

THE TIME LIMITS OF ARTICLE 39 CISG

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The issue of time limits with respect to the rights of the buyer vis-à-vis the seller is very important in practice and has caused many disputes in the past both in courts and among commentators. In this article I will touch upon certain important elements that appear to me to be particularly worthy of discussion. First, the issue of *reasonableness of the time* within which the buyer must give notice to the seller in order to safeguard its rights arising from the lack of conformity of the goods delivered (problem of Article 39(1) CISG). Second, the issue of how to proceed *when the cut-off period of Article 39(2) CISG must be brought in line with a (shorter) national statute of limitation*.

The first issue is one where there is abundant case law. The second issue is one where case law is very scarce, but several published cases can be found in my home jurisdiction, Switzerland, allowing me to operate from my home turf (not of course without having regard to further Vienna Convention jurisdictions and international arbitration).

I. ARTICLE 39(1) CISG: NOTICE PERIOD: HAS UNIFORMITY BEEN REACHED?

First, one must distinguish between two periods in the context of the conformity of goods, namely, (a) the period in which the delivered goods must be examined in order to preserve the buyer's rights, and (b) the period in which notice of the defect(s) must be given.

This simple distinction causes more difficulties than one would expect: several decisions, particularly from Austrian and some German courts, show that the two periods have not been sufficiently distinguished.¹ For example,

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1. See cases referred to by Camilla Baasch Andersen, *Reasonable Time in Article 39(1) of the CISG—Is Article 39(1) Truly a Uniform Provision?*, nn.205-06 (1998), available at <http://cisgw3.law.pace.edu/cisg/biblio/andersen.html>; CLOUT Case No. 107 [Oberlandesgericht Innsbruck, Austria, 1 July 1994], available at <http://cisgw3.law.pace.edu/cases/940701a3.html> (CISG-online.ch case 107) (decided in the first instance by Landesgericht Feldkirch, Austria, 29 Mar. 1994, available at <http://>

in 1994, an Austrian Higher District Court judgement was passed dealing with the sale of flowers. In an *obiter dictum*, the Court found that the buyer had failed to give the seller notice within a reasonable time after the discovery of the defect.² It is not entirely clear whether it thereby confused the time-frames of Article 38 and 39 of the CISG.³

Even more important in practice than the period for examination of the goods is the length of the period for notification. As a preliminary matter, it must be noted that courts have not always distinguished sufficiently between the “reasonable time” as defined in Article 39(1) CISG and the total notice period. While the first period begins to run at the time of (actual or constructive) discovery of the defects, the total notice period extends from the time of delivery to the time when notice has to be given.⁴

The Convention leaves us alone with the notion of “reasonableness.” Of course, whether a notice period in a particular case is “reasonable” cannot be determined without regard to the particular circumstances of each individual case. Indeed, there are many circumstances that influence its extent. To name only a few important ones:

- *Any party derogation from Article 39(1) CISG.* Here, the question to be asked must be: (a) whether the parties have agreed on a particular time frame for notification,⁵ (b) whether a derogation from the notice period may be implied, depending on the acts or behaviour of either the seller or the buyer, (c) whether there are usages established between the parties that influence the time-frame (Article 9(1) CISG); or (d) whether there is an international trade usage (Article 9(2) CISG).
- The particular seller may *reasonably expect* that notice be given within a certain time in view of the statements made by, or the earlier behaviour of the buyer (Article 8(2) CISG).
- *The type of the remedy chosen.* In particular, where the buyer chooses to avoid the contract, the seller will need more time to take care of his goods, whereas a remedy of damages places no such pressure on the buyer.⁶

cisgw3.law.pace.edu/cases/940329a3.html (CISG-online.ch case 213)).

2. CLOUT Case No. 107, *supra* note 1.

3. Baasch Andersen, *supra* note 1, § III(2.1).

4. *See, e.g.*, CLOUT Case No. 425 [Oberster Gerichtshof, Austria, 21 Mar. 2000], *available at* <http://cisgw3.law.pace.edu/cases/000321a3.html> (CISG-online.ch case 641) (wood). “[O]bliges the buyer to take the delivery and to give a written notice to the seller clearly specifying the lack of conformity of the delivered wood within 14 days after he was or would have been able to examine the good.” *Id.*

5. *See* CISG art. 6.

6. Bernard Audit, *La vente internationale de marchandises, Convention des Nations-Unies du 11 avril 1980*, LIBRAIRIE GÉNÉRALE DE DROIT ET DE JURISPRUDENCE 105 (1990); C.M. BIANCA & M.J. BONELL, COMMENTARY ON THE INTERNATIONAL SALES LAW: THE 1980 VIENNA SALES CONVENTION, Art. 39 CISG, at 2.4 (1987); MICHAEL GEORG GERNY, UNTERSUCHUNGS- UND RÜGEPLICHTEN BEIM KAUF NACH SCHWEIZERISCHEM, FRANZÖSISCHEM UND US-AMERIKANISCHEM RECHT SOWIE NACH CISG 203 (1999); Ingeborg Schwenzer, *Art. 39*, in COMMENTARY ON THE UN CONVENTION ON THE INTERNATIONAL

- *The type of the goods sold*: If they are of a perishable nature, or seasonal goods, the notice period must be shorter than if they are of a durable type.⁷
- *The nature of the contract between the parties and the buyer's duty to limit the seller's loss*. Where the seller faces a particular deadline of which the buyer is aware, speedier notice is required within the framework of the deadline in question (Article 8(1) CISG).

Subject to this list of typical circumstances, which may be considerably extended, the term “reasonable time” may be based on standards for typical groups of cases. Such standards could serve as a starting (or vantage) point of a fixed period, which would then be influenced by pre-determined or other reasonable factors.⁸

One of the best known promoters of such a guideline for the determination of “reasonable time” has been the German commentator Ingeborg Schwenzer. She pointed out in her well-known Commentary that while the German legal system has traditionally been restrictive with regard to the relevant notice period, others such as France and the United States have been much more liberal, going as far as several months or even years.⁹ She thus advocated for an appropriate compromise, namely that a vantage point of approximately one month should be defined to avoid discrepancies in international practice.¹⁰ Madame Schwenzer's rule has been called the “generous” or “noble month” rule and has found followers since. As an example, Camilla Baasch Andersen concluded in her very well-researched article that more uniform results would ensue and there would be greater predictability for both buyer and seller in the determination of when a notice of non-conformity is due.¹¹

SALE OF GOODS (CISG) 16 (Peter Schlechtriem & Ingeborg Schwenzer eds., 2d ed. 2005); Ulrich Magnus, *Art. 39*, in J. VON STAUDINGERS KOMMENTARZUM BÜRGERLICHEN GESETZBUCH MIT EINFÜHRUNGSGESETZ UND NEBENGESETZEN, WIENER UN-KAUFRECHT (CISG) 14, 48 (1999) [hereinafter STAUDINGER-MAGNUS].

7. Schwenzer, *supra* note 6, at 16; see also STAUDINGER-MAGNUS, *supra* note 6, at 43.

8. Baasch Andersen, *supra* note 1, § VI(3) (Overall Conclusion).

9. Schwenzer, *supra* note 6, at 17, with further references; see also GERNY, *supra* note 6, at 152 *et seq.*; Shuttle Packaging Sys., L.L.C. v. Tsonakis, No. 01 C 691, 2001 WL 34046276, at *1 (W.D. Mich. Dec. 17, 2001), available at <http://cisgw3.law.pace.edu/cases/011217u1.html> (CISG-online.ch case 773) (thermoforming line equipment for the manufacture of plastic gardening pots). “It is also clear from the statute that on occasion it will not be practicable to require notification in a matter of a few weeks.” *Id.* at *26; Code Civil (C. CIV.) art. 1648 (Fr.); Audit, *supra* note 6, at 107.

10. Schwenzer, *supra* note 6, at 17, with reference to CLOUT Case No. 202 [Cour d'Appel de Grenoble, France, 13 Sept. 1995], available at <http://cisgw3.law.pace.edu/cases/950913fl.html> (CISG-online.ch case 157).

11. Baasch Andersen, *supra* note 1, § VI(2) (Recommended Approach for Future Practice).

The question arises whether or not the “noble month” can be said to have become an international trend when looking at the cases listed in the CLOUT digest or elsewhere.

In 1995, the German Supreme Court (BGH) dealt for the first time with Article 39(1) CISG since its adoption in Germany. The case concerned mussels from New Zealand, which upon examination by the German buyer contained higher levels of cadmium than prescribed in the recommended German guideline.¹² The case concerned a notice which was given more than six weeks after discovery of the defect. In *dictum*, the Court stated that a notice given a month after discovery may be considered “reasonable time” in the interests of differing international legal traditions.¹³

Four years later, in 1999, the German BGH again had the opportunity to express its opinion in a case between a Swiss seller of semi-finished paper products and a German paper converting company.¹⁴ Again in the form of *dictum*, but now calling it a “rule,” the BGH applied the “noble month” standard, as if it had always been there.¹⁵

The German comments and decisions left their traces in Switzerland. In a judgement on Article 39(1) CISG from 1997, the Court of Appeals of the Canton of Luzern was called upon to determine the “reasonable time” for the notice period.¹⁶ The case involved an Italian seller of pharmaceutical goods

12. CLOUT Case No. 123 [Bundesgerichtshof, Germany, 8 Mar. 1995], available at <http://cisgw3.law.pace.edu/cases/950308g3.html> (CISG-online.ch case 144).

13. CLOUT Case No. 123, *supra* note 12, § II(2). “Even if this Court were to apply a very generous ‘rough average’ of about one month, taking into account different national legal traditions, the time limit for the notice of the lack of conformity with the contract had expired. . . .” *Id.* (citations omitted); see in addition Baasch Andersen, *supra* note 1, § III(1.3.3.2.) (Recent Practice—1995 and After). “Although the case concerned perishable goods, the hypothetically acceptable time-frame of Schwenzer’s ‘noble month’ guideline was not restricted to a shorter period in the present case. . . .” *Id.*

14. CLOUT Case No. 319 [Bundesgerichtshof, Germany, 3 Nov. 1999], available at <http://cisgw3.law.pace.edu/cases/991103g1.html> (CISG-online.ch case 475).

15. CLOUT Case No. 319, *supra* note 14, § II(2)(b)(bb).

Even if the [buyer] could have excluded a possible operating error quickly by internal investigation and without commissioning an expert opinion, it had to be allotted, in any case, a certain period of approximately one week for the decision as to what to do next and for the initiation of necessary measures—e.g., the selection and commissioning of an expert—followed by the two weeks assumed by the Court of Appeals for the expert’s investigation, followed by the—regular—one-month notice period pursuant to Art. 39(1) CISG (compare BGHZ 129, 75, 85 *et seq.*). But in that case, the [buyer’s] notice letter to the [sellers] dated June 14, 1993—seven weeks after the total loss—was not untimely.

Id. (emphasis added).

16. CLOUT Case No. 192 [Obergericht des Kantons Luzern, Switzerland, 8 Jan. 1997], available at <http://cisgw3.law.pace.edu/cases/970108s1.html> (CISG-online.ch case 228), also published in Schweizerische Zeitschrift für Internationales und Europäisches Recht (SZIER) 132 (1997).

(blood tubes) that were delivered to a Swiss buyer, a small company that delivered the devices to hospitals. The tubes were allegedly not in conformity with the contract. The Court discussed the various opinions of the German doctrine and came to the conclusion that the “noble month” standard should be adopted. It held, among other things, that there was a duty to inspect the goods based on Article 38 CISG, despite their sterile packaging, and that under Article 39(1) CISG notice was to be given within a “noble month” after the non-conformities should have been discovered.¹⁷ A few years later, in 2003, the same Court had to decide again on this issue in the case of a sale of a textile machine and confirmed its holding of six years earlier.¹⁸ It thereby expressly referred to Schwenzler and found that her theory should be followed. In a later case, the Swiss Federal Supreme Court confirmed upon appeal that the lower court had not exceeded its discretion by holding that the “noble month” period should apply with regard to a textile cleaning machine.¹⁹

As an intermediary result, there has been a cautious convergence in the direction of the “noble month” at least in German and Swiss court practice. Even in these jurisdictions, however, the “noble month” theory, where accepted, has been clearly limited to a starting point, which must be varied according to the specific circumstances. Moreover, whether the starting point should be a “noble month” or rather a “noble fortnight” or merely a “noble week” is much disputed among courts and commentators.²⁰

17. CLOUT Case No. 192, *supra* note 16, § 4.

18. Obergericht Luzern, Switzerland, 12 May 2003, *available at* <http://www.cisg-online.ch/cisg/overview.php?test=846> (CISG-online.ch case 846).

19. Bundesgericht, Switzerland, 13 Nov. 2003, § 3.1 to 3.2, *available at* <http://cisgw3.law.pace.edu/cases/031113s1.html> (CISG-online.ch case 840).

20. For a tendency to follow the “noble month” theory concerning *durable goods*, see Amtsgericht Augsburg, Germany, 29 Jan. 1996, § 2, *available at* <http://cisgw3.law.pace.edu/cases/960129g1.html> (CISG-online.ch case 172) (shoes); CLOUT Case No. 319, *supra* note 14, § II(2)(b)(bb) (hygienic tissues); Landgericht Darmstadt, Germany, 29 May 2001, *available at* <http://cisgw3.law.pace.edu/cases/010529g1.html> (CISG-online.ch case 686) (furniture); CLOUT Case No. 289 [Oberlandesgericht Stuttgart, Germany, 21 Aug. 1995], § 2(b), *available at* <http://cisgw3.law.pace.edu/cases/950821g1.html> (CISG-online.ch case 150) (machine) (with reference to CLOUT Case No. 123, *supra* note 12, § II(2) (mussels)); CLOUT Case No. 192, *supra* note 16, § 4(e) (blood infusion devices); Bundesgericht, *supra* note 19, §§ 3.1 to 3.2 (used textile cleaning machine).

For a less generous rule, see ROLF HERBER & BEATE CZERWENKA, INTERNATIONALES KAUFRECHT, KOMMENTAR ZUM DEM ÜBEREINKOMMEN DER VEREINTEN NATIONEN VOM 11. APRIL 1980 ÜBER VERTRÄGE ÜBER DEN INTERNATIONALEN WARENKAUF Art. 39 at 9 (1991); BURGHARD PILTZ, INTERNATIONALES KAUFRECHT, DAS UN-KAUFRECHT (WIENER ÜBEREINKOMMEN VON 1980) IN PRAXISORIENTIERTER DARSTELLUNG § 5, at 59 (1993) (four to seven working days); GERT REINHART, UN-KAUFRECHT, KOMMENTAR ZUM ÜBEREINKOMMEN DER VEREINTEN NATIONEN VOM 11. APRIL 1980 ÜBER VERTRÄGE ÜBER DEN INTERNATIONALEN WARENKAUF Art. 39 at 5 (1991) (normally a few days).

Moreover, whether those cases referred to from courts in Germany and Switzerland reflect a representative choice is an open question. When browsing the case law after the thoroughly researched article of Miss Andersen was published, i.e. in the past three years or so, many more decisions can be found with regard to the length of the period. Most of them do not, or at least not explicitly, support the “noble month” theory.²¹ Rather,

21. Landgericht Berlin, Germany, 21 Mar. 2003, available at <http://cisgw3.law.pace.edu/cases/030321g1.html> (CISG-online.ch case 785).

A [seller] could expect that the [buyer] should give notice of any lack of conformity after the lapse of one month at the latest. It might also be possible to argue that the [buyer] was obliged to give such a notice even at an earlier stage. In any event, the notice given—seven weeks after the actual delivery of the goods—was not timely.

Id.; Landgericht Tübingen, Germany, 18 June 2003, § 1.1.1(b), available at <http://cisgw3.law.pace.edu/cases/030618g1.html> (CISG-online.ch case 784). “[T]here is a common assumption that it should be short. This is a strict standard requiring the time period to be normally a few days.” *Id.* See also REINHART, *supra* note 20, Art. 39 at 5; Oberlandesgericht Karlsruhe, Germany, 6 Mar. 2003, § II(1), available at <http://cisgw3.law.pace.edu/cases/030306g1.html> (CISG-online.ch case 812). “Generally, the appropriate time limit may range from one month to two weeks.” *Id.* STAUDINGER-MAGNUS, *supra* note 6, at 49; Landgericht München, Germany, 20 Feb. 2002, § I(2)(b), available at <http://cisgw3.law.pace.edu/cases/020220g1.html> (CISG-online.ch case 712). “A time of several months can under no circumstances be regarded as a reasonable time.” *Id.* See Herbert Stumpf, *Art. 39, in KOMMENTARZUM EINHEITLICHEN UN-KAUFRECHT* No. 8 (Ernst von Caemmerer & Peter Schlechtriem eds., 1990).

Handelsgericht Bern, Switzerland, 17 Jan. 2002, § III(2)(a), available at <http://cisgw3.law.pace.edu/cases/020117s1.html> (CISG-online.ch case 725) (translation by CISG Online).

According to [Magnus], a period of notice of about a week can be considered as an average orientation which is to be prolonged or shortened with regard to the circumstances (Ulrich Magnus, *Art. 39, in KOMMENTARZUM UN-KAUFRECHT, ÜBEREINKOMMEN DER VEREINTEN NATIONEN ÜBER VERTRÄGE ÜBER DEN INTERNATIONALEN WARENKAUF* (CISG) No. 21 (Heinrich Honsell ed., 1997)). With regard to German legal practice, others propose a period of about a month (Ingeborg Schwenzer, *Art. 39, in KOMMENTARZUM EINHEITLICHEN UN-KAUFRECHT, DAS ÜBEREINKOMMEN DER VEREINTEN NATIONEN ÜBER VERTRÄGE ÜBER DEN INTERNATIONALEN WARENKAUF—CISG* No. 17 (Peter Schlechtriem & Ingeborg Schwenzer eds., 3d ed. 2000)); see also CLOUT Case No. 192, *supra* note 16).

Id. (internal citation altered); Kantonsgericht Schaffhausen, Switzerland, 25 Feb. 2002, § 4, available at <http://cisgw3.law.pace.edu/cases/020225s1.html> (CISG-online.ch 723). “[I]n the present case the notification must be considered to be on time if at the latest it took place two months after the delivery of the goods, respectively one month after the determination of a hidden deficiency.” *Id.*; Handelsgericht St. Gallen, Switzerland, 11 Feb. 2003, § 2(b), available at <http://cisgw3.law.pace.edu/cases/030211s1.html> (CISG-online.ch case 900). “[D]efects . . . were objected to . . . three months after receipt of the goods . . . not made within a reasonable time after defects were discovered . . .” *Id.*; Bundesgericht, *supra* note 19, § 3.2. “[T]he Court of Appeal (Obergericht) assumed in the present case that a period of examination of one week and a period of notification of one month could be accepted. . . . In respect of this finding, the Court of Appeal (Obergericht) does not appear to have exceeded its discretion.” *Id.* (internal citation altered); Kantonsgericht Schaffhausen, Switzerland, 27 Jan. 2004, available at <http://cisgw3.law.pace.edu/cases/040127s1.html> (CISG-online.ch case 960) (one week as a benchmark); Bundesgerichtshof, Germany, 30 June 2004, § II(1), available at <http://cisgw3.law.pace.edu/cases/040630g1.html> (CISG-online.ch case 847). “[T]he period of more than two months could no longer be deemed a reasonable period within the

the analysis of these cases shows that, while express contradictions of the “noble month” rule have been rare, the rule (or at least the idea that a fixed period of time should serve as a starting point and then varied in light of the specific circumstances²²) has not been established as a principle in the practice of national courts.

The “noble month” theory may have had a good start in recent years in Germany and Switzerland and has influenced various courts outside these jurisdictions. However, opposition from important commentators is strong, probably too strong as to allow the rule to become an international standard. Nevertheless, the wish that a fixed notice period, depending on the type of goods sold, would serve as a starting or vantage point, upon which certain groups of situations should be distinguished, would increase legal security and would, in my submission, not introduce a creeping codification by the courts.

I have not spoken about those cases in which the parties derogated from the time-limit for giving notice.²³ There must be a warning, however, to

meaning of Art. 39(1) CISG.” *Id.*

CLOUT Case No. 378 [Tribunale di Vigevano, Italy, 12 July 2000], § 11, *available at* <http://cisgw3.law.pace.edu/cases/000712i3.html> (CISG-online.ch case 493). “As for the time within which notice of non-conformity must be given, it must be fixed on a case-by-case basis, in light of the circumstances of the individual case . . .” *Id.* (citing Tribunale Civile di Cuneo, Italy, 31 Jan. 1996, *available at* <http://cisgw3.law.pace.edu/cases/960131i3.html> (CISG-online.ch case 268), CLOUT Case No. 167 [Oberlandesgericht München, Germany, 8 Feb. 1995], *available at* <http://cisgw3.law.pace.edu/cases/950208g2.html> (CISG-online.ch case 142), and CLOUT Case No. 81 [Oberlandesgericht Düsseldorf, Germany, 10 Feb. 1994], *available at* <http://cisgw3.law.pace.edu/cases/940210g1.html> (CISG-online.ch case 116)). The Italian CISG commentator Franco Ferrari stated, during the March 2005 CISG Conference in Vienna where this topic was discussed, that the ruling judge (who had been working with him academically) was influenced by his own critical position towards the noble month theory.

22. See Baasch Andersen, *supra* note 1, § VI(2) (Recommended Approach for Future Practice).

23. See CISG art. 6; CLOUT Case No. 336 [Tribunale d’appello di Lugano, Switzerland, 8 June 1999], *available at* <http://cisgw3.law.pace.edu/cases/990608s1.html> (CISG-online.ch case 497) (the court stated that the buyer had lost his right to rely on lack of conformity because he had given the notice of lack of conformity neither within the time provided by standard terms of the contract in derogation of Article 39 CISG, nor within a reasonable time according to Article 39(1) CISG); Landgericht Giessen, Germany, 5 July 1994, *available at* <http://cisgw3.law.pace.edu/cases/940705g1.html> (CISG-online.ch case 111) (the parties agreed on a period of eight days since the delivery of the goods for their examination and notification of their nonconformity, this derogation from Article 39 CISG is in accordance with Article 6 CISG); Landgericht Hannover, Germany, 1 Dec. 1993, *available at* <http://cisgw3.law.pace.edu/cases/931201g1.html> (CISG-online.ch case 244) (the parties agreed on a period for notification of ten days); CLOUT Case No. 94 [Internationales Schiedsgericht der Bundeskammer der gewerblichen Wirtschaft—Wien, 15 June 1994] (CISG-online.ch case 120) (the buyer gave notice of the defects six months after delivery of the goods while, according to the contract, he should have done so immediately after delivery of the goods (at the latest two months after the delivery)); CLOUT Case No. 50 [Landgericht Baden-Baden, Germany, 14 Aug. 1991], *available at* <http://cisgw3.law.pace.edu/cases/910814g1.html> (CISG-online.ch case 24). “The [seller] made the acknowledgment of rejections depend on their being declared . . . in any case no later than 30 days after the invoice date. This statement . . . became a part of

parties who wish to make use of this recommendable tool of specifying reasonableness. Such an agreement should not leave too much interpretation on how the period is to be fixed for a certain length of time. In particular, it is still unclear to what extent the interpretation of the party will is still dominated by cultural differences. This is particularly true in cross-border sales.

II. ARTICLE 39(2) CISG: INTERPLAY OF THE TWO YEAR CUT-OFF PERIOD AND NATIONAL STATUTE OF LIMITATIONS FOR WARRANTY CLAIMS

It is well known that Article 39(2) CISG cuts off the buyer's rights even if the non-conformity is detected more than two years after delivery. In other words, if notice is not given within this period, the buyer loses its rights vis-à-vis the seller.²⁴ This relatively short time-limit was heavily disputed when the Convention was drafted.²⁵

The two-year period of Article 39(2) CISG must be clearly distinguished from the statute of limitation for warranty claims, i.e. the period within which the buyer must perform a formal act such as to invoke a court or arbitral tribunal to preserve its warranty claim, or within which the seller must accept its debt. If none of these actions occur within this period, the claim cannot be enforced without the seller's consent. Here, the national rules were felt to be far too divergent to find a solution within the CISG itself. Instead, it was "outsourced" in the form of the New York (Parallel) Limitation Convention, which each state may ratify separately from the CISG. However, only a few countries have done so, including important export and import nations such as the United States.²⁶ It is noteworthy that CLOUT does not contain any cases in which the Limitation Convention applied, and I have no knowledge of any published cross-border cases to which the CISG applied in which the issue of time was disputed other than in the context of Article 39(2) CISG.

the contract." *Id.* § 2; CLOUT Case No. 232 [Oberlandesgericht München, Germany, 11 Mar. 1998], § 3, available at <http://cisgw3.law.pace.edu/cases/980311g1.html> (CISG-online.ch case 310) (the parties agreed on a notice period of two weeks after delivery of the goods); CLOUT Case No. 292 [Oberlandesgericht Saarbrücken, Germany, 13 Jan. 1993], available at <http://cisgw3.law.pace.edu/cases/930113g1.html> (CISG-online.ch case 83) (the court stated that generally, parties could derogate from the provisions contained in Art. 38, 39 CISG by trade usage).

24. See, e.g., Landgericht Marburg, Germany, 12 Dec. 1995, available at <http://cisgw3.law.pace.edu/cases/951212g1.html> (CISG-online.ch case 148).

25. For a summary of the drafting history, see for example Schwenzer, *supra* note 6, at 22.

26. Status of contracting states available at http://www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1974Convention_status.html.

Where the four-year period of the Limitation Convention does not apply, a conflict may arise between the cut-off period of Article 39(2) CISG and the national statute of limitation, namely if the latter is shorter than the Article 39(2) period. Where this is the case, the question arises (i) as to whether Article 39(2) CISG takes precedence and (ii) if so, how the national statute of limitation must be adapted. The first question is no doubt answered in the affirmative. The CISG is an international instrument which, once ratified, clearly prevails over national laws, unless a permitted reservation applies. The second question is one of the applicable domestic law and is less clear where the national law has not been adapted by the legislature. Germany solved the problem by introducing legislation to implement the CISG, the so-called *Vertragsgesetz zum Wiener Kaufrecht (CISG Act)*, which stated that in a CISG case, the domestic German limitation period starts to run only at the time of notification of the defect by the buyer, not at the time of delivery as would be the case outside the CISG.²⁷

Switzerland is a typical example of the (many) countries that still have statutes of limitation for warranty claims that are shorter than two years and have not yet adapted their legislation to Article 39(2) CISG.²⁸ According to Article 210 Swiss Code of Obligations, the statute of limitation runs one year after delivery of the goods. At least three published court cases in Switzerland have dealt with the problem of the conflict between the limitation period of Article 210 OR and the longer period of Article 39(2) CISG so far. The Commercial Court of the Canton of Bern held, in two instances, that an analogy with the German solution (according to which the limitation period, contrary to what the Swiss Code states, begins to run only at the time of notice) is justified.²⁹ On the other hand, the Superior Court of Geneva, in a 1997 decision, held that an extension of the one-year period to two years was

27. CISG Act art. 3; Kurt Siehr, *Art. 3, in KOMMENTAR ZUM UN-KAUFRECHT, ÜBEREINKOMMEN DER VEREINTEN NATIONEN ÜBER VERTRÄGE ÜBER DEN INTERNATIONALEN WARENKAUF (CISG) 3* (Heinrich Honsell ed., 1997).

28. Schwenzer, *supra* note 6, at 28, especially n.85; Markus Müller-Chen, *Art. 8, in COMMENTARY ON THE UN CONVENTION ON THE INTERNATIONAL SALE OF GOODS (CISG) n.69* (Peter Schlechtriem & Ingeborg Schwenzer eds., 2d ed. 2005) (the limitation periods have different lengths in the different national laws); Thomas Koller, *Die Verjährung von Ansprüchen des Käufers aus der Lieferung nicht vertragskonformer Ware im Spannungsfeld zwischen UN-Kaufrecht (CISG) und nationalem Partikularrecht (gleichzeitig eine Besprechung zweier Urteile des Handelsgerichts des Kantons Bern)*, ZEITSCHRIFT FÜR JURISTISCHE AUSBILDUNG UND PRAXIS 41, 50-51 (2003); André Janssen, *Das Verhältnis nationaler Verjährungsvorschriften zur Ausschlussfrist des Art. 39 Abs. 2 CISG in der Schweiz*, 23 PRAXIS DES INTERNATIONALEN PRIVAT- UND VERFAHRENSRECHTS 369, 371 (2003).

29. Handelsgericht des Kantons Bern, Switzerland, 30 Oct. 2001, § III(3)(d)(cc) (CISG-online.ch case 956); Handelsgericht Bern, *supra* note 21, § III(3)(d)(cc).

justified,³⁰ thereby reversing the lower court's finding that the general statute of limitation of ten years (Article 127 OR) should be applied rather than the shorter period for warranty claims.³¹ The prevailing doctrine has criticized the Bern decisions and, at least in part, supported the Geneva superior court's holding.³² It appears that an extension of the Swiss one-year period of Article 210 Swiss Code of Obligations to two years in cases where the CISG applies is more in line with the spirit of the original Swiss rule (i.e. the one year statute of limitation which begins to run at the time of delivery rather than the time of notice) and international tendencies,³³ and should thus be supported. Of course, this finding has no effect at all on the rule that timely notice must be given according to Article 39 CISG and that, absent such timely notice, the rights of the buyer are forfeited.

In all such countries where Article 39 CISG has not been brought in line with the domestic (shorter) statutory limitation periods for purchaser claims, we are thus now confronted with the problem that, pending a statutory reform or at least a supreme court ruling, nobody can rely on the statutory period for domestic sales in an international sales situation. The only certainty (absent a breach of the duty of a particular state to comply with the CISG) is that the statute of limitation cannot run before the two year period of Article 39(2) CISG has lapsed.³⁴

The conclusion for practitioners confronted with the many jurisdictions, such as Switzerland, that have not (yet) adapted their legislation therefore

30. CLOUT Case No. 249 [Cour de Justice de Genève, Switzerland, 10 Oct. 1997], § 3, available at <http://cisgw3.law.pace.edu/cases/971010s1.html> (CISG-online.ch case 295). “[I]t is convenient to bring the two periods (Art. 210 al. 1 CO and Art. 39 CISG) in line by extending the limitation period of Art. 210 al. 1 CO to the maximum delay for notification of deficiencies of Art. 39 CISG (two years).” *Id.*

31. Tribunal de Genève, Switzerland, 14 Mar. 1997 (CISG-online.ch case 898).

32. See, e.g., Michael R. Will, “*Meine Grossmutter in der Schweiz . . .*”: *Zum Konflikt von Verjährung und Rügefrist nach UN-Kaufrecht*, in *FESTSCHRIFT FÜR WERNER LORENZ ZUM 80. GEBURTSTAG 623 et seq.* (Thomas Rauscher & Heinz-Peter Mansel eds., 2001); Koller, *supra* note 28, at 52 *et seq.*; see also CHRISTOPH BRUNNER, UN-KAUFRECHT—CISG, KOMMENTAR ZUM ÜBEREINKOMMEN DER VEREINTEN NATIONEN ÜBER VERTRÄGE ÜBER DEN INTERNATIONALEN WARENKAUF VON 1980 Art. 4 at 25-27 (2004); Janssen, *supra* note 28, at 369 *et seq.*

33. See, e.g., Jean-Marc Joerin & Claude Treyer, *Discrepancies Between Lack of Conformity Notification Requirements in CISG 39(2) and the Statute of Limitations in CO 210: Gap-Filling by Arbitral Tribunals or Prerogative of Legislator?*, 18 ASA BULLETIN 82-91 (2000) (discussing ICC Award No. 99773/1999).

34. See Handelsgericht des Kantons Bern, *supra* note 29, § III(3)(b); Handelsgericht des Kantons Bern, *supra* note 21, § III(3)(c): “In other words, claims underlying the CISG should not be statute-barred as long as the periods of Art. 39 CISG are not stale by the buyer even if the shorter national period of limitation had already elapsed.” *Id.*; Heinrich Honsell, *Art. 210*, in *KOMMENTAR ZUM SCHWEIZERISCHEN PRIVATRECHT, OBLIGATIONENRECHT I* at 8 (Heinrich Honsell et al. eds., 1992); Koller, *supra* note 28, at 47.

must be that no purchase agreements with foreign parties should be left without a contractual guarantee for warranty claims. To avoid conflicts of statutory interpretation, such guarantees should make clear what time-limits apply to warranty claims. Of course, this solution is a way out only to the extent that the domestic law allows for sufficient party autonomy to extend statutory periods,³⁵ which is not always the case.

35. Heinrich Honsell, *Art. 201*, in *BASLER KOMMENTAR ZUM SCHWEIZERISCHEN PRIVATRECHT, OBLIGATIONENRECHT I* at 13 (Heinrich Honsell et al. eds., 2003). The time periods for the examination of the goods and the notification of the defects can be shortened or extended by agreement of the parties. The parties can change the limitation period of Art. 210 OR. *Id.* at 5. The prevailing doctrine states that the extension of the limitation period to more than ten years is not possible; Swiss Federal Supreme Court, 19 Apr. 1921 [BGE 47 II 160 ff., 165], § 3 (the regulations of the Swiss Code of Obligations concerning the time periods for the examination of the goods and the notification of the defects are to be applied only as long as there is no declaration of intent of the parties); PETER GAUCH ET AL., *PRÄJUDIZIENBUCH ZUM OR, RECHTSPRECHUNG DES BUNDESGERICHTS* Art. 201 OR, at 4 (2002); HANS GIGER, *BERNER KOMMENTAR ZUM SCHWEIZERISCHEN ZIVILGESETZBUCH, DAS OBLIGATIONENRECHT, BAND VI, 2. ABTEILUNG: DIE EINZELNEN VERTRAGSVERHÄLTNISSE, I. TEILBAND: KAUF UND TAUSCH—DIE SCHENKUNG, 1. ABSCHNITT: ALLGEMEINE BESTIMMUNGEN—DER FAHRNISKauf, ART. 184-215 OR* Art. 201 OR, at 84 *et seq.*, Art. 210 OR, at 42 (1979); MAX KELLER & KURT SIEHR, *KAUFRECHT. KAUFRECHT DES OR UND WIENER UNKAUFRECHT* 83 ff. (3d. ed. 1995); Hannes Zehnder, *Die Mängelrüge im Kauf-, Werkvertrags- und Mietrecht*, 96 *SCHWEIZERISCHE JURISTEN-ZEITUNG (SJZ)* 545, 549 (2000) (the parties can deviate from the time periods for the examination of the goods and the notification of the defects by contract by agreement within the limits of the law).

For *Germany*, see Barbara Grunewald, in *MÜNCHENER KOMMENTAR ZUM HANDELSGESETZBUCH, BAND 6, VIERTES BUCH. HANDELSGESCHÄFTE, 2. ABSCHNITT. HANDELSKAUF, DRITTER ABSCHNITT. KOMMISSIONSGESCHÄFT §§373-406, WIENER ÜBEREINKOMMEN ÜBER VERTRÄGE ÜBER DEN INTERNATIONALEN WARENKAUF—CISG § 377 HGB*, at 108 (Karsten Schmidt ed., 2004) (generally, the parties can deviate from the regulations in § 377 HGB by agreement).

For *Austria*, see Rudolf Reischauer, in *KOMMENTAR ZUM ALLGEMEINEN BÜRGERLICHEN GESETZBUCH* (Peter Rummel ed., 3d ed. 2000) (the parties can deviate from the limitation periods by agreement).