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Non-Conformity of Goods in Light of CISG, Unidroit Principles and the Palestinian Commercial Law Draft

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Non-Conformity of Goods in Light of CISG, Unidroit Principles and the Palestinian Commercial Law Draft

Cover Page Footnote

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regard are harmonized with the aforementioned international instruments, i.e. CISG and UP.

In 2000, a committee had been formed to review the commercial laws applicable in the Gaza Strip and the West Bank and prepare a (one) Commercial Law Draft for Palestine. In 2004, the PCLD was published with its Memorandum. However, this draft has not yet been enacted due to political impediments.

CISG was adopted in 1980, and entered into force in 1988⁽²⁾. The main purpose of CISG is to unify the law of international sale of goods world-wide and to alleviate the problems arising from the application of domestic laws⁽³⁾. However, CISG includes compromise provisions: CISG *per se* was indeed the maximum that could be achieved at the legislative level.

Therefore, Unidroit (i.e. the International Institute for the Unification of Private Law) decided to adopt another approach. In 2010, Unidroit published the third enlarged edition of the so-called Unidroit Principles of International Commercial Contracts⁽⁴⁾. When drafting the Unidroit Principles, the crucial factor was not which rule was adopted by the majority of countries, but rather which of the rules at issue was persuasive and well-suited for cross-border transactions.

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- (2) CISG today has been ratified by, and is in effect in, 77 countries. For more information on the status of CISG, visit: <http://www.cisg.law.pace.edu/cisg/countries/cntries.html>
- (3) To put it in the words of the preamble of CISG, “*the adoption of uniform rules which govern contracts for the international sale of goods and take into account the different social, economic and legal systems would contribute to the removal of legal barriers in international trade and promote the development of international trade*”. An English version of the official text of CISG is available at: <http://www.cisg.law.pace.edu/cisg/text/treaty.html>
- (4) The black letter rules of the UNIDROIT Principles in English are available at: <http://www.unidroit.org/english/principles/contracts/principles2010/translations/blackletter2010-main.htm>; the official integral version of the UNIDROIT Principles in English is available at: <http://www.unilex.info/dynasite.cfm?dssid=2377&dsmid=13637&x=1>. It should be mentioned that the first edition of the Unidroit Principles was published in 1994; the second edition thereof was published in 2004. The new (third) edition of the UNIDROIT Principles consists of 211 Articles (as opposed to the 120 Articles of the 1994 edition and the 185 Articles of the 2004 edition).

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(effective in Palestine⁽⁹⁾), international commercial usages⁽¹⁰⁾ and the interpretations of the terms in international trade prepared by international organizations (e.g. incoterms) if the contract refers to them⁽¹¹⁾.

With regard to sale of goods contract, PCLD includes some provisions very similar to those of CISG and the Unidroit Principles. This is true, for instance, in relation to pricing (Article 90 PCLD⁽¹²⁾) and measurement of damages according to the substitute transaction or current price (Articles 97 & 99 PCLD⁽¹³⁾). As already said, this paper will only consider the non-conformity of

applied the Egyptian civil code to a dispute between an Austrian supplier and an Egyptian buyer who entered into a contract for the supply of electronic scales and their spare parts; the panel obviously failed to apply CISG to the dispute, although the requirements for its application as laid by Articles 1/1-a and 3 are met.

(9) It should however be noted that Palestine has not yet adhered to CISG. Nevertheless, CISG may be applied in Palestine: According to its Article 1/1-b, CISG may apply in countries to which the contract involved has no connection; it rather suffices that the parties to the contract have their places of business in different States and that the rules of private international law of the court before which the dispute is brought lead to the application of the law of a contracting state. Besides, the Palestinian Arbitration Law No. 3 of 2000 allows for such a possibility: According to Article 19 thereof, parties to an international arbitration may agree on the law applicable to their dispute; the arbitration panel shall take into consideration the customs applicable to the relation between the disputing parties. More importantly, in case of violation of what the parties had agreed upon regarding application of *legal rules* on the issues in dispute, each party of arbitration shall have the right to appeal against the arbitral award before the competent court pursuant to Article 43/5 thereof, (emphasis added).

(10) The Memorandum of Article 89 of the PCLD explicitly says that the Unidroit Principles may apply in Palestine to international sale of goods contracts as an expression of international commercial usages.

(11) Article 89/2 PCLD.

(12) Compare: Article 55 CISG, and Article 5.1.7/1 UP.

(13) With regard to the substitute transaction, compare: Article 75 CISG, and Article 7.4.5 UP. With regard to the current price, compare: Article 76 CISG, and Article 7.4.6 UP.

It should also be mentioned that Article 92 PCLD corresponds to Article 56 CISG with regard to the fixing of price according to the weight of the goods; Article 93 PCLD corresponds to Article 65 CISG with regard to the specification of the form, measurement or other features of the goods; Article 94/2 PCLD corresponds to Article 33/b CISG with regard to the determination of the time of delivery by the buyer; and Article 98 PCLD corresponds to Article 73 CISG with regard to avoidance of the contract for delivery of goods by instalments.

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documents relating to the goods⁽¹⁶⁾. Non-conformity of the quality of goods means delivery of goods whose quality is worse or better than agreed upon⁽¹⁷⁾.

Non-conformity also covers situations in which the goods are not contained or packaged as required⁽¹⁸⁾ by contract or convention. Likewise, delivery of a different kind of goods (*aliud*) is considered a case of non-conformity⁽¹⁹⁾. Obviously, CISG adopts a one unified notion of non-conformity⁽²⁰⁾ (i.e. it

Arabic), An-Nisr Edhabi Li-Tiba'a, Cairo, 1996-1997, 35-37. Decision of Landgericht Landshut – Germany, No. 54 O 644/94, dated 05.04.1995, (insufficient quantity of the goods is considered a case of non-conformity).

- (16) Schlechtriem / Schwenger, Schwenger, *supra* note 14, 530; Poikela, *supra* note 15, 33.
- (17) Schlechtriem / Schwenger, Schwenger, *supra* note 14, 530; Leisinger, Benjamin K., “Fundamental Breach Considering Non-Conformity of the Goods”, *Beiträge zum internationalen Wirtschaftsrecht*, Band 8, Sellier European Law Publishers, München, 2007, 128.
- (18) Honsell, Magnus, *supra* note 15, 386; Henschel, *supra* note 14, 6; *Abd-Elaziz, supra note 15, 99*.
- (19) Decision of Bundesgerichtshof – Germany, No. VIII ZR 51/95, dated 03.04.1996, (the Court stated that CISG, contrary to German domestic law, does not make any difference between delivery of goods of different kind (*aliud*) and delivery of non-conforming goods); Decision of Oberster Gerichtshof – Austria, No. 1 Ob 74/99 K, dated 29.06.1999, (the seller delivered unprepared planks instead of the prepared planks agreed upon); Schlechtriem, P., “*Internationales UN-Kaufrecht*”, Mohr Siebeck Tübingen, 2007, 106; Honnold, John O., “*Uniform Law for International Sales Under the 1980 United Nations Convention*”, 3rd ed., Deventer: Kluwer Law International (1999), 335, also available at: <http://www.cisg.law.pace.edu/cisg/biblio/honnold.html>; Veneziano, *supra* note 15, 42. Contra: Bianca, C. M., Conformity of Goods, in: Bianca, C. M. / Bonell, M. J. (Eds.), “*Commentary on the International Sales Law*”, Giuffrè: Milan (1987) {Commentaries by J. Barrera Graf, H.T. Bennett, C.M. Bianca, M.J. Bonell, G. Eörsi, M. Evans, E.A. Farnsworth, W. Khoo, V. Knapp, O. Lando, D. Maskow, B. Nicholas, J. Rajski, K. Sono, D. Tallon, M. Will}, 273, “*Neither the text of the rule nor international trade needs support the extreme opinion which assumes that the seller has delivered the goods even when he has handed over goods which, according to common sense, are totally different from the goods expected by the buyer*”; Decision of Oberlandesgericht Düsseldorf – Germany, No. 6 U 119/93, dated 10.02.1994, “*Soweit die Kl. teilweise eine nicht bestellte Farbe geliefert hat, lag eine aliud-Lieferung vor, die zur teilweisen Nichterfüllung führte*”.
- (20) Decision of Tribunal Cantonal de Sion – Switzerland, No. C1 97 288, dated 29.06.1998; Maley, Kristian, “The limits to the conformity of the goods in the United Nations Convention on Contracts for the International Sale of Goods (CISG)”, 12 *Int'l Trade &*

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different goods than agreed upon shall also be considered a case of non-conformity, even if the goods delivered are of better quality⁽²⁴⁾.

However, the excess in quantity of the goods is not deemed to be a matter of non-conformity, for which Article 103/1 PCLD rather lays down a special rule (i.e. the seller might not return the excess part of the goods unless the buyer refused to pay its price⁽²⁵⁾; the buyer may not demand rescission of the contract or reduction of the price with damages).

As far as the latent defect is concerned, it only exists if the goods delivered were defected and such defect⁽²⁶⁾ was not known by the buyer⁽²⁷⁾; hence it presumes that the condition of the goods at the time of delivery is the same as at the time of conclusion⁽²⁸⁾. In contrast, non-conformity under PCLD means that the condition of the goods at the time of delivery is not the same as at the time of conclusion⁽²⁹⁾. That is to say, the goods delivered are not like the goods as

(24) Shawarbi, Abd-Elhamid, “*Aliltizamit wal A’qoud Ettijariyya wifqan Liqanoun Attijara raqam 17 lisant 1999*”, (Commercial Contracts and Obligations According to the Code of Commerce No. 17 for the Year 1999 – *in Arabic*), Almaaref – Alexandria, 2001, 486.

(25) This special rule is different from the counterpart civil law rule (Shawarbi, *supra* note 24, 490; Al-Manshawi, Abd-Elhamid, “*Attaleeq ala Alqanoun Ettijari Aljadeed raqam 17 lisant 1999fi doua’ alfiqh walqada’*”, (Commentary on the New Commercial Code No. 17 for the Year 1999 in Light of Doctrine and Jurisprudence – *in Arabic*), Almaaref – Alexandria, 2005, 90), that stipulated in Article 454/2 of the Palestinian Civil Law Draft, according to which, if the quantity of the thing sold exceeds that indicated in the contract, and if the price has been fixed by unit, the buyer must, when the object of the purchase cannot be divided, make up the price unless the excess is very great, in which case he may demand rescission of the contract; see also Articles 225 & 226 Mejella.

(26) According to Article 338 Mejella, the defect is defined as the fault that, in the opinion of merchants and professionals, reduces the price of the thing sold.

(27) According to Mejella and the Palestinian Civil Law Draft, there is an implied condition that the thing sold should be free from any (hidden) defect (Articles 336 and 473, respectively). Such defect should exist before or at the time of delivery of the thing sold (i.e. regardless of whether before or after the contract conclusion), and be unknown to the buyer at the time of conclusion of the contract (Articles 339 & 340 and 473/2, respectively).

(28) Shawarbi, *supra* note 24, 485.

(29) Shawarbi, *supra* note 24, 484; Decision of the Egyptian Court of Cassation, No. 56 for judicial year 2, dated 08.12.1932, cited in: Alfakahani / Husni, *supra* note 23, 136.

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damages and price reduction only⁽³⁴⁾ unless usages or practices established between the parties indicate otherwise⁽³⁵⁾.

Unidroit Principles address non-conformity in general terms only because – contrary to CISG – they cover all international commercial contracts. Thus non-conformity is generally mentioned in Article 7.1.1 UP as a category of non-performance⁽³⁶⁾.

B-2: Criteria of non-conformity:

In the following, this article will deal with the criteria of non-conformity under CISG, UP and PCLD.

B-2-a: Criteria of non-conformity under CISG:

Non-conformity of goods can be defined under CISG according to both subjective and objective criteria.

B-2-a-i: Subjective Criteria of non-conformity:

It goes without saying that the goods delivered shall be in conformity with all specifications agreed upon by the parties whether explicitly or implicitly⁽³⁷⁾. It does not matter whether the parties agreed thereupon through individual negotiations or by means of incorporation of the standard terms of either party⁽³⁸⁾; the general provisions of CISG, particularly Articles 7, 8 and 9, may apply in this context⁽³⁹⁾. The decision on the validity of such an agreement will, however, be taken in accordance with the applicable domestic law (Article 4/a CISG).

(34) Henschel, *supra* note 14, 6; Honsell, Magnus, *supra* note 15, 387.

(35) Leisinger, *supra* note 17, 9; Schlechtriem / Schwenger, Schwenger, *supra* note 14, 531.

(36) It says: “*Non-performance is failure by a party to perform any of its obligations under the contract, including defective performance or late performance*”. The Official Comment to this Article further says “*that “non-performance” is defined so as to include all forms of defective performance*”.

(37) Schlechtriem / Schwenger, Schwenger, *supra* note 14, 529; Honsell, Magnus, *supra* note 15, 387; Bianca / Bonell, Bianca, *supra* note 19, 273.

(38) Schlechtriem / Schwenger, Schwenger, *supra* note 14, 529; Poikela, *supra* note 15, 19; Abd-Elaziz, *supra* note 15, 51.

(39) Henschel, *supra* note 14, 4; Poikela, *supra* note 15, 19-20.

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tribunals. On the contrary, the case law that was made latter reassured the primacy of the party autonomy in respect with the goods specifications⁽⁴⁴⁾.

It should be noted that the above mentioned subjective criterion⁽⁴⁵⁾ of non-conformity is clearly stipulated in Article 35/1-2 CISG, Article 5.1.6 UP and Article 102/1 PCLD. It is also in accord with the principle of party autonomy⁽⁴⁶⁾ regulated by Article 6 CISG, Articles 1.1, 1.3, 1.5 UP and Article 2 PCLD (and Article 479 of the Palestinian Civil Law Draft).

B-2-a-ii: Objective Criteria of non-conformity:

If the parties did not agree to the goods specifications at all – like in the case of routine and quick orders of purchase⁽⁴⁷⁾, or if such an agreement was not sufficient⁽⁴⁸⁾, conformity of the goods will be decided according to objective criteria⁽⁴⁹⁾. According to Article 35/2 CISG, the goods will not conform unless they meet the following four cumulative⁽⁵⁰⁾ parameters or criteria:

First, the goods delivered shall be fit for the normal purpose of use of similar goods⁽⁵¹⁾. It was decided, in one case, that this criterion reflects the average

(44) For instance, a Belgium court concluded in 2004 that, if the truck delivered had a different number and was four years older than agreed upon, there exists a case of non-conformity (Decision of Rechtbank van Koophandel, Kortrijk, No. AR/2136/2003, dated 04.06.2004). Also, a Spanish Court found, in 2007, that the seller had breached its obligations set forth in Articles 25 and 35 CISG, reasoning that the buyer was deprived of what he was entitled to expect under the contract since the machine's functioning and technical qualities did not conform to those agreed upon (Decision of Audiencia Provincial de Madrid, No. 244/2007, dated 22.03.2007). Above all, the Swiss supreme court held, in 2004, that the delivery by the seller of small crystals contrary to the contract specifications, namely "big crystals", was a case of non-conformity encompassed by Article 35 CISG (Decision of Schweizerisches Bundesgericht, No. 4C.245/2003, dated 13.01.2004).

(45) Schlechtriem / Schwenger, Schwenger, *supra* note 14, 529; Maley, *supra* note 20, 104.

(46) Honnold, *supra* note 19, 254; Maley, *supra* note 20, 83.

(47) Honnold, *supra* note 19, 255.

(48) Schlechtriem / Schwenger, Schwenger, *supra* note 14, 532.

(49) Veneziano, *supra* note 15, 44; Decision of Oberster Gerichtshof – Austria, No. 7 Ob 302/05w, dated 25.01.2006.

(50) Poikela, *supra* note 15, 59.

(51) Article 35/2-a CISG. See also: Decision of Hof van Hoger Beroep, Gent – Belgium, No. 2003/AR/2026, dated 10.05.2004; Decision of Cour d'Appel de Grenoble - France, No.

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after delivery; other types of goods shall also stay safe for a period of time after delivery, which must be a reasonable period in light of the ordinary purpose of use of the goods at issue⁽⁶⁰⁾. The buyer is entitled to expect that the goods delivered possess certain basic qualities that make them usable for their ordinary purpose, even if the contract does not include an express provision to this effect⁽⁶¹⁾.

According to the case law of CISG, the following are some examples in which the goods were not fitting for the ordinary purpose of use: wine being adulterated by the addition of a high quantity of sugar which caused an augmentation of the alcohol degree⁽⁶²⁾; baking dishes (cake pans, soufflé pans and plotters) not being resistant to high temperatures and broke when used in ovens⁽⁶³⁾; pressure cookers showing a defect that made their use dangerous⁽⁶⁴⁾; and special kind of wax sold being not in conformity with the industry standards that were known to and applied by both parties⁽⁶⁵⁾.

It should be noted here that the seller cannot as a rule be expected to observe the special public law requirements in the buyer's country⁽⁶⁶⁾ even in the situation where it knew the country of export⁽⁶⁷⁾. Such public law standards in

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- (60) Schlechtriem / Schwenger, Schwenger, *supra* note 14, 533; Bianca / Bonell, Bianca, *supra* note 59, 289, “*even without an express guarantee the buyer may expect the goods to last for a normal time. Goods cannot be said fit for their normal purposes, indeed, when they endure only for an exceptionally short period*”.
- (61) Poikela, *supra* note 15, 37.
- (62) Decision of Cour de Cassation – France, No. 173 P, dated 23.01.1996.
- (63) Decision of Cour de Cassation – France, No. 2205 D, dated 17.12.1996.
- (64) Decision of Cour d'Appel de Paris – France, No. 2002/18702, dated 04.06.2004.
- (65) Decision of Bundesgerichtshof – Germany, No. VIII ZR 121/98, dated 24.03.1999.
- (66) Decision of U.S. District Court, E.D., Louisiana, No. Civ. A. 90-0380, dated 17.05.1999; Henschel, *supra* note 14, 7. Leisinger, *supra* note 17, 20.
- (67) Decision of Oberster Gerichtshof – Austria, No. 7 Ob 302/05w, dated 25.01.2006; Decision of Bundesgerichtshof – Germany, No. VIII ZR 159/94, dated 08.03.1995; Decision of Oberlandesgericht Frankfurt am Main – Germany, No. 13 U 51/93, dated 20.04.1994; Decision of Bundesgerichtshof – Germany, No. VIII ZR 67/04, dated 02.03.2005; Decision of Audiencia Provincial de Granada – Spain, No. 143/2000, dated 02.03.2000; Decision of U.S. District Court, E.D., Louisiana, No. Civ. A. 90-0380, dated 17.05.1999; Maley, *supra* note 20, 116; Bianca / Bonell, Bianca, *supra* note 19, 283; Kruisinga, *supra* note 32, 43-44, 52.

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on the seller's skill and judgment⁽⁷⁷⁾. The buyer's particular purpose could be, for instance, the use of the goods in a specific way of processing or the use of the goods in a certain region having special standards relating to religion⁽⁷⁸⁾. There is no problem when the buyer expressly informs the seller of the particular purpose for which the buyer acquires the goods; in such a situation, the seller will obviously have the opportunity to object as s/he pleases⁽⁷⁹⁾. In order to decide whether such a purpose is impliedly made known to the seller, an objective test shall be applied⁽⁸⁰⁾: the reasonable person, through an adequate means, should have known the buyer's particular purpose of use⁽⁸¹⁾. In both cases, the seller shall be made aware of the buyer's special purpose at the time of conclusion. Thus, it is held by the *Cour d'Appel de Grenoble* – France that: because the seller delivered some metallic elements which could not be used for the reassembling of the second hand hanger as agreed upon by the parties, there was a lack of conformity as the seller knew at the time of contracting that such metallic elements had to be used for that particular purpose and were not fit for it⁽⁸²⁾.

Besides, the seller will not be responsible for delivering goods not fit for the buyer's special purpose if the circumstances show that the buyer did not rely, or that it was unreasonable for him to rely on the seller's skill and judgment. This would be the case if, for instance: (1) the buyer and the seller possess the same

(77) Article 35/2-b CISG.

(78) Leisinger, *supra* note 17, 14.

(79) Schlechtriem / Schwenger, Schwenger, *supra* note 14, 537; Poikela, *supra* note 15, 42; Abd-Elaziz, *supra* note 15, 91, 92.

(80) Maley, *supra* note 20, 118.

(81) Schlechtriem / Schwenger, Schwenger, *supra* note 14, 537; Leisinger, *supra* note 17, 15.

(82) Decision No. RG 93/4879, dated 26.04.1995.

For more case law applying Article 35/2-b CISG, see for instance: Decision of U.S. Court of Appeals, Fourth Circuit, No. 00-1125, dated 21.06.2002; Decision of Helsinki Court of Appeal – Finland, No. S 96/1215, dated 30.06.1999, available (with an English translation) at: <http://cisgw3.law.pace.edu/cases/980630f5.html>; Decision of Tribunale di Busto Arsizio - Italy, dated 13.12.2001; Decision of British Columbia Supreme Court – Canada, No. C993594, dated 21.08.200; Decision of Supreme Court of Western Australia - Australia, No. [2003] WASC 11; CIV 1647 of 1998, dated 17.01.2003.

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The case law has correctly applied this criterion of conformity in many situations⁽⁹⁵⁾. Nevertheless, in one case, it was incorrectly ruled that “*Ein Muster ist nur verbindlich, wenn die Parteien dies vereinbart haben*”. That is to say, conformity to a model is relevant only when in the contract there is an express agreement of the parties thereupon⁽⁹⁶⁾. This decision is obviously in conflict with the clear wording of Article 35/2-c, according to which it suffices when the model is held out by the seller to the buyer. That is to say, the parties implicitly⁽⁹⁷⁾ agree that the goods must be in conformity with the model⁽⁹⁸⁾.

Fourth, the goods delivered must be contained or packaged in the manner usual for such goods or, where there is no such manner, in a manner adequate to preserve and protect the goods⁽⁹⁹⁾. The seller is obliged to package the goods, not only when the goods are dispatched, but also when he only has to place them at the buyer’s disposal⁽¹⁰⁰⁾ for the collection by the buyer⁽¹⁰¹⁾. Thus, the seller will commit a breach⁽¹⁰²⁾ if the goods are not contained or packaged according to the usage prevailing in the concerned sector of commerce⁽¹⁰³⁾. In the absence of such a usage, the goods shall be contained or packaged in the manner usual for such goods according to the surrounding circumstances⁽¹⁰⁴⁾,

(95) See, for instance: Decision of Landgericht Berlin – Germany, No. 102.0.181/98, dated 25.05.1995; Decision of U.S. Court of Appeals, 2nd Circuit, No. 95-7182, 95-7186, dated 06.12.1995; Decision of U.S. District Court, Southern District of New York, No. 00 Civ. 5189 (RCC), dated 23.08.2006.

(96) Decision of Landgericht Berlin – Germany, No. 52 S 247/94, dated 15.09.1994.

(97) Schlechtriem / Schwenger, Schwenger, *supra* note 14, 539.

(98) Decision of Oberlandesgericht Graz, No. 6 R 194/95, dated 19.11.1995.

(99) Article 35/2-d CISG. However, if the parties make some specifications with respect to the proper packaging of the goods sold, then the goods must conform to such contractual specifications pursuant to Article 35/1 CISG.

(100) Poikela, *supra* note 15, 51.

(101) Leisinger, *supra* note 17, 22; Kruisinga, *supra* note 32, 34.

(102) Decision of Oberlandesgericht Koblenz – Germany, No. 2 U 923/06, dated 14.12.2006; Poikela, *supra* note 15, 43.

(103) Schlechtriem / Schwenger, Schwenger, *supra* note 14, 539-540; Bianca / Bonell, Bianca, *supra* note 19, 277; Leisinger, *supra* note 17, 23. Az-Zuqrod, Ahmad Es-Sayyed, “Osoul Qanoun Et-Tejara Ed-Dawliyya Al-Bai’ Ed-Dawli Lil-Badai” (Principle of International Trade Law - International Sale of Goods – in Arabic),. Al-Maktaba Al-A’sriyya, Cairo, 2007, 176.

(104) Schlechtriem / Schwenger, Schwenger, *supra* note 14, 540.

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special purpose of use, the buyer shall prove that such purpose was made known to the seller and the seller shall prove that the buyer could not rely on the seller's skills and judgment⁽¹¹¹⁾.

B-2-b: Criteria of non-conformity under UP:

As far as the Unidroit Principles are concerned, Article 5.1.6 adopts a one general criterion⁽¹¹²⁾, i.e. the reasonable quality of the goods which shall not be less than average in the circumstances. According to the Official Comment to this UP Article, “*the minimum requirement is that of providing goods of average quality. The supplier is not bound to provide goods ... of superior quality if that is not required by the contract, but neither may it deliver goods ... of inferior quality. This average quality is determined according to the circumstances, which normally means that which is available on the relevant market at the time of performance (there may for example have been a recent technological advance). Other factors may also be of relevance, such as the specific qualifications for which the performing party was (chosen)*”.

This general criterion encompasses all four criteria of Article 35/2 CISG: If the goods delivered do not fit with the ordinary purpose of use of similar goods, they cannot be considered of a reasonable quality: Even under CISG, the ordinary purpose of use requires delivery of reasonable quality goods. If the contract does not include specifications for the goods, the quality of such goods shall not be less than normal⁽¹¹³⁾. Besides, the goods delivered shall not be defective⁽¹¹⁴⁾.

as Article 2/a (Decision of Bundesgerichtshof – Germany, No. VIII ZR 304/00, dated 09.01.2002), Article 35 (Decision of Cour d'Appel, Mons - Belgium, No. R.G. 1999/242, dated 08.03.2001), Article 38-39 (Decision of Handelsgericht Zürich – Switzerland, No. HG930138 U/H93, dated 09.09.1993), and Article 79 (Decision of Tribunale di Vigevano – Italy, No. 405, dated 12.07.2000). It goes without saying that the prevailing opinion in the case law is preferable because it adopts an autonomous and uniform interpretation of the question in contingency with Article 7 CISG.

- (111) Schlechtriem / Schwenger, Schwenger, *supra* note 14, 547; Maley, *supra* note 20, 119.
- (112) The generality of this criterion corresponds with the fact the Unidroit principles govern not only the international sale of goods, but also other international commercial contracts, particularly the service contracts.
- (113) Article 5.1.6, Official Comment: “*The contract will often be explicit as regards the quality due (“grade 1 oil”), or it will provide elements making that quality determinable.*”

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of contract formation, that apply to the sale of goods too⁽¹¹⁷⁾, the subject matter of the contract, i.e. the goods contracted for, shall be well-known by the parties⁽¹¹⁸⁾. Therefore, it does not in principle matter whether the goods are delivered to be used for the ordinary purpose or for the buyer's particular purpose. It is also of no importance whether the goods are packaged or not, and, if yes, whether the manner of package is normal in the course of commerce or not. In all cases, it is rather important whether the goods delivered (that were well-known to the buyer at the time of contract) are still in the same condition in which they were at the time of sale⁽¹¹⁹⁾. In this regard, PCLD materially differs from CISG under which the extent of fitness of the goods for the ordinary use has to be decided on a case-by-case basis. Besides, since PCLD governs domestic contracts only, the question whether the seller has to respect the public law standards in the buyer's country does not arise at all.

With regard to sample or model, Article 431/1 of the Palestinian Civil Law Draft explicitly states that, "*if the sale is made according to sample or model, the thing sold should conform to the sample or model*"⁽¹²⁰⁾. In case of non-conformity however, the buyer can either accept the goods delivered or reject them only. As far as the special purpose and packaging are concerned, neither PCLD nor the Palestinian Civil Law Draft regulates them; they can however be relevant if the parties' contract addresses them.

(117) Shawarbi, *supra* note 24, 403.

(118) Articles 200-204 Mejella. Article 429 Palestinian Civil Law Draft, which says: "*The buyer must have a sufficient acquaintance with the thing sold. This acquaintance will be deemed sufficient if the contract contains the description of the thing sold and its essential qualities, so that it may be identified*".

(119) Nevertheless, Article 130 of the Palestinian Civil Law Draft explicitly provides that, "*if there is no agreement as to the degree of quality, and the quality cannot be ascertained by usage or by any other circumstances, the debtor must supply an article of average quality*". Thus, the seller of unascertained goods must provide goods of average quality.

(120) See also: Decision of the Egyptian Court of Cassation, No. 222 for judicial year 25, dated 15.10.1959, cited in: Alfakahani / Husni, *supra* note 23, 144; Article 325 Mejella.

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carrier for transportation, regardless of whether the analysis made before shipment was mistaken, or the goods were deteriorated during the three-week period before their being closed into the containers and shipped, or else the goods lacked conformity upon passing of the risk but the defects became apparent only after their arrival at the port of destination⁽¹²⁷⁾.

In yet another case where the buyer of a painting attributed to Henry van der Velde sued the seller when the party to whom the buyer resold the painting had determined that the said painting is not indeed attributed to that artist, the court held that the seller was not liable because, at the moment of delivery, there was no indication of any kind that the painting was no longer to be attributed to Henry van der Velde⁽¹²⁸⁾. This reasoning is surely not convincing “as it is impossible to doubt that the non-conformity existed before the passing of risk”⁽¹²⁹⁾.

Article 36/1 CISG also protects the buyer against the latent defects⁽¹³⁰⁾ (i.e. the defects in the goods delivered which exist at the time the risk passes to the buyer, but become apparent only after that time⁽¹³¹⁾), since they could not be discovered with the normal inspection of the goods upon delivery⁽¹³²⁾. So, a German court found that although the suspicion of contamination of the pork sold had become apparent only after the risk had passed to the buyer (Article 36/1 CISG), it amounted nonetheless to a lack of conformity as the facts which had given rise to suspicion already existed when the risk passed to the buyer⁽¹³³⁾.

(127) Decision of Tribunale di Appello di Lugano, seconda camera civile – Switzerland, No. 12.97.00193, dated 15.01.1998.

(128) Decision of Arrondissementsrechtbank Arnhem, in *Kunsthaus Math. Lempertz OHG v. Wilhelmina van der Geld*, dated 17.07.1997.

(129) Ferrari, *supra* note 20, 480.

(130) Schlechtriem / Schwenger, Schwenger, *supra* note 14, 550; Honnold, *supra* note 19, 265; *Abd-Elaziz, supra* note 15, 137.

See also: Decision of COMPROMEX, Comisión para la Protección del Comercio Exterior de Mexico, No. M/21/95, dated 29.04.1996; Decision of Bundesgerichtshof – Germany, No. VIII ZR 67/04, dated 02.03.2005.

(131) Maley, *supra* note 20, 99; *Shafik, supra* note 41, 148.

(132) Bianca / Bonell, Bianca, *supra* note 59, 285.

(133) Decision of Oberlandesgericht Frankfurt am Main – Germany, No. 8 O 57/01, dated 29.01.2004.

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obligation, like insurance of the goods⁽¹⁴¹⁾, selection of the transporter or transportation means⁽¹⁴²⁾ or non-disclosure to the buyer the best way to use the goods (machines)⁽¹⁴³⁾, the lack of conformity due to such a breach may occur after the time in which the risk passes to the buyer. In this regard, it does not matter when the breach by the seller of his obligation happens whether before⁽¹⁴⁴⁾ or after⁽¹⁴⁵⁾ the time in which the risk passes to the buyer. It is also of no relevance whether the seller was at fault or not⁽¹⁴⁶⁾; the seller may only be exempted according to the rules of Article 79 CISG⁽¹⁴⁷⁾.

In Palestine, if the defect happens in the possession of the buyer, the seller will be in principle not liable⁽¹⁴⁸⁾ (Articles 339 and 340 Mejella). However, such a defect will be considered as a hidden defect (i.e. the one which existed in the thing sold when it was in the seller's hands) if it is due to an old cause which existed in the thing sold when it was in the possession of the seller (Article 473/4 of the Palestinian Civil Law Draft).

With regard to the guarantee, the seller is liable under Article 35/2-a, b CISG for any lack of conformity brought about by a breach of his/her obligation to guarantee the normal or the buyer's special purpose of use of the goods. Article

(141) Honsell, Magnus, *supra* note 15, 398.

(142) Bianca / Bonell, Bianca, *supra* note 59, 286.

(143) *Ibid*; Abd-Elaziz, *supra* note 15, 146-147.

(144) Schlechtriem / Schwenger, Schwenger, *supra* note 14, 551. Decision of Tribunal de commerce, Namur – Belgium, No. 985/01, dated 15.01.2002 (the seller should be liable for any lack of conformity existing after the time of delivery, but arising from a breach of his obligations occurring prior to the passing of risk. In the case at issue however, the buyer did not bring evidence to that effect).

(145) Honsell, Magnus, *supra* note 15, 399.

(146) Schlechtriem / Schwenger, Schwenger, *supra* note 14, 551; Honsell, Magnus, *supra* note 15, 399.

Contra: Shafik, *supra* note 41, p. 149; Musa, *supra* note 83, 183; Abd-Elaziz, *supra* note 15, 151. (the buyer must establish the seller's fault that results in the non-conformity of goods).

(147) Honsell, Magnus, *supra* note 15, 399; Schlechtriem / Schwenger, Schwenger, *supra* note 14, 551.

(148) Noteably, Mejella does not explicitly provide for a cut-off period of time for notice of the defect. Instead, Article 341 thereof only employs an acceptance rule to cut off buyer's option with regard to defects of which he knew at the time of delivery.

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In Palestine, the action based on the defect is generally prescribed in six months from the time of delivery of the thing sold unless the seller agrees to be bound for a longer period (Article 484/1 of the Palestinian Civil Law Draft)⁽¹⁶⁰⁾. With regard to the guarantee by virtue of which the seller warrants the proper working of the thing sold for an agreed period of time, Article 481 of the Palestinian Civil Law Draft states that if a defect subsequently appears in the thing sold, the buyer must give notice to the seller within one month from the date of the appearance of the defect and commence an action within six months from the date of notification; otherwise, he would forfeit his right to the warranty.

Taking into consideration the sphere of application of the Unidroit Principles, i.e. the fact that they govern not only sale of goods, but also other commercial contracts, they do not include any specific rule with regard to the time of non-conformity; the Unidroit Principles do not have a counterpart provision to Article 36 CISG. Thus, where the Unidroit Principles are applicable to a (international) sale of goods contract, this matter will be determined by the domestic or uniform law otherwise applicable⁽¹⁶¹⁾.

C: Buyers duties upon taking over the goods:

Upon delivery of the goods, the buyer has to inspect them and notify the seller of any lack of conformity. CISG expressly provides for the details of these duties in Articles 38 & 39, respectively, both were also applied by the case law with remarkable frequency⁽¹⁶²⁾. The Unidroit Principles, by contrast, tackles

(160) However, the seller cannot avail himself of the prescription of six months if it is proved that he has fraudulently concealed the defect from the buyer, (Article 484/2 of the Palestinian Civil Law Draft).

(161) Article 1.6/2 UP.

(162) CISG-AC Opinion no 2, "Examination of the Goods and Notice of Non-Conformity: Articles 38 and 39", 7 June 2004. Rapporteur: Professor Eric E. Bergsten, Emeritus, Pace University School of Law, New York, 16 *Pace Int'l L. Rev.* Vol. 16 (2004), pp. 377-408, also available at: <http://www.cisg.law.pace.edu/cisg/CISG-AC-op2.html>, Comment no 5.1; Flechtner, Harry M., "Conformity of Goods, Third Party Claims, and Buyer's Notice of Breach under the United Nations Sales Convention ("CISG"), with Comments on the "Mussels Case," the "Stolen Automobile Case," and the "Ugandan Used Shoes Case", *University of Pittsburg School of Law Working Papers Series*, Paper 64, 2007,

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within as short a period as is practicable in the circumstances. With regard to the contracts for delivery of goods by installments, the buyer shall examine each installment separately⁽¹⁶⁷⁾ unless the installments are different parts of one and the same goods, in which case examination can be postponed till the last installment is delivered⁽¹⁶⁸⁾.

Taking into account that CISG governs sales of all types of goods (as defined in Articles 1-6 CISG), it was, on one hand, impossible to lay down a precise pre-determined period within which the buyer must examine the goods. On the other hand, Article 38 CISG could not adopt the prompt examination rule of Article 38 ULIS, i.e. the 1964 Uniform Law on International Sale of Goods, which was influenced by legal systems whose domestic sales laws adopt rigid rule in this regard (like the German law)⁽¹⁶⁹⁾; it rather reflects a compromise among different legal systems, including those whose domestic laws eventually allow for a relatively long period of examination (such as Dutch and French laws⁽¹⁷⁰⁾). So, the flexibility and variability of the period of time for the examination of the goods is widely recognized by CISG; the phrase used by Article 38/1 “*within as short a period as is practicable in the circumstances*” is *per se* flexible enough to allow divergence⁽¹⁷¹⁾. Thus, the case law has set different examination periods ranging from one day to one month after delivery⁽¹⁷²⁾. By contrast, examination has been found to be untimely in many

itself – contrary to Article 39 CISG – does not provide that the buyer who fails to examine loses his right to rely on the lack of conformity, (Flechtner, *supra* note 162, 19).

(167) Schlechtriem / Schwenger, Schwenger, *supra* note 14, 554; Honsell, Magnus, *supra* note 15, 412.

(168) Honsell, Magnus, *supra* note 15, 412.

(169) Schwenger, Ingeborg, “The Noble Month (Articles 38, 39 CISG) – The Story Behind the Scenery”, 7 *Eur. J. L. Reform* 2005, pp. 353-366, 355.

(170) *Ibid.*

(171) Ferrari, *supra* note 20, 481; Shafik, *supra* note 41, 152.

(172) See, for instance: Decision of Landgericht Aachen - Germany, No. 41 O 198/89, dated 03.04.1990: (the same day of delivery); Decision of CIETAC China International Economic and Trade Arbitration Commission, dated 00.00.1995: (few days); Decision of Schweizerisches Bundesgericht, No. 4C.144/2004, dated 07.07.2004: (three days); Decision of, Decision of Oberlandesgericht Schleswig – Germany, No. 11 U 40/01, dated 22.08.2002: (3-4 days); Decision of Oberlandesgericht Koblenz – Germany, No. 2 U 1556 / 98, dated 18.11.1999: (one week); Decision of Cour de Cassation – France, No.

situations, for instance: four months after the delivery of the second of two engines (20 months after the delivery of the first engine)⁽¹⁷³⁾; beyond one week following delivery⁽¹⁷⁴⁾; after three or four days following delivery⁽¹⁷⁵⁾; after the day of arrival at the port of destination⁽¹⁷⁶⁾; and any time later than immediately following delivery⁽¹⁷⁷⁾.

Having said that, I suggest that one month could be a reasonable period of time for examination of the goods by the buyer. This period can be lengthened or shortened in light of the given circumstances⁽¹⁷⁸⁾. Though CISG itself does not provide for a precise period of examination, this one month period can be taken as a starting point. It is worth noting that the seller will normally suffer no significant prejudice from the buyer's failure to examine the goods timely, and the buyer shall, by contrast, lose all remedies if he is held not to have complied

994 D, dated 26.05.1999: (two weeks); Decision of Oberlandesgericht Köln – Germany, No. 18 U 121/96, dated 21.08.1997: (one month).

- (173) Decision of Landgericht Düsseldorf - Germany, No. 31 O 231/94, dated 23.06.1994.
 (174) Decision of Oberlandesgericht Koblenz - Germany, No. 2 U 580/96, dated 11.09.1998.
 (175) Decision of Oberlandesgericht Karlsruhe - Germany, No. 1 U 280/96, dated 25.06.1997.
 (176) Arbitral Award of ICC Court of Arbitration, No. 8247, dated 00.06.1996.
 (177) Decision of Oberlandesgericht Düsseldorf - Germany, No. 6 U 32/93, dated 10.02.1994.
 (178) Decision of Oberster Gerichtshof – Austria, No. 1 Ob 223/99x, dated 27.08.1999, (the examination period has to be adapted according to the objective and subjective circumstances of the concrete case. It can depend on the size of the buyer's company, its personal and business situation, the characteristic features and the quantity of the goods to be examined, the efforts necessary for an examination, the type of the chosen legal remedy selected); Decision of Oberlandesgericht Saarbrücken - Germany, No. 1 U 703/97, dated 03.06.1998, (perishable goods have to be immediately examined by the buyer); Decision of Landgericht Düsseldorf - Germany, No. 31 O 231/94, dated 23.06.1994, (in order to discover possible defects, the buyer necessarily had first to install the engines and put them into operation, which required more than a few days). CISG-AC Opinion no 2, *supra* note 162, Article 38 para. 2 (at p. 378): “*whether and when it is practicable, and not just possible, to examine the goods depends on all the circumstances of the case. It is often commercially practicable to examine the goods immediately upon receipt. This would normally be the case with perishables. In other cases, such as complicated machinery, it may not be commercially practicable to examine the goods except for externally visible damage or other non-conformity until, for example, they can be used in the way intended. If the goods are to be re-sold, the examination will often be conducted by the sub-purchaser. Another example is dealt with in article 38(3)*”. Schwenzer, *supra* note 169, 364-365; Abd-Elaziz, *supra* note 15, 176.

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with his duty to examine the goods and to give notice in the appropriate time. Unless the courts and arbitral tribunals have a starting or vantage point with regard to the period of examination, the parties would otherwise likely exclude applicability of Article 38 CISG and – according to Article 6 CISG – incorporate into the contract a clause determining the period in which the buyer has to examine the goods.

As far as the Unidroit Principles are concerned, they do not particularly regulate the buyer's duty to examine the goods because they govern all types of international commercial contracts, including the contracts of service. In the Official Illustration No. 7 to Article 1.7/1 however, it is made clear that the buyer should give notice to the seller specifying the nature of the defect in the machine sold without undue delay after he has discovered or ought to have discovered the defect⁽¹⁷⁹⁾. This implicitly implies that the buyer must also examine the goods within as short a period as is practicable in the circumstances. In addition, Article 7.2.2-e UP obliges the aggrieved party (e.g. the buyer) to “*require performance within a reasonable time after it has, or ought to have, become aware of the non-performance*”, which clearly implies that the buyer should, in case of a defective performance, examine the goods delivered⁽¹⁸⁰⁾. The Arrondissementsrechtbank Zwolle (Netherlands), interpreted the words of Article 39/1 CISG “*or ought to have discovered*” by reference to the concept of good faith adopted in the UNIDROIT Principles (as well as in Article 7(1) CISG) and concluded that the buyer ought to have examined the goods more carefully, which would have permitted timely discovery of the defects⁽¹⁸¹⁾.

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- (179) This Illustration explicitly says: “*Under a contract for the sale of high-technology equipment the purchaser loses the right to rely on any defect in the goods if it does not give notice to the seller specifying the nature of the defect without undue delay after it has discovered or ought to have discovered the defect*”.
- (180) Schelhaas, Harriet, Chapter 7: Non-performance, Section 2: Right to Performance, in: Vogenauer, Stefan / Kleinheisterkamp, Jan (Eds.), “Commentary on the Unidroit Principles on International Commercial Contracts (PICC)”, Oxford University Press, 2009, Article 7.2.2 para. 50.
- (181) Decision No. HA ZA 95-640, dated 05.03.1997, available at: <http://www.unilex.info/case.cfm?pid=1&do=case&id=332&step=Abstract> and in: Unif. L. Rev. 1999-4, p. 1012.

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Under CISG, this period of examination begins to run upon delivery of the goods⁽¹⁹²⁾, which generally corresponds to the time risk of loss passes to the buyer⁽¹⁹³⁾. PCLD clearly provides that the 15-day period of notice, and thus the examination period, starts with the (actual) physical possession of the goods by the buyer. The Official Illustration No. 7 to Article 1.7 UP, mentioned above, also implies the delivery of the goods as the starting point for examination by the buyer.

Under CISG, special consideration shall however be given to all latent defects which could be discovered only later⁽¹⁹⁴⁾ (e.g. after putting the goods into operation⁽¹⁹⁵⁾). Article 102 PCLD clearly deals with manifest defects⁽¹⁹⁶⁾, i.e. defects that could be discovered by a normal examination of the goods⁽¹⁹⁷⁾; with regard to latent defects, by contrast, the general rules of contract shall apply according to which the buyer should give notice to the seller of latent defects when they become apparent⁽¹⁹⁸⁾.

If the goods are delivered before the date for delivery⁽¹⁹⁹⁾ (e.g. before the exact time or the period during which delivery is due), the buyer shall not examine the goods before the date of delivery is due⁽²⁰⁰⁾. If the goods are

(192) Decision of Landgericht Berlin – Germany, No. 103 O 213/02, dated 21.03.2003; Decision of Tribunale di Vigevano – Italy, No. 405, dated 12.07.2000; Decision of Arrondissementsrechtbank Zwolle – Netherlands, No. HA ZA 95-640, dated 05.03.1997; Decision of Landgericht Hannover – Germany, No. 22 O 107/9301.12.1993.

(193) Article 69 CISG.

(194) Decision of Oberster Gerichtshof – Austria, No. 7 Ob 301/01t, dated 14.01.2002; Decision of Bundesgerichtshof – Germany, No. VIII ZR 287/98, dated 03.11.1999; Decision of Tribunale di Vigevano – Spain, No. 405, dated 12.07.2000; CISG-AC Opinion no 2, *supra* note 162, Article 38 para. 3 (at p. 378): “*The period for examining for latent defects commences when signs of the lack of conformity become evident*”. Kruisinga, *supra* note 32, 27.

(195) Veneziano, *supra* note 15, 50; Abd-Elaziz, *supra* note 15, 177-178.

(196) Article 102/1 PCLD clearly reads: “*If, after taking over the goods, it becomes clear to the buyer that the goods sold are ... defective*”.

(197) Article 470/2 of the Palestinian Civil Law Draft.

(198) *Id.*

(199) See Articles 37 & 52 CISG.

(200) Schlechtriem / Schwenger, Schwenger, *supra* note 14, 569; Abd-Elaziz, *supra* note 15, 180.

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examine the goods as from the time of delivery, and he should have examined the goods before being redirected or redispached.

Pursuant to their sphere of application, neither the Unidroit Principles nor PCLD explicitly address the situations governed by Article 38/2-3 CISG. Thus, the general rule of examination according to both instruments would apply.

As for the method of examination, the parties may – according to all three instruments - agree to whatever method they want⁽²⁰⁷⁾. Examination may also happen according to usages or practices established between the parties⁽²⁰⁸⁾. In all events, examination shall not be very expensive⁽²⁰⁹⁾. That is to say, it shall be reasonable in the given circumstances of each case⁽²¹⁰⁾, including the size and structure of the buyer's firm⁽²¹¹⁾, the characteristic features and quantity of the

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- (207) Article 6 CISG; Articles 1.1, 1.3, 1.5 UP; Article 2 PCLD.
- (208) Decision of Oberster Gerichtshof – Austria, No. 1 Ob 223/99x, dated 27.08.1999, (the Court found that, in the absence of a specific agreement between the parties, the required manner of examination can be inferred from trade usages and practices); Decision of Landgericht Trier – Germany, No. 7 HO 78/95, dated 12.10.1995, (the court found that the buyer is not bound to have the wine examined with respect to possible water additions, since this kind of examination is not included among the ones generally undertaken in the wine branch); Honsell, Magnus, *supra* note 15, 413; Schlechtriem / Schwenger, Schwenger, *supra* note 14, 565; Bianca, C. M., Examination of goods, in: Bianca, C. M. / Bonell, M. J. (Eds.), “*Commentary on the International Sales Law*”, Giuffrè: Milan (1987) {Commentaries by J. Barrera Graf, H.T. Bennett, C.M. Bianca, M.J. Bonell, G. Eörsi, M. Evans, E.A. Farnsworth, W. Khoo, V. Knapp, O. Lando, D. Maskow, B. Nicholas, J. Rajski, K. Sono, D. Tallon, M. Will}, 297-298; Shafik, *supra* note 41, p. 152; Musa, *supra* note 83, 184; Abd-Elaziz, *supra* note 15, 192.
- (209) Decision of Oberster Gerichtshof – Austria, No. 1 Ob 223/99x, dated 27.08.1999; Decision of Landgericht Paderborn – Germany, No. 7 O 147/94, dated 25.06.1995; Honsell, Magnus, *supra* note 15, 414.
- (210) Schlechtriem / Schwenger, Schwenger, *supra* note 14, 565-566; Honsell, Magnus, *supra* note 15, 414; Bianca / Bonell, Bianca, *supra* note 208, 298; Az-Zuqrod, *supra* note 103, p. 180; Abd-Elaziz, *supra* note 15, 192.
- (211) Decision of Oberlandesgericht Karlsruhe – Germany, No. 1 U 280/96, dated 25.06.1997; Decision of Bundesgerichtshof – Germany, No. VIII ZR 259/97, dated 25.11.1998; Musa, *supra* note 83, 184.

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conformity, but rather to the satisfaction of the formal duty to give notice thereof⁽²²¹⁾.

Each claimed lack of conformity must be specifically described⁽²²²⁾; the notice of one defect does not mean that other defects need not to be reported to the seller. In one case, it is therefore decided that the fact that the goods were delivered without the required certificate was in itself a case of non conformity which the buyer should have notified to the seller without having to wait for a formal declaration by the competent authority that the goods cannot be further processed and resold⁽²²³⁾.

As far as the textual requirement of the notice is concerned, it should first of all be noted that notice in general terms that the goods are lacking conformity will not suffice⁽²²⁴⁾. Notice shall rather name the nature and extent of the lack of conformity⁽²²⁵⁾ so that each possible misleading can be avoided⁽²²⁶⁾: It should therefore define whether and to which extent the alleged lack of conformity is missing or excessive part of the goods, lack in quality or delivery of a different kind of goods.

Similarly, the notice should identify the particular goods claimed to be non-conforming⁽²²⁷⁾ and convey the results of the buyer's examination⁽²²⁸⁾. However,

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- (221) Günther, Klaus, "Requirement for a textual precise notice of lack of conformity under Art. 39(1) CISG as interpreted by the German courts", *International Sales* No. 24, 1999, pp. 4-7, 4; Baasch Andersen, *supra* note 220, 77; Schwenger, *supra* note 169, 366.
- (222) Schlechtriem / Schwenger, Schwenger, *supra* note 14, 577; Baasch Andersen, *supra* note 220, 82.
- (223) Decision of Oberlandesgericht München, No. U346/02, dated 13.11.2002. See also: Decision of Landgericht Oldenburg – Germany, No. 12 O 674/93, dated 09.11.1994.
- (224) Honsell, Magnus, *supra* note 15, 426; Honnold, *supra* note 19, 279; Günther, *supra* note 221, 5; Abd-Elaziz, *supra* note 15, 208.
- (225) Decision of Landgericht Bochum – Germany, dated 24.01.1996. Shafik, *supra* note 41, 154.
- (226) Günther, *supra* note 221, 5.
- (227) Decision of Bundesgerichtshof – Germany, No. VIII ZR 287/98, dated 03.11.1999; Decision of Oberlandesgericht Koblenz – Germany, No. 2 U 31/96, dated 31.01.1997. Kruisinga, *supra* note 32, 90.
- (228) Decision of Landgericht Erfurt – Germany, No. 3 HKO 43/98, dated 29.07.1998; Schlechtriem / Schwenger, Schwenger, *supra* note 14, 577; Abd-Elaziz, *supra* note 15, 211.

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Whether the notice is sufficiently specified or not will depend upon the circumstances of the given case⁽²³⁶⁾, including the category of goods involved, the alleged lack of conformity and the relative commercial positions of the buyer and the seller⁽²³⁷⁾ - for instance, the notice given by an expert shall be much more detailed than the one given by a non-expert⁽²³⁸⁾, and “a buyer of machinery and technical equipment needs to give a notice only of the symptoms, not an explanation of the underlying causes”⁽²³⁹⁾. The Official Illustration No. 7 of Article 1.7 of the Unidroit Principles clearly differentiates in this regard between two situations: whether the high-technology equipment sold to a buyer operates in a country where such equipment is commonly used or not. In the first case, the buyer must precisely specify the nature of the defect he discovers; otherwise, he will lose the right to rely on this defect. In the latter

(236) Günther, *supra* note 221, 5.

(237) According to the case law, the following descriptions of a lack of conformity are sufficiently specific under Article 39/1 CISG: notice that floor tiles suffered from serious premature wear and discoloration (Decision of Hoge Raad – Netherlands, No. 16.442, dated 20.02.1998); and notice to a seller of a machine for processing moist hygienic tissues that the buyer’s customer had found steel splinters in semi-finished products produced by the machine, resulting in patches of rust on the finished products (Decision of Bundesgerichtshof – Germany, No. VIII ZR 287/98, dated 03.11.1999).

By contrast, the following descriptions of a lack of conformity are not sufficiently specific under Article 39/1 CISG: notice that cotton cloth was of bad quality (Decision of Rechtbank van Koophandel, Kortrijk – Belgium, No. 8336, dated 16.12.1996); notice that failed to specify that cheese was infested with maggots (Decision of Arrondissementsrechtbank Roermond – Netherlands, No. 900336, dated 19.12.1991); notice referring to the final customers’ complaints without specifying the defects (Decision of Landgericht Saarbrücken – Germany, No. 8 O 49/02, dated 02.07.2002); and notice that frozen bacon was rancid, but which did not specify whether all or only a part of the goods were spoiled (Decision of Landgericht München, No. 10 HKO 2375/94, dated 20.03.1995).

(238) Günther, *supra* note 221, 5; Kruisinga, *supra* note 32, 90; Decision of Landgericht Erfurt - Germany, No. 3 HKO 43/98, dated 29.07.1998, “*Von einem Fachmann kann unter Umständen eine genauere Bezeichnung der Vertragswidrigkeit der Ware erwartet werden als von einem Fachkundigen*”.

(239) CISG-AC Opinion no 2, *supra* note 162, Comment no 5.14. See also: Decision of Tribunale di Busto Arsizio – Italy, dated 13.12.2001; Decision of Oberlandesgericht Koblenz - Germany, No. 2 U 923/06, dated 14.12.2006. Schlechtriem, *supra* note 19, 120.

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Under PCLD, by contrast, the period of notice of non-conformity (i.e. 15 days) begins with the moment in which the buyer physically takes delivery of the goods sold. This implies that he has to act very quickly.

The flexibility of the period within which the buyer must give notice of the non-conformity is widely recognized by CISG⁽²⁴⁶⁾. such period may be defined in light of the circumstances of each case⁽²⁴⁷⁾, including whether the lack of conformity is easily discovered⁽²⁴⁸⁾, nature of the goods⁽²⁴⁹⁾ (whether

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- (246) Decision of Tribunale Civile di Cuneo, Sez. I – Italy, No. 45/96, dated 31.01.1996; Decision of Audiencia Provincial de Castellon – Spain, No. 310/2000, dated 16.06.2000, (the court observed that, with respect to the fixed term of 30 days allowed by Spanish domestic law for notification of defects, Article 39 CISG contained a “laxer wording” to establish the obligation of the buyer to send notice of lack of conformity of the delivered goods); Schlechtriem / Schwenger, Schwenger, *supra* note 14, 579; Shafik, *supra* note 41, p. 155; Abd-Elaziz, *supra* note 15, 197.
- (247) Decision of Cour de Cassation – France, No. 994 D, dated 26.05.1999; Decision of Oberster Gerichtshof - Austria, No. 7 Ob 301/01t, dated 14.01.2002; Decision of Tribunale di Vigevano – Italy, No. 405, dated 12.07.2000; Decision of Tribunale Civile di Cuneo, Sez. I – Italy, No. 45/96, dated 31.01.1996; Decision of Oberlandesgericht Düsseldorf – Germany, No. 6 U 32/93, dated 10.02.1994; Decision of Oberlandesgericht Düsseldorf – Germany, No. 17 U 136/92, dated 12.03.1993; Decision of Tribunale di Rimini – Italy, No. 3095, dated 26.11.2002; Ferrari, *supra* note 20, 489; Canellas, Anselmo Martinez, “The Scope of Article 44 CISG”, 25 *J.L. & Com.* 261 (2005-2006), pp. 261-272, 264; CISG-AC Opinion no 2, *supra* note 162, Comment no 3.3; Abd-Elaziz, *supra* note 15, 198.
- (248) Decision of Rechtbank van Koophandel, Kortrijk – Belgium, No. 8336, dated 16.12.1996, (a period of approximately two months after delivery was not reasonable, taking into account that the defects were easily noticeable and that in the trade concerned the goods are usually processed or sold quickly). See also: Decision of Bundesgerichtshof – Germany, No. VIII ZR 321/03, dated 30.06.2004; Decision of Oberlandesgericht Düsseldorf – Germany, No. U 136/92, dated 12.03.1993; Decision of Oberlandesgericht Köln – Germany, No. 18 U 121/96, dated 21.08.1997; Decision of Landgericht Berlin – Germany, No. 99 O 29/93, dated 16.09.1992; Schwenger, *supra* note 169, 364.
- (249) Decision of Tribunale di Vigevano – Italy, No. 405, dated 12.07.2000; Decision of Pretura di Torino – Italy, dated 30.01.1997; Decision of Tribunale di Rimini – Italy, No. 3095, dated 26.11.2002; Decision of U.S. District Court, S.D., Michigan, No. 1:01-CV-691, dated 17.12.2001; Schlechtriem, *supra* note 19, 117; Schwenger, *supra* note 169, 364. Kruisinga, *supra* note 32, 79.

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examination of the goods⁽²⁵⁹⁾ to two months after such examination⁽²⁶⁰⁾ or delivery of the goods sold⁽²⁶¹⁾. By contrast, notice of non-conformity has been found to be untimely in periods ranging from seven days⁽²⁶²⁾ to seven months from the moment in which the non-conformity was discovered or ought to have been discovered⁽²⁶³⁾, and from four days⁽²⁶⁴⁾ to three years after delivery of the goods⁽²⁶⁵⁾. Having said that, and for the sake of minimizing discrepancies in international practice⁽²⁶⁶⁾, I argue that one month could be a reasonable period for giving the notice of non-conformity by the buyer to the seller⁽²⁶⁷⁾, which can

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- (259) Decision of Tribunale di Forlì – Italy, No. 2280/2007, dated 11.12.2008, (purchase of several different models of shoes).
 - (260) Decision of Cour d'Appel de Colmar – France, dated 24.10.2000, (sale of a determined amount of glue).
 - (261) Decision of U.S. District Court, Southern District of New York, No. 00 Civ. 5189 (RCC), dated 23.08.2006, (contract to build a production system for the box used in packaging cassettes).
 - (262) Decision of Hof van Beroep, Gent – Belgium, No. 1999A/2160, dated 23.05.2001, (sale of textiles).
 - (263) Decision of Pretura di Torino – Italy, dated 30.01.1997, (sale of cotton fabric).
 - (264) Decision of Landesgericht Flensburg – Germany, No. 4 O 369/99, dated 19.01.2001, (sale of living sheep delivered for slaughter).
 - (265) Decision of Oberlandesgericht Düsseldorf – Germany, No. 17 U 82/92, dated 08.01.1993, (sale of tinned cucumbers).
 - (266) Baasch Andersen, *supra* note 220, 97; Schwenger, *supra* note 169, 365.
 - (267) Notably, such a period is already suggested by some high level courts in different countries, e.g.: Decision of Obergericht Kanton Luzern – Switzerland, No. 11 95 123/357, dated 08.01.1997, “*Deutsche Autoren wollen tendenziell einen Zeitraum von acht Tagen zugrunde legen. Auch die ersten deutschen Entscheidungen zum CISG weisen in diese Richtung. Wo aufgrund langjähriger Tradition im nationalen Recht auch eine Rüge erst mehrere Monate nach Entdeckung des Mangels als noch innerhalb angemessener Frist erhoben gilt - wie namentlich im US-amerikanischen Recht - dürfte diese Sichtweise auf die Auslegung des CISG durchschlagen. Will man allzugroßen Auslegungsdivergenzen vorbeugen, erscheint eine Annäherung der Standpunkte unabdingbar. Als grobem Mittelwert sollte man deshalb von ca. wenigstens einem Monat ausgehen*”; Decision of Bundesgerichtshof – Germany, No. VIII ZR 287/98, dated 03.11.1999, “*die regelmäßige einmonatige Rügefrist nach Art. 39 Abs. 1 CISG*”; Decision of Bundesgerichtshof – Germany, No. VIII ZR 159/94, dated 08.03.1995, “*Selbst wenn man insoweit - nach Auffassung des erkennenden Senats sehr großzügig - wegen der unterschiedlichen nationalen Rechtstraditionen von einem ‚grobem Mittelwert‘ von etwa einem Monat ausgehen wollte ..., war die Rügefrist vor dem 3. März 1992*

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this one month period can be taken as a starting point. One shall not forget that the seller will normally suffer no ill consequences from failing to receive the notice from the buyer quickly⁽²⁷⁰⁾, and the buyer will suffer essential consequences, namely loss of all remedies, if he is considered not to notify the seller timely. Thus, the buyer has an overall rough average period of two months for examination and notice⁽²⁷¹⁾, which may however be adjusted according to the circumstances of the individual case. In all events, the buyer should not lose his remedies merely because he did not examine the goods on time unless such failure also results in a late notice⁽²⁷²⁾. What matters here is clearly the time of notice: whether it is given “*within a reasonable time after he ... ought to have discovered*” the lack of conformity of the goods or not⁽²⁷³⁾. In

reasonable, insofar as no specific circumstances suggest otherwise); Baasch Andersen, *supra* note 220, 160-161.

- (269) Girsberger (*supra* note 256, 247) goes in the same direction and suggests “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”.
- (270) Reitz, *supra* note 216, 443-451, who rejected all arguments for the cut-off period for notice, i.e. the possible loss by the seller of evidence, the seller’s ability to avoid some costs of his breach by offering cure, and the seller’s ability to claim against his supplier or carrier before time of prescription lapses. In addition, it is worth mentioning here that the amended section 2-607/3-a UCC adopts an obvious buyer-friendly rule, whereby buyer’s recovery is precluded only to the extent that the seller can establish that it was prejudiced by the failure to receive timely notice.
- (271) CISG-AC Opinion no 2, *supra* note 162, Article 39 para. 2 (at p. 379): “*Unless the lack of conformity was evident without examination of the goods, the total amount of time available to give notice after delivery of the goods consists of two separate periods, the period for examination of the goods under article 38 and the period for giving notice under article 39. The Convention requires these two periods to be distinguished and kept separate, even when the facts of the case would permit them to be combined into a single period for giving notice*”. Schlechtriem, *supra* note 19, 119; Schlechtriem / Schwenger, Schwenger, *supra* note 14, 579.
- (272) CISG-AC Opinion no 2, *supra* note 162, Article 38 para. 1 (at p. 378): “*Although a buyer must examine the goods, or cause them to be examined, within as short a period as is practicable in the circumstances, there is no independent sanction for failure to do so. However, if the buyer fails to do so and there is a lack of conformity of the goods that an examination would have revealed, the notice period in article 39 commences from the time the buyer “ought to have discovered it”*”.
- (273) Flechtner, *supra* note 162, 19.

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Unless the parties agree on a specific form of the notice⁽²⁸⁰⁾, the buyer is free under CISG to give any kind of notice of non-conformity and by any means: It can be in writing⁽²⁸¹⁾ (e.g. through a service of process⁽²⁸²⁾, or by means of fax, telefax or telegram⁽²⁸³⁾) or orally⁽²⁸⁴⁾ (e.g. via telephone⁽²⁸⁵⁾). Since the oral notice may raise crucial problems of evidence⁽²⁸⁶⁾, it is recommended that the oral notice be confirmed in writing⁽²⁸⁷⁾. In all events, however, the notice must be given to the seller or the person authorized by him⁽²⁸⁸⁾. Whereas such notice

according to Article 481 of the Palestinian Civil Law Draft - give notice to the seller within one month from the date of the appearance of the defect.

- (280) Decision of Landgericht Baden-Baden, Germany, No. 4 O 113/90, dated 14.08.1991; Decision of Oberlandesgericht Karlsruhe – Germany, No. 1 U 280/96, dated 25.06.1997.
- (281) Decision of Cour d'Appel de Versailles, 12ème chambre, 1ère section – France, No. 56, dated 29.01.1998.
- (282) Decision of U.S. District Court, Eastern District of Kentucky, No. 07-161-JBT, dated 18.03.2008; Decision of Cour d'Appel de Versailles, 12ème chambre, 1ère section – France, No. 56, dated 29.01.1998, (Article 39 CISG does not require that the notice be given by means of a service of process).
- (283) Schlechtriem / Schwenger, Schwenger, *supra* note 14, 578; Veneziano, *supra* note 15, 51.
- (284) Decision of Oberlandesgericht Karlsruhe – Germany, No. 12 U 179/02, dated 06.03.2003, available at: <http://cisgw3.law.pace.edu/cases/030306g1.html>; Schlechtriem / Schwenger, Schwenger, *supra* note 14, 578; Abd-Elaziz, *supra* note 15, 206; Musa, *supra* note 83, 185.
- (285) Decision of Schweizerisches Bundesgericht – Switzerland, No. 4C.144/2004, dated 07.07.2004; Decision of Landgericht Frankfurt am Main – Germany, No. 3/3 O 37/92, dated 09.12.1992; Honsell, Magnus, *supra* note 15, 432; Schlechtriem / Schwenger, Schwenger, *supra* note 14, 578.
- (286) Decision of Landesgericht Flensburg – Germany, No. 4 O 369/99, dated 19.01.2001; Decision of Landgericht Stuttgart – Germany, No. 3 KfH 0 97/89, dated 31.08.1989; Decision of Landgericht Marburg – Germany, No. 2 O 246/95, dated 12.12.1995; Decision of Amtsgericht Kehl – Germany, 3 C 925/93, dated 06.10.1995; Decision of Landgericht Frankfurt am Main – Germany, No. 3/13 O 3/94, dated 13.07.1994; Honsell, Magnus, *supra* note 15, 432; Veneziano, *supra* note 15, 51.
- (287) Honsell, Magnus, *supra* note 15, 432; Schlechtriem / Schwenger, Schwenger, *supra* note 14, 578; Veneziano, *supra* note 15, 51.
- (288) Decision of Hoge Raad – Netherlands, No. C04/007HR, dated 04.02.2005, (the seller could not have been unaware of the notice sent on time to the Belgian company, since there was clear evidence that the seller and the Belgian company shared responsibility for the sale (being the former responsible for the execution and the latter for the

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Article 102/3 PCLD provides that the buyer should start his action in court within a time limit of six months from the delivery⁽²⁹²⁾. Taking into consideration the sphere of application of the Unidroit Principles, they do not include such a rule. Thus, where the Unidroit Principles apply to the contract of sale at issue, such matter will be decided according to the otherwise applicable domestic or uniform law⁽²⁹³⁾.

Under both CISG and PCLD, the parties may agree to shorten or lengthen this period of limitation⁽²⁹⁴⁾. It may also be derogated by usage⁽²⁹⁵⁾. Under the Unidroit Principles, the parties may agree upon such a period⁽²⁹⁶⁾. A usage may also define this period according to Article 1.9 thereof.

If the buyer gives the seller the proper notice, he can claim any applicable remedy. Since CISG (or the Unidroit Principles) does not regulate the prescription of such remedies, recourse will be made to the applicable domestic

(292) See also Article 478 of the Palestinian Civil Law Draft, according to which an action on a warranty is prescribed in six months from the time of delivery of the thing sold unless the seller agrees to be bound by the warranty for a longer period. The seller, however, cannot avail himself of the prescription of six months if it is proved that he has fraudulently concealed the defect from the buyer.

Notably, this domestic cut-off period of notice will never conflict with Article 39 CISG, since the former— according to Article 89/2 PCLD – addresses domestic sale of goods contracts only, to which CISG actually does not apply.

(293) Article 1.6/2 UP.

(294) With regard to CISG, see: Article 6. Article 39/2 CISG also ends with saying “*unless this time-limit is inconsistent with a contractual period of guarantee*”. See also: Decision of Cour d'Appel de Paris, No. 03/21335, dated 25.05.2005; Arbitral Award of ICC Court of Arbitration – Paris, No. 7660/JK, dated 23.08.1994; Schlechtriem, *supra* note 19, 123; Veneziano, *supra* note 15, 52-53.

Concerning PCLD, see: Articles 2 & 102/4, the later clearly provides: “*The parties may amend the periods stipulated in this Article or exempt the buyer from complying with them*”. See also Article 479 of the Palestinian Civil Law Draft, according to which the contracting parties may, by specific agreement, increase, restrict or abolish the warranty. Nevertheless, any clause abolishing or restricting the warranty is null and void if the seller intentionally and fraudulently conceals the defects of the thing sold.

(295) Article 2/3 PCLD; Article 9 CISG; Veneziano, *supra* note 15, 53.

(296) Articles 1.1 & 1.5 thereof.

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each of them are satisfied⁽³⁰³⁾. Thus, the buyer may claim specific performance⁽³⁰⁴⁾, including delivery of substitute goods and remedy of the lack of conformity by repair⁽³⁰⁵⁾ (Articles 45/1-a & 46)⁽³⁰⁶⁾, fixing an additional period of time of reasonable length for performance by the seller of his obligation (Articles 45/1-a & 47)⁽³⁰⁷⁾, declaring the contract avoided (Articles

the protection of the rules stipulated in Article 35/2 CISG; the buyer will lose all his remedies. Likewise, Article 468/2 of the Palestinian Civil Law Draft provides that the seller is not answerable for the defects of which the buyer was aware at the time of the sale or which he could have discovered himself had he examined the thing sold with the care of a reasonable person (see also Articles 341 and 343 Mejella). Notably, while Article 35/3 CISG expressly refers only to the objective criteria stipulated in Article 35/2 CISG, it seems that Article 468/2 of the Palestinian Civil Law Draft refer to all cases of seller's liability, including when, at the time of delivery, the thing sold does not possess the qualities the existence of which he guaranteed to the buyer. This means that, in Palestine, the buyer's knowledge at the time of conclusion of the absence of an agreed-upon specification of the goods would preclude the seller's liability, but under CISG could not.

(302) Decision of Landgericht Paderborn – Germany, No. 7 O 147/94, dated 25.06.1996.

(303) Poikela, *supra* note 15, 18.

(304) According to Article 46/1 CISG, the buyer requiring performance may not resort to a remedy which is inconsistent with this requirement, e.g. price reduction or avoidance of the contract.

(305) Repair of the lack of conformity may always be required by the buyer unless it is unreasonable to do so; in case the lack of conformity is in the form of delivery of a different kind of goods or of wrong quality, the buyer may require performance, i.e. substitute goods, only if the lack of conformity represents a fundamental breach; in case the seller delivers insufficient quantity of the goods, the buyer may claim delivery of the missing quantity (Articles 51/1 & 46/1 CISG).

(306) Notably, the right to require performance under CISG is a discretionary one: Under Article 28 CISG, “*a court is not bound to enter a judgement for specific performance unless the court would do so under its own law in respect of similar contracts of sale*”.

(307) Article 47 CISG explicitly allows the buyer to fix an additional period of time for performance of any obligation the seller has not performed, including the seller's obligation to deliver goods conforming to the contract. Unfortunately however, Article 49/1-b CISG, by addressing avoidance in cases of additional period of time with regard of the delivery obligation only, limits the allowance of such additional period of time as an effective remedy.

In any event, if the buyer fixes an additional period of time for performance, he may not resort to other remedies during that period, although he retains the right to claim damages for delay in performance that occurs during the period. This prohibition is intended to

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whether exclusively or in conjunction with any other remedies (Article 45/2). Further, the buyer may claim interest on damages for non-conformity of the goods⁽³¹²⁾. In addition, Articles 51 and 52 CISG include special rules for certain cases of non-conformity (shortfall quantity, discrepancy in quality of only one part of the goods and excess quantity)⁽³¹³⁾.

acted in conformity with the obligations set out in Articles 38 and 39 CISG had the right to reduce the price in accordance with Article 50 CISG. However, the court found that the buyer could not arbitrarily reduce the price and the reduction should have been by one third rather than by half, in the same proportion as the value of the goods actually delivered had at the time of the delivery bears to the value that conforming goods would have had at that time. The seller was therefore entitled to the difference between what he received (one half of the price) and what he should have received (two thirds of the price), (Decision of Landgericht Aachen – Germany, No. 41 O 198/89, dated 03.04.1990).

- (311) The case law has awarded damages to the buyer who had made reasonable expenditures for different purposes, such as: inspection of non-conforming goods (Award of Arbitration Institute of the Stockholm Chamber of Commerce, No. 107/1997, dated 00.00.1998); shipping and customs costs incurred when returning the goods (Decision of U.S. Bankruptcy Court for the District of Oregon, No. 02-66975-fra11, dated 29.03.2004); hiring a third party to process goods (Decision of Oberlandesgericht Köln – Germany, No. 27 U 58/95, dated 18.01.1997), reimbursing sub-buyers on account of non-conforming goods (Decision of Oberlandesgericht Köln, No. 22 U 4/96, dated 21.05.1996); handling and storing non-conforming goods (Award of Arbitration Institute of the Stockholm Chamber of Commerce, No. 107/1997, dated 00.00.1998); and delivering and taking back the non-conforming goods to and from a sub-buyer (Decision of U.S. Court of Appeals, 2nd Circuit, No. 95-7182, 95-7186, dated 06.12.1995).
- (312) Article 78 CISG only provides for the right of the aggrieved party to interest in general; it does stipulate the rate of interest. Nevertheless, the case law clearly recognizes the right of interest on damages for non-performance (see, for instance: Decision of Kantonsgericht des Kantons Zug - Switzerland, No. A 3 1997 61, dated 21.10.1999; Decision of Handelsgericht Zürich- Switzerland, No. HG 95 0347, dated 05.02.1997; Decision of Tribunal de Grande Instance de Strasbourg - France, dated 22.12.2006) on a rate to be determined – according to the prevailing view - by the applicable domestic law (see, for instance: Decision of Obergericht des Kantons Appenzell Ausserrhoden-Switzerland, No. O1Z 08 1, dated 18.08.2008; Decision of Oberlandesgericht Köln – Germany, No. 16 U 17/05, dated 03.04.2006; Decision of Rechtbank van Koophandel, Hasselt – Belgium, No. A.R: 04/79, dated 25.02.2004).
- (313) According to Article 51 CISG, “(1) *If the seller delivers only a part of the goods or if only a part of the goods delivered is in conformity with the contract, articles 46 to 50 apply in respect of the part which is missing or which does not conform. (2) The buyer*

Under the Unidroit Principles, the buyer may withhold performance until the seller tenders its performance (Article 7.1.3)⁽³¹⁴⁾, regardless of whether the seller's defective performance is fundamental or not^{(315), (316)}; by notice to the seller, allowing an additional period of time for performance (Article 7.1.5)⁽³¹⁷⁾-lapsing of which without proper performance by the seller will allow the buyer to terminate the contract unless such defective performance relates to minor parts only⁽³¹⁸⁾; claim specific performance (Articles 7.2.2 – 7.2.5)⁽³¹⁹⁾, including repair or replacement of the defective performance⁽³²⁰⁾ “within a reasonable

may declare the contract avoided in its entirety only if the failure to make delivery completely or in conformity with the contract amounts to a fundamental breach of the contract”. Article 52 CISG says: “(1) If the seller delivers the goods before the date fixed, the buyer may take delivery or refuse to take delivery. (2) If the seller delivers a quantity of goods greater than that provided for in the contract, the buyer may take delivery or refuse to take delivery of the excess quantity. If the buyer takes delivery of all or part of the excess quantity, he must pay for it at the contract rate”.

- (314) Reading Article 7.1.3 UP (which refers to performance in general) and Article 7.1.1 (which defines non-performance) together, it follows that the suspension of obligations by the buyer is also permitted in cases of defective performance, Vogenauer / Kleinheisterkamp, Schelhaas, Harriet, Chapter 7: Non-performance, Section 2: Right to Performance, in: Vogenauer, Stefan / Kleinheisterkamp, Jan (Eds.), “Commentary on the Unidroit Principles on International Commercial Contracts (PICC)”, Oxford University Press, 2009, Article 7.1.3 para. 8.
- (315) *Ibid*, Article 7.1.3 para. 13.
- (316) However, if the non-performance (e.g. non-conformity of the goods) is only of minor importance, the buyer's right to withhold may be precluded by the principle of good faith. With regard to the partial performance, the Official Commentary on Article 7.1.3 UP illustrates further by saying: “*The text does not explicitly address the question which arises where one party performs in part but does not perform completely. In such a case the party entitled to receive performance may be entitled to withhold performance but only where in normal circumstances this is consonant with good faith (Art. 1.7)*”.
- (317) Contrary to CISG, Article 7.1.5 of the Unidroit Principles does not limit the innocent party to cases of non-delivery only before he can avoid the contract.
- (318) Article 7.1.5/3-4 UP; Vogenauer / Kleinheisterkamp, Schelhaas, *supra* note 314, Article 7.1.5 para. 25.
- (319) Contrary to CISG, specific performance under the Unidroit Principles is not a discretionary remedy; it is rather recognized as a rule so that the court must award it unless one of the stipulated exceptions in Article 7.2.2 thereof is met.
- (320) Vogenauer / Kleinheisterkamp, Schelhaas, *supra* note 180, Article 7.2.2 para. 9; Vogenauer / Kleinheisterkamp, Schelhaas, *supra* note 314, Article 7.1.4 para. 13; Article

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time, without significant inconvenience and free of charge⁽³²¹⁾; terminate the contract (Article 7.3.1)⁽³²²⁾; or claim damages either exclusively or in conjunction with any other remedies (Articles 7.4.1 – 7.4.8)⁽³²³⁾ and interest on damages for non-performance (Article 7.4.10)⁽³²⁴⁾. In addition, Article 6.1.3 UP provides that the obliged (e.g. the buyer) is entitled to the right to “*reject an offer to perform in part at the time performance is due whether or not such offer is coupled with an assurance as to the balance of the performance unless the obligee has no legitimate interest in so doing*”, which also applies by way of analogy to defective performance⁽³²⁵⁾ and excessive performance⁽³²⁶⁾.

7.1.4 UP, Official Comment, No. 6, which goes further to say: “*Repairs constitute cure only when they leave no evidence of the prior nonperformance and do not threaten the value or the quality of the product as a whole*”.

(321) Vogenauer / Kleinheisterkamp, Schelhaas, *supra* note 180, Article 7.2.3 para. 3. See also: Vogenauer / Kleinheisterkamp, Schelhaas, *supra* note 314, Article 7.1.4 para. 13.

(322) Termination may not however be granted unless the lack of conformity amounts to a fundamental breach. In the case that involved an agreement between two Spanish parties for the sale of an apartment plus a parking space, the Audiencia Provincial de Cádiz (Sección 2ª) in Spain, in its decision No. 25/2009, dated 19.01.2009, rejected the request for termination of the contract because the assignment of the first parking space (that does not meet the contractually agreed specifications) did not amount to a fundamental breach; instead the court ordered the assignment of a new parking space that meets the contractually agreed specifications, see: <http://www.unilex.info/case.cfm?pid=2&do=case&id=1469&step=Abstract>

(323) In its arbitral award No. T-9/07, dated 23.01.2008, the Foreign Trade Court of Arbitration attached to the Serbian Chamber of Commerce ruled that the seller’s failure to deliver the certificate of origin of the goods as requested by the contract (i.e. crystal sugar of Serbian origin) clearly amounted to a non-(conforming) performance of the contract according to Articles 35/1, 36/1 and 45/1-b CISG, and hence the buyer has the right to damages according to, inter alia, Articles 7.4.1 and 7.4.4 of the UNIDROIT Principles, see: <http://www.unilex.info/case.cfm?pid=2&do=case&id=1442&step=Abstract>

(324) Contrary to CISG, Article 7.4.9/2 of the Unidroit Principles explicitly defines the rate of interest, that is to say “*the average bank short-term lending rate to prime borrowers prevailing for the currency of payment at the place for payment, or where no such rate exists at that place, then the same rate in the State of the currency of payment. In the absence of such a rate at either place the rate of interest shall be the appropriate rate fixed by the law of the State of the currency of payment*”.

(325) Atamer, Yesim, Chapter 6: Performance, Section 1, Performance in General, in: Vogenauer, Stefan / Kleinheisterkamp, Jan, “*Commentary on the Unidroit Principles on*

Obviously, CISG explicitly provides for the price reduction whereas this remedy is not even mentioned by the Unidroit Principles. This could be explained by reference to the scope of application of each instrument: Since the Unidroit Principles do not only govern international sale of goods, but also all other international commercial contracts. They possibly find damages as a sufficient remedy readily available. But since CISG is a *lex specialis*, it has to include such remedy, which is crucial for the buyer in certain cases (e.g. when the buyer has difficulty in proving its loss, or when the seller is exempted from paying damages under Article 79 CISG⁽³²⁷⁾).

As far as the right of the buyer to withhold performance is concerned, it is also obvious that, whereas the Unidroit Principles explicitly provide for it, CISG includes no explicit provision in this regard. According to the prevailing view, however, such a right is recognized as a general principle underlying CISG pursuant to Article 7/2⁽³²⁸⁾: The buyer may retain his own performance for a reasonable time (Article 49/2-b CISG) or the additional period of time fixed by him (Article 47 CISG) when demanding a cure according to Article 46 CISG⁽³²⁹⁾. It is also decided that, in accordance with the principle of simultaneous exchange of performances underlying Articles 71, 58, 86 CISG, the buyer requesting substitute delivery or repairs under Article 46 CISG would be allowed to withhold payment until the seller had performed in conformity with the contract⁽³³⁰⁾. It is worth mentioning that the parties, under both instruments, may choose certain remedy or remedies within their contract⁽³³¹⁾.

Under PCLD, the buyer may under certain conditions claim rescission of the contract or, otherwise, reduction of the price. In either case, he may also claim

International Commercial Contracts (PICC)", Oxford University Press, 2009, Article 6.1.3 para. 23.

(326) Vogenauer / Kleinheisterkamp, Atamer, *supra* note 325, Article 6.1.3 para. 24.

(327) Piliounis, *supra* note 307, 33-34.

(328) Schlechtriem, P., "Subsequent Performance and Delivery Deadlines – Avoidance of CISG Sales Contracts Due to Non-Conformity of the Goods", 18 *Pace Int'l L Rev.* 2006, pp. 83-98, 92.

(329) Schlectriem, *supra* note 328, 93.

(330) Decision of Oberster Gerichtshof – Austria, No. 4 Ob 179/05k, dated 08.11.2005.

(331) Piliounis, *supra* note 307, 8.

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damages (Article 102/1)⁽³³²⁾. Contrary to CISG and the Unidroit Principles, rescission may not be declared by the buyer through a notice sent to the seller unless the contract includes an express resolution clause (*lex commissoria*)⁽³³³⁾. The buyer must rather claim rescission before the court, which may only grant it when the defect, the lack of quantity or the lack of conformity makes the goods sold unsalable or unusable for the declared purpose⁽³³⁴⁾ unless the parties' agreement or usages indicate otherwise⁽³³⁵⁾. It also goes without saying that the buyer may – under the general rules of contract⁽³³⁶⁾ – claim specific performance⁽³³⁷⁾, including replacement of the thing sold by buying a similar thing at the seller's expense with the permission of the court, or even without such permission in cases of emergency⁽³³⁸⁾. Neither the Commercial Law Draft nor the Civil Law Draft in Palestine provides for the so-called *Nachfrist*, i.e.

(332) This rule is in accord with Article 473 of the Palestinian Civil Law Draft. However, Article 337 Mejella only gives the buyer the right to choose either to rescind the contract and return the thing sold to the seller or to continue with the contract and accept the defective thing sold with the named-price; the buyer may not therefore retain the thing sold and claim compensation. Yet, if the defect happened in the possession of the buyer and he learns afterwards that there was another defect which existed beforehand while the thing sold was in the possession of the seller, the buyer may not rescind the contract and return the thing sold to the seller; he can only retain the thing sold and reduce the price. For instance, where the thing sold is cloth and the buyer discovers a defect only after the cloth has been cut, the buyer may only reduce the price, Article 345 Mejella.

(333) Article 170/2 of the Palestinian Civil Law Draft says: "*The parties may agree that in case of non-performance of the obligations flowing from the contract, the contract will be deemed to have been rescinded ipso facto without a court order. Such an agreement does not release the parties from the obligation of serving a formal summons unless the parties expressly agree that such a summons will be dispensed with*".

(334) Under Article 170/2 of the Palestinian Civil Law Draft, the court may also reject an application for rescission when the part of the contract which the debtor has failed to perform is of little importance in comparison with the obligation in its entirety.

(335) Shawarbi, *supra* note 24, 484.

(336) Article 225 of the Palestinian Civil Law Draft, according to which the debtor shall be compelled, upon being summoned to do so, specifically to perform his obligation, if such performance is possible. When, however, specific performance is too onerous for the debtor, he may limit performance to payment of a sum of money as indemnity, provided that this method of performance does not seriously prejudice the creditor.

(337) Shawarbi, *supra* note 24, 485.

(338) Al-Manshawi, *supra* note 25, 89.

allowance by the creditor of an additional period of time for performance by the debtor. Thus, taking into consideration the enlargement of remedies the buyer has in case of non-conformity under CISG (and the Unidroit Principles), CISG is more suitable than PCLD to solve problems arising out of non-conformity.

It should be noted in this regard that the rules of CISG on non-conformity supersede or exhaust conflicting national rules on validity (e.g. mistake in the quality or characteristics of the goods⁽³³⁹⁾). Though CISG does not address the question of contract validity (Article 4/a), it regulates the same facts involving such mistake comprehensively and exclusively⁽³⁴⁰⁾. The buyer cannot therefore get around the rules of Articles 38 & 39⁽³⁴¹⁾: If he does not examine the goods according to Article 38 CISG, nor give a notice to the buyer of non-conformity within the period prescribed in Article 39 CISG, he may not avoid the contract on the ground of mistake in the characteristic or quality of the goods according to national law even if the statutory limitation period of such a right has not lapsed yet. However, this does not apply to other questions of validity, like deceit⁽³⁴²⁾, or even other kinds of mistakes that do not conflict with conformity of goods⁽³⁴³⁾. The latter questions of validity shall obviously be settled according to the applicable domestic law (Article 4/a CISG).

With regard to the Unidroit Principles, Article 3.2.4 thereof expressly provides: “A party is not entitled to avoid the contract on the ground of mistake

(339) Honnold, *supra* note 19, 262-263; Honsell, Magnus, *supra* note 15, 381; Schlechtriem / Schwenger, Schwenger, *supra* note 14, 545; Henschel, *Ibid*, p. 172.

(340) Decision of Oberster Gerichtshof – Austria, No. 2 Ob 100/00 w, dated 13.04.2000: “Über die im Übereinkommen geregelten Ansprüche hinausgehende, im nationalen Recht vorgesehene Ansprüche könnten nicht geltend gemacht werden. Dies gelte trotz Art 4 lit a UN-K auch für die Irrtumsanfechtung”; Decision of Landgericht Aachen – Germany, No. 43 O 136/92, dated 14.05.1993: “Ob aufgrund der fehlenden Marktgängigkeit der Geräte die Anwendung der Regeln über den Wegfall der Geschäftsgrundlage oder die Anfechtung wegen Irrtums über eine verkehrswesentliche Eigenschaft der gekauften Sache nach nationalem Recht in Betracht kommt, kann offengelassen werden, da diese Rechtsinstitute durch die Regelung des CISG verdrängt werden”; Schlechtriem / Schwenger, Schwenger, *supra* note 14, 545; Henschel, *supra* note 14, 5.

(341) Henschel, *Ibid*, p. 172.

(342) Schlechtriem / Schwenger, Schwenger, *supra* note 14, 545.

(343) Henschel, *Ibid*, p. 172; Honnold, *supra* note 19, 262-263; Veneziano, *supra* note 15, 62.

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if the circumstances on which that party relies afford, or could have afforded, a remedy for non-performance". The Official comment on this Article goes further to illustrate: "A, a farmer, who finds a rusty cup on the land sells it to B, an art dealer, for 10,000 Euros. The high price is based upon the assumption of both parties that the cup is made of silver (other silver objects had previously been found on the land). It subsequently turns out that the object in question is an ordinary iron cup worth only 1,000 Euros. B refuses to accept the cup and to pay for it on the ground that it lacks the assumed quality. B also avoids the contract on the ground of mistake as to the quality of the cup. B is entitled only to the remedies for non-performance". Like CISG, the Unidroit Principles obviously maintain the principle of the exhaustion of rights⁽³⁴⁴⁾. This clearly coincides with the principle underlying the Unidroit Principles of preservation of the contract as far as possible, i.e. allowance of termination of the contract only as a last resort⁽³⁴⁵⁾. Giving the aggrieved party (e.g. the buyer) the right to choose between the remedies of mistake and the remedies of non-performance would necessarily have circumvented the fundamental breach doctrine since avoidance for mistake is not subject to this requirement⁽³⁴⁶⁾. In order to apply the rule of Article 3.2.4 UP, it is not necessary that the aggrieved party (e.g. the buyer) actually succeeds in invoking one of the remedies of non-performance (e.g. non-conformity) stipulated in the UP Chapter Seven⁽³⁴⁷⁾. It rather suffices that this party could have been afforded a remedy for non-performance.

As far as the PCLD is concerned, one writer argues that the buyer can choose to avoid the contract due to mistake or to relying on the non-conformity of the goods⁽³⁴⁸⁾,⁽³⁴⁹⁾ reasoning that, while mistake is a sociological situation, non

(344) Vogenauer / Kleinheisterkamp, Huber, *supra* note 116, Article 3.7 para. 3; Henshel, *Ibid*, p. 173.

(345) Vogenauer / Kleinheisterkamp, Huber, *supra* note 116, Article 3.7 para. 4.

(346) *Ibid*.

(347) *Ibid*, Article 3.7 para. 7.

(348) Shawarbi, *supra* note 24, 485. See also: Decision of the court of cassation, Egypt, No. 2567 for judicial year 61, dated 30.6.1999, available in the Arab Legal Information Network at: <http://www.eastlaws.com/Ahkam/AhkamSearch.aspx>.

(349) Notably, this opinion is also adopted by the European Principles of Contract Law: Article 4:119 thereof explicitly says: "A party who is entitled to a remedy under this Chapter (on

conformity is a material one⁽³⁵⁰⁾. It follows that the buyer’s claim of avoidance collapses after three years⁽³⁵¹⁾ whereas his rights based on non-conformity forfeit after six months⁽³⁵²⁾. However, this opinion overlooks the fact that both non-conformity and mistake in the characteristic or quality of the goods involve the same operating facts. Thus, at least with relation to CISG, the Palestinian validity rules on mistake shall be superseded by non-conformity rule because the latter rules are considered *lex specialis*.

D-2: Seller’s right to cure the non-conformity:

CISG deals with the seller’s right to cure the lack of conformity in three Articles: Article 48 tackles the seller’s right to cure after the date for delivery; Article 37 deals with the same right before the date for delivery; Article 34, as a *lex specialis*, regulates the seller’s right to cure any lack of conformity in the documents before the date for delivery. In case the seller has to deliver within a period of time, he may cure any lack of non-conformity till the end of this period of time⁽³⁵³⁾.

The seller’s right to cure is limited by the “*unreasonable inconvenience*” or “*unreasonable expense*” (Articles 34 & 37) / “*uncertainty of reimbursement by the seller of expenses advanced by the buyer*” (Article 48). In all events, remedy by the seller of the lack of conformity shall be at his own expense⁽³⁵⁴⁾. In

validity) in circumstances which afford that party a remedy for non-performance may pursue either remedy”.

(350) Shawarbi, *supra* note 24, 485.

(351) Article 145 of the Palestinian Civil Law Draft.

(352) Article 102/3 PCLD.

(353) Schlechtriem / Schwenger, Schwenger, *supra* note 14, 556-557; Honnold, *supra* note 19, 270; Keller, Bertram, “Early delivery and the seller’s right to cure lack of conformity: Comparison between the provisions of Articles 37 CISG and the counterpart provisions of the Unidroit Principles”, in: Felemegas, John (Ed.), *An International Approach to the Interpretation of the United Nations Convention on Contracts for the International Sale of Goods (1980) as Uniform Sales Law*, Cambridge University Press, 2007, pp. 174-179, 175.

(354) Honsell, Magnus, *supra* note 15, 405; Bianca, C. M., Cure before date for delivery, in: Bianca, C. M. / Bonell, M. J. (Eds.), “*Commentary on the International Sales Law*”, Giuffrè: Milan (1987) {Commentaries by J. Barrera Graf , H.T. Bennett , C.M. Bianca , M.J. Bonell , G. Eörsi , M. Evans , E.A. Farnsworth , W. Khoo , V. Knapp , O. Lando ,

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addition, the buyer is retained the right to damages⁽³⁵⁵⁾. CISG does not however explicitly limit the seller's right to cure by giving notice thereof to the buyer. Yet, any attempt by the seller to cure without notice will likely cause unreasonable inconvenience⁽³⁵⁶⁾. According to Article 27 CISG, notice shall be effective upon dispatch.

CISG does not also explicitly define the consequences of the buyer's groundless refusal of seller's cure. Nevertheless, taking into account the provision of Article 80 CISG⁽³⁵⁷⁾, the buyer shall not rely on the lack of conformity in such cases⁽³⁵⁸⁾.

With regard to cure after the date of delivery, there is a discrepancy in opinion about which right has priority over the other: the seller's right to cure or the buyer's right to avoid the contract when the non-conformity represents a fundamental breach. Taking the explicit formulation of Article 48/1 CISG into account however, the buyer's right to avoid the contract is an independent one unaffected by the seller's intention to cure⁽³⁵⁹⁾. This conclusion is also supported

D. Maskow , B. Nicholas , J. Rajski , K. Sono , D. Tallon , M. Will}, 293; Keller, *supra* note 354, 178.

(355) Decision of Oberster Gerichtshof – Austria, No. 7 Ob 301/01t, dated 14.01.2002, (only reliance damages).

(356) Schlechtriem / Schwenger, Schwenger, *supra* note 14, 558.

(357) Schlechtriem / Schwenger, Schwenger, *supra* note 14, 559.

(358) Honsell, Magnus, *supra* note 15, 406; Bianca / Bonell, Bianca, *supra* note 354, 294; Keller, *supra* note 354, 179.

(359) Kee, Christopher, "Cure after date for delivery: Remarks on the manner in which the Unidroit Principles may be used to interpret or supplement Article 48 of the CISG", in: Felemegas, John (Ed.), *An International Approach to the Interpretation of the United Nations Convention on Contracts for the International Sale of Goods (1980) as Uniform Sales Law*, Cambridge University Press, 2007, pp. 189-192, 190, 191; Award of ICC Court of Arbitration – Paris, No. 7531/1994, dated 00.00.1994, (on the ground of the fundamental character of the breach by the seller the buyer was entitled to avoid the contract according to Article 49/1 CISG. The seller was not entitled to remedy by supplying substitute goods in accordance with Article 48/1 CISG, since in the opinion of the sole arbitrator the seller's right to cure after the date for delivery is dependent on the consent of the buyer).

Contra: Schlechtriem, *supra* note 328, 89, who argues that "a realistic offer of the seller to cure "prevents" immediate avoidance, ...(provided) the offer to cure must be performed within the fixed delivery time, or in any case within a reasonable time".

by Article 48/2 CISG⁽³⁶⁰⁾: Had the seller's right to cure taken preference over the buyer's right to avoid the contract, then this buyer's right to avoid would have been automatically suspended during curative period specified in the seller's request.

Contrary to CISG, Article 7.1.4 of the Unidroit Principles recognizes a general right for the "non-performing party" to cure (e.g. seller or buyer⁽³⁶¹⁾ whether before or after the date of performance). This right to cure is obviously supported by the principle of preserving contracts⁽³⁶²⁾, the principle of mitigating damages⁽³⁶³⁾ and the principle of good faith⁽³⁶⁴⁾ - all underlying CISG and the Unidroit Principles.

Article 7.1.4 of the Unidroit Principles is better formulated than the counterpart articles in CISG: It explicitly provides, for instance, for the seller's duty to give notice to the buyer indicating the proposed manner and timing of the cure (which is effective upon receipt, Article 1.9 UP); the right of the aggrieved party (e.g. the buyer) to refuse cure only if he has a legitimate interest⁽³⁶⁵⁾,⁽³⁶⁶⁾; and the preference of the non-performing party's (e.g. the

(360) It says: "If the seller requests the buyer to make known whether he will accept performance and the buyer does not comply with the request within a reasonable time, the seller may perform within the time indicated in his request. The buyer may not, during that period of time, resort to any remedy which is inconsistent with performance by the seller".

(361) Keller, *supra* note 354, 175; Kee, *supra* note 359, 190.

(362) Kee, *supra* note 359, 189.

(363) Keller, *supra* note 354, 175.

(364) Article 7.1.4 UP, Official Comment, No. 1: "This article thus favours the preservation of the contract. It also reflects the policy of minimizing economic waste, as incorporated in Art. 7.4.8 (Mitigation of harm), and the basic principle of good faith stated in Art. 1.7".

(365) Like under CISG, the aggrieved party (e.g. the buyer) may refuse cure if he has to pay costs in advance, Vogenauer / Kleinheisterkamp, Schelhaas, *supra* note 314, Article 7.1.4 para. 18.

(366) Vogenauer / Kleinheisterkamp, Schelhaas, *supra* note 314, Article 7.1.4 para. 27; Article 7.1.4, Official Comment, No. 10, which clearly says: "Once the aggrieved party receives effective notice of cure, it must permit cure and, as provided in Art. 5.1.3, cooperate with the non-performing party. For example, the aggrieved party must permit any inspection that is reasonably necessary for the non-performing party to effect cure. If the aggrieved party refuses to permit cure when required to do so, any notice of termination is

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seller's) right to cure over the aggrieved party's (e.g. the buyer's) right to declare the contract avoided⁽³⁶⁷⁾.

PCLD, like other civil law legal systems, does not recognize the seller's right to tender a second time since the seller gives the goods autonomously outside his disposal power. At best, the court would take any reasonable offer of cure by the seller into account in assessing damages claimed by the buyer. Thus, taking into consideration the possibility of preserving the contract by means of cure through the seller under CISG (and the Unidroit Principles), CISG is more suitable than PCLD in solving problems arising out of non-conformity.

E: Legal Effects of the buyer's failure to respect his duties:

As a rule the buyer will lose all remedies based on the lack of conformity if he does not conduct a proper and timely examination of the goods, and as a result fails to give notice to the seller of such lack of conformity. Nevertheless, if the lack of conformity relates to facts of which the seller knew or could not have been unaware of and which he did not disclose to the buyer, the buyer could rely on the lack of conformity though he did not examine the goods or give notice to the seller of such lack of conformity (Article 40 CISG). Likewise, if the buyer has a reasonable excuse for his failure to give notice to the seller of the non-conformity, he may still claim some remedies under Article 44 CISG. Obviously, the special provisions of Articles 40 & 44 CISG are exceptions to the general rule laid down in Article 39 CISG⁽³⁶⁸⁾. Besides, the case law developed a third exception, namely where the seller waives his right to invoke

ineffective. Moreover, the aggrieved party may not seek remedies for any non-performance that could have been cured".

(367) Article 7.1.4, Official Comment, No. 8, according to which "If the aggrieved party has rightfully terminated the contract pursuant to Arts. 7.3.1(1) and 7.3.2(1), the effects of termination (Art. 7.3.5) are also suspended by an effective notice of cure. If the non-performance is cured, the notice of termination is inoperative. On the other hand, termination takes effect if the time for cure has expired and any fundamental non-performance has not been cured".

(368) Honnold, *supra* note 19, 275, 282; Poikela, *supra* note 15, 18; Decision of Oberlandesgericht Celle, No. 7 U 147/03, dated 10.03.2004, available at: <http://cisgw3.law.pace.edu/cases/040310g1.html>

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delivers a quantity of goods greater than that provided for in the contract according to Article 52/2, and the buyer does not give notice of this lack of conformity, the buyer may not refuse to take delivery of the excess quantity. He must pay for this excess quantity at the contract rate. The same rule applies to the delivery of goods of higher quality than agreed upon if the buyer does not give notice to the seller thereof⁽³⁷⁹⁾.

Notably, in contracts for the delivery of goods in installments, if the buyer does not notify the seller of the lack of conformity of one installment, the buyer shall not rely on the lack of conformity with regard to this installment only. In a decision made in Switzerland in 1992, the court, with respect to the first set of furniture, held that the buyer was not entitled to declare the contract avoided, as it had not examined the goods and given notice of the non-conformity in accordance with Articles 38 and 39 CISG; with respect to the second set of furniture however, the court found that the buyer was entitled to a reduction of the price⁽³⁸⁰⁾.

In Palestine too, the buyer will lose his right to rely on the lack of conformity if he does not give the seller proper notice thereof⁽³⁸¹⁾. Accordingly, the buyer may not, in such a case, demand rescission of the contract or reduction of the price or damages.

As far as the Unidroit Principles are concerned, the buyer will – according to Article 7.2.2 thereof – lose his right to require performance. It however seems that, contrary to CISG and PCLD, the buyer's right to claim damages remains unaffected⁽³⁸²⁾; but his right to terminate the contract will generally be lost on the ground of the limitation to a reasonable time in Article 7.3.2 UP⁽³⁸³⁾.

(379) Honsell, Magnus, *supra* note 15, 433.

(380) Decision of Pretura di Locarno-Campagna, No. 6252, dated 27.04.1992.

(381) Article 102/2 PCLD. See also: Article 470 of the Palestinian Civil Law Draft, (if the buyer fails to give notice of the defect, he will be deemed to have accepted the thing sold with its defect).

(382) Vogenauer / Kleinheisterkamp, Schelhaas, *supra* note 180, Article 7.2.2 para. 58.

(383) Vogenauer / Kleinheisterkamp, Schelhaas, *supra* note 180, Article 7.2.2 para. 58.

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The provision of Article 40 CISG normally applies when the seller delivers different goods⁽³⁸⁸⁾ or greater quantity of the goods than what was provided for in the contract⁽³⁸⁹⁾. Similarly, “the seller who knows, from complaints received from other customers in the context of previous sales of similar goods, that the goods lack conformity cannot rely on the fact that the buyer did not give notice within the time limit of Article 39 CISG”⁽³⁹⁰⁾. Also, the seller could not rely on Articles 38 and 39 CISG, pursuant to Art. 40 CISG, since the addition of water to the wine constituted a defect that the seller could not be unaware of, being necessarily the result of an intentional behavior⁽³⁹¹⁾. It is also held that, pursuant to Art. 40 CISG, the seller had lost his right to rely on Articles 38 and 39 CISG, since he was not only the vendor but also the manufacturer of the metal parts, and therefore could not have been unaware of the defects, all the more so because the non-conformity of part of the goods was due both to an excessive quantity of carbon and a mixture of components during the pouring and casting process of the metal⁽³⁹²⁾.

According to the prevailing view, the lack of conformity should relate to facts of which the seller knew or could not have been unaware at the time in which the goods are put at the buyer’s disposal⁽³⁹³⁾ (e.g. the time of delivery⁽³⁹⁴⁾). The seller will surely lose his right to rely on Articles 38 and 39

(388) Decision of Oberlandesgericht Zweibrücken – Germany, No. 7 U 4/03, dated 02.02.2004, available at: <http://cisgw3.law.pace.edu/cases/040202g1.html>. Honsell, Magnus, *supra* note 15, 438.

(389) Schlechtriem / Schwenger, Schwenger, *supra* note 14, 590; Leisinger, *supra* note 17, 10.

(390) Arbitral Award of ICC Court of Arbitration – Paris, No. 11333, dated 00.00.2002.

(391) Decision of Landgericht Trier, No. 7 HO 78/95, dated 12.10.1995: “Im übrigen kann die Klägerin sich gemäß Art. 40 vorliegend nicht auf die Art. CISG 38 und 39 CISG berufen, weil die Vertragswidrigkeit auf Tatsachen beruht, die sie kannte oder über die sie nicht in Unkenntnis sein konnte und die sie der Käuferin nicht offenbart hat; die Lieferung eines mit Wasser versetzten Weines, der nicht verkehrsfähig ist, stellt nämlich ein arglistiges Verhalten dar”.

(392) Decision of Cour de Cassation, No. 1303 FS-P+B, dated 04.10.2005.

(393) Honsell, Magnus, *supra* note 15, 439.

(394) Decision of Landgericht Landshut – Germany, No. 54 O 644/94, dated 05.04.1995
 Contra: Schlechtriem / Schwenger, Schwenger, *supra* note 14, 591, (the moment in which the notice period ends should be taken into consideration); Abd-Elaziz, *supra* note 15, 221-222.

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the buyer⁽⁴⁰³⁾. To put it in the words of the Provisional Appellate Court of Köln – Germany, “*Selbst der grob fahrlässig unwissende Käufer erscheint schutzwürdiger als der arglistig handelnde Verkäufer*”,⁽⁴⁰⁴⁾ i.e. even a very negligent buyer deserves more protection than a fraudulent seller.

Also, under Article 341 Mejella the seller will not be liable for the defects in the thing sold if the buyer knowing the defects accepts the sale. Contrary to CISG, this provision does not also consider the case in which the seller could not have been unaware of the defect. Thus, Article 468/2 of the Palestinian Civil Law Draft is better formulated than Article 341 Mejella: It clearly makes the seller not answerable for the defects of which the buyer was aware at the time of the sale or which he could have discovered himself had he examined the thing sold with the care of a reasonable person unless the buyer proves that the seller has affirmed to him the absence of these defects or fraudulently concealed them from him⁽⁴⁰⁵⁾. The first sentence coincides with Article 40 CISG, and the second sentence goes further and explicitly addresses the case in which the seller fraudulently conceals the defects in the thing sold. Moreover, in harmony with the rules of CISG, Article 478 of the Palestinian Civil Law Draft prevents the seller from availing himself of the prescription of six months (i.e. the absolute cut-off period) if it is proved that he has fraudulently concealed the defect from the buyer.

The Unidroit Principles, by contrast, do not include any explicit provision in this regard. However, the principle of good faith and fair dealing in international trade (Article 7.1/1) would play here an important role.

E-3: Exception 2: Buyer’s Failure to Give Notice Due to a Reasonable Excuse:

According to Article 44 CISG, the buyer who has “*a reasonable excuse*” for his failure to give the notice of lack of conformity may retain some of the remedies he has legally had if he had satisfied his notice duty, namely reduction

(403) Poikela, *supra* note 15, 52.

(404) Decision of Oberlandesgericht Köln, No. 22 U 4/96, dated 21.05.1996.

(405) See also Article 479 of the Palestinian Civil Law Draft, according to which the parties may agree to increase, restrict or abolish the warranty unless such agreement is null and void since the seller intentionally and fraudulently conceals the defects of the thing sold.

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seller the proper notice of lack of conformity due to a reasonable excuse, but at the same time deprives him from other important remedies, including avoidance of the contract, in order to protect the seller's interest in legal certainty⁽⁴¹⁶⁾.

Thus, it is the buyer who bears the burden of proving the reasonable excuse⁽⁴¹⁷⁾; otherwise, he should not rely at all on the non-conformity of goods for the lack of notice. Normally, there shall be a reasonable excuse when a reasonable person of the same kind as the buyer would not have notified the seller in the same circumstances⁽⁴¹⁸⁾. Related circumstances could include objective (e.g. type of the goods involved, kind and degree of non-conformity, the way of examination and the specificity of the notice⁽⁴¹⁹⁾) and subjective factors⁽⁴²⁰⁾ (e.g. the origin of the buyer and his level of experience⁽⁴²¹⁾). Such a reasonable excuse would therefore be easily accepted in the case of buyer with less experience such as a single trader, an artisan or a free professional. Thus because the buyer is a large company which requires immediate decisions and actions and involves a great degree of commercial experience, he may not have a reasonable excuse⁽⁴²²⁾. Likewise, the fact that the buyer's deficient organization caused delay in installing and putting the machinery into operation did not constitute a reasonable excuse but was well within the buyer's sphere of

(416) Canellas, *supra* note 247, 263. Schlechtriem / Schwenger, Schwenger, *supra* note 14, 621.

(417) Decision of Oberlandesgericht Koblenz – Germany, No. 2 U 580/96, dated 11.09.1998; Decision of Oberlandesgericht Saarbrücken – Germany, No. 1 U 69/92, dated 13.01.1993; Honsell, Magnus, *supra* note 15, 471. Veneziano, *supra* note 15, 54; Abd-Elaziz, *supra* note 15, 219.

(418) Honsell, Magnus, *supra* note 15, 466-467.

(419) Canellas, *supra* note 247, 266-267.

(420) *Ibid*, 265-266.

(421) Decision of Oberlandesgericht München - Germany, No. 7 U 3758/94, dated 08.02.1995: *“Eine wesentliche Rolle spielen dabei das Gewicht des Pflichtverstoßes, die Art der Ware und die Art des Mangels sowie eine etwa mangelnde Erfahrung des Käufers”*.

(422) Decision of Oberlandesgericht München - Germany, No. 7 U 3758/94, dated 08.02.1995: *“Die Vorschrift greift insbesondere Platz bei Käufern, die ein Einzelhandelsgewerbe, ein Handwerk, einen landwirtschaftlichen Betrieb oder einen freien Beruf betreiben, während größere Betriebe wie die Firma PCD, deren Geschäft auf rasche und pünktliche Abwicklung eingerichtet sein muß, sich in der Regel an ihrem Pflichtverstoß werden festhalten lassen müssen”*.

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the developing countries who, like the Ugandan buyer here, might be faced with difficult circumstances to examine the goods at their original port of arrival⁽⁴²⁹⁾.

It should finally be mentioned that, neither the Unidroit Principles, nor PCLD, include a provision similar to the provision of Article 44 CISG. Contrary to CISG, both instruments were not in need to have compromise solutions to meet the interests of different legal systems. Indeed, the general principle of good faith would suffice in this respect⁽⁴³⁰⁾. Even under CISG itself, some writers already argued that the principle of reasonableness underlying the examination and notice periods according to Articles 38 and 39 CISG might take into consideration the possibility of the existence of a reasonable excuse, which would mean that Article 44 CISG is unnecessary⁽⁴³¹⁾.

E-4: Exception 3: Seller’s waiver of his right to invoke that the notice was late:

The seller might waive his right to set up the defense that the notice is not timely⁽⁴³²⁾. This waiver can be explicit or - in certain circumstances – implicit⁽⁴³³⁾. Implicit waiver may be decided according to the criteria of interpretation under Article 8 CISG. Thus, such waiver can be assumed when the seller takes back the goods or recognizes the defect in the goods without any

(429) Flechtner, *supra* note 162, 23-24; Schwenger, *supra* note 169, 360-361.

(430) Article 1.7/1 UP, according to which “each party must act in accordance with good faith and fair dealing in international trade”; Article 148/1 of the Palestinian Civil Law Draft, according to which “a contract must be performed in accordance with its contents and in compliance with the requirements of good faith”.

(431) See, for instance: CISG-AC Opinion no 2, *supra* note 162, Comment no 4.3, according to which “it may be questioned whether article 44 added anything to the notice regime, since both article 38 and article 39 contain language that can fairly be interpreted to reach any result that article 44 was intended to reach. Furthermore, some courts interpreting ULIS had escaped the strict requirements of articles 38 and 39 by interpreting article 40 to hold that a seller who delivered defective goods “could not have been unaware” of the defects, thereby permitting the buyer to rely upon a late or defective notification of a lack of conformity. The same result could be achieved under CISG article 40, which is identical to ULIS article 40 in all essentials”.

(432) Honsell, Magnus, *supra* note 15, 435.

(433) Schlechtriem / Schwenger, Schwenger, *supra* note 14, 586; Günther, *supra* note 221, 4.

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Since the Unidroit Principles address the non-conformity of goods in general terms only, the rules of chapter four thereof on interpretation (i.e. Articles 4.1 - 4.8) could lead to the same result. In Palestine, Articles 159 – 168 of the Palestinian Civil Law Draft (Interpretation of Contract) would also be helpful in this regard. To sum up, whereas the explicit waiver might raise no problem under both instruments, the implicit one could be deduced from their general rules on interpretation.

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PCLD (when enacted) and, thus, to actually apply the above mentioned international uniform law instruments.

In order to bring the Palestinian law in line with these international instruments, PCLD could also be reviewed once more: It can certainly be improved by importing from CISG and the Unidroit Principles some new legal ideas to Palestine. With regard to the non-conformity of goods discussed in this paper, PCLD can include new provisions on certain questions, particularly:

- Since PCLD does not explicitly regulate the buyer's special purpose of use and packaging of the goods, it can benefit from the provision of Article 35/2-b & d.
- Taking into consideration the enlargement of remedies the buyer has in case of non-conformity under CISG (and the Unidroit Principles), CISG is more suitable than PCLD to solve problems arising out of non-conformity. PCLD might therefore include the seller's right to cure (as part of international restatement of contract law): Article 7.1.4 UP does encourage the worldwide acceptance of a general right to cure.

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- {Commentaries by J. Barrera Graf , H.T. Bennett , C.M. Bianca , M.J. Bonell , G. Eörsi , M. Evans , E.A. Farnsworth , W. Khoo , V. Knapp , O. Lando , D. Maskow , B. Nicholas , J. Rajska , K. Sono , D. Tallon , M. Will}.
- 10- **Bianca**, C. M., Liability for lack of conformity, in: Bianca, C. M. / Bonell, M. J. (Eds.), *“Commentary on the International Sales Law”*, Giuffrè: Milan (1987) {Commentaries by J. Barrera Graf , H.T. Bennett , C.M. Bianca , M.J. Bonell , G. Eörsi , M. Evans , E.A. Farnsworth , W. Khoo , V. Knapp , O. Lando , D. Maskow , B. Nicholas , J. Rajska , K. Sono , D. Tallon , M. Will}.
 - 11- **Canellas**, Anselmo Martinez, “The Scope of Article 44 CISG”, 25 *J.L. & Com.* 261 (2005-2006), pp. 261-272.
 - 12- **CISG-AC Opinion no 2**, “Examination of the Goods and Notice of Non-Conformity: Articles 38 and 39”, 7 June 2004. Rapporteur: Professor Eric E. Bergsten, Emeritus, Pace University School of Law, New York, 16 *Pace Int’l L. Rev.* Vol. 16 (2004), pp. 377-408, also available at: <http://www.cisg.law.pace.edu/cisg/CISG-AC-op2.html>.
 - 13- **Ferrari**, Franco, “Divergences in the application of the CISG’s rules on non-conformity of goods”, 68 *RabelsZ* 2004-3, pp. 473-494.
 - 14- **Flechtner**, Harry M., ““Conformity of Goods, Third Party Claims, and Buyer’s Notice of Breach under the United Nations Sales Convention (“CISG”), with Comments on the “Mussels Case,” the “Stolen Automobile Case,” and the “Ugandan Used Shoes Case””, *University of Pittsburg School of Law Working Papers Series*, Paper 64, 2007, pp. 1-24, available at: <http://law.bepress.com/pittlwps/papers/art64>.
 - 15- **Girsberger**, Daniel, “The Time Limits of Article 39 CISG”, 25 *J. L. & Com.* 2005-2006, pp. 241-251.
 - 16- **Günther**, Klaus, “Requirement for a textual precise notice of lack of conformity under Art. 39(1) CISG as interpreted by the German courts”, *International Sales* No. 24, 1999, pp. 4-7.
 - 17- **Henschel**, Rene Franz, “Conformity of Goods in International Sales Governed by CISG Article 35: Caveat Venditor, Caveat Emptor and Contract Law as Background Law and as a Competing Set of Rules”, *Nordic J. Comp. L.* issue 2004 # 1, pp. 1-2.
 - 18- **Honnold**, John O., *“Uniform Law for International Sales Under the 1980 United Nations Convention”*, 3rd ed., Deventer: Kluwer Law International (1999), 335, also available at: <http://www.cisg.law.pace.edu/cisg/biblio/honnold.html>.
 - 19- **Huber**, Peter, Chapter 7: Non-performance, Section 3: Termination, in: Vogenauer, Stefan / Kleinheisterkamp, Jan, *“Commentary on the Unidroit*

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- 27- **Maley**, Kristian, “The limits to the conformity of the goods in the United Nations Convention on Contracts for the International Sale of Goods (CISG)”, *12 Int’l Trade & Bus. L. Rev.* 2009, pp. 82-126.
- 28- **Musa**, Taleb Hasan, “*Qanoun Et-Tejara Ed-Dawliyya*” (International Commercial Law – *in Arabic*), Dar Ethaqafa Lin-Nasher Wa-Tawzee’, Amman, 2005.
- 29- **Piliounis**, Peter A., “The Remedies of Specific Performance, Price Reduction and Additional Time (*Nachfrist*) Under the CISG: Are These Worthwhile Changes or Additions to English Sales Law?” *12 Pace Int’l L Rev.* 2000, pp. 1-46.
- 30- **Poikela**, Teija, “Conformity of Goods in the 1980 United Nations Convention on Contracts for the International Sale of Goods”, *Nordic J. Comp. L.* issue 2003 # 1, pp. 1-68.
- 31- **Reitz**, John C., “A History of Cutoff Rules as a Form of *Caveat Emptor*: Part I - The 1980 U.N. Convention on the International Sale of Goods”, *36 Am. J. Comp. L.* 1988, pp. 437-472.
- 32- **Schlechtriem**, P., “*Internationales UN-Kaufrecht*”, Mohr Siebeck Tübingen, 2007.
- 33- **Schlechtriem**, P., “Subsequent Performance and Delivery Deadlines – Avoidance of CISG Sales Contracts Due to Non-Conformity of the Goods”, *18 Pace Int’l L Rev.* 2006, pp. 83-98.
- 34- **Schwenzer**, Ingeborg, “The Noble Month (Articles 38, 39 CISG) – The Story Behind the Scenery”, *7 Eur. J. L. Reform* 2005, pp. 353-366.
- 35- **Schwenzer**, Ingeborg, *Vertragsmäßigkeit der Ware sowie Rechte oder Ansprüche Dritter*, in: Schlechtriem, P. / Schwenger, I. (Eds.), “*Kommentar zum Einheitlichen UN-Kaufrecht – CISG* -“ [Commentary on Uniform UN-Sales Law - *in German*] [commentaries by Bacher, Ferrari, Fountoulakis, Hager, Hornung, Maultzsch, Müller-Chen, Schlechtriem, Schmidt-Kessel, Schroeter, Schwenger, Widmer], München: Beck, 5th ed., 2008.
- 36- **Shafik**, M., “*Ittifaqiyat al-Umam al-Muttahidah bi-sha'n al-Bay' al-Dawli lil-Bada'i': dirasah fi qanun al-tijarah al-dawli*” [The United Nations Convention on Contracts for the International Sale of Goods: A Study of International Commercial Law - *in Arabic*], Dar El-Nahda Arabia, Cairo, 1988.
- 37- **Shawarbi**, Abd-Elhamid, “*Aliltizamit wal A'qoud Ettijariyya wifqan Liqanoun Attijara raqam 17 lisant 1999*”, (Commercial Contracts and Obligations According to the Code of Commerce No. 17 for the Year 1999 – *in Arabic*), Almaaref – Alexandria, 2001.

عدم مطابقة البضائع في ظل اتفاقية فينا للبيوع الدولية

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ملخص البحث

يتناول هذا البحث عدم مطابقة البضائع في ظل اتفاقية فينا للبيوع الدولية، من حيث: مفهومها، ومعايير تحديدها، والوقت الواجب توافرها فيه، وكذلك الواجبات الملقاة على عاتق المشتري لدى تسلمه البضائع، سواء فيما يتعلق بفحصها أو إخطار البائع بالعيب في مطابقتها. كما ويتناول هذا البحث الآثار القانونية التي تترتب على عدم مطابقة البضائع، سواء فيما يتعلق بالحقوق التي يستطيع أن يتمتع بها المشتري في هذه الحالة، أو حق البائع في إصلاح الخلل في مطابقة البضائع التي تم تسليمها، وكذلك الآثار القانونية التي تترتب على عدم قيام المشتري بالواجبات الملقاة على عاتقه، والمتمثلة بخسارة كل حقوقه الناتجة عن عدم المطابقة والاستثناءات الواردة على ذلك. ويتناول البحث كل هذه المسائل مقارنة بالحلول الواردة في هذا الخصوص في مبادئ النييدرولا لعقود التجارة الدولية وفي مشروع القانون التجاري الفلسطيني والقوانين الأخرى ذات العلاقة النافذة في فلسطين.