full text of the decision) ("reasonable and usual" examination); CLOUT case No. 423 [Oberster Gerichtshof, Austria, 27 August 1999], also available on the Internet at www.cisg.at.

⁵² CLOUT case No. 423 [Oberster Gerichtshof, Austria, 27 August 1999], also available on the Internet at www.cisg.at. See also Oberlandesgericht Dresden, Germany, 8 November 2007, English translation available on the Internet at www.cisg.law.pace.edu (random sampling and stress tests of goods required because it would not have involved much effort or excessive costs); Oberlandesgericht Köln, Germany, 12 January 2007, English translation available on the Internet at www.cisg.law.pace.edu (article 38 only requires an examination whose cost and effort is in reasonable proportion to the expected benefits of the examination); Landgericht Hamburg, Germany, 6 September 2004, English translation available on the Internet at www.cisg.law.pace.edu (buyer should have examined the bottom of containers because this would not have entailed "unacceptable expenses" for the buyer); CLOUT case No. 773 [Bundesgerichtshof, Germany, 30 June 2004] (see full text of the decision) (technical testing of goods not required because it was "economically unreasonable"); Landgericht Paderborn, Germany, 25 June 1996, Unilex (holding that the buyer need not conduct special chemical analyses of plastic compound), reasoning approved in CLOUT case No. 541 [Oberster Gerichtshof, Austria, 14 January 2002].

⁵³ CLOUT case No. 892 [Kantonsgericht Schaffhausen, Switzerland, 27 January 2004] (see full text of the decision) (offering the following examples of the type of examinations required for different types of goods: "in case of textiles, ironing and washing tests (in order to examine the quality of the colors or the shrinking); in case of shoes and clothes, a wearing of the goods"); CLOUT case No. 230 [Oberlandesgericht Karlsruhe, Germany, 25 June 1997], reversed on other grounds by CLOUT case No. 270 [Bundesgerichtshof, Germany, 25 November 1998]; CLOUT case No. 997 [Sø og Handelsretten, Denmark, 31 January 2002] (stating that buyer should have discovered that frozen fish were older than specified in the contract and in poor condition by examining time stamps on the packaging, and by thawing and examining samples).

⁵⁴ CLOUT case No. 230 [Oberlandesgericht Karlsruhe, Germany, 25 June 1997], reversed on other grounds by CLOUT case No. 270 [Bundesgerichtshof, Germany, 25 November 1998].

⁵⁵ CLOUT case No. 828 [Gerechtshof 's-Hertogenbosch, the Netherlands, 2 January 2007]; CLOUT case No. 944 [Gerechtshof 's-Hertogenbosch, the Netherlands, 11 October 2005] (see full text of the decision). See also CLOUT case No. 230 [Oberlandesgericht Karlsruhe, Germany, 25 June 1997], reversed on other grounds by CLOUT case No. 270 [Bundesgerichtshof, Germany, 25 November 1998] ("adequate to reveal possible deficiencies").

⁵⁶ Oberlandesgericht Köln, Germany, 31 August 2006, English translation available on the Internet at www.cisg.law.pace.edu; CLOUT case No. 892 [Kantonsgericht Schaffhausen, Switzerland, 27 January 2004] (see full text of the decision).

⁵⁷ Oberlandesgericht Dresden, Germany, 8 November 2007, English translation available on the Internet at www.cisg.law.pace.edu (simple visual examination was not adequate where random sampling and stress tests were reasonable and would have revealed the defects); Rechtbank van Koophandel Hasselt, Belgium, 6 January 2004, English translation available on the Internet at www.cisg.law.pace.edu (because visual examination would have suggested defects were present, buyer was obliged to conduct further examination).

⁵⁸ Oberlandesgericht Köln, Germany, 12 January 2007, English translation available on the Internet at www.cisg.law.pace.edu.

⁵⁹ CLOUT case No. 232 [Oberlandesgericht München, Germany, 11 March 1998] (see full text of the decision); CLOUT case No. 4 [Landgericht Stuttgart, Germany, 31 August 1989] (see full text of the decision) (in view of his expertise, merchant buyer should have conducted "a more thorough and professional examination").

⁶⁰ Landgericht Aschaffenburg, Germany, 20 April 2006, English translation available on the Internet at www.cisg.law.pace.edu.

⁶¹ Landgericht Aschaffenburg, Germany, 20 April 2006, English translation available on the Internet at www.cisg.law.pace.edu; Rechtbank van Koophandel Hasselt, Belgium, 6 January 2004, English translation available on the Internet at www.cisg.law.pace.edu.

⁶² High People's Court of Fujian Province, People's Republic of China, 20 December 2014, (Cugranca Safety SL v. Fujian Quanzhou Dongba Shoes & Clothes Ltd), (2014) *Min Min Zhong Zi* No. 1454 Civil Judgment (holding that buyer was bound to prove that "reasonable sampling" had been used in the examination of the goods), available on the Internet at www.ccmt.org.cn; Oberlandesgericht Dresden, Germany, 8 November 2007, English translation available on the Internet at www.cisg.law.pace.edu; Landgericht Aschaffenburg, Germany, 20 April 2006, English translation available on the Internet at www.cisg.law.pace.edu; CLOUT case No. 997 [Sø og Handelsretten, Denmark, 31 January 2002]; CLOUT case No. 634 [Landgericht Berlin, Germany, 21 March 2003] (see full text of the decision); CLOUT case No. 230 [Oberlandesgericht Karlsruhe, Germany, 25 June 1997] (requiring test use of goods for defects that would only become apparent upon use and asserting that random testing is always required), reversed on other grounds by CLOUT case No. 270 [Bundesgerichtshof, Germany, 25 November 1998]; CLOUT case No. 232 [Oberlandesgericht München, Germany, 11 March 1998] (see full text of the decision); CLOUT case No. 98 [Rechtbank Roermond, the Netherlands, 19 December 1991] (buyer required to thaw and examine a portion of shipment of frozen cheese) (see full text of the decision); CLOUT case No. 423 [Oberster Gerichtshof, Austria, 27 August 1999], also available on the Internet at www.cisg.at; CLOUT case No. 292 [Oberlandesgericht Saarbrücken, Germany, 13 January 1993]; CLOUT case No. 285 [Oberlandesgericht Koblenz, Germany, 11 September 1998] (buyer should have conducted a test by processing a sample of delivered plastic using its machinery) (see full text of the decision); CLOUT case No. 251 [Handelsgericht des Kantons Zürich, Switzerland, 30 November 1998]; CLOUT case No. 81 [Oberlandesgericht Düsseldorf, Germany, 10 February 1994]; CLOUT case No. 4 [Landgericht Stuttgart, Germany, 31 August 1989] (spot checking of delivery of shoes not sufficient where defects had been discovered in an earlier delivery).

⁶³ Oberlandesgericht Köln, Germany, 12 January 2007, English translation available on the Internet at www.cisg.law.pace.edu.

⁶⁴ Landgericht Aschaffenburg, Germany, 20 April 2006, English translation available on the Internet at www.cisg.law.pace.edu (sampling is sufficient for deliveries of large quantities of goods); CLOUT case No. 892 [Kantonsgericht Schaffhausen, Switzerland, 27 January 2004] (see full text of the decision) (stating that only random sampling is required for mass production items, but random sampling was not sufficient for the "small series" of goods in the case); Rechtbank van Koophandel Hasselt, Belgium, 6 January 2004, English translation available on the Internet at www.cisg.law.pace.edu; CLOUT case No. 170 [Landgericht Trier, Germany, 12 October 1995] (taking samples of wine for examination the day after delivery was adequate; buyer did not have to examine for dilution with water because that is not generally done in

the wine trade); CLOUT case No. 280 [Oberlandesgericht Jena, Germany, 26 May 1998] (examination of random samples of live fish after delivery would have been sufficient); CLOUT case No. 192 [Obergericht des Kantons Luzern, Switzerland, 8 January 1997] (spot checking of wrapped medical devices would be adequate) (see full text of the decision). But see Rechtbank Zwolle, the Netherlands, 5 March 1997, Unilex (examination of delivery of fish by sample would not be sufficient where the buyer had ready opportunity to examine entire shipment when it was processed and buyer had discovered lack of conformity in another shipment by the seller).

⁶⁵ Regional Court Zilina, Slovakia, 25 October 2007, English translation available on the Internet at www.cisg.law.pace.edu; CLOUT case No. 98 [Rechtbank Roermond, the Netherlands, 19 December 1991] (fact that delivery consisted of frozen cheese did not excuse buyer from obligation to examine: buyer should have thawed and examined a portion of shipment); CLOUT case No. 292 [Oberlandesgericht Saarbrücken, Germany, 13 January 1993] (fact that doors had been delivered wrapped in plastic sheets on pallets and buyer contemplated sending them on to its customers did not prevent buyer from examining goods: buyer should have unwrapped a sample of the doors); Rechtbank van Koophandel Kortrijk, Belgium, 6 October 1997, Unilex (not reasonable to expect buyer of yarn to unroll the yarn in order to examine it before processing); CLOUT case No. 192 [Obergericht des Kantons Luzern, Switzerland, 8 January 1997] (buyer should have removed a sample of medical devices from shipping boxes and examined them through transparent wrapping) (see full text of the decision).

⁶⁶ Landgericht Aschaffenburg, Germany, 20 April 2006, English translation available on the Internet at www.cisg.law.pace.edu.

⁶⁷ Landgericht Aschaffenburg, Germany, 20 April 2006, English translation available on the Internet at www.cisg.law.pace.edu; CLOUT case No. 892 [Kantonsgericht Schaffhausen, Switzerland, 27 January 2004] (see full text of the decision); CLOUT case No. 319 [Bundesgerichtshof, Germany, 3 November 1999]; CLOUT case No. 423 [Oberster Gerichtshof, Austria, 27 August 1999], also available on the Internet at www.cisg.at; Landgericht Ellwangen, Germany, 21 August 1995, Unilex.

⁶⁸ CLOUT case No. 892 [Kantonsgericht Schaffhausen, Switzerland, 27 January 2004] (see full text of the decision); Landgericht Ellwangen, Germany, 21 August 1995, Unilex; CLOUT case No. 4 [Landgericht Stuttgart, Germany, 31 August 1989] (spot checking of delivery of shoes not sufficient where defects had been discovered in an earlier delivery).

⁶⁹ U.S. District Court, Northern District of Illinois, United States, 21 May 2004 (Chicago Prime Packers, Inc. v. Northam Food Trading Co.), available on the Internet at www.cisg.law.pace.edu.

⁷⁰ CLOUT case No. 251 [Handelsgericht des Kantons Zürich, Switzerland, 30 November 1998].

⁷¹ CLOUT case No. 230 [Oberlandesgericht Karlsruhe, Germany, 25 June 1997] (see full text of the decision).

⁷² CLOUT case No. 284 [Oberlandesgericht Köln, Germany, 21 August 1997] (immediate examination of chemicals required where the chemicals were going to be mixed with other substances soon after delivery); Rechtbank Zwolle, the Netherlands, 5 March 1997, Unilex (examination was due quickly where shipment of fish was to be processed by the buyer, because the processing would make it impossible to ascertain whether the fish were defective when sold); Arrondissementsrechtbank 's-Hertogenbosch, the Netherlands, 15 December 1997, Unilex (examination of furs not conducted until they had already undergone processing was not timely).

⁷³ For example, Tribunale di Forlì, Italy, 16 February 2009, English translation available on the Internet at www.cisg.law.pace.edu; CLOUT case No. 1203 [Rechtbank Breda, the Netherlands, 16 January 2009], English translation available on the Internet at www.cisg.law.pace.edu; CLOUT case No. 828 [Gerechthof 's-Hertogenbosch, the Netherlands, 2 January 2007]; Landgericht Hamburg, Germany, 6 September 2004, English translation available on the Internet at www.cisg.law.pace.edu; Appellationshof Bern, Switzerland, 11 February 2004, English translation available on the Internet at www.cisg.law.pace.edu, reasoning upheld in CLOUT case No. 894 [Bundesgericht, Switzerland, 7 July 2004] (see full text of the decision) (“The period of time under article 38 (1) CISG commences when the goods are at the disposal of the buyer at the stipulated location.”); CLOUT case No. 892 [Kantonsgericht Schaffhausen, Switzerland, 27 January 2004] (see full text of the decision) (the time for the buyer’s examination “is to be counted from the time the buyer has access to the goods at the place of delivery. . . . The time in which the goods are at the buyer’s disposal is decisive for the beginning of the period for examination.”); Rechtbank van Koophandel Hasselt, Belgium, 6 January 2004, English translation available on the Internet at www.cisg.law.pace.edu; CLOUT case No. 634 [Landgericht Berlin, Germany 21 March 2003]; CLOUT case No. 541 [Oberster Gerichtshof, Austria, 14 January 2002] (approving approach of lower appeals court which stated that examination period begins as soon as the goods are made available to the buyer at the place of delivery) (see full text of the decision); CLOUT case No. 48 [Oberlandesgericht Düsseldorf, Germany, 8 January 1993] (where the contract provided for delivery of cucumbers “free on refrigerated truck Turkish loading berth,” the German buyer should have examined the goods when they were loaded in Turkey, instead of waiting until they had been forwarded to Germany); CLOUT case No. 81 [Oberlandesgericht Düsseldorf, Germany, 10 February 1994] (asserting that the period for examining the goods under article 38 and giving notice under article 39 begins upon delivery to the buyer); CLOUT case No. 378 [Tribunale di Vigevano, Italy, 12 July 2000] (buyer’s time for examining goods begins to run upon delivery or shortly thereafter, except where the defect can only be discovered when the goods are processed); CLOUT case No. 56 [Canton of Ticino Pretore di Locarno Campagna, Switzerland, 27 April 1992] (buyer must examine goods upon delivery); Rechtbank Zwolle, the Netherlands, 5 March 1997, Unilex (examination due at the time of delivery or shortly after). The German Supreme Court has suggested that an article 38 examination of machinery should be conducted both at the time of delivery and at the time of installation; see CLOUT case No. 319 [Bundesgerichtshof, Germany, 3 November 1999] (see full text of the decision). In a decision involving the sale and installation of sliding gates, one court held that the defects in the gates should have been discovered when installation of the gates was substantially complete, even though some minor work remained unperformed by the seller; see CLOUT case No. 262 [Kanton St. Gallen, Gerichtskommission Oberrheinthal, Switzerland, 30 June 1995]. The court did not actually cite article 38—instead, it discussed the article 39 (1) obligation to give notice of a lack of conformity within a reasonable time after the non-conformity was discovered or should have been discovered—but the decision clearly implies that the time for the buyer’s examination of the goods commenced even before seller had completed all its duties. Where elevator cables were delivered on incorrectly-sized reels, a court has held that the buyer should have examined the goods for defects at the time he rewound the cables on proper-sized reels (which occurred eight days after delivery); thus the subsequent discovery of obvious defects in the cables by the buyer’s customer was, with respect to the buyer obligations under article 38 (1), untimely. CLOUT case No. 482 [Cour d’appel Paris, France, 6 November 2001]. Where goods were delivered to the port designated by the contract’s FOB term but the buyer did not receive the bill of lading covering the goods until almost a month later, the court “assumed” that the period for examination did not begin to run until the buyer received the bill of lading. CLOUT case No. 775 [Landgericht Frankfurt, Germany, 11 April 2005] (see full text of the decision).

⁷⁴ See CISG article 69; Hof van Beroep Antwerpen, Belgium, 22 January 2007, English translation available on the Internet at www.cisg.law.pace.edu.

⁷⁵ CLOUT case No. 944 [Gerechthof 's-Hertogenbosch, the Netherlands, 11 October 2005] (see full text of the decision).

⁷⁶ Hof van Beroep Antwerpen, Belgium, 14 February 2002 (NV Carta Mundi v. Index Syndicate Ltd), English translation available on the Internet at www.cisg.law.pace.edu.

⁷⁷ Obergericht Zug, Switzerland, 19 December 2006, English translation available on the Internet at www.cisg.law.pace.edu.

⁷⁸ CLOUT case No. 319 [Bundesgerichtshof, Germany, 3 November 1999] (see full text of the decision). See also CLOUT case No. 541 [Oberster Gerichtshof, Austria, 14 January 2002] (approving approach of lower appeals court which held that defects could not be discovered until the goods were put into provisional operation) (see full text of the decision); CLOUT case No. 378 [Tribunale di Vigevano, Italy, 12 July 2000] (“the time when the buyer is required to examine the goods under article 38(1) . . . as a rule is upon delivery or shortly thereafter and only exceptionally may be later, for instance when the defect is discoverable only by processing the goods.”); CLOUT case No. 833 [Hoge Raad, the Netherlands, 20 February 1998] (implying that the period for examining for latent defects in floor tiles began to run when buyer’s customer complained, some seven months after seller delivered the tiles to buyer); Landgericht Düsseldorf, Germany, 23 June 1994, Unilex (suggesting that period to examine engines for latent defects did not begin until buyer had installed and put goods into operation); Rechtbank van Koophandel Kortrijk, Belgium, 27 June 1997, available on the Internet at www.law.kuleuven.be (time for examination of goods and notice of lack of conformity was extended for goods that had to be processed before defects could be discovered). But see CLOUT case No. 634 [Landgericht Berlin, Germany, 21 March 2003] (stating that, even if defects in fabrics would not be revealed until they were dyed, buyer should have conducted preliminary spot testing by dyeing samples of the fabric).

⁷⁹ Oberlandesgericht Köln, Germany, 31 August 2006, English translation available on the Internet at www.cisg.law.pace.edu (examination of generic goods [chlorine tables] was required immediately after delivery); Arbitration Court of the International Chamber of Commerce, June 1996 (Arbitral award No. 8247), *International Court of Arbitration Bulletin*, vol. 11, p. 53 (2000) (buyer should have examined a large shipment of a chemical compound on the day it arrived in the port of destination); Landgericht Landshut, Germany, 5 April 1995, Unilex (asserting that buyer’s obligation to examine the goods must be complied with immediately, even if the goods are not perishable); CLOUT case No. 56 [Canton of Ticino Pretore di Locarno Campagna, Switzerland, 27 April 1992] (because both buyer and seller were merchants, buyer should have examined the goods immediately upon delivery) (see full text of the decision); Hof Arnhem, the Netherlands, 17 June 1997, Unilex (buyer, who was a dealer in medical equipment, should have checked immediately after delivery whether documents necessary to satisfy regulations were present); CLOUT case No. 290 [Oberlandesgericht Saarbrücken, Germany, 3 June 1998] (buyer must examine flowers on the day of delivery); CLOUT case No. 81 [Oberlandesgericht Düsseldorf, Germany, 10 February 1994] (examination of shirts was required immediately following delivery).

⁸⁰ Regional Court Zilina, Slovakia, 25 October 2007, English translation available on the Internet at www.cisg.law.pace.edu (packaging of goods made it difficult to examine goods before resale, and thus buyer was not required to examine goods immediately upon delivery); CLOUT case No. 81 [Oberlandesgericht Düsseldorf, Germany, 10 February 1994] (see full text of the decision); CLOUT case No. 251 [Handelsgericht des Kantons Zürich, Switzerland, 30 November 1998].

⁸¹ Appellationshof Bern, Switzerland, 11 February 2004, English translation available on the Internet at www.cisg.law.pace.edu, reasoning upheld in CLOUT case No. 894 [Bundesgericht, Switzerland, 7 July 2004] (see full text of the decision) (“It is beyond doubt that the buyer has to act in due course. . . . Neither the wording nor the historical background of article 38 CISG requires that a strict standard has to be applied to the time limit for the examination. Instead, the buyer should not be burdened with strict legal standards when a breach of contract by the seller is at issue.”); CLOUT case No. 892 [Kantonsgericht Schaffhausen, Switzerland, 27 January 2004] (see full text of the decision). It has also been asserted that strict examination periods imposed by domestic law are inapplicable under article 38. CLOUT case No. 775 [Landgericht Frankfurt, Germany, 11 April 2005] (see full text of the decision).

⁸² See, for example, CLOUT case No. 1203 [Rechtbank Breda, Netherlands, 16 January 2009], English translation available on the Internet at www.cisg.law.pace.edu (where goods were perishable fruit, the buyer was obliged to examine them before they were shipped to its customers); CLOUT case No. 541 [Oberster Gerichtshof, Austria, 14 January 2002] (see full text of the decision).

⁸³ CLOUT case No. 423 [Oberster Gerichtshof, Austria, 27 August 1999], also available on the Internet at www.cisg.at. The opinion continues by asserting that “the reasonable periods pursuant to articles 38 and 39 CISG are not long periods.” For other statements on the flexible standard for the time for examination and/or the factors that should be considered in determining whether examination was timely, see CLOUT case No. 192 [Obergericht des Kantons Luzern, Switzerland, 8 January 1997] (indicating that a tribunal should consider “the nature of the goods, the quantity, the kind of wrapping and all other relevant circumstances”) (see full text of the decision); Tribunale Civile di Cuneo, Italy, 31 January 1996, Unilex (asserting that scholars discussing article 38 have indicated that the time frame is “elastic, leaving space to the interpreter and in the end to the judge, in terms of reasonableness, so that the elasticity will be evaluated in accordance with the practicalities of each case”); CLOUT case No. 81 [Oberlandesgericht Düsseldorf, Germany, 10 February 1994] (in determining the time for examining the goods “the circumstances of the individual case and the reasonable possibilities of the contracting parties are crucial”) (see full text of the decision); CLOUT case No. 230 [Oberlandesgericht Karlsruhe, Germany, 25 June 1997] (asserting that, although the “median” time for an examination of durable goods is three to four days, “[t]his figure can be corrected upward or downward as the particular case requires”) (see full text of the decision).

⁸⁴ Rechtbank Arnhem, the Netherlands 11 February 2009, UNILEX; Oberster Gerichtshof; Rechtbank Breda, the Netherlands, 16 January 2009, English translation available on the Internet at www.cisg.law.pace.edu; CLOUT case No. 849 [Audiencia Provincial de Pontevedra, Spain, 19 December 2007] (see full text of the decision); Hof van Beroep Ghent, Belgium, 16 April 2007, English translation available on the Internet at www.cisg.law.pace.edu; Obergericht Zug, Switzerland, 19 December 2006, English translation available on the Internet at www.cisg.law.pace.edu; Appellationshof Bern, Switzerland, 11 February 2004, English translation available on the Internet at www.cisg.law.pace.edu, reasoning upheld in CLOUT case No. 894 [Bundesgericht, Switzerland, 7 July 2004] (see full text of the decision); Rechtbank van Koophandel Veurne, Belgium, 19 March 2003, English translation available on the Internet at www.cisg.law.pace.edu (fresh vegetables); CLOUT case No. 290 [Oberlandesgericht Saarbrücken, Germany, 3 June 1998] (flowers); CLOUT case No. 98 [Rechtbank Roermond, the Netherlands, 19 December 1991] (cheese); Rechtbank Zwolle, the Netherlands, 5 March 1997, Unilex (fish).

⁸⁵ Hof van Beroep Gent, Belgium, 12 May 2003, English editorial remarks available on the Internet at www.cisg.law.pace.edu.

⁸⁶ Kantonsgericht Schaffhausen, Switzerland, 25 February 2002, English translation available on the Internet at www.cisg.law.pace.edu (“the position of the buyer in its trade”); CLOUT case No. 56 [Canton of Ticino Pretore di Locarno Campagna, Switzerland, 27 April 1992] (see full text of the decision); Hof Arnhem, the Netherlands, 17 June 1997, Unilex. See also U.S. District Court, Northern District of Illinois, United States, 21 May 2004 (Chicago Prime Packers, Inc. v. Northam Food Trading Co.), available on the Internet at www.cisg.law.pace.edu (“the skill of the [buyer’s] employees”).

⁸⁷ CLOUT case No. 775 [Landgericht Frankfurt, Germany, 11 April 2005] (see full text of the decision); Landgericht Hamburg, Germany, 6 September 2004, English translation available on the Internet at www.cisg.law.pace.edu. See also U.S. District Court, Northern District of Illinois, United States, 21 May 2004 (Chicago Prime Packers, Inc. v. Northam Food Trading Co.), available on the Internet at www.cisg.law.pace.edu (time for examination varies with “the method of . . . delivery” of the goods); Kantonsgericht Schaffhausen, Switzerland, 25 February 2002, English translation available on the Internet at www.cisg.law.pace.edu (“the general circumstances and the infrastructure at the place of examination”).

⁸⁸ CLOUT case No. 284 [Oberlandesgericht Köln, Germany, 21 August 1997] (immediate examination of chemicals required where the chemicals were going to be mixed with other substances soon after delivery); Rechtbank Zwolle, the Netherlands, 5 March 1997, Unilex (examination was due quickly where shipment of fish was to be processed by the buyer; processing would make it impossible to ascertain whether the fish were defective when sold); Arrondissementsrechtbank 's-Hertogenbosch, the Netherlands, 15 December 1997, Unilex (examination of furs not conducted until they had already undergone processing was not timely).

⁸⁹ Landgericht Köln, Germany, 11 November 1993, Unilex, reversed on other grounds by CLOUT case No. 122 [Oberlandesgericht Köln, Germany, 26 August 1994] (see full text of the decision).

⁹⁰ Compare Helsinki Court of First Instance, Finland, 11 June 1995, available on the Internet at www.cisg.law.pace.edu (existence of pre-delivery tests showing acceptable vitamin content for skin care products excused buyer from testing for vitamin content immediately after delivery) with CLOUT case No. 280 [Oberlandesgericht Jena, Germany, 26 May 1998] (buyer was not entitled to rely on pre-importation veterinarian's inspection certificate certifying health of live fish: buyer should have examined samples of fish after delivery).

⁹¹ CLOUT case No. 120 [Oberlandesgericht Köln, Germany, 22 February 1994] (buyer's examination was timely, taking into account the fact that two days of the period were weekend days) (see full text of the decision); Amtsgericht Riedlingen, Germany, 21 October 1994, Unilex (three days for examining delivery of ham was sufficient even though Christmas holidays interfered with examination). But see CLOUT case No. 833 [Hoge Raad, the Netherlands, 20 February 1998] (despite buyer's summer vacation, it should not have delayed in examining the goods when its customer complained in July).

⁹² CLOUT case No. 775 [Landgericht Frankfurt, Germany, 11 April 2005] (see full text of the decision); U.S. District Court, Northern District of Illinois, United States, 21 May 2004 (Chicago Prime Packers, Inc. v. Northam Food Trading Co.), available on the Internet at www.cisg.law.pace.edu; (time for examination influenced by “the complexity of the machinery . . . [and] the need for training and ongoing repairs with respect to the machinery”); CLOUT case No. 892 [Kantonsgericht Schaffhausen, Switzerland, 27 January 2004] (see full text of the decision); Handelsgericht St. Gallen, Switzerland, 11 February 2003, English translation available on the Internet at www.cisg.law.pace.edu; Kantonsgericht Schaffhausen, Switzerland, 25 February 2002, English translation available on the Internet at www.cisg.law.pace.edu; Landgericht Düsseldorf, Germany, 23 June 1994, Unilex (where the goods consisted of two engines to be used for manufacturing hydraulic presses and welding machines, buyer had more than the usual time for an examination in order to determine conformity with technical specifications; because buyer delayed examining the goods until some four months after delivery of the second engine (16 months after delivery of first engine), however, the examination was untimely).

⁹³ CLOUT case No. 849 [Audiencia Provincial de Pontevedra, Spain, 19 December 2007] (see full text of the decision); CLOUT case No. 775 [Landgericht Frankfurt, Germany, 11 April 2005] (see full text of the decision); Landgericht Hamburg, Germany, 6 September 2004, English translation available on the Internet at www.cisg.law.pace.edu; CLOUT case No. 892 [Kantonsgericht Schaffhausen, Switzerland, 27 January 2004] (see full text of the decision); Handelsgericht St. Gallen, Switzerland, 11 February 2003, English translation available on the Internet at www.cisg.law.pace.edu; CLOUT case No. 315 [Cour de cassation, France, 26 May 1999] (time for examination took into account the difficulty of handling the metal sheets involved in the sale); Rechtbank van Koophandel Kortrijk, Belgium, 27 June 1997, Unilex (period for examination was longer for goods that had to be processed before defects could be discovered (in this case, yarn to be woven)); Rechtbank van Koophandel Kortrijk, Belgium, 6 October 1997, Unilex (buyer of crude yarn did not have to examine goods until they were processed; it would be unreasonable to expect buyer to unroll the yard in order to examine it before processing); Landgericht Düsseldorf, Germany, 23 June 1994, Unilex (buyer had longer than normal period to examine engines to be used in its manufacturing process because buyer had to install and put goods into operation in order to discover defects). Compare CLOUT case No. 81 [Oberlandesgericht Düsseldorf, Germany, 10 February 1994] (the time for examination depends on the circumstances of the particular case, in this case, involving a sale of shirts, “it was easily possible to examine the shirts—at least by way of sampling—immediately after their delivery”) (see full text of the decision). But see CLOUT case No. 98 [Rechtbank Roermond, the Netherlands, 19 December 1991] (fact that sale involved frozen cheese did not excuse buyer from prompt examination, buyer could thaw and examine a sample of delivery) (see full text of the decision).

⁹⁴ CLOUT case No. 892 [Kantonsgericht Schaffhausen, Switzerland, 27 January 2004] (see full text of the decision); Rechtbank van Koophandel Hasselt, Belgium, 6 March 2002 (Roelants Europrint v. Beltronic Engineering International), UNILEX; Rechtbank Zwolle, the Netherlands, 5 March 1997, Unilex (buyer should have examined fish before processing and selling them to its customers given that buyer had already discovered lack of conformity in a previous shipment by the seller); Rechtbank van Koophandel Kortrijk, Belgium, 27 June 1997, available on the Internet at www.law.kuleuven.be (“defects in prior shipments a factor to consider in determining timeliness of examination”).

⁹⁵ CLOUT case No. 634 [Landgericht Berlin, Germany 21 March 2003].

⁹⁶ Regional Court Zilina, Slovakia, 25 October 2007, English translation available on the Internet at www.cisg.law.pace.edu (defects in clothing could not be detected until worn by the buyer's retail customers); CLOUT case No. 775 [Landgericht Frankfurt, Germany, 11 April 2005] (see full text of the decision); U.S. District Court, Northern District of Illinois, United States, 21 May 2004 (Chicago Prime Packers, Inc. v. Northam Food Trading Co.), available on the Internet at www.cisg.law.pace.edu; CLOUT case No. 892 [Kantonsgericht Schaffhausen, Switzerland, 27 January 2004] (see full text of the decision); Handelsgericht St. Gallen, Switzerland, 11 February 2003, English translation available on the Internet at www.cisg.law.pace.edu; Landgericht München, Germany, 27 February 2002, English translation available on the Internet at www.cisg.law.pace.edu (no duty to examine video machinery for basic electrical safety features); Amtsgericht Riedlingen, Germany, 21 October 1994, Unilex (defects in under-seasoned ham were easily discernible, and thus buyer should have examined goods and discovered defects quickly); Landgericht Köln, Germany, 11 November 1993, Unilex, reversed on other grounds in CLOUT case No. 122 [Oberlandesgericht Köln, Germany, 26 August 1994] (mistake in business report was easily discoverable, and thus examination was required to be quick) (see full text of the decision); CLOUT case No. 359 [Oberlandesgericht Koblenz, Germany, 18 November 1999] (where defects are easy to discover, the time for examination should not exceed one week); CLOUT case No. 284 [Oberlandesgericht Köln, Germany, 21 August 1997] (where chemicals were to be mixed with other substances and defects were easily discernible, immediate examination of the

goods was required). See also Tribunale Civile di Cuneo, Italy, 31 January 1996, Unilex (time period for notice (and, perhaps, examination) is reduced if defects are easily recognizable); CLOUT case No. 482 [Cour d'appel Paris, France, 6 November 2001] (see full text of decision).

⁹⁷ Regional Court Zilina, Slovakia, 25 October 2007, English translation available on the Internet at www.cisg.law.pace.edu.

⁹⁸ CLOUT case No. 828 [Gerechthof 's-Hertogenbosch, Netherlands, 2 January 2007].

⁹⁹ Kantonsgericht Schaffhausen, Switzerland, 25 February 2002, English translation available on the Internet at www.cisg.law.pace.edu.

¹⁰⁰ CLOUT case No. 775 [Landgericht Frankfurt, Germany, 11 April 2005] (see full text of the decision).

¹⁰¹ Obergericht Zug, Switzerland, 19 December 2006, English translation available on the Internet at www.cisg.law.pace.edu.

¹⁰² Oberlandesgericht Schleswig, Germany, 22 August 2002, English translation available on the Internet at www.cisg.law.pace.edu (live-stock had to be examined immediately after delivery because of the possibility of rapid change in their condition).

¹⁰³ Hof van Beroep Ghent, Belgium, 16 April 2007, English translation available on the Internet at www.cisg.law.pace.edu.

¹⁰⁴ Appellationshof Bern, Switzerland, 11 February 2004, English translation available on the Internet at www.cisg.law.pace.edu, reasoning upheld in CLOUT case No. 894 [Bundesgericht, Switzerland, 7 July 2004] (see full text of the decision) (“As a rough yardstick, which needs adjustment in either direction according to the circumstances of each case, a period for examination of one week—five working days—can apply”; although suggesting elsewhere that the period for examining non-perishable goods should be set at 2-3 weeks); CLOUT case No. 892 [Kantonsgericht Schaffhausen, Switzerland, 27 January 2004] (see full text of the decision) (“As far as the period of time for the examination is concerned, roughly a week is adequate. . . For examination and notification a period of time of 14 days [seven days for exam, seven days for notice] is an orientation”—although court found that period was inadequate on the facts of the particular case); CLOUT case No. 541 [Oberster Gerichtshof, Austria, 14 January 2002] (approving approach of lower appeals court which had asserted: “As a rough assessment for orientation purposes, an inspection period of one week (five work days) can apply”) (see full text of the decision); CLOUT case No. 285 [Oberlandesgericht Koblenz, Germany 11 September 1998] (“Generally speaking, examination of the goods by the buyer should occur within a week after delivery”); CLOUT case No. 284 [Oberlandesgericht Köln, Germany, 21 August 1997] (where chemicals were to be mixed with other substances and defects were easily discernible, immediate examination of the goods was required); CLOUT case No. 359 [Oberlandesgericht Koblenz, Germany, 18 November 1999] (“where defects are easy to discover . . . the examination period should not exceed a period of one week”); Landgericht Mönchengladbach, Germany, 22 May 1992, Unilex (generally allowing one week for examination of goods). Compare CLOUT case No. 1057 [Oberster Gerichtshof, Austria, 2 April 2009], English translation available on the Internet at www.cisg.law.pace.edu (“A period of 14 days would be reasonable in order to examine the goods and give notice due to the lack of special circumstances”); CLOUT case No. 1399 [Oberlandesgericht Hamburg, Germany, 25 January 2008], English translation available on the Internet at www.cisg.law.pace.edu (14 days up to a maximum of one month after receipt of the goods is a reasonable time for examination and notice of lack of conformity, except where particular circumstances lead to a shorter or longer period); Oberlandesgericht Linz, Austria, 1 June 2005, English translation available on the Internet at www.cisg.law.pace.edu (an examination and notification period of 14 days is reasonable, absent special circumstances). CLOUT case No. 423 [Oberster Gerichtshof, Austria, 27 August 1999] (see full text of the decision) (unless special circumstances suggest otherwise, buyer has a total of approximately 14 days to examine and give notice of defects).

¹⁰⁵ CLOUT case No. 230 [Oberlandesgericht Karlsruhe, Germany, 25 June 1997]. See also U.S. District Court, Northern District of Illinois, United States, 21 May 2004 (Chicago Prime Packers, Inc. v. Northam Food Trading Co.), available on the Internet at www.cisg.law.pace.edu (citing with approval decisions that, as a general rule, require examination within three to four days of delivery, as well as decisions requiring examination immediately upon delivery). Compare Handelsgericht St. Gallen, Switzerland, 11 February 2003, English translation available on the Internet at www.cisg.law.pace.edu (“within a few working days”); Landgericht Düsseldorf, Germany, 23 June 1994, English translation available on the Internet at <http://cisgw3.law.pace.edu> (a few working days).

¹⁰⁶ Obergericht des Kantons Appenzell Auserrhoden, Switzerland, 18 August 2008, Unilex (examination period of two weeks is reasonable where the buyer's customers discovered the defects); Obergericht Zug, Switzerland, 19 December 2006, English translation available on the Internet at www.cisg.law.pace.edu (as a basic rule for examination of non-perishable goods not subject to major price fluctuations, two weeks (but not less than one week or five working days) after delivery).

¹⁰⁷ Appellationshof Bern, Switzerland, 11 February 2004, English translation available on the Internet at www.cisg.law.pace.edu, reasoning upheld in CLOUT case No. 894 [Bundesgericht, Switzerland, 7 July 2004] (see full text of the decision) (“In the absence of further circumstances justifying either a shorter or longer period and in the absence of particular practices or usages, the period granted for examination of non-perishable goods should be set as two-three weeks”; although also indicating “[a]s a rough yardstick, which needs adjustment in either direction according to the circumstances of each case, a period for examination of one week—five working days—can apply”).

¹⁰⁸ Kantonsgericht Schaffhausen, Switzerland, 25 February 2002, English translation available on the Internet at www.cisg.law.pace.edu; CLOUT case No. 284 [Oberlandesgericht Köln, Germany, 21 August 1997].

¹⁰⁹ CLOUT case No. 849 [Audiencia Provincial de Pontevedra, Spain, 19 December 2007] (see full text of the decision); Oberlandesgericht Köln, Germany, 31 August 2006, English translation available on the Internet at www.cisg.law.pace.edu.

¹¹⁰ CLOUT case No. 484 [Audiencia Provincial de la Pontevedra, Spain, 3 October 2002] (frozen fish).

¹¹¹ Obergericht des Kantons Appenzell Auserrhoden, Switzerland, 18 August 2008, Unilex; CLOUT case No. 315 [Cour de Cassation, France, 26 May 1999] (see full text of the decision).

¹¹² CLOUT case No. 885 [Bundesgericht, Switzerland, 13 November 2003] (see full text of the decision).

¹¹³ China International Economic and Trade Arbitration Commission, People's Republic of China, 23 February 1995, Unilex, English translation available on the Internet at www.cisg.law.pace.edu.

¹¹⁴ Appellationshof Bern, Switzerland, 11 February 2004, English translation available on the Internet at www.cisg.law.pace.edu, reasoning upheld in CLOUT case No. 894 [Bundesgericht, Switzerland, 7 July 2004] (see full text of the decision).

¹¹⁵ Hovioikeus/hovrätt Helsinki, Finland, 31 May 2004 (Crudex Chemicals Oy v. Landmark Chemicals S.A.), English editorial analysis available on the Internet at www.cisg.law.pace.edu.

¹¹⁶ CLOUT case No. 46 [Landgericht Aachen, Germany, 3 April 1990] (see full text of the decision). See also Supreme Court, Israel, 17 March 2009 (Pamesa Cerámica v. Yisrael Mendelson Ltd), English text available on the Internet at www.cisg.law.pace.edu (examination

immediately upon the goods arrival deemed timely); CLOUT case No. 867 [Tribunale di Forlì, Italy, 11 December 2008], English translation available on the Internet at www.cisg.law.pace.edu (same).

¹¹⁷ CLOUT case No. 45 [Arbitration Court of the International Chamber of Commerce, 1989 (Arbitral award No. 5713)] (see full text of the decision).

¹¹⁸ Oberlandesgericht Köln, Germany, 12 January 2007, English translation available on the Internet at www.cisg.law.pace.edu.

¹¹⁹ Obergericht Luzern, Switzerland, 29 July 2002, English translation available on the Internet at www.cisg.law.pace.edu (complex machinery).

¹²⁰ Oberlandesgericht Köln, Germany, 31 August 2006, English translation available on the Internet at www.cisg.law.pace.edu; Landgericht Düsseldorf, Germany, 23 June 1994 Unilex.

¹²¹ CLOUT case No. 482 [Cour d'appel Paris, France, 6 November 2001] (buyer should have examined elevator cables delivered on incorrectly-sized reels at the time he rewound the cables on proper-sized reels (which occurred eight days after delivery); discovery by the buyer's customer of obvious defects in the cables some two months thereafter was, with respect to the buyer obligations under article 38 (1), untimely).

¹²² CLOUT case No. 608 [Tribunale Rimini, Italy, 26 November 2002] (see full text of the decision).

¹²³ CLOUT case No. 634 [Landgericht Berlin, Germany 21 March 2003].

¹²⁴ CLOUT case No. 849 [Audiencia Provincial de Pontevedra, Spain, 19 December 2007] (see full text of the decision).

¹²⁵ CLOUT case No. 775 [Landgericht Frankfurt, Germany, 11 April 2005] (see full text of the decision).

¹²⁶ Hof van Beroep Ghent, Belgium, 16 April 2007, English translation available on the Internet at www.cisg.law.pace.edu.

¹²⁷ CLOUT case No. 192 [Obergericht des Kantons Luzern, Switzerland, 8 January 1997] (see full text of the decision).

¹²⁸ CLOUT case No. 251 [Handelsgericht des Kantons Zürich, Switzerland 30 November 1998].

¹²⁹ U.S. District Court, Northern District of Illinois, United States, 21 May 2004 (Chicago Prime Packers, Inc. v. Northam Food Trading Co.), available on the Internet at www.cisg.law.pace.edu.

¹³⁰ CLOUT case No. 285 [Oberlandesgericht Koblenz, Germany, 11 September 1998]; Landgericht Mönchenglöblich, Germany, 22 May 1992, available on the Internet at www.cisg-online.ch; CLOUT case No. 359 [Oberlandesgericht Koblenz, Germany, 18 November 1999].

¹³¹ CLOUT case No. 828 [Gerechtshof 's-Hertogenbosch, Netherlands, 2 January 2007].

¹³² Landgericht, Köln, Germany, 11 November 1993, Unilex.

¹³³ CLOUT case No. 230 [Oberlandesgericht Karlsruhe, Germany, 25 June 1997].

¹³⁴ Amtsgericht Riedlingen, Germany, 21 October 1994, Unilex; Landgericht Landshut, Germany, 5 April 1995, Unilex (examination for proper quantity of sports clothing).

¹³⁵ Arbitration Court of the International Chamber of Commerce, 1996 (Arbitral award No. 8247), Unilex.

¹³⁶ CLOUT case No. 81 [Oberlandesgericht Düsseldorf, Germany, 10 February 1994].

¹³⁷ Dalian Maritime Court, People's Republic of China, 29 June 2005 (Minermet S.p.A. Italy v. China Metallurgical Import & Export Dalian Company, China Shipping Development Co., Ltd Tramp Co.), (2004) *Da Hai Chang Shang Wai Chu Zi* No. 1 Civil Judgment, English translation available on the Internet at www.cisg.law.pace.edu, affirmed by High People's Court of Liaoning Province, People's Republic of China, 10 December 2015, (2005) *Liao Min Si Zhong Zi* No. 132 Civil Judgment, available on the Internet at www.pkulaw.cn.

¹³⁸ For the distinction between latent and obvious (patent) defects, see CLOUT case No. 4 [Landgericht Stuttgart, Germany, 31 August 1989]; CLOUT case No. 378 [Tribunale di Vigevano, Italy, 12 July 2000]; CLOUT case No. 284 [Oberlandesgericht Köln, Germany, 21 August 1997] (see full text of the decision); CLOUT case No. 230 [Oberlandesgericht Karlsruhe, Germany, 25 June 1997].

¹³⁹ Landgericht München, Germany, 27 February 2002, English translation available on the Internet at www.cisg.law.pace.edu.

¹⁴⁰ See, for example, CLOUT case No. 944 [Gerechtshof 's-Hertogenbosch, the Netherlands, 11 October 2005] (see full text of the decision) (reasonable time for giving article 39 notice regarding defects that ought to have been discovered during a "simple examination" when the goods were delivered to the buyer began to run from the time of the simple examination; reasonable time for giving article 39 notice regarding defects that could not be discovered until a "more thorough" examination when the goods arrived at the premises of the buyer's customer began to run from the time of the more thorough examination).

¹⁴¹ See footnote 46 *supra* and accompanying text discussing CLOUT case No. 319 [Bundesgerichtshof, Germany, 3 November 1999] (period for examination to discover latent defects in grinding device did not begin until device broke down approximately three weeks after delivery).

¹⁴² See footnote 44 *supra* and accompanying text; footnote 93 *supra* and accompanying text.

¹⁴³ Under this approach, the question of the timely discovery of such latent defects is an issue governed not by article 38 but by the requirement in article 39 (1) that the buyer notify the seller of a lack of conformity "within a reasonable time after [the buyer] discovered or ought to have discovered it." In other words, even though this approach posits that a latent defect might not be reasonably discoverable during the examination required by article 38, the buyer still is charged with taking reasonable action to discover such defects under article 39. For further discussion related to this issue, see the Digest for article 39.

¹⁴⁴ Landgericht Paderborn, Germany, 25 June 1996 (see full text of the decision). For other decisions that may take a similar approach to the relationship between the article 38 examination and discovery of latent defects, see CLOUT case No. 590 [Landgericht Saarbrücken, Germany, 1 June 2004] (see full text of the decision) ("the reasonable period of time commences for hidden defects without further examination periods, as soon as the buyer discovers the lack of conformity"); CLOUT case No. 280 [Oberlandesgericht Jena, Germany, 26 May 1998] (failure to examine goods as provided in article 38 would be irrelevant if the buyer could show that an expert examination would not have detected the defect); CLOUT case No. 423 [Oberster Gerichtshof, Austria, 27 August 1999], also available on the Internet at www.cisg.at (suggesting that, if buyer had conducted a thorough and professional post-delivery examination of the goods that did not reveal a latent lack

of conformity, buyer would have satisfied its obligations under article 38); Landgericht Ellwangen, Germany, 21 August 1995, Unilex (suggesting that buyer satisfied its article 38 obligations by examining the goods without a chemical analysis that, when conducted later, revealed a latent defect).

¹⁴⁵ CLOUT case No. 590 [Landgericht Saarbrücken, Germany, 1 June 2004] (see full text of the decision).

¹⁴⁶ See footnote 43 *supra* and accompanying text.

¹⁴⁷ See Landgericht Landshut, Germany, 5 April 1995, Unilex (stating that the article 38 examination must usually be conducted at the place for the performance of the obligation to deliver under article 31).

¹⁴⁸ This will be true, for example, if the parties agree to any of the various trade terms under which the buyer bears the risk of loss while the goods are in transit—e.g., Free Carrier (FCA) named point under the INCOTERMS. The same result would occur in transactions involving carriage of the goods if the parties have not agreed upon the place of delivery: in such cases, article 31 (a) provides that delivery occurs when the seller hands the goods over to the first carrier for transmission to the buyer.

¹⁴⁹ Where the contract provided for delivery “FOB Mombassa, Kenya,” the court held that under article 38 (2) the buyer was required to examine the goods in Mombassa (rather than in Uganda, where the goods were eventually transshipped) because Mombassa was the destination of the goods as per the terms of the contract. CLOUT case No. 775 [Landgericht Frankfurt, Germany, 11 April 2005] (see full text of the decision). Where the contract does not involve transport of the goods by a third party carrier, however, article 38 (2) does not apply. CLOUT case No. 1203 [Rechtbank Breda, the Netherlands, 16 January 2009], English translation available on the Internet at www.cisg.law.pace.edu.

¹⁵⁰ Handelsgericht St. Gallen, Switzerland, 11 February 2003, English translation available on the Internet at www.cisg.law.pace.edu; CLOUT case No. 608 [Tribunale Rimini, Italy, 26 November 2002] (see full text of the decision).

¹⁵¹ CLOUT case No. 608 [Tribunale Rimini, Italy, 26 November 2002] (see full text of the decision).

¹⁵² CLOUT case No. 802 [Tribunal Supremo, Spain, 17 January 2008] (see full text of decision).

¹⁵³ Helsinki Court of Appeal, Finland, 29 January 1998, available on the Internet at www.utu.fi. For other cases applying article 38 (2), see CLOUT case No. 123 [Bundesgerichtshof, Germany, 8 March 1995] (see full text of the decision); Arbitration Court of the International Chamber of Commerce, June 1996 (Arbitral award No. 8247), *International Court of Arbitration Bulletin*, vol. 11, p. 53 (2000); Tribunale Civile di Cuneo, Italy, 31 January 1996, Unilex; Landgericht Landshut, Germany, 5 April 1995, Unilex; China International Economic and Trade Arbitration Commission, People’s Republic of China, 1995, Unilex (under a CIF contract, where delivery to the buyer occurs when the goods pass the ship’s rail at the port for loading, the buyer’s time for examination did not start until the goods arrived at the port of destination).

¹⁵⁴ CLOUT abstract No. 984 [China International Economic and Trade Arbitration Commission, People’s Republic of China, 4 November 2002] (see full text of the decision).

¹⁵⁵ Not only does article 6 of CISG provide that the parties may “derogate from or vary the effect of any of [the Convention’s] provisions,” but article 38 (2) itself is phrased in permissive (“examination *may* be deferred”) as opposed to mandatory fashion.

¹⁵⁶ CLOUT case No. 48 [Oberlandesgericht Düsseldorf, Germany, 8 January 1993] (see full text of the decision).

¹⁵⁷ Oberlandesgericht Brandenburg, Germany, 3 July 2014, *Internationales Handelsrecht* 2014, 228 = CISG-online No. 2543.

¹⁵⁸ Unless article 38 (3) applies, the time for the buyer to examine the goods usually commences when the goods are delivered or, in the case of goods transported by a third-party carrier, when the goods arrive at their destination. See paragraph 20 *supra*.

¹⁵⁹ According to a statement of a delegate from the Netherlands at the 1980 Vienna Diplomatic Conference at which the final text of CISG was adopted, the distinction between “redirected in transit” and “redispached” is as follows: “‘Redispached’ implied that the goods had reached their first destination and had subsequently been sent on. ‘Redirected in transit’ implied that they had never reached their first destination.” Summary Records of the United Nations Conference on Contracts for the International Sale of Goods, 16th meeting of Committee I, A/CONF.97/C.1/SR.16, reproduced in Official Records of the United Nations Conference on Contracts for the International Sale of Goods, Vienna, 10 March–11 April 1980, at p. 320, paragraph 18; Note to Secretariat Commentary on article 38 (article 36 of the draft Convention) available on the Internet at www.cisg.law.pace.edu.

¹⁶⁰ Thus where the buyer reasonably could have examined the goods while they were in the buyer’s possession before being redispached to the buyer’s customer, article 38 (3) is inapplicable. Oberlandesgericht Dresden, Germany, 8 November 2007, English translation available on the Internet at www.cisg.law.pace.edu (buyer had reasonable opportunity to examine goods during three months they were in buyer’s possession before being redispached; article 38 (3), therefore, was inapplicable); Rechtbank van Koophandel Hasselt, Belgium, 6 January 2004, English translation available on the Internet at www.cisg.law.pace.edu (buyer had ample time to examine the goods during the six weeks they were in its possession before being redispached to its customer, although whether buyer had reasonable opportunity to examine them before redispach depends on whether examination would require removing packaging, or seals or other proof of authenticity, necessary for transport to its customer; because buyer failed to prove that removal of such items was required, buyer could not invoke article 38 (3)).

¹⁶¹ For an example where a court found all requirements for application of article 38 (3) had been satisfied, see Oberlandesgericht Düsseldorf, Germany, 23 January 2004, English translation available on the Internet at www.cisg.law.pace.edu.

¹⁶² Amtsgericht Viechtach, Germany, 11 April 2002, English translation available on the Internet at www.cisg.law.pace.edu. The fact that the seller knew the buyer was located in a county different from the one where the goods were delivered, it has been suggested (in dicta), did not mean that the seller was or ought to have been aware that goods would be transshipped. CLOUT case No. 775 [Landgericht Frankfurt, Germany, 11 April 2005] (see full text of the decision).

¹⁶³ Rechtbank van Koophandel Hasselt, Belgium, 6 January 2004, English translation available on the Internet at www.cisg.law.pace.edu. The fact that the Ugandan buyer would have had to fly to Kenya in order to examine the goods at the place of delivery before they were transshipped to Uganda, and that such an examination might have triggered Kenyan custom duties, was found not to prevent the buyer from having a reasonable opportunity to examine the goods in Kenya: the Ugandan buyer could have avoided the expense of flying to Kenya by employing an agent to examine the goods, the buyer had ample time to have the goods examined in Kenya, and examination would not have required difficulty in removing the goods from their packaging; the buyer, furthermore, failed to prove that examination would have triggered Kenyan customs duties. In addition, the buyer assumed the risk of Kenyan custom duties and the expense of travel to Kenya by agreeing to a

price-delivery term providing for delivery in Kenya. CLOUT case No. 775 [Landgericht Frankfurt, Germany, 11 April 2005] (see full text of the decision).

¹⁶⁴ CLOUT case No. 120 [Oberlandesgericht Köln, Germany, 22 February 1994], see also Unilex.

¹⁶⁵ U.S. District Court, Northern District of Illinois, United States, 21 May 2004 (Chicago Prime Packers, Inc. v. Northam Food Trading Co.), available on the Internet at www.cisg.law.pace.edu.

¹⁶⁶ CLOUT case No. 944 [Gerechtshof 's-Hertogenbosch, the Netherlands, 11 October 2005] (see full text of the decision).

¹⁶⁷ CLOUT case No. 292 [Oberlandesgericht Saarbrücken, Germany, 13 January 1993].

¹⁶⁸ CLOUT case No. 192 [Obergericht des Kantons Luzern, Switzerland, 8 January 1997] (see full text of the decision).