〔**ARTICLE**〕

CISG Articles 38 & 39 and Japanese Commercial Code Article 526

—— Examination of Goods and Notice of Non-conformity : "One Month No Prejudice" Test ——

Yasutoshi Ishida*

CISG Article 38

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

(2) If the contract involves carriage of the goods, examination may be deferred until after the goods have arrived at their destination.

(3) If the goods are redirected in transit or redispatched by the buyer without a reasonable opportunity for examination by him and at the time of the conclusion of the contract the seller knew or ought to have known of the possibility of such redirection or redispatch, examination may be deferred until after the goods have arrived at the new destination.

CISG Article 39

(1) The buyer loses the right to rely on a lack of conformity of the goods if he does not give notice to the seller specifying the nature of the lack of

* Professor of Law, Himeji-Dokkyo University, Japan (ishida@gm.himeji-du.ac.jp).
Cite as 56 HIMEJI LAW REVIEW 1 (2015). Downloadable PDF file of this article is available from CiNii Articles, http : //ci.nii.ac.jp/vol_issue/nels/AN10008582_en.html

conformity within a reasonable time after he has discovered it or ought to have discovered it.

(2) In any event, the buyer loses the right to rely on a lack of conformity of the goods if he does not give the seller notice thereof at the latest within a period of two years from the date on which the goods were actually handed over to the buyer, unless this time-limit is inconsistent with a contractual period of guarantee.

Introduction

The United Nations Convention on Contracts for the International Sale of Goods (hereinafter CISG) provides in Articles 38 and 39 for the buyer's obligations to examine the goods and to give notice of non-conformity. They are among the most litigated provisions of the CISG.[1] The majority of the decisions have been yielded in those countries whose domestic laws impose comparatively stringent time limits both on examination and on notification, such as Germany, Austria and Switzerland.[2]

One possible scenario for this tendency is: when a dispute over non-conformity of goods arises, the seller's lawyer fixes his eyes on the climate of the forum state courts to impose strict examination and notice requirements on buyers, and advises his client not to compromise with the buyer and to proceed to

---

1) *See* Un Convention on Contracts for the International Sale of Goods (CISG) 595 (Stefan Kröll, Loukas Mistelis, & Pilar Perales Viscasillas eds., 2011) [hereinafter Kröll]; Harry Flechtner, *Buyer's Obligation to Give Notice of Lack of Conformity (Articles 38, 39, 40 and 44)*, in The Draft Uncitral Digest and Beyond: Cases, Analysis and Unresolved Issues in the UN Sales Convention 377 (Franco Ferrari, Harry Flechtner and Ronald A. Brand eds., 2004).

2) Kröll, *supra* note 1, at 561–62. *See also* CISG-AC Opinion no 2, Examination of the Goods and Notice of Non-Conformity: Article 38 and 39, 7 June 2004, Rapporteur: Professor Eric E. Bergsten, Comments, para. 5.1, available at http://www.cisgac.com/default.php?ipkCat=128&ifkCat=195&sid=195.

a lawsuit, whereas the buyer, judging from his literal reading of Article 38 and 39 and/or from his own sense of fair transactions, admits no unreasonable tardiness in his examination and notice. Relatively fuzzy and malleable expressions used in Articles 38 and 39, *i. e.,* "within as short a period as is practicable" and "within a reasonable time" add wing to this conflict of interpretations. As we shall see next, theses phrases are rather designed to allow time for the buyer than to shield the seller from his liability for the defective goods.[3)]

Ⅰ. TWO ELASTIC WORDS

A. "Practicable" in Article 38

The predecessor of the CISG, the Convention relating to a Uniform Law on the International Sale of Goods (hereinafter ULIS) provides in Article 38 that "the buyer shall examine the goods, or cause them to be examined, *promptly*." Article 11 defines the word "promptly" as "within as short a period as *possible* in the circumstances."[4)] Compared to the expression "as short as possible" of the ULIS, the expression "as short as practicable" of the CISG Article 38 seems to be somewhat unfamiliar. However, the word "practicable" is the linchpin of the provision, and to replace it with "possible" would ruin the virtue of the provision. The American Heritage Dictionary of the English Language glosses the difference of two synonyms, "possible" and "practical." According to it, "*possible*" can imply "the barest chance within the limits of circumstances," while "*practical*" accents "the prudence, efficacy, or economy of an act."[5)] The Oxford English Dictionary defines the word "*practicable*" as "capable of being put into practice, carried out in

---

3) *See* Flechtner, *supra* note 1, at 377 ("By necessity, the provisions employ flexible, and thus necessarily vague, standards.")

4) Article 11 of the ULIS provides: "Where under the present Law an act is required to be performed 'promptly,' it shall be performed within as short a period as possible, in the circumstances, from the moment when the act could reasonably be performed."

5) THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 1025 (New College ed. 1981).

action, effected, accomplished, or done ; feasible."[6]

A thing is "possible" however difficult it may be and whatever cost it may entail. On the other hand, a thing is not "practicable" if it would be very difficult or it would run substantial cost out of proportion to its efficacy. For instance, with reasonable public transportations available, walking five miles to school every morning is "possible," but usually not "practicable." Practicability inquires whether a reasonable person in the same shoes would do it, rather than whether there is a theoretical possibility to do it.

Secretariat Commentary on Article 38 explains that the "examination which this article requires the buyer to make is one which is reasonable in the circumstances. ...That which is reasonable in the circumstances will be determined by the individual contract and by usage in the trade and will depend on such factors as the type of goods and the nature of the parties."[7] Practicability provided in Article 38 (1) "to a certain extent, allows the court to take into account the subjective situation of the buyer and other factors, which may justify delay."[8] The concept is most aptly explained by the illustration by Professor Honnold :

> A sales contract called for the delivery to Buyer of 500 gallon cans of chlorine in sealed metal containers ; when the seal is broken the chlorine must be used promptly or it will evaporate. On June 1 a shipment under this contract was delivered to Buyer. Buyer stored the containers in his warehouse without counting the number of cans or testing the contents. On September 1 Buyer notified Seller that he had just opened the containers to use the chlorine in his chemical processes, and found that there were only 400 containers, and that 200 contained chlorine that did not meet the contract specifications.[9]

6） The Oxford English Dictionary (CD Rom ed. 2009).

7） Secretariat Commentary on Article 36 of the 1978 Draft [draft counterpart of CISG article 38] [Examination of the goods], commentary 3, available at http : //www.cisg.law.pace.edu/cisg/text/secomm/secomm-38.html

8） Kröll, *supra* note 1, at 576.

9） John O. Honnold, Uniform Law for International Sales under the 1980 United Nations Convention 356 (Harry M. Flechtner ed., 4th ed. 2009) [hereinafter Honnold &↗

It would be "practicable" for the buyer to count the number of the containers soon after the delivery (probably in an hour). But it would not be "practicable," although "possible," to examine the contents at that time, because it would waste some of the chlorine. Therefore, deferring the examination until the time of the actual use should be allowed. The deferment will not deteriorate the quality of the chlorine.

Another example is provided by the CISG Advisory Council Opinion No. 2. It says in the case of 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."[10)]

When a person buys goods from a seller located in a country in the other end of the globe and arranges it to be sent by a carrier, it is theoretically "possible" for the buyer to go all the way to the seller's premises and examine the goods there before they are handed over to the carrier, but it is unquestionably impracticable and downright futile, with a normal alternative to examine it at the buyer's premises after carriage. Hence, Article 38 (2) provides: "If the contract involves carriage of the goods, examination may be deferred until after the goods have arrived at their destination."[11)]

If a buyer must redispatch to his customer within two days a gross of goods packaged in sealed boxes wrapped by decorative paper, it might be "possible" to examine them within the period, but not "practicable" because it would be arduous to open the paper wrappings and boxes and neatly restore them as they were. Hence, Article 38 (3) provides: "If the goods are redirected in transit or

---

↘ FLECHTNER].

10) CISG-AC Opinion, *supra* note 2, Opinion, Article 38, para. 2, available at http://www.cisgac.com/default.php?ipkCat=128&ifkCat=144&sid=144 >

11) CISG Article 31 (a) provides that the delivery is made at the time when the goods are handed over to the first carrier. *See* Ingeborg Schwenzer (ed.), SCHLECHTRIEM & SCHWENZER, COMMENTARY ON THE UN CONVENTION ON THE INTERNATIONAL SALE OF GOODS (CISG) 618 (3rd ed., 2010) [hereinafter SCHLECHTRIEM & SCHWENZER] ("[A]n examination at the time of delivery, ie upon the handing over of the goods to the first carrier, is usually impossible, but in any event it is not reasonable to require the buyer to do so.")

redispatched by the buyer without a reasonable opportunity for examination by him…, examination may be deferred until after the goods have arrived at the new destination."

Because the transactions which involve carriage are covered by Article 38(2) and (3), at a glance Article 38(1) appears to be designed for the contracts not involving carriage. However, it is almost inconceivable that international transactions governed by the CISG should not involve any carriage of goods. Therefore, paragraph (1) seems to be applied only in a very rare case where the buyer himself (not a carrier) picks up the goods at the seller's premises.[12] In this case, the examination period starts to run upon the goods being actually and directly handed over to the buyer.[13] Probably, in most cases, an on-site examination will be "practicable," at least for those external defects which are visually discernible, and any non-conformity will be immediately worked around. Thus, the ambit of the provision would be very narrow. It would play a small role in a very limited number of cases where the goods are directly handed over to the buyer, who does not examine them then and there, or who does carry out an examination on the spot, but to the goods whose defects will come out of hiding in later use.

In order to set one of the CISG provisions on its proper arena, Article 38 (1) should be interpreted to set up a general rule governing the period in which an examination is to be performed. This has already been recognized at least implicitly,[14] but should be underscored. Paragraphs (2) and (3) of Article 38 are illustrative provisions exemplifying what "is practicable in the circumstances" in typical cases which will most commonly occur in everyday transactions.[15] In both cases, examinations may be deferred because earlier examinations would be

---

12) The concept of the carrier acting as an agent of the buyer is rejected. *See* HONNOLD & FLECHTNER, *supra* note 9, at 357.

13) *See* SCHLECHTRIEM & SCHWENZER, *supra* note 11, at 617.

14) *See* HONNOLD& FLECHTNER, *supra* note 9, at 357 ; KRÖLL, *supra* note 1, at 574.

15) *See* Secretariat Commentary, *supra* note 7, commentary 4 ("Paragraph (1) states the basic rule that the buyer must examine the goods or cause them to be examined 'within as short a period as is practicable in the circumstances'. Paragraphs (2) and (3) state special applications of this rule for two particular situations.")

impracticable. Because the general rule of paragraph (1) is wielding its effect, the buyers are not obliged to examine the goods *soon* after they have arrived at the (new) destination. When the goods are already placed at the (new) destination, paragraphs (2) and (3) are no longer relevant. Therefore, the general rule of paragraph (1) applies and the goods are required to be examined "within as short a period as is practicable in the circumstances."

Article 38 (1) does not specify the starting point of the time for examination. It was drafted on the basis of Article 11 of the ULIS which defines the word "promptly" as "within as short a period as possible, in the circumstances, *from the moment when the act could reasonably be performed*." This definition contains dual periods, *i. e.*, (1) a period "as short…as possible, in the circumstances" and (2) a period starting from "the moment when the act could reasonably be performed." During the 2nd Session of the Working Group, this duality was criticized for not reflecting the urgency intended by the word "promptly" and for its perplexing relations with the articles in which the word "promptly" was used together with their own starting points. Therefore, the Working Group recommended a provision without a specific starting point : "within as short a period as is practicable in the circumstances,"[16] which has become a part of Article 38 (1) of the CISG. If it were to provide, for instance, "as short a period as is practicable from the time the buyer has received the goods," it would become self-contradictory because, as we shall see in the Section A of Chapter III below, examination after receiving the goods is not practicable in many cases.

In my view, Article 38 (1) itself implies the starting point of examination, *i. e.*, the point when the start of examination "is practicable in the circumstances." It is not so much a provision setting out a rule of the duration period of examination as a rule of the beginning time of examination.

---

16) *See* John O Honnold, Documentary History of the Uniform Law for International Sales 65 (1989) [hereinafter Documentary History].

B. "Reasonable" in Article 39 (1) and "One Month No Prejudice" Test

Article 39 (1) urges the buyer to give notice of non-conformity to the seller "within a reasonable time after he has discovered it." A body of court opinions and commentaries in various countries have announced a wide range of views about how long the "reasonable time" should be.[17] In order to prevent excessive differences in interpretation and to converge diverse views, Professor Schwenzer has suggested a period of one month (so called "*noble month*") as a rough average, and noted that recent Germany and Switzerland case laws were approaching this average.[18] Probably her suggestion is intended to confront those court decisions which upheld extremely short notice periods lopsidedly advantageous to the seller[19] (I will come back to this suggestion later). However, in measuring the reasonable time, the "circumstances of each individual case are decisive…so that a schematic fixing of time for the notice of defect is impossible."[20]

In principle, "reasonable time" in Article 39 (1) is inherently incompatible

---

17) *See, e.g.,* KRÖLL, *supra* note 1, at 609–17 ; SCHLECHTRIEM & SCHWENZER, *supra* note 11, at 629–34.

18) *See* SCHLECHTRIEM & SCHWENZER, *supra* note 11, at 632. More recently an Italian district court has noted "that with regard to the reasonable time period indicated in Art. 39 of the CISG, the prevailing case law indicates that a period of one month…can be considered adequate" (Italy, 12 April 2011, District Court Reggio Emilia (*Ceramic case*), English translation available at http : //cisgw3.law.pace.edu/cases/110412i3.html).

19) *See* HONNOLD& FLECHTNER, *supra* note 9, at 372 ("This suggestion counteracts some of the extremely short suggested presumptive notice period….")

20) Bundesgerichtshof [BGH] [Federal Supreme Court], Germany, 11 January 2006 (*Automobile case*), English translation available at http : //cisgw3.law.pace.edu/cases/060111g1.html.

See also KRÖLL, *supra* note 1, at 613–14 ; SCHLECHTRIEM & SCHWENZER, *supra* note 11, at 630 ; Harry M. Flechtner, *Funky Mussels, A Stolen Car, and Decrepit Used Shoes : Non-Conforming Goods and Notice Thereof under the United Nations Sales Convention* ("CISG"), 26 B. U. INT'L L. J. 1, 17 (2008) ("[A]dopting a presumption [period of one month] merely because it seems sensible to the decision-maker, and would make analysis easier, is an invasion of the legislative function, as well as an infringement on the sovereignty of States that ratified the Convention based on a text that did not include the presumption.")

with numerically fixed periods, such as one month or two weeks. A numerical fixation is usually inappropriate even if it is classified under a categorical label of goods such as "perishable," "durable," and "seasonal." It is said that in the case of perishable goods, notice of non-conformity must be given within hours, or within a few days at longest.[21] This is because prompt notice will enable the seller to deal with the goods before they (further) deteriorate and to verify whether or not the non-conformity existed before the transfer of the risk to the buyer.[22] Seasonal goods also call for rapid notice, because late notice will frustrate the seller's attempt to sell the goods during the time of their upturn of demand.[23] The same reasoning is applied to the goods which are neither perishable nor seasonal but which are subject to relatively swift price changes. However, perishable goods do not necessarily command a few-hour notice when, for instance, they are properly frozen in a cold storage warehouse. Seasonal goods do not require a prompt notice if they are meant for the market one year ahead. A numerical fixation per category is subject to perpetual change because a gross category will be con-

---

21) *See, e.g.*, SCHLECHTRIEM & SCHWENZER, *supra* note 11, at 630.

22) In Netherlands *Watermelon case* (Netherlands, 16 January, 2009, *Rechtbank* [District Court] Breda, English translation available at http: //cisgw3.law.pace.edu/cases/090116n1.html), the district court stated that the buyer "should have complained either immediately or at least a few days following delivery of the watermelons. One of the reasons for this is that the goods in question are watermelons, which are subject to decay, and such decay can be expedited if such goods are not being transported under the correct conditions." *See also* Slovak Republic, 24 February, 2009, District Court in Komarno (*Potatoes case* in which the buyer was held to have met the requirements of Article 39), English translation available at http: //cisgw3.law.pace.edu/cases/090224k1.html.

23) In Denmark *Christmas tree case* (Denmark, 4 November, 1998, Randers County Court, English translation available at http: //cisgw3.law.pace.edu/cases/981104d1.html), the Christmas trees were delivered to the buyer's premises on December 2 in 1996, and the buyer gave two notices of non-conformities by December 4, and notified to avoid the contract on December13. The court found that although the non-conformity notices were timely, the notification of avoidance was not given "within a reasonable time" as provided in Article 49(2)(b)(i), stating "In the light of the fact that the case concerns delivery of Christmas trees where the sale has to happen within a short time and where the trees must be considered worthless after December 24…." The Christmas trees in this case were fir trees, which were perishable as well.

tinuously begging subcategories with different sets of parameters which justify modified treatment. "Reasonable" time naturally inquires the "reason" why such and such length of time is appropriate for notice. Such reasons may be numerous, having as many different shades as international transactions in this world.

Courts and commentators have explained the need for timely notice, explicitly or implicitly, against the background of the legislative objectives of Article 39. It has been pointed out that the notice requirement protects the interests of the seller by enabling him to:

1. examine the goods (*e. g.,* by sending his representative) and verify the genuineness of the buyer's claim (including the ascertainment of whether the defects existed before the transfer of risk)
2. cure the non-conformity by repairing them, dispatching missing parts, or delivering substitutes
3. resell the goods rejected by the buyer
4. prepare for disputes with the buyer and/or the seller's own supplier
5. adapt financial planning for possible expense over the buyer's claim
6. finalize the transaction[24)]

Why are the interests of the seller so warm-heartedly protected, who has sent defective goods in the first place? Isn't it strange that the buyer should be expected to help the seller prepare for a lawsuit by the buyer himself? I would like to limit these cordial treatments of the default seller to the first two: (1) examine the goods and verify the buyer's claim, (2) cure the non-conformity. In my view, the seller's interests in timely notice are justified so long as they serve the remedial measures the seller takes for the buyer's claim. In order to cope with the defective goods, the seller has to first examine the goods to confirm the nature and degree of the defects, and then select an appropriate means such as repair and replacement. A notice is deemed to have been given within a reasonable time if it has not hampered these remedial attempts by the seller. This limitation is

---

24) *See* KRÖLL, *supra* note 1, at 596–97; SCHLECHTRIEM & SCHWENZER, *supra* note 11, at 624–25, 635*;* HONNOLD & FLECHTNER, *supra* note 9, at 366–67.

consistent with the penalty that the buyer will suffer when he fails to give a timely notice. The buyer loses the right to rely on the non-conformity of the goods, because he has missed the opportunity of the seller's attempt to remedy it.

I have focused on the first two of the six interests of the seller enumerated above. However, the remaining four interests will consequently be protected when the first two are secured, because if a notice is given in time for the first two measures, especially the first, the seller will normally afford to do the rest, which are usually less urgent. But these are only collateral interests reflective of the two that the courts should take into account in considering the timeliness of notice.

These two purposes underlying Article 39 must be brought to the foreground and be the explicit test of whether a notice has been given in a reasonable time. In other words, the timeliness of notice should be determined by whether the tardiness of notice has frustrated these purposes. Generally speaking, once a law is promulgated, it is applied to its letter regardless of whether the application to a case serves the purposes underlying the law. However, CISG Article 39 (1) contains a term that has an interpretive nexus to the legislative purposes, *i. e.*, "reasonable."[25] A notice, even belated, is deemed reasonable so long as it preserves the two interests of the seller regarding the non-conformity claims.

This approach leads to the "(*substantial*) *prejudice*" test that Professor Flechtner advocates. The test asks "whether the seller suffered substantial prejudice from the buyer's delay in giving notice."[26] In 1973, a Japanese scholar

---

25) KRÖLL, *supra* note 1, at 597 ("[T]he mere fact that a belated or insufficiently specific notification has not led to any negative effects on the seller's position does not, as such, prevent the seller from relying on Art. 39. The absence of such negative effects may, however, become a relevant factor in determining what constitutes a 'reasonable time' in a particular case or when time begins to run.")

26) HONNOLD & FLECHTNER, *supra* note 9, at 372–73. Professor Flechtner expounded this test as follow :

> First, the tribunal should determine whether the buyer has given notice within the time, and with the specificity, that would normally be expected of one in the buyer's position — a standard that is akin to a negligence standard. If the answer is yes, the buyer's notice should be deemed adequate, since acting with reasonable care should be enough to preserve an aggrieved party's rights. If the ↗

suggested a similar standard with regard to Japanese Commercial Code Article 526, which, as we shall see in the Section A of Chapter III below, governs the examination of the goods and notice of non-conformity :

> As a matter of general trade customs, timeliness of the notice to the seller is to be judged in correlation of both the time which the buyer needs to examine the subject-matter goods and *the risk that the seller will suffer prejudice from the tardiness of notice*. This is because it is not reasonable to exclude the buyer's remedies when the seller is not considered to be placed in an especially disadvantageous position, even where the notice is not necessarily deemed to have been given timely in light only of the period needed to examine the goods, for the buyer's obligations of examination and notification are meant to exclude the remedies for the buyer who fails to timely notify the non-conformity of the supplied goods in order to protect the interests of the seller. .... In determining the risk that the seller will suffer prejudice from the tardiness of notice, we should take into account whether the seller himself has produced the goods or purchased from others, whether the repair of the goods or acquisition of substitutes will become difficult as the time passes, whether the price of the goods is susceptible to fluctuation, whether the value of the goods will largely diminish as the time passes, whether the proof of conformity of the goods at the time of delivery will become difficult as the time passes, and so

---

↘ answer is no,...I would permit the buyer to show that the tardiness or vagueness of the notice did not interfere with the seller's right to cure, to collect and preserve evidence. or to seek redress from its own supplier — *i. e.*, that the notice did not prejudice the seller with respect to the purposes served by the Article 39 notice requirement. (Flechtner, *supra* note 1, at 387).

Later in the commentary he edited, he lowered the hurdle for the buyer, so that the buyer has only to prove the absence of 'substantial prejudice' to the seller. *See* HONNOLD & FLECHTNER, *supra* note 9, at 372–73. For the seller, the hurdle was heightened for his rebuttal. Probably, this heightened scrutiny is intended to prevent the seller from being exempted from his liability by enumerating trifling mischiefs.

on.[27]

I entirely agree with these two professors in introducing the element of prejudice to the seller into the analysis of the timeliness of notice. The legitimacy of considering the prejudice can be buttressed from another direction. Article 33 (a) of the CISG provides for the seller's obligation to deliver the goods at the date fixed by or determinable from the contract. Article 33 (c) provides for the seller's obligation to deliver the goods "*within a reasonable time* after the conclusion of the contract," when no date or period is fixed or determinable. If the seller has delivered the goods belatedly in breach of one of these provisions, the buyer is not automatically entitled to remedies. Article 74 provides, "Damages for breach of contract by one party consist of a sum equal to the loss … suffered by the other party as a consequence of the breach," and the buyer must prove that harm has been done by the late delivery and claim damages calculated on the basis of loss incurred. In a German case where the Italian seller sought the payment of the price for clothes, the German buyer asserted the seller's breach of Article 33 (a) as a defense. The German district court held that the buyer was not entitled to remedies because "a one-day delay did not cause any harm."[28] In an ICC Arbitration case, the seller in breach of Article 33 (c) failed to deliver within a reasonable time replacement parts of the machines that the buyer had purchased from the seller. The Arbitrator Roland Loewe held that the seller was liable to pay damages equal to the loss including the loss of profit because the seller ought to have foreseen damages as a possible consequence of seller's breach of contract.[29]

It is a general principle of law universally acknowledged and a general principle of the CISG under Articles 7 (2) and 74 that one must prove damage or

---

27) 神崎克郎『商行為法 I』274 頁（1973 年）[Katsuro Kanzaki, I Law of Commercial Transactions 274 (1973) (emphasis added) (written in Japanese)].

28) Germany, 27 March, 1996, District Court Oldenburg (*Clothes case*), English translation available at http : //cisgw3.law.pace.edu/cases/960327g1.html.

29) ICC Arbitration Award, 1/HV/JK of 23, January, 1997, English translation available at http : //cisgw3.law.pace.edu/cases/978611i1.html.

loss in order to obtain monetary compensation for the breach of obligation by others. Article 39 (1) would be anomaly if it gave the seller monetary benefit in the form of relief from his compensatory liability, without any proof of prejudice.

Usually courts search for an appropriate length for the notice period. They may feel it hard to make a general standard applicable to the class of goods at hand and to other factors affecting the reasonable time. Even if they do, they may be skeptical about the worldwide currency of their standard. Therefore, courts may be predisposed to simply decide whether or not the actual notice period of the case at hand was within a reasonable time. In this inquiry, courts tend to ask whether the buyer "*could have acted more promptly*" as we shall see in the Used Shoe Case and TV Cabinet Case below. This is fatal for the buyer, with his every procrastination disallowed. The "could have acted more promptly" approach looks attractive to the courts, because it relieves them from the burdens both of standardizing a proper length of period for the similar circumstances, and of scrutinizing the substantive claims of defects and damages.[30]

Fusing the merits of the suggestions by Professor Schwenzer and Professor Flechtner, I suggest "o*ne month no prejudice*" test. In this test, the buyer will be presumed to have given notice within a reasonable time so long as he does so within a month after he has discovered or ought to have discovered the nonconformity. The seller on the other hand is allowed to rebut the presumption by proving that he has suffered substantial prejudice from the late (although within a month) notice. Normally, this should add nothing to the seller's burden in the court proceedings, for the seller is usually expected to argue that the buyer's notice was not given within a reasonable time because.... The seller should be

---

30) Such an anti-buyer bias is partly explained by the possibility that the court might have an impression that the buyer's claim of defects was doubtful. *See, e. g.,* Netherlands *Watermelon case*, *supra* note 22 ("[Buyer] never complained about the quality of the watermelons, either orally or in writing, until the moment that [Buyer] was summoned to pay"). *See also*, Hungary, December, 2008, Judicial Board of Szeged [Appellate Court] (*Wine case*), English translation available at http: //cisgw3.law.pace.edu/cases/081205h1.html (the buyer claimed that the alcohol level of the wine was below minimum after he failed to pay the price.)

discouraged from brusquely arguing that the buyer's notice was too late without expounding the reasons.

This test is intended to prevent courts from confiscating the buyer's remedies by adopting the "could have acted more promptly" approach and imposing too short a notice period. It also shifts the burden of proof of the prejudice from the buyer to the seller. Once the buyer has proved that he has given notice within a month, the seller must prove that he has suffered substantial prejudice due to the alleged tardiness of the notice. It would be difficult for the buyer to prove the absence of prejudice to the seller, with most of the necessary information on the seller's side. In the case of truly spoilable "perishable" goods, the seller's counter-proof will be relatively easily admitted.

Even if the buyer has failed to notice within a month, he is still permitted to prove that the seller did not suffer any substantial prejudice. Thus, the gist of the test is the shift of burden of proof before and after the elapse of one month.

This test will provide courts with a handy threshold tool which they can easily hold on to. This initial handiness will tip the balance toward the advantage of the buyer away from the lopsided advantage of the seller. Reviewing whether the seller suffered substantial prejudice is in no way easy, but in performing the task, courts are expected to inquire whether the seller's two interests above have been harmed. In judging the substantiality of prejudice, courts should weigh the seriousness of the prejudice, against the seriousness and reasonableness of stripping the buyer of all his remedies. In this process, case-specific reviews of individual circumstances are expected and the case law will be accumulated toward the uniformity of the application of Article 39 as required by Article 7 (1). Someday the time will come when the court can dispense with the threshold one month.

Ⅱ. The Used Shoe Case

In this Chapter, I would like to dwell on the case of used shoes decided by a

German district court in 2005.[31] The case is a treasury of the ways "how not to apply Article 38"[32] and 39. A critical anatomy of this case will paradoxically give us a vision as to how we should apply these Articles.

A. The Fact and the Court Opinion

The buyer (plaintiff), a company based in Kampala, Uganda, through an announcement on the Internet placed by the seller (defendant), bought 18 tons of used shoes at a price of 30,750 EUR. The contract provided for delivery "FOB Mombasa, Kenya." The goods arrived at Mombasa on April 26, 2004. The buyer paid the final installment on the purchase price on May 18, and received the Bill of Lading (B/L) from the seller on May 24. The buyer had the goods transported to Kampala, Uganda, where he examined them on June 16. By the examination, the buyer discovered the bags contained only defective and unusable shoes, including high-heeled shoes, inline-skates and shoe trees. On the following day (June 17), the buyer informed the seller of the non-conformity. On June 24, the Uganda National Bureau of Standards disallowed the import of the shoes because of their bad and unhygienic condition, recommending their destruction at the parties' cost. The buyer declared the contract avoided by the letter dated July 2,[33] and sued to recover the purchase price plus damages for costs and interest.

Relying on the refusal of import by the Uganda National Bureau of Standards, the court held that the seller had fundamentally breached the contract.[34] The court, however, ruled that the buyer was precluded from relying on the lack of con-

---

31) Landgericht Frankfurt, April 11, 2005 (F. R. G.), English translation available at http : //cisgw3.law.pace.edu/cases/050411g1.html.

32) HONNOLD & FLECHTNER, *supra* note 9, at 357 (emphasis in original).

33) Article 49 of the CISG provides : "(1) the buyer may declare the contract avoided : *(a)* if the failure by the seller to perform any of his obligations under the contract or this Convention amounts to a fundamental breach of contract."

34) Article 25 of the CISG defines a fundamental breach as one which "results in such detriment to the other party as substantially to deprive him of what he is entitled to expect under the contract."

formity. That is to say, the court held that the buyer had lost all the rights with respect to the seller's breach, including the right to avoid the contract and to claim for the damages. This is because the buyer in breach of Article 38 failed to examine the goods timely and in breach of Article 39 (1) did not give notice of non-conformity within a reasonable time. The buyer paid the purchase price of 30,750 EUR and also incurred costs such as customs, handling fees and freight, for the junk shoes officially recommended to be scrapped.

There are two main issues in this case, and the court opinion on each of them is being summarized next.

(1) Timeliness of the examination and notice of the defects

The buyer gave notice of non-conformity only one day after its discovery. However, the examination of the goods was delayed and the delay resulted in the ensuing notice being too late. Mombasa in Kenya was the contractual destination of the goods. Therefore, an examination of the goods should have been conducted there (Article 38 (2)). The goods arrived in Mombasa on April 26, 2004. Even if the period for examination began on May 24 when the buyer received the B/L, the examination was carried out three weeks later. An examination that did not take place until three weeks had passed must be regarded as too late and unreasonable in international commerce. The buyer had known for several weeks that the goods had arrived in Mombasa and would have been able to organize an examination. The goods were not complicated technical equipment. Nor was it necessary to assemble or process them in order to examine them. Non-conformity of the goods could have been detected only by looking at samples.

(2) Whether Article 38 (3) is applied and the examination was deferred until the goods arrived at Kampala without a reasonable opportunity to examine them at Mombasa

The buyer did have a reasonable opportunity to examine the goods before they were forwarded. The buyer had sufficient time to examine the goods in Mombasa. The goods were sent to Kampala three weeks after the buyer had

received the B/L and seven weeks after their arrival in Mombasa. In addition, the shoes were packed in simple plastic bags easily openable without destroying them. The buyer argued that it would have been unreasonable to fly from Uganda to Kenya to examine the goods. However, the buyer could have ordered somebody else to examine them. Inconvenience of a flight from Uganda to Kenya could not be an argument against the seller, because the buyer himself had chosen Mombasa as the destination. The buyer also argued that an examination in Mombasa would have involved breaking the customs seal on the containers, requiring the buyer to pay Kenyan customs duties. But the obligation did not represent a lack of a reasonable opportunity in the sense of Article 38 (3). Such an obligation was one of the factors that the buyer had to take into account in his commercial considerations for a profitable transaction.[35]

B. Analysis of the Court Opinion

The court opinion has at least three major flaws in its interpretation of Articles 38 and 39. Next I will analyze each of them.

(1) No redirection or redispatch of Article 38 (3)

Relying on Article 38 (3), the buyer argued that its examination was deferred until the goods arrived in Uganda. The court rejected the argument, holding that the buyer had a reasonable opportunity to examine the goods at Mombasa. However, it seems to me that the goods were neither "redirected in transit [n]or redispatched" in this case. "Redirection in transit occurs when the buyer... changes the destination before the delivery of the goods at the originally agreed destination"[36] and "redispatch" occurs "where the buyer, after having received the

35) Another issue concerning Article 38 (3) was whether "at the time of the conclusion of the contract the seller knew or ought to have known of the possibility of such redirection or redispatch." The court implicitly denied that the seller knew or ought to have known of the possibility, stating the "fact that the buyer has its place of business in Uganda is insofar insufficient." The court, however, did not decide on this issue, deeming it unnecessary because the court negated the lack of a reasonable opportunity for examination.

36) KRÖLL, *supra* note 1, at 586.

goods, sends them off to a different destination."[37]

It is disputable whether the true destination of this case was Mombasa or Kampala, but let us assume for a moment that it was Mombasa as both the buyer and the court did. The "originally agreed" destination had been always Mombasa without ever being changed, and the goods were actually carried to Mombasa. Therefore, there was no redirection. Nor was there any redispatch in this case. Redispatch requires the buyer to once receive the goods at the original destination. In this case, however, the buyer had never received the goods at Mombasa. But again, for a moment let us assume that the goods were either redirected or redispatched from Mombasa to Kampala as the buyer and the court apparently did. Because the general requirement of practicability of Article 38 (1) applies to paragraph (3), it is necessary to determine whether the buyer was "without a reasonable opportunity" for a "*practicable*" examination. Appling this standard, flying from Kampala to Mombasa or employing an agent for examination was in no way a practicable option. It would have cost the buyer extra expenses which he could otherwise have dispensed with. Therefore, the buyer waited for the arrival of the goods and examined them in Kampala. The goods were durable ones. A reasonable person would have chosen this practical option. However, it seems that for the court, neither reasonableness nor practicability of examination was relevant, because the agreed delivery place was all that mattered. Professor Flechtner said :

> Thus in the court's view, a buyer's agreement to a particular destination for the goods eliminates any argument that the opportunity to examine the goods at that destination is "unreasonable" as per Article 38 (3). The same logic, presumably, would also preclude any argument that examination at an agreed point of delivery might not be "practicable in the circumstances" under Article 38 (1). As the court saw it, by agreeing to delivery of the shoes "FOB Mombasa," the buyer had agreed to examine the goods in that city no matter how inconvenient or

37) *Id.*

expensive such examination was.[38]

(2) Practicability in Article 38 (1) & (2)

Departing from our two assumptions above, this case involved no redirection or redispatch, and, therefore, the provision of the CISG governing this case is not Article 38 (3), but Article 38 (2) together with the general requirement of practicability of Article 38 (1). The "destination" of Article 38 (2) is "not defined by, *e. g.*, technical delivery under a price-delivery term, but rather by the actual destination of the goods where the buyer will take physical possession."[39] The destination in this case, therefore, was Kampala not Mombasa.

In the case of the transactions by Incoterms, such a trade term as "FOB Mombasa" does not mean that the destination of the goods is Mombasa. Roughly speaking, the trade terms of Incoterms are meant to show "what is and is not included in the price." The price may include no freight at all as in Ex Work or it may include the freight and insurance to the designated port as in CIF. FOB of Incoterms 2010 provides: "The buyer must contract, at its own expense for the carriage of the goods *from the named port of shipment* (B3 (a))."[40] Clearly, the term presupposes the further carriage of the goods from the named port to the final destination. Therefore, a port or place designated in an Incoterms FOB contract is not the final destination, and examination is not required to be carried out there.[41]

---

38) Flechtner, *supra* note 20, at 21. *See also* HONNOLD & FLECHTNER, *supra* note 9, at 359.

39) *Id*.

40) INCOTERMS 2010, FOB Free On Board (emphasis added), INT'L CHAMBER OF COMMERCE (2010). The summary of each term is available at http : //www.iccwbo.org/products-and-services/ trade-facilitation/incoterms-2010/the-incoterms-rules.

41) In FOB transactions, in the absence of the agreement by the parties and relevant trade custom, "the buyer is not obliged to inspect the goods when shipped and … usually 'the only possible place of inspection would be on arrival of the goods at their place of destination.' If, however, the goods are bought by the overseas buyers with a view to resale, the court might regard as sufficient an inspection which is carried out at the place where the ultimate buyer resides." CAROLE MURRAY *et al*., SCHMITTHOFF : THE LAW AND PRACTICE OF INTERNATIONAL TRADE § 2-015, at 29 (12th ed. 2012) (footnote omitted).

These characteristics of FOB invoke the element of practicability of CISG Article 38 (1). Normally a seller in Country A agrees to sell to a buyer in Country B on the term of FOB "Port X in Country A." It is impracticable for the buyer in Country B to bother to examine the goods at the Port X in Country A. The same is true of the case where, although the named port is in the buyer's country, it is located far from the buyer's place of business.[42] In my analysis, the contract of this case involved the carriage of goods to Kampala via Mombasa from the inception. According to the 38 (2), the examination was deferred until the goods arrived at Kampala.

(3) Reasonableness of time for notice in Article 39 (1)

The CISG has no paragraph directly providing the consequence of failure to examine the goods, and commentators generally agree that the breach of the examination duty of Article 38 by itself will not trigger any sanction.[43] The buyer's failure to examine the goods may lead to failure to notify the non-conformity "within a reasonable time after he…ought to have discovered it" (Article 39 (1)), and hence to the drastic sanction of being deprived of all the remedies with regard to the non-conformity.

The court denied remedy, stating that "an examination that did not take place until three weeks had passed must be regarded as too late and unreasonable in international commerce."[44] Contrary to the common view, the court seems to have imposed sanction on the late examination and not to have given sufficient

---

42) The FOB of Incoterms is used only for sea and inland waterway transportation, and normally a port of the exporting country is designated. In the Used Shoe Case, however, no sea or inland waterway transportation seems to have been involved after the goods arrived at Mombasa. Mombasa is a port on the importer side. The court opinion does not elucidate this point. Presumably the trade term of this case was something like "Fob named inland point in country of importation" in Revised American Foreign Trade Definitions.

43) *See* SCHLECHTRIEM & SCHWENZER, *supra* note 11, at 609 ; KRÖLL, *supra* note 1, at 560 ; Flechtner, *supra* note 20, at 23.

44) Landgericht Frankfurt, *supra* note 31.

consideration as to the timeliness of notice, shunting aside the possibility that June 17 notice might have been "within a reasonable time."[45]

The court's anti-buyer bias is easily perceived. In order to justify the examination at Mombasa, it relied on the simplicity of opening the bags on the one hand, and on the other, it ignored the complications that breaking the customs seal would have entailed. This anti-buyer bias generated another lopsided emphasis and disregard. The court emphasized that the "buyer had known for several weeks that the goods had arrived in Mombasa and *would have been able to organize an examination*."[46] This statement clearly shows the real ground on which the court decision was based : namely that the buyer *could have acted more promptly*. As explained in the section B of Chapter I above, because the court saw the possibility that the buyer could have examined the goods earlier, it disregarded the need to consider whether the notice was sent within a reasonable time in the end. This is another way how not to apply Article 39 (1). Let us apply the "one month no prejudice test" here. The threshold gate is easily passed. The buyer gave notice on June 17 within one month after he obtained the B/L on May 24. Next question is whether the seller suffered substantial prejudice from the allegedly tardy examination and notice. So long as we read the court opinion, it appears that the buyer could have expedited its handling, but that expedition would have made the seller's position no better. The shoes could not possibly have been transformed into inline-skates after the risk of loss passed to the buyer. The evidence of non-conformity was officially confirmed by the Uganda Authority. The shoes which were destined to be destroyed were never susceptible to repair. The time lag between May 24 and June 17 probably did not affect the availability of substitutes for the unique goods, even when the seller of this transaction (which smacks of fraud) had a conscientious intention to supply substitutes. This absence of prejudice eloquently explains why the court took the

---

45) HONNOLD & FLECHTNER, *supra* note 9, at 360 ("Even if the buyer had examined the goods in Kenya as soon as they were available to inspect, notice on June 17 would arguably have been within a 'reasonable time' as required by Article 39 (1).")

46) Landgericht Frankfurt, *supra* note 31 (emphasis added).

"could have acted more promptly" approach. For the purpose of Article 39 (1), what is relevant is not whether the buyer could have acted more promptly, but whether the notice was given in a reasonable time. Buyers should not be denied remedies so long as they have sent a notice within a reasonable time even if they could have examined the goods more promptly, or even if there was some procrastination.

There is a very interesting statistics concerning the transportation from Mombasa to Kampala.[47] According to the statistics, in 2008, the road freight transportation time through the Northern Corridor (the fastest way) from Mombasa to Kampala by a 40ft container truck was 23 days on average (including 14 day dwell time of transit freight at Mombasa Port, bound for Kampala).[48] The figure of 23 days can well account for the period from the time the buyer obtained the B/L (May 24) to the arrival and examination of the goods at Kampala (June 16). It might be that the buyer arranged the inland transportation to Kampala soon after he obtained the B/L. If this inference is true, it would be more accurate to say that the buyer could not have examined the goods in any shorter period than he actually did.

Compared with the ULIS, the obligations of examination and notification under the CISG are relaxed and more favorable to the buyer. These alleviations were made in answer to concerns voiced by developing countries, generally less equipped with expertise and facilities.[49] Inefficient inland transporting systems should be included in these concerns. Usually it would be inconceivable in the developed countries that it should take as many as 23 days for a container truck to pick up a cargo at a port and do 1,119 km (distance from Mombasa to Kampala).

---

47) Japan International Cooperation Agency, PADECO Co. & Mitsubishi UFJ Research and Consulting Co., The Research on the Cross－Border Transport Infrastructure : Phase 3, Final Report, Chapter 3 (2009), available at http : //www.jica.go.jp/english/our_work/thematic_issues/transportation/pdf/research_cross-border04.pdf.

48) *Id.* at 29-30.

49) *See, e.g.*, SCHLECHTRIEM & SCHWENZER, *supra* note 11, at 608.

Ⅲ. Japanese Commercial Code Article 526

A. Japanese Commercial Code Article 526 and CISG Articles 38 & 39

Japan deposited the instrument of accession with the United Nations in July, 2008, and the CISG took effect over Japan in August, 2009. So far we have no case dealing with CISG Article 38 or 39.[50] However, we have long had a commercial code, which has an article concerning the time for examination of goods and for notice of non-conformity, similar to those of the CISG. Analyzing the article and cases which applied it will shed some light on the CISG jurisprudence. Japanese Commercial Code (hereinafter JCC) Article 526 provides:

> (1) In a sales transaction between merchants, the buyer shall, *upon receiving* the subject property of the sale,[51] examine the property *without delay*.
>
> (2) In the case prescribed in the preceding paragraph, when the buyer, by the examination under the provision of said paragraph, has discovered that there is a defect or shortfall in the quantity of the subject property of the sale, unless he *immediately* dispatches a notice to the effect to the seller, he may not cancel the contract, nor demand a reduction of the purchase price or compensation for the damage by reason of the defect or shortfall. The same shall apply where there is a defect in the subject property of the sale that is not immediately discoverable and where the buyer has discovered the defect within six months.[52]

---

50) So far (November, 2014), I have found only three cases which mentioned the CISG. They cited a CISG Article but only for reference. None of them applied it.

51) In this paper the phrase "the subject property (of the sale)" is used to mean "the property that is the subject matter of the sale." The word "goods" is not used because Article 526 applies to the immovable property as well.

52) Paragraph (3) provides that paragraphs (1) and (2) shall not apply where the seller had knowledge of the defect or the shortfall of quantity. This provision is similar to Article 40 of the CISG. The English translation of the JCC by the Ministry of Justice is available at http: //www.japaneselawtranslation.go.jp/law/detail/?id=2135&vm=04&re=02. My translation above is different from it.

The basic fabric of Article 526 of the JCC resembles that of Articles 38 and 39 of the CISG. Article 526 (1) of the JCC corresponds to Article 38 (1) of the CISG, imposing the duty to examine the goods and fixing the time for it. They are also commonly lacking in a provision prescribing the consequences of a breach of the duty. In both of them a failure to examine by itself is interpreted to have no negative effect so long as a notice of non-conformity is given in time.[53] Article 526 (2) of the JCC corresponds to Article 39 of the CISG, imposing the duty to notify non-conformity of the goods, fixing the time for it, and prescribing the consequences of a breach of the duty, *i. e.,* total loss of remedies that the buyer might otherwise have. In addition, both of them set a final time limit for non-conformity notice.

On the other hand, there are at least three distinctive differences between the two laws. The first is the starting point of the period for examination. CISG Article 38 (1) does not explicitly specify the starting point for examination. As I have argued in the Section A of Chapter I above, the starting point for examination is interpreted to be such a time "as is practicable in the circumstances." JCC Article 526 does set the starting point, *i. e.,* "upon receiving the property." This setting is very problematic in the eye of modern international transactions. For they often involve intermediate buyers, who arrange for carriage to send the goods directly to his customers or consumers. Such buyers will never "receive" the goods, and hence do not usually have an opportunity to examine them.[54] This is also true of the buyers who once receive the goods and who redispatch them without a reasonable opportunity to examine them as in the case provided for in CISG Article 38 (3).

The second difference is the period for examination. While in CISG Article 38 (1), it is "within as short a period as is practicable in the circumstances," it is "without delay" in JCC Article 526 (1). The JCC requirement is clearly more exacting and more inflexible than that of the CISG. It seems to be less receptive to

---

53) On the CISG, *see supra* note 43 and accompanying text. On the JCC, *see* TANAKA, *infra* note 84, at 141 and accompanying text.

54) *See* the discussion concerning the two Japanese cases below.

buyers' subjective situations.

The third is the time for the notification of non-conformity. While in CISG Article 39 (1), it is "within a reasonable time," it is "immediately" in JCC Article 526 (2). As I have argued in the section B of Chapter I above, "within a reasonable time" should be interpreted as allowing for some degree of procrastination. The word "immediately" ("*Tadachini*" in Japanese) seems to allow for no lapse of time, shutting its eyes to whether notification can practicably be performed. It is one of the most stringent expressions among those describing the expeditiousness of conduct. In addition, whereas under the CISG, "the fairly strict standard for the timing of the examination is partly mitigated by the more lenient standard in Art. 39 for the proper notice,"[55] it is tightened up by the more exacting standard under the JCC on the contrary.

It should be noted that the JCC was promulgated and put into force in 1899, more than a century ago, and surprisingly enough, the text of Article 526 has remained substantially the same ever since, except for minor alterations made in 2005.[56] This oldness of Article 526 may account for the differences above. In 1899, we had no motor trucks, and goods were mostly carried by horse cart. What occurs to me is the image of a buyer unloading the wooden cargo boxes form the cart and removing the straw wrappings from them. In this primitive image, a buyer always examines the goods without delay after he has unloaded them. The requirements of examination without delay and immediate notice by Article 526 seem to be considerably stringent in light of multipronged modes of present-day transactions. Courts have to exert their ingenuity and invent flexible interpretations to adapt this outdated Article to the peculiar situations of contemporary cases.[57]

---

55) KRÖLL, *supra* note 1, at 576.

56) The paragraphs (1) and (2) of the present Article 526 had been laid down in the same single paragraph (paragraph (1)) before the amendment in 2005. Although the old provision was divided into two paragraphs, the text itself is almost identical. Present paragraph (3) used to be paragraph (2).

57) Even in 1903, only four years later after the JCC was put into force, the Osaka Court of Appeal (present Osaka High Court) upheld the notice made within one month after the ↗

B. The TV Cabinet Case : Prejudice Test

On April 22 in 1977, shortly before the UNCITRAL approved the "Sales" draft of CISG at Vienna,[58] the Tokyo District Court handed down a decision on JCC Article 526 in a case involving the international sale of TV cabinets, in which the court applied the prejudice test.[59] The plaintiff was a New Jersey-based import-sales company. The defendant was a Japanese stock company engaged in manufacturing various cabinets for televisions, radios, and so forth. On May 24, 1969, the plaintiff and defendant entered into a verbal agreement,[60] by which the defendant agreed to manufacture 1,000 sets of cabinets for 19 inch televisions and to supply them to the plaintiff, who would in turn sell them to the third-party purchaser, Sylvania Electric Products Inc (hereinafter Sylvania). The price was 18,480 U. S dollars on the basis of FOB Yokohama. The plaintiff provided design drawings and specifications for the defendant, and the cabinets were manufactured in accordance with them. They were so-called "knockdown" products, whose final assembly was to be made by Sylvania after delivery. On June 31, 1969, the defendant shipped the cabinets at the Port of Yokohama. The plaintiff paid the price at the beginning of August. The cabinets arrived at the Port of New York on August 27, and at Sylvania around the middle of September.

In the beginning of October, an employee of Sylvania in charge of cabinets

---

↘ discovery of the defects. It stated that Article 526 allowed certain number of days between the discovery of defects and the notice so long as they did not disturb the safety of transaction. 大阪控訴裁判所判決，明治 36 年 6 月 23 日，法律新聞 155 号 10 頁（1903 年）[the Osaka Court of Appeal, June 23, 1903, LEGAL NEWSPAPER No. 155, at 10 (1903) (written in Japanese)].

58) UNCITRAL unanimously approved the "Sales" draft (providing for the rights and obligations of the seller and buyer under the sales contract) in its 10th session (May-June, 1977). *See* DOCUMENTARY HISTORY, *supra* note 16, at 318.

59) 東京地方裁判所判決，昭和 52 年 4 月 22 日 [Judgment of the Tokyo District Court, April 22, 1977] : 下級裁判所民事裁判例集 28 巻第 1～4 号 399 頁（1977 年）[28 LOWER COURT REPORTER OF CIVIL CASES 399 (1977) (written in Japanese)].

60) Japanese Civil Code Article 555 provides that a sales contract is concluded by "promising," requiring no writing for a contract to be enforceable. This is consistent with Article 11 of the CISG.

picked 5 sets out of the 1.000 and visually examined them. He discovered some cracks and apertures in them.[61] Around November 21, an over-time deterioration test was performed on 15 sets by heating and humidifying them and assembling their parts. As a result of this test, some grooves of sideboards were found misaligned, seam joints of veneers swollen, panels warped or detached from the frames, and so on.[62]

Late in November, 1969, a representative of the plaintiff traveled to Japan, met the defendant, and notified him of the defects, showing one of the defective sets and the written report of the defects. In December, 1969, the plaintiff repeatedly requested the defendant to come over to U. S. in order to settle the problem. They also demanded the defendant to supply substitutes and pay damages. Seeing that the defendant would not comply with the demand, the plaintiff declared the contract avoided, and notified it to the defendant by the letter dated May 6, 1970. The plaintiff filed a suit in the Tokyo District Court, alleging the imperfect performance of the contract by the defendant, and claiming the damages of 27,500 U. S. dollars plus interest.

(1) The Opinion of the Court

The opinion of the Tokyo District Court is characterized both by the beautiful general statements as to the modes of interpretation of Article 526, and by the dubious application of it. First, the court announced a rule on the time and place of examination. What the court said reminds us of Article 38 (1) of the CISG. It said, "The receiving of the subject property, prerequisite to the obligations of examination and notice provided in [Article 526] is to be interpreted to refer to

---

61) The plaintiff alleged that on receiving the oral report of the defects from Sylvania, they notified the defendant of the defects through their Tokyo office in the beginning of October. The court held the allegation unsupported by evidence.

62) The plaintiff also examined 50 sets in December and found 34 of them useless. In addition, on March 31 in 1970, on the request by the plaintiff, an expert from American Case Company re-examined the 50 sets examined by the plaintiff, and also examined another 35 sets remaining unpacked. As a result, more defects were discerned than discovered by the plaintiff.

the state in which the examination of the subject property has become possible on the buyer's side as a matter of practice."[63] What the court said next reminds us of Article 38(3) of the CISG:

> At the time of the conclusion of sales contract, when it is mutually comprehended between the seller and buyer that the subject property of the sale will be resold from the buyer to a third party, and that as a matter of practice it will become possible to examine the said subject property only after it is handed over to the third party, the time of its arrival at his place should be deemed as the time of receipt when the examination becomes possible as a matter of practice.[64]"

Applying this standard, the court held that "the middle of September, 1969 when the goods of this case arrived at Sylvania should be recognized as the time when the plaintiff received them."[65] The court, however, concluded that the "full-scale"[66] examination which was carried out about November 21 was too late, stating "Because Sylvania had the facilities for examination, the plaintiff, after receiving the goods in this case, could have *immediately* and easily investigated whether there were defects or not by taking such a measure as commissioning Sylvania."[67]

---

63) Lower Court Reporter, *supra* note 59, at 408 (emphasis added).
Professor Oosumi had already pointed out in 1958:
> So-called receipt of the subject property represents that as a performance of the contract of sale, the subject property is put in the state in which it is to be examined by the buyer as a matter of practice. For example, it cannot be said that the property is received in this sense if the property right is transferred to the buyer by the delivery of the carrier's note, but if the property has not been handed over to the buyer yet.

大隅健一郎『商行為法』67 頁（1958 年）[Oosumi Kenichiro, Law of Commercial Transaction 67 (1958) (written in Japanese)].

64) Lower Court Reporter, *supra* note 59, at 408.

65) *Id.*

66) Lower Court Reporter, *supra* note 59, at 410. It is doubtful whether the examination in November can be properly described as "full-scale," because it targeted only 15 sets out of 1,000 sets. Probably the court preferred to use this description in order to discriminate it from the visual examination of 5 sets in October, which apparently the court did not treat as an examination under Article 526 (1).

67) *Id* (emphasis added).

Next, the District Court laid down the standard for determining whether a notice was made immediately, as required by JCC Article 526. The court adopted the prejudice test. :

> Whether the notice provided in Commercial Code Article 526 [(2)][68] has been given immediately after the receipt by the buyer of the subject property must be decided, weighing such factors as the time the buyer is presumed to need in order to examine the said subject property in the transaction in light of the trade common sense, the risk that *the seller will suffer prejudice from the delay of the notice*, the necessity to provide the seller with the opportunity to investigate the defects early, and so on.[69]

Applying this standard, the court held :

> The goods of this case are wooden cabinets which are prone to change over time. The defendant stored them in bond in Yokohama on July 16, 1969 and they became out of the defendant's control. And the plaintiff received the goods in the middle of September. Seeing that it was not until late November that the defendant was notified of the defects, it was considerably difficult for the defendant to investigate the conformity with the contract at the time of the receipt of the goods of this case, the cause of engendering the defects, and so on. Judging comprehensively from all the factors above, we hold it difficult to say that the said notice in November, 1969 was made *immediately after the receipt* [of the goods].[70]

(2) The Analysis of the Opinion

The buyer of this case was an intermediate trader who would not physically receive the goods, whereas Article 526 requires the buyer to examine the goods "upon receiving" them. The court was obliged to apply the provision to this situation. Because there was no buyer who had himself received the goods in this

---

68) The case was handed down in 1977 long before the amendment of Article 526 in 2005. Hence, the paragraph number above is actually (1) of the old Article 526.

69) Lower Court Reporter, *supra* note 59, at 409–10 (emphasis added).

70) *Id.* at 410 (emphasis added).

case, the court had to invent a place where the buyer had constructively received the goods. Otherwise the buyer could have argued that because he had never received the goods, he had no obligation of examination under Article 526. A place of examination must logically be the place where the examination is capable of being put into practice. In this case, the place was held to be the premises of Sylvania. The opinion of the Tokyo District Court appears as if it had applied the CISG. The "examination [was] deferred until after the goods have arrived" (Article 38 (3)) there. It is interesting to see the court interpretation of a century-old statute should reach the same conclusion as the 1980 Convention. This could happen because the statute was too old to be literally applied and the court could not help ingeniously interpreting it, considering what was practicable and reasonable in the context of the modern international transactions. In 1973, Professor Kanzaki had already written :

> In the modern mechanism of distribution and sale, there exist a number of merchants whose business is to buy goods not for their own use but for reselling them to others. These merchants may not have such facilities as to examine the purchased machine, for instance, by making a trial operation by themselves. Moreover, in the modern mechanism of distribution and sale, as a matter of general trade customs, they are not required to examine the purchased goods, for instance, by unwrapping them. If we always require those in the middle of mechanism of distribution and sale to examine the purchased goods by such a means as unwrapping them, the modern distribution and sale of goods will be paralyzed to a great extent.[71)]

The standard that the court set forth on the time and place of examination hits the nail on the head, adapting the century-old code to the actuality of the modern transactions. However, the application of it is dubious. The court adopted the "*could have acted more promptly*" approach. Here again, it turned out this approach had involved the anti-buyer bias. The court said that the plaintiff "could

71) KANZAKI, *supra* note 27, at 272.

have *immediately* and easily investigated whether there were defects or not"[72] after they arrived at Sylvania. Clearly this is not what is written in the statute enacted some hundred years ago. Article 526 requires the examination to be made "without delay" ("*chitai naku*" in Japanese). The phrase has a roomier and less exacting connotation than "immediately." Professor Michida, Rapporteur of the First Committee at the Diplomatic Conference in 1980, pointed out this discrepancy, and described the court opinion as "horrible," stating "before discussing whether 'immediately' or not, the court should have once uttered the phrase 'without delay' laid down in the law."[73]

The court made another misusage in denying that the notice was made "*immediately after the receipt*"[74] of the goods. Article 526 requires the notice to be dispatched immediately but *after the discovery of non-conformity*. The reason why the court made these displacements of the crucial languages of the Article may be explained as follows. For the court, "without delay" did not allow for any time frame so that the receipt of the goods was directly attached to the time for notice.[75] For the court, therefore, the combination of examination and notice had to be made *immediately after the receipt of the goods*. The examination was carried out around November 21 and the notice was made "late in November." Probably, it was difficult for the court to definitively assert that the buyer had failed to give notice immediately after the examination. Therefore, the court had to impute all the sin to the tardy examination, pointing out the possibility to examine earlier.[76]

---

72) Lower Court Reporter, *supra* note 59, at 410 (emphasis added).

73) 道田信一郎「国際物品売買条約案と国連会議 (5)」ジュリスト 665 号 109 頁, 111 頁 (1978) [Shinichiro Michida, *Draft of the CISG and the UN Conference (5)*, 665 Jurist 109,111 (1978) (written in Japanese)].

74) Lower Court Reporter, *supra* note 59, at 410 (emphasis added).

75) Probably for the same reason, courts and commentators have been indifferent to the absence in JCC Article 526 of a provision of "ought to have discovered" type, which backs up a case involving late or no examination. The phrase "without delay" is considered to have no time frame allowing for various time lengths, from which the point when the buyer "ought to have discovered" the non-conformity is selected.

76) Michida, *supra* note 73 at 111 : ("So long as it was difficult to say that the notice itself had been too late, the judgment could not logically stand, unless it attributed the buyer's↗

This is indeed the same scenario as that of the Used Shoe Case. What is different is that the Tokyo District Court adopted the prejudice test in order to determine whether the notice had been given in time. It held that the timeliness had to be decided, "weighing such factors as …the risk that the seller will suffer prejudice from the delay of the notice."[77] It is laudable that the court should have introduced the element of prejudice to the seller into the inquiry of timeliness of notice, but again its conclusion is dubious. The court said "it was considerably difficult for the defendant to investigate the conformity with the contract at the time of the receipt of the goods of this case, the cause of engendering the defects, and so on."[78] However, TV cabinets made of wood are not perishable goods like raw fish and meat. The cabinets in question were received in the middle of September, and the examination and notice were made late in November. Even if the defects had loomed during this period, one would conclude that they had been inherently defective, being deteriorated so early.[79]

C. The Pantyhose Case : Economical Impossibility

In 1986, the Osaka District Court handed down a decision concerning defective pantyhose.[80] The plaintiff entered into a sales agreement with the defendant in which the plaintiff purchased from the defendant 111,000 deca of pantyhose made in Korea.[81] The price was 500 yen per deca, and the total price amounted to 55.5

↘ fault to the belatedness of the examination preceding the notice").

77) LOWER COURT REPORTER, *supra* note 59 at 409.

78) *Id.* at 410.

79) The possibility that the non-conformity came about during the transportation is slim. The defects that the buyer had found included those which could not come into being over time. such as the grooves shallower than specified and the misplaced cross arms. *See id.* at 402.

80) 大阪地方裁判所判決，昭和 61 年 12 月 24 日［Judgment of the Osaka District Court, December 24, 1986］：金融・商事判例 912 号 8 頁（1993 年）［912 FINANCE & COMMERCE REPORTER 8（1993）(written in Japanese)］.

81) Actually the purchaser that did this transaction was not the plaintiff named in the court report but a company called "Nomura-yu." The company went bankrupt after it had filed this suit and the named plaintiff became a trustee in bankruptcy. In this paper, the company is described as plaintiff.

million yen. The pantyhose were deposited in storage, and the plaintiff took the delivery by the delivery order on September 27, 1979.

From the end of 1979 toward the beginning of 1980, the plaintiff received complaints one after another about the defects of the pantyhose from his customers to whom the pantyhose were resold. The plaintiff took back some of the defective goods from the customers in order to examine them and discerned a number of defects in them, such as ones with holes in the toes, ones made of blended yarn of different thickness, and ones dyed unevenly. The plaintiff promptly notified the defendant of the defects, and requested the defendant to take back the goods and/or make price reductions, but in vain. Ultimately, about two-thirds of all the pantyhose purchased from the defendant turned out to be commercially valueless.

The plaintiff was obliged to comply with the demands for substantial price reductions from his customers, and to sell the remaining goods at a substantially lower price. The plaintiff filed a suit with the Osaka District Court, alleging the imperfect performance of contract by the defendant, and claiming damages of some 46 million yen. The defendant made a defense of JCC Article 526, insisting that the plaintiff had breached its obligation to timely notify the non-conformity.

The pantyhose in question were triply packaged. Two pairs were folded and packed in a cellophane bag, and 150 sets of cellophane bags were stuffed in an inner carton made of corrugated board and sealed with packing tape. And a set of two inner cartons were put in an outer carton made of corrugated board and sealed with packing tape.

The Osaka District Court delivered the judgment for the plaintiff. Although the plaintiff took delivery of the goods by the delivery order on September 27 in 1979, the court did not deem it as the receiving point for the purpose of the Article 526 examination. It said :

> Because it was difficult to discover defects with the goods wrapped in the cellophane bags, in order to examine the pantyhose in this case, one had to open the cartons seriatim, finally open the bags and extend the folded pantyhose…with due care not to rip or crease the bags. In order

> to restore the goods, one had to fold them without making wrinkles and tidily put them into the bags. Considering all these, even though the examination of the pantyhose in this case might be *physically possible, but in terms of economy and business, it was impossible*. One has to acknowledge that in the end it was not until consumers wore them after purchase that the discovery of defects became possible.[82]

The court concluded that, "having received notices from the customers from the end of December, 1979 toward the beginning of January, 1980 and discovered the defects around the period, the [plaintiff] immediately notified the [defendant] of the defects."[83]

The court did not explicitly determine when the plaintiff received the goods or whether the plaintiff examined the goods without delay, as required by Article 526. It is generally recognized that so long as a notice is given timely, "it does not matter whether the buyer has examined the goods or learned of the defects or shortage by some other means than his examination…because the legislative purpose of Article 526 consists in letting the seller take countermeasures by the buyer swiftly notifying the seller."[84] Therefore, it is the straightforward interpretation of the court opinion that the court passed over the issue of examination.[85] However, because this approach is characteristically used when no actual receipt of the goods by the buyer is involved, it is generally difficult to fix the starting point of notice time. Another interpretation is possible. Because the court held that the discovery of defects became possible when the consumers wore the pantyhose, the court could have deemed that moment as a constructive receiving point, as the Tokyo District Court in the TV Cabinet Case did.

The court's statement that even though the examination "might be physically

---

82) Finance & Commerce Reporter, *supra* note 80, at 13 (emphasis added).

83) *Id.*

84) 田中誠二『新版・商行為法（再全改定版）』141 頁（1983 年）[Seiji Tanaka, Law of Commercial Transactions 141 (Fully Revised New Edition, 1983) (written in Japanese)].

85) As written above, the buyer did examine the goods by himself, but only after received complaints from his customers.

possible, but in terms of economy and business, it is impossible[86]" seems as if it had paraphrased the meaning of the word "practicable" in CISG Article 38 (1). The opinion of the Osaka District Court can be interpreted to have deferred the point of examination to the final consumers.[87]

After the Osaka High Court affirmed the judgment of the District Court, the defendant appealed to the Supreme Court on the issue of the period of claim exclusion provided in the Civil Code.[88] The Supreme Court remanded the case on the issue in 1992, but the District Court's judgment on examination and notice remained intact.[89]

Conclusion

It has been said that the purpose of Articles 38 and 39 of the CISG is to protect the seller's interests in taking countermeasures concerning the buyer's claim of non-conformity. The seller, who has sent defective goods in the first place, is warm-heartedly protected. In some cases, the seller may be relieved from his liability for damages if the buyer somewhat procrastinates the examination and notification. The buyer, on the other hand, may be left with junk after having paid

---

86) Finance & Commerce Reporter, *supra* note 80, at 13.

87) Professor Kanzaki had already pointed out :

> The protection of the seller is sufficiently secured by an examination without delay by the sub-purchaser who has bought the goods from the buyer (or by those who subsequently have obtained the goods). Therefore, the buyer does not necessarily have to examine the goods by themselves in order to seek remedies to the seller by reason of non-conformity of the goods supplied. In practice, the rights of the buyers in the middle of the mechanism of distribution and sale will be secured by the sub-purchasers or those who have subsequently obtained the goods. (Kanzaki, *supra* note 27, at 272)

88) Japanese Civil Code Articles 570 and 566 (3) provide that the buyer must cancel the contract of sale or make claims for damages by reason of the defects or shortfall of the property within one year after he knows the fact.

89) 最高裁判所第三小法廷判決, 平成 4 年 10 月 20 [Judgment of the 3rd Panel of the Supreme Court, October 20, 1992] : 最高裁判所民事判例集 46 巻 7 号 1129 頁 (1993 年) [46 Supreme Court Reporter of Civil Cases 1129 (1993) (written in Japanese)]

the full price and costs. I have suggested "one month no prejudice" test. It is meant to prevent such a "*draconian*"[90] consequence and at the same time to allow for case-specific applications of Article 38 and 39.

JCC Article 526 has been practicably interpreted with the modernization of commercial transactions and with the emergence of the buyers who never physically receive the goods. The courts have been forced to inoculate practicability elements into the interpretation of the century old statute. It can safely be predicted that in future cases concerning Article 38 of the CISG, Japanese courts will properly apply the standard of "within as short a period as is practicable in the circumstances." It is what they have already been doing in defiance of the provision which plainly requires examinations "upon receiving" the goods.[91] As to the reasonable time of Article 39 (1), it is likely that Japanese courts will inquire whether the seller's interests in revising proper remedial measures have been prejudiced, as the Tokyo District Court did in the TV Cabinet Case.[92] However, the Tokyo District Court retained the position to stringently impose the duty of

---

90) Statement by Mr. Date-Bah (Ghana) at the 16th meeting of the First Committee during the Diplomatic Conference in 1980. *See* DOCUMENTARY HISTORY, *supra* note 16, at 541.

91) In 1991, in a case concerning faulty child clothes, the Tokyo District Court again held : "The receiving of the subject property, prerequisite to the obligations of examination and notice provided in JCC Article 526, is to be interpreted to refer to the state in which the examination of the subject property has become possible on the buyer's side as a matter of practice."東京地方裁判所判決, 平成 3 年 3 月 22 日 [Judgment of the Tokyo District Court, March 22, 1991] : 判例時報 1402 号 113 頁 (1992 年) [1402 CASE LAW JOURNAL 113 (1992) (written in Japanese)].

92) More recently in a case concerning the defects of knitted clothes in 2003, the Tokyo District Court stated that the meaning of "immediately" of JCC Article 526 is determined "not only by the time, but also by the risk that the seller will suffer prejudice by the delay of the notice, and by the necessity to provide the seller with the opportunity to investigate the defects early…."東京地方裁判所判決, 平成 15 年 4 月 24 日 [Judgment of the Tokyo District Court, April 24, 2003] [LEXIS AS ONE (LexisNexis Japan)].

The standard commentary on commercial transaction law states in its latest edition that whether the buyer has failed to notify timely "is determined by considering the trade practice, the possibility that the seller will suffer prejudice, and so on." 江頭憲治郎『商取引法 (第 7 版)』31 頁 (2013) [KENJIRO EGASHIRA, COMMERCIAL TRANSACTION LAW 31 (7th ed. 2013) (written in Japanese)].

immediate notifications.[93] Japanese courts should be warned not to be affected by the notification requirement of JCC Article 526 ("immediately") in applying CISG Article 39 ("within a reasonable time").

With the backlight of the static and outmoded language of JCC Article 526, we can see that it is a godsend that CISG Articles 38 and 39 should be endowed with such pliable words as "practicable" and "reasonable." These words are expansive, constantly renewed and susceptible to varying interpretations which will elastically accommodate future changes in international transactions. For instance, a practicable time for examination and reasonable time for notice might be drastically modified with the advent of newfangled IT transactions. Courts in future should bear in mind this plasticity in interpreting Articles 38 and 39.

93) In 2003 in the knitted clothes case cited in the note 92 above, the Tokyo District Court held that the notice given only half a month after the receipt of the goods was too late because of the prejudice to the seller.