

# EXAMINATION OF GOODS BY BUYERS UNDER INTERNATIONAL SALES CONTRACTS

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## ABSTRACT

*Article 38 of the UN Convention on Contracts for the International Sale of Goods (CISG) requires that buyer must examine the goods, or cause them to be examined, within as short a period as is practicable under the circumstances. In this respect, it is crucial for a buyer to examine the goods within as short a period as is practicable in the circumstances of a case. The study aims to identify what are the factors that may be taken into consideration for the purpose of fixing the time limit to examine the goods. The buyer's examination of goods is an obligation based on CISG rules that are intended to protect the interests of both the seller and buyer. The findings show that the factors that are considered by the courts include, the nature of goods, applicable trade usages, mode of delivery, machinery's complexity, type of defect, circumstances of the parties and expertise of the buyer's employees. The conclusion is that a buyer who fails to both examine the goods and give notice of nonconformity to the seller within a reasonable time loses the right to rely on the lack of conformity provision and, consequently, loses remedies recognized under Article 45 of the CISG. The study recommends that a buyer, who wishes to obtain more time to examine the goods and to give notice of nonconformity, specify the intended period in contract by derogating from the provisions of Articles 38 and 39 of CISG.*

**Keywords:** Seller, Buyer, Examination of Goods, Nonconformity, UN CISG.

## INTRODUCTION

The United Nations Convention on Contracts for the International Sale of Goods (CISG) 1980, applicable to contracts governing the sale of goods between parties, whose places of business are situated in different countries, and such countries are contracted to the CISG (Article 1). The CISG imposes certain obligations on both the seller (Articles 30-44) and buyer (Articles 53-60). The Convention obligates the seller to provide goods to the buyer as agreed in the contract in respect of quality, description, quantity and packing (Article 35). The buyer is required to inspect the delivered goods, or get them to be inspected by others, within a brief duration as is feasible in the given situations (Article 38). In case of non-conformity of the purchased goods, the purchaser must inform the seller within an appropriate duration after the purchaser either "discovered" or "ought to have discovered" the lack of conformity; otherwise, the purchaser forgoes the right to invoke the nonconformity rule (Article 39).

Article 38 does not specify definite time period within which examination of the goods must occur. However, it used the phrase "*Within as short a period as is practicable in the circumstances*". Therefore, it is always a disputed matter between buyer and seller that whether the buyer has examined the goods within the duration as is practicable in the circumstance. If the examination of the goods is not completed within a short period, the buyer may not be able to meet the timeline fixed for notifying the seller about any non-conformity. In this context it is

important to find out what are the factors that are considered by the courts for the purpose of fixing the time limit to examine the goods.

### **OBJECTIVE OF THE STUDY**

The objective of this study is to examine the scope of time period available to the buyer for the examination of the goods to uncover any non-conformity and the consequences of the buyer's non-compliance to examine the goods within the duration stipulated in Article 38 of CISG. The study also identifies what are the factors that are considered by the courts in fixing the time limit within which the examination of the goods must occur.

### **METHODOLOGY**

The research is based on analysis of judicial decisions and how the courts interpreted the provisions of Article 38 under different circumstances. The paper analyses the case law in which courts explained the scope of phrase "*Examination of the goods within as short a period as is practicable in the circumstances.*" The factors considered by the courts for the purpose of determining the time limit to examine the goods include, nature of goods, quantity of goods, packaging of goods, complexity of machinery, type of defect, mode of delivery, expertise of the buyer and usages of trade.

### **DISCUSSION**

#### **THE BUYER MUST INSPECT OR CAUSE THEM TO BE INSPECTED (ART. 38 (1))**

The moment the goods reach to their destination, the buyer is required to take several decisions such as, when to inspect the goods, how to examine them, whether the goods delivered according to the contract, and if not, how to inform the seller (Kennedy, 1998). Article 38 necessitates the purchaser to inspect the goods himself, or get them to be inspected by others, in not more than a brief duration as is possible in the given situation. As soon as the inspection time and notice time is completed, the buyer's right to object to the defect ends (Chemical Substance Case, 1998). The time by which the buyer must inspect the goods under Article 38 corresponds to the time, contemplated in Article 39, by which the buyer must have uncovered any nonconformity and from which a "*Reasonable time*" in which to give notice of the nonconformity starts (Schlechtriem & Schwenger, 2005). Inspection of the purchased goods as directed by Article 38 is a basic requirement for informing any lack of conformity stipulated by Article 39 (Brunner & Gottlieb, 2019). Hence, to retain all the rights related to the nonconformity clause, inspection of the goods must happen within a brief spell as is possible in the given circumstances.

The primary responsibility to inspect the goods under Article 38 is on the buyer himself, however in some circumstances he may depend upon, his employees or third persons such as experts (Schlechtriem & Schwenger), or an institution suitable for inspections of such nature (Cotton Twilled Fabric Case, 2006) or on the customer (Huber, 2007). If the buyer leaves the inspection of the goods to the customers, he must take responsibility for the acts of his customers (Stainless Steel Plate Case, 2004). The reading of Article 38 clause (1) suggests that the purchaser is required to inspect the goods, or get the goods to be inspected promptly after receiving the goods, with due consideration to the circumstances (Electrical Actuators Case, 2013).

## **Examination by an Expert**

Under certain circumstances, examination of goods by a skilled person is necessary to ascertain whether there is any nonconformity. In such cases, the buyer may take the help of an expert to inspect the goods. In the case of goods that requires a skilled person's examination (Trekking Shoes Case, 1999) or goods with technically complicated functions (Cooling System Case, 2002) the buyer may call an expert to comply with its obligation to examine the goods.

## **Expenses of Examination**

In normal situations, unless agreement between the parties or practice indicates otherwise, the buyer should bear the expenses of examination (Schlechtriem & Schwenger, 2005). If the buyer already incurred the expenses to examine the goods, however, the contract was avoided; in such cases the buyer can recover these costs as damages (Brunner & Gottlieb, 2019).

## **Burden of Proof**

If a seller alleges that inspection of the goods and notice of nonconformity were not carried out according to the requirements under Articles 38 and 39, the buyer bears the responsibility to establish that both the goods' inspection and information of non-conformity to the seller have been compiled within the scheduled duration as provided under Articles 38 and 39 (Wire and Cable Case, 2004).

## **Time limit to Conduct Examination**

Article 38 requires that the buyer, who wants to protect his rights, obliged to inspect the goods within a particular time limit (Schlechtriem & Schwenger, 2005). Accordingly, the examination must be completed "within a short period as is practicable in the circumstances" (John & Honnold, 2009). Article 38 does not set a specific time span within which such an examination should take place, it is very flexible and depends upon on each case's individual circumstances (DiMatteo et al., 2003). Further, the CISG does not require a "prompt" or "immediate" examination but, instead, an examination "Within a short period as is practicable in the circumstances (Schlechtriem & Schwenger, 2005)." It means the time span to examine the goods may differ from every case, country and circumstances (Canellas, 2005).

## **Beginning of the Examination Time Period**

The phrase "*As soon as practicable*" under Article 38 begins from the time and day when the goods have been delivered by the seller to the buyer (Cisterns and Accessories Case, 2007). The duration under Article 38(1) of the CISG commences "when the goods are at the disposal of the buyer at the stipulated location. The actual examination may take from a couple of hours to several months and can vary between a mere visual check and in-depth inspection by expert personnel (Wire and Cable Case, 2004). If the goods are technical appliances, the examination period commences once the seller has handed over the instruction manuals or has given necessary instructions to the buyer (Brunner & Gottlieb, 2019).

## The Buyer Unable to Inspect the Goods within a Brief Period in Following Cases

Article 38 clause (1) does not expressly specify the time limit for examination; however, this time limit should be as short as possible under the circumstances (Audio CDs Case, 2003). It may depend upon the type of the products and their proposed use, and considerable weight must be given to the nature of goods while deciding the practicable duration for an inspection (Schelechtriem & Butler, 2009). A buyer may not retain his right to complain about nonconformity, if he continues to accept the goods without objecting about the defects he had noticed or ought to have noticed during the examination (Video Recorders Case, 2000).

In *Chicago Prime Packers, Inc., v. Northam Food Trading Co., et al.* (2003) the buyer sent notice 11 days after discovering the non-conformity of the goods (fresh, blast-frozen pork back ribs). The U.S. Court ruled that the purchaser failed to do the inspection of the shipment of products in a limited time span as feasible and also failed to notify the seller within appropriate time. Similarly, in a case of frozen and cooked seafood case (*Kingfisher Seafoods Limited v. Comercial Eloy Rocio Mar SL.*, 2007) an appellate court in Spain ruled that taking a month time to inspect the products is too long when the commodities are perishable in nature. In the case of press engines, the court ruled that notifying the seller after four months of delivery was very late; it should have been discovered earlier (*Engines for Hydraulic Presses and Welding Machines Case*, 1994).

### Method of Examination

The procedure of examination of goods may be ascertained by consensus between the parties (Schlechtriem & Schwenger, 2005). In the absence of any understanding between the parties or commercial usage to such an effect, the buyer must examine the goods in an appropriate manner that considers the goods' nature, quantity, packaging, and all other relevant circumstances (Schlechtriem & Schwenger, 2005). If the goods are in a big quantity, the buyer only has the duty to take a reasonable number of random samples to test their quality (Brunner & Gottlieb, 2019). The inspection, as per Article 35, should relate to each and every feature of conformity of the products and be like that it can disclose all nonconformities a purchaser should discover (*G.W.A. Bernards case* 2007). Importantly, the examination under Article 38 must relate to quantity, quality, ability, and all necessary documents as needed by the contract (*Bevaplast v. Tetra Médical*, 1997).

### Reasonable Examination

Article 38 requires the buyer to conduct a reasonable examination of the goods delivered. What is a "*Reasonable*" examination differs from case to case, although there are certain matters such as the goods' nature, type, quantity, and containing packaging are considered to be relevant while ascertaining the manner of examination that is reasonable (Huber, 2007). It is not necessary that buyer's examination must reveal every probable defect (Thompson, 2000). Applying a relevant CISG general principle, a "*Reasonable*" (reasonably intensive) examination should suffice, as opposed to one that would reveal every conceivable defect (Lookosfsky, 2017). The buyers are exempted from thorough examination of the goods if the product's nature or quantity makes overall examination unreasonable (DiMatteo et al., 2004).

The situations of each case determine the factors such as duration of examination by the buyer and the kind of inspection that should be performed (*Paperboard Containers Case*, 2007).

The obligation also depends upon the usage in particular trades. Article 38 states that the buyer has an indispensable obligation to perform a timely and reasonable examination of the delivered products. The responsibility of the buyer to inspect the goods exists irrespective of the fact that the seller delivered flawless goods earlier (Aluminum Hydroxide Case, 1997).

### **Examination in Respect of Latent Defects**

Where the non-conformity of goods is latent or hidden and is not possible to discover in a *prima facie* examination, the duration for performing an inspection to discover such defects does not start until the deficiencies disclose themselves (UNCITRAL, 2016). This means the duration for inspecting hidden defects commences when symptoms of nonconformity become evident (CISG, Advisory Council Opinion No. 2, 2004). It is also clear that the appropriate time for a buyer to notify seller under Article 39(1) in such a case (where defect is hidden) begins later, since the buyer “ought to have discovered” the non-conformity later (Honnold, 2009). In conformity with Article 39(1), hidden defects must be notified within a reasonable time period after discovery but not later than two years after the handover of goods as stated in Article 39(2) (Brunner & Gottlieb, 2019). This two-year duration referred under Article 39(2) operates only when the Article 39(1) duration is not lesser (Heating Valve Case, 2007).

### **EXAMINATION WHERE CONTRACT INVOLVES CARRIAGE OF GOODS (ARTICLE 38 (2))**

In contracts involving carriage of goods, Article 38 clause (2) allows a buyer to postpone his inspection “*Until after the goods have arrived at their destination,*” and the time to examination for the buyer starts only after he received the goods (UNCITRAL, 2016). The adjournment of examination is qualified only if the agreement contains the shipment of goods (Mazzotta, 2003), and the duration of examination starts after goods reached to their final destination (Audio CDs Case, 2003).

In case the buyer gets the reasonable chance to examine the goods before its redirection, he must not postpone the examination until goods reached to a new stopping place (Marble Building Materials Case, 2000). In *Fruitpartner BV v. Helfer Overseas Fruit Distributor SA* (2009), per the terms of the contract, the seller delivered mangoes to the buyer at the buyer’s cold storage facility; thereafter, the buyer without examining dispatched the goods to Switzerland and detected rotting of mangoes in Switzerland. The court ruled that mangoes are quickly perishable fruits; therefore, the buyer is needed to examine them immediately. In this case, the agreement between the parties did not state for transportation to Switzerland; hence, deferring of examination of mangoes till they reached to Switzerland is not allowed. Accordingly, Article 38(2) of the CISG was not applicable to this case.

### **EXAMINATION OF GOODS REDIRECTED OR RE-DISPATCHED (ARTICLE 38(3))**

The examination of goods which are rerouted or re-forwarded during transit, in the absence of opportunity for inspection, the inspection may be postponed until after the goods have reached to the new stopping point, on the condition that the seller was aware or should have known this fact when the agreement was concluded (Article 38(3)). For the application of Article 38 clause (3), the buyer must establish the knowledge of the seller about redirection or re-forward of the goods in transit and there was no opportunity for buyer to inspect the goods prior

to dispatch (Article 38(3)). If there is an opportunity to the buyer to examine, but he failed to do so; he cannot rely on Article 38 (3).

A buyer who simply stores the goods until possible resale without checking cannot rely on Article 38(3) (Funnel Covers Case, 2007). If there is a special packaging for export purpose, the buyer may rely on Article 38(3) until the goods arrive at the new stopping place (Rolled Metal Sheets Case, 1994). In *H.-S. v. NV C.*, (2004), the buyer complained of nonconformity after a customer complained; the buyer had received shirts six weeks before delivering them to the customer. The court ruled that the buyer got adequate time (six weeks) to inspect the goods and had not established that the packaging had made the inspection impracticable. Article 38(3) does not regulate cases wherein the buyer initially places goods in his own storage and thereon sells them without examining them (Doors Case, 1993).

### **NOTICE OF NONCONFORMITY TO THE SELLER**

The key protection for buyers in CISG contracts is issuing a timely notice (Kennedy, 1998). Article 39 necessitates the buyer to inform the seller about nonconformity within appropriate time. Many times Article 38 and Article 39 are being used together, due to the reason that Article 38 fixes the time span during which a buyer must complete the examination of the goods, and after discovery of any defect or ought to have uncovered the fault, the reasonable time to inform the seller starts under Article 39 clause (1) (Flechtner, 2008).

#### **Seller's Knowledge of Nonconformity of Goods**

According to Article 40 of the CISG, if the seller knew the non-conformity or there was no possibility to be unaware, but he did not communicate to the buyer about lack of conformity, such seller cannot depend on Articles 38 and 39. In such circumstances a buyer is totally exempted from his responsibility to scrutinize the goods under Article 38 and sending timely information of non-conformity to the seller under Article 39 (Water-jet Cutting Machine Case, 2006). However, the buyer is required to establish the factual prerequisites stated under Article 40 of the CISG. In the *Talcum Block Case* (1993), the buyer had informed the seller of nonconformity before shipping; however, the seller shipped the goods in the same condition, and the consignee found the goods defective. The tribunal found that the seller was familiar of the defect; therefore, pursuant to Article 40, Articles 38 and 39 of the CISG are not applicable to the seller.

### **CONSEQUENCES OF FAILURE TO EXAMINE THE GOODS**

Articles 38 and 39 do not set strict legal obligations to examine the goods but rather non-actionable duties to be taken in the buyer's interest (Brunner & Gottlieb, 2019). A buyer who failed to check the goods within a required time span and failed to give notice of defect to the seller within a appropriate time is required to perform all the contractual obligations, accept the goods, even non-conforming and pay the price for the procured goods (Audio CDs Case, 2003). Further, the buyer forgoes the rights such as the right to demand for repair the goods, deliver substituted goods (CISG, Advisory Council Opinion No. 2, 2004), avoid the contract (G.W.A. Bernards case, 2007), reduce the purchase price (Schreiber case, 2007), and claiming of damages under Articles 74 to 77 of the CISG.

## CONCLUSION

The study concludes that the examination of the goods by the buyer under Article 38 of the CISG is to enable both the buyer and seller to respond appropriately if any nonconformity is found in the goods delivered. The buyer, who wants to rely on the nonconformity clause and aims to retain remedies under the CISG, must conduct reasonable inspection of the goods within a brief duration as is practicable in the circumstances, otherwise, forgoes the remedies recognized under Article 45 of CISG. For the purpose of time limit, whether and when it is practicable to examine the goods depend up on the circumstances of the each case.

## RECOMMENDATIONS

According to Article 38 the time period for the goods' examination starts as soon as the seller delivered the goods to the buyer, and the courts also construed this provision very strictly. Therefore, it is recommended that if the buyer wishes to gain more time for inspection of the goods and to send information of nonconformity, he may do so through the contractual provision, with express derogation under Article 6, from Articles 38 and 39 of the CISG. In the case of technical goods and complex machinery, it is advisable for a buyer to take help of experts to determine the conformity of the goods.

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