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## DUTY TO EXAMINE THE GOODS IN INTERNATIONAL LAW OF SALES

*The duty to examine the goods in the international law of sales is regulated by Article 38 of the 1980 UN Convention on Contracts for the International Sale of Goods. The Convention explicitly provides that the buyer has the duty to examine the goods and sets out the time frame in which the examination should take place. The place of the examination may be deduced from the Convention. However, the Convention does not address the method and scope of the examination nor who should bear the costs of the examination.*

*This paper analyzes some aspects of the duty to examine the goods. The importance of the duty to examine the goods, its purpose, relationship to the duty to notify the seller of the lack of conformity of the goods and its legal nature are discussed at the outset. Subjects effecting the examination and method and scope of the examination are analyzed in the second part of this paper.*

Key words: *Contract of Sale. – Examination of the Goods. – Method of Examination. – Conformity of the Goods. – CISG.*

### 1. INTRODUCTION

Pursuant to the 1980 UN Convention on Contracts for the International Sale of Goods (CISG), the buyer has the duty to examine the delivered goods and to notify the seller on possible non-conformities properly and in a timely manner. In such a case, the buyer's omission has serious legal consequences. The seller's obligation to deliver the goods is deemed to be performed and the buyer has to pay the purchase price. Consequently, the buyer loses the right to rely on a lack of conformity of the goods and to claim damages.

In international sales, the duty to examine the goods is of great theoretical and practical importance. Article 38 of the CISG explicitly provides that the buyer has the duty to examine the goods and regulates the time frame in which the examination should take place. The place of the examination may be deduced from the Convention. However, the CISG does not address the method and intensity of the examination nor who should bear the costs of the examination.

The duty to examine the goods is governed by Article 38 of the CISG, in Chapter II – Obligations of the Seller. However, it is important to stress that this provision defines the buyer's duty to inspect the goods and, therefore, *de facto* is not the obligation of the seller.

The legislative history shows that provisions governing the buyer's duty to examine the goods and to notify the seller regarding a disclosed non-conformity were broadly disputed. The diverging views on this point were due to the substantial differences existing in domestic laws of sales. Generally, domestic legal systems can be divided into two main groups. The first group includes domestic laws of sales in which the examination of the goods and proper and timely notification of non-conformity are preconditions for the buyer to exercise his rights arising out of non-conformity of the delivered goods. In that respect, there are countries in which the time-frame for the examination is short and those which allow the examination to take place in a reasonable time. In contrast, there are legal systems in which examination and notification are required only when the buyer wants to avoid the contract, while for the claim of damages, the buyer does not need to examine the goods and to notify the seller.

The implementation and interpretation of the provisions regulating the examination of the goods and notice of non-conformity have generated numerous problems and perplexities. Moreover, these issues were among the most litigated matters in the CISG. Despite the fact that these issues concern international sales, case law is influenced by the domestic laws of sales and reflects the legal importance of notification of the seller in specific countries. Accordingly, there are only a few decisions and awards from countries in which notification of the seller is not necessary for the claim of damages. Similarly, there are relatively few decisions in countries where the domestic law of sales requires the notice to be given in a reasonable period of time.<sup>1</sup> Logically, the majority of decisions stem from countries where the domestic laws provide strict rules regarding the examination of the goods and non-conformity notice.<sup>2</sup>

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<sup>1</sup> *CISG-AC Opinion no.2, Examination of the Goods and Notice of Non-Conformity: Articles 38 and 39*, 7 June 2004, para. 5.1, available at <http://www.cisg.law.pace.edu/cisg/CISG-AC-op2.html>, last visited February 2011.

<sup>2</sup> See more *CISG-AC Opinion no.2, Examination of the Goods and Notice of Non-Conformity: Articles 38 and 39*, 7 June 2004, para. 5.1, available at <http://www.cisg.law.pace.edu/cisg/CISG-AC-op2.html>, last visited February 2011.

In the practical application of the CISG, it should be noted that the duty to examine the goods and the duty to notify the seller of non-conformity of the goods are established in the seller's favor, while being an additional burden on the buyer. In the international law of sales it is, therefore, of essential importance not to impose overly harsh requirements on the buyer because the risk of non-conformity of the goods would thereby be shifted to the buyer. Further, it is important to stress that the criteria established under the domestic laws of sales are not applicable in the international sale of goods. The necessity of providing an autonomous interpretation of the CISG becomes especially prominent in cases where the domestic laws of sales contain rules that are substantially similar to Article 38 of the CISG.

## 2. SCOPE OF ARTICLE 38 OF THE CISG

The buyer must examine the goods, or cause them to be examined, within as short a period as is practicable in the circumstances.<sup>3</sup> The buyer has the duty to examine the goods for every lack of conformity within the meaning of Article 35 of the CISG. The examination should reveal every material defect of the goods, departures from the quantity and description of the goods (an *aliud*) and defects in packaging.

When the sale of goods contract is concluded on the basis of a sample or model, the buyer has to begin with the examination of the sample or model itself and to notify the seller of possible defects. Afterwards, the buyer is nevertheless required to examine the main delivery even though the sample or model was free of defects.<sup>4</sup>

Article 38 of the CISG applies not only to the original delivery, but to subsequent deliveries as well, i.e. the delivery of the lacking goods in case of partial delivery and the delivery of the substitute or repaired goods.

In case of a contract for the delivery of the goods by installments, the buyer must examine each individual consignment.<sup>5</sup> When the buyer does not comply with his duty to examine each individual consignment and therefore does not inform the seller of the defects, he loses his right to rely

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<sup>3</sup> Article 38(1) CISG.

<sup>4</sup> See more I. Schwenzer in: P. Schlechtriem, I. Schwenzer (ed.), *Commentary on the UN Convention of the International Sale of Goods (CISG)*, New York 2005<sup>2</sup>, Art. 38, para. 9.

<sup>5</sup> See Article 73 CISG. See also Netherlands, *Rechtbank Rotterdam*, 20 January 2000, available at [www.unilex.info](http://www.unilex.info); Austria, *Oberster Gerichtshof*, 27 August 1999, available at [www.unilex.info](http://www.unilex.info); CISG-online 1813, Netherlands, *Rechtbank Arnhem (Tree case)*, 11 February 2009.

on a lack of conformity.<sup>6</sup> On the other hand, the buyer retains his rights in respect to posterior non-conforming deliveries.<sup>7</sup> The buyer's duty to examine each individual consignment is assessed in relation to the circumstances of each particular case. If successive deliveries are functionally connected (e.g. successive deliveries of parts of complex machinery whose non-conformity can be established only after installation and test work), then the duty to examine does not *de facto* exist for a single delivery.

Article 38 of the CISG places a duty on the buyer to examine the goods in order to establish any possible lack of conformity. In contrast, provisions governing the liability of the seller for defects in title and third party rights, based on industrial property and other intellectual property, do not require the buyer to examine the goods, but only to notify the seller.<sup>8</sup>

In theory, it is widely accepted that Article 38 of the CISG should have analogous application to documents.<sup>9</sup> Although the Convention does not provide explicit rules, different interpretations would undermine the seller's right to cure the non-conformity. In the author's opinion, the principle of good faith (Art. 7(1) CISG) requires the examination of documents.

The seller is bound to hand over documents relating to the goods.<sup>10</sup> The Convention does not explicitly determine which documents are *documents relating to the goods* referred to in Article 34 of the CISG. Quite frequently, one may find provisions in contracts setting out the documents that the seller is obligated to hand over to the buyer. When the application of the INCOTERMS is stipulated, they contain detailed rules on documents that should be handed over by the seller. Also, the mode of payment (e.g. clean payment, documentary credit) may generally determine the documents that should be handed over to the buyer. Irrespective of the type of documents, the buyer should examine them in order to establish their accuracy and to be able to notify the seller in due time.

Article 38 of the CISG is of secondary importance. It applies only if the parties have not agreed otherwise.<sup>11</sup> Since the elective nature of the

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<sup>6</sup> CISG-online 1813, Netherlands, *Rechtbank Arnhem (Tree case)*, 11. February 2009.

<sup>7</sup> See more I. Schwenzer in: P. Schlechtriem, I. Schwenzer (ed.), Art. 38, para. 9.

<sup>8</sup> See Article 41–43 CISG.

<sup>9</sup> See C. Benicke in: K. Schmidt (Hrsg.), *Münchener Kommentar zum Handelsgesetzbuch*, München 2004, Vor Art. 38, 39, para 4; I. Schwenzer in: P. Schlechtriem, I. Schwenzer (ed.), Art. 38, para. 7; U. Magnus in: H. Honsell (Hrsg.), *Kommentar zum UN-Kaufrecht*, Berlin, Heidelberg 2010, Art. 38, para 8. Opposite position, W.A. Achilles, *Kommentar zum UN-Kaufrechtsübereinkommen (CISG)*, Luchterhand 2000, Art. 38, para 2.

<sup>10</sup> See Article 30 and Article 34 CISG.

<sup>11</sup> See Article 6 CISG.

examination is not in accordance with the needs of international trade, the duty to examine is often stipulated in standard form contracts and usages.<sup>12</sup> Furthermore, trade usages to which parties have agreed or impliedly made them applicable to their contract and practices which they have established between themselves supersede Article 38 of the CISG<sup>13</sup>.

### 3 LEGAL NATURE AND PURPOSE OF THE DUTY TO EXAMINE

Examination of the goods is not a legal obligation, but is, by its legal nature, a duty (*die Obliegenheit*).<sup>14</sup> The duty represents “an obligation to oneself”<sup>15</sup> and not to the other party in a contract. Thus, the examination of the goods is an additional burden on the buyer. Failure to comply with this burden does not constitute a breach of a contract and, accordingly, the seller can neither require the examination nor can non-performance of the examination represent a ground for claim for damages.

The duty to examine the goods should not be confused with the buyer’s right (Art. 58(3) of the CISG) to examine the goods before payment of the purchase price.<sup>16</sup>

The main purpose of the examination is to determine whether or not the goods are in conformity with the contract, i.e. to reveal defects in quality, quantity, description and packaging.

The duty to examine the goods is closely connected with the duty to notify the seller. Namely, the seller will be liable for the non-conformity of the delivered goods only if the buyer gives him notice pursuant to Article 39 of the CISG. The examination usually precedes the non-conformity

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<sup>12</sup> See more M. Draškić, *Obaveze prodavca prema unifikovanim pravilima o međunarodnoj kupoprodaji* [The Seller’s Obligations According to the Unified Law of International Purchase-Sale], Beograd 1966, 93; B. T. Blagojević, V. Krulj (ed.), *Komentar Zakona o obligacionim odnosima* [Commentary on the Law of Obligations], Book I, Beograd 1980, 975.

<sup>13</sup> See Article 9(1) and (2) CISG.

<sup>14</sup> U. Magnus, *J. von Staudingers Kommentar zum Bürgerlichen Gesetzbuch: Wiener UN-Kaufrecht (CISG)*, Sellier-de Gruyter, Berlin 2005, 388; I. Schwenzer in: P. Schlechtriem, I. Schwenzer (ed.), Art. 38, para 5; C. Benicke in: K. Schmidt (Hrsg.), Vor Art. 38, 39, para 1; U.P. Gruber in: W. Krüger, H.P. Westermann (Hrsg.), *Münchener Kommentar zum Bürgerlichen Gesetzbuch*, Band 3, 4. Auflage, München, 2004, Art. 38, para 3; I. Saenger in: H.G. Bamberger, H. Roth (Hrsg.), *Kommentar zum Bürgerlichen Gesetzbuch*, C.H. Beck, München 2003, Art. 38, para 1.

<sup>15</sup> M. Hutter, *Die Haftung des Verkäufers für Nichtlieferung bzw. Lieferung vertragswidriger Ware nach dem Wiener UNCITRAL-Übereinkommen über internationale Warenkaufverträge vom 11. April 1980*, Allgäu 1988, 70.

<sup>16</sup> W. A. Achilles, Art. 38, para 1; I. Schwenzer in: P. Schlechtriem, I. Schwenzer (ed.), Art. 38, para 3.

notice and serves for its preparation. However, the examination of the goods is not a precondition for proper notification. In other words, with the fulfillment of conditions set out in Article 39(1) of the CISG, notice of the buyer will have a legal effect even where the buyer has either not examined the goods sufficiently or at all. Furthermore, failure to examine the goods and to give notice of the lack of conformity is not detrimental to the buyer whenever the defect is latent, that is, if the non-conformity could not have been recognized upon an appropriate examination of the goods.<sup>17</sup> Finally, the seller is not entitled to rely on the provision of Art. 38 of the CISG if he acted in bad faith, i.e. if the lack of conformity relates to the facts he knew or could not have been unaware of, and which he did not disclose to the buyer,<sup>18</sup> and when the buyer has a reasonable excuse for his failure to give the notice of non-conformity<sup>19</sup>.

The essential difference between the duty to examine the goods and the duty to notify the seller of the lack of conformity lies in the fact that the buyer does not suffer any sanctions for failing to examine the goods. Nevertheless, in such a case, he bears the risk of the existence of the non-conformity, i.e. the risk that his notification could end in failure. If defects are recognized too late due to failure to examine the goods (after the deadline set for giving the notice of non-conformity), the buyer will *de facto* not be in a position to notify the seller of the non-conformity and will lose the right to rely on it. Consequently, the observation of the duty to examine the goods is in the buyer's own interest. In contrast, failure to inform the seller of the defects leads to the loss of remedies.

The primary function of the examination is to recognize defects and prepare the notice of non-conformity. Additionally, the examination of the goods should determine when, in the absence of the examination, the buyer *ought to have* discovered the lack of conformity and, from that moment, the reasonable time for giving the notice of non-conformity starts to run. Finally, pursuant to Art. 49(2)(b)(i) of the CISG, the buyer

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<sup>17</sup> “Es kann nicht dem Käufer zum Nachteil gereichen, wenn er die Untersuchung unterlassen hat, wenn eine normale Untersuchung den Mangel nicht hätte aufdecken können.” Quoted from R. Herber, B. Czerwenka, *Internationales Kaufrecht – Kommentar zu dem Übereinkommen der Vereinten Nationen vom 11. April 1980 über Verträge über den Internationalen Warenkauf*, München 1991, Art. 38, para 2.

See also C. Brunner, *UN-Kaufrecht – CISG – Kommentar zum Übereinkommen der Vereinten Nationen über Verträge über den internationalen Warenkauf von 1980 – Unter Berücksichtigung der Schnittstellen zum internen Schweizer Recht*, Bern 2004, Art. 38, para 2; U. Magnus in: H. Honsell (Hrsg.), Art. 38, para 4; I. Schwenzer in: P. Schlechtriem, I. Schwenzer (ed.), Art. 38, para 5; C. Benicke in: K. Schmidt (Hrsg.), Vor Art. 38, 39, para 1; I. Saenger in: H.G. Bamberger, H. Roth (Hrsg.), Art. 38, para 1.

See also Finland, *Helsinki Court of Appeal (Steel plates case)*, 29 January 1998, <http://cisgw3.law.pace.edu/cases/980129f5.html>, last visited February 2011.

<sup>18</sup> See Article 40 CISG.

<sup>19</sup> See Article 44 CISG.

loses the right to declare the contract avoided unless he does so within a reasonable time after he knew or *ought to have known* of the breach.

#### 4. EXAMINATION BY THE BUYER OR A THIRD PARTY

Pursuant to Article 38(1) of the CISG, the buyer must examine the goods, or cause them to be examined, within as short a period as is practicable in the circumstances. Contracts of international sale usually contain detailed rules regulating subjects effecting the examination of the goods. Sometimes this issue can be determined by usages or previous practice established between parties.

It is conceivable for parties to agree to examine the goods together. However, that will not often be the case because of the distant character of international sales.

By stating that the buyer must either examine the goods or “cause them to be examined”, Article 38(1) implies that the buyer need not personally carry out the examination.<sup>20</sup> In other words, the examination can be carried out by the buyer, his employees, as well as third persons acting in accordance with the buyer’s instructions (e.g. expert<sup>21</sup> in specific field or his customer). These persons should be treated as the buyer’s assistants and the buyer is liable for their work, i.e. the buyer will have to bear the consequences of inadequate examination.

According to the agreement the buyer can be obligated to entrust the examination with the third independent party. It is possible for the examination to be carried out by impartial controlling organizations, as well as by official bodies.

The examination of the goods by controlling organization is very common in international trade practice. In contracts of sale, however, parties must explicitly provide for this. Even though appointing an impartial controlling organization raises costs of transaction, the parties usually opt

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<sup>20</sup> Digest of Article 38 case law, 2008 UNCITRAL Digest of case law on the United Nations Convention on the International Sale of Goods, <http://www.cisg.law.pace.edu/cisg/text/digest-art-38.html>, last visited February 2011.

“The buyer is obliged to examine the goods itself as a middleman or have them examined by the third person.” Austria, *Oberster Gerichtshof*, 27 August 1999, <http://www.unilex.info/case.cfm?pid=1&do=case&id=480&step=Abstract>, last visited February 2011.

<sup>21</sup> Serbia, *Foreign Trade Court of Arbitration attached to the Yugoslav Chamber of Commerce* (“*Wet blue*” leather case), 12 February 2001, <http://cisgw3.law.pace.edu/cases/010212sb.html> (expert-specialist for leather chosen and sent by the buyer); Netherlands, *Rechtbank Rotterdam*, 20 January 2000, available at [www.unilex.info](http://www.unilex.info) (buyer’s quality inspector in the seller’s place); CISG-online No. 47, Germany, *Bundesgerichtshof*, 3 November 1999 (expert appointed by the buyer to examine the goods).

for this due to the distant character of international sales. Quite often, the examination by third person is a necessity because parties are neither proficient nor have the equipment required for specialized operations. Finally, after the examination, the controlling organization issues a certificate of quality that informs the buyer of the condition of the goods before arrival at their destination. It is important to distinguish two situations that can directly influence the liability of the parties. In other words, a distinction should be made between cases where the parties agree on third impartial persons or where the seller insists on the appointment of the controlling organization and where the buyer chooses the person carrying out the examination. In the first case, the buyer is not liable for the third person's work and does not have to bear the consequences of inadequate examination and the duty to examine the goods is fulfilled by giving necessary instructions. In the second case, the third person acts as the buyer's assistant and the buyer is liable for his work. It is commonly accepted that the buyer is not responsible for the consequences of an improper examination effected by official bodies<sup>22</sup>.

Finally, there is a possibility for the duty to examine to be shifted to the customer in cases of the sale of goods in transit.<sup>23</sup> When the buyer, for example, resells and redispaches the goods before having had a reasonable opportunity to examine them, the goods must be examined by the new buyer.<sup>24</sup>

## 5. METHOD AND INTENSITY OF EXAMINATION OF THE GOODS

The method of examination represents the factual acts undertaken in order to ascertain the condition of the delivered goods, while the intensity and scope of the examination determine how extensive those factual acts should be. The method and scope of the examination are generally regulated by the contract of sale, in particular where the goods are complex machinery or equipment. Additionally, the method and intensity of examination can arise from usages and/or previous course of dealings.

On the other hand, the CISG is silent about the method and scope of examination. However, the answer to that question may be deduced from the general principles underlying the CISG, as well as from comprehensive case law.

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<sup>22</sup> See I. Schwenzer in: P. Schlechtriem, I. Schwenzer (ed.), Art. 38, para 10.

<sup>23</sup> CISG-online 570, Germany, *OLG Koblenz*, 18 November 1999; CISG-online 918, Germany, *OLG Düsseldorf*, 23 January 2004

<sup>24</sup> C.M. Bianca in: C.M. Bianca, M.J. Bonell (ed.), *Commentary on the International Sales Law – The 1980 Vienna Sales Convention*, Milan 1987, Art. 38, para 2.2.



Whenever the method and scope of the examination are not specified, the examination has to be appropriate in the given circumstances and has to enable non-conformity to be revealed within a short period of time. It is widely accepted in theory that the nature and scope of the examination should be determined in accordance with *general principle of reasonableness*.<sup>25</sup> In other words, the examination required is one which is reasonable in all the circumstances, and not the one which would reveal every possible defect.<sup>26</sup> In any case, customary methods of examination that have emerged for certain branches of trade have to be observed (e.g. individual examination, spot checks, chemical analysis...)<sup>27</sup>

The method and intensity of examination are determined by its purpose. Inspection should serve as a preparation for adequate and thorough notification of non-conformity. Consequently, the examination should detect any possible lack of conformity and its nature, since the buyer, under Article 39(1) of the CISG, has to give notice to the seller specifying the nature of the lack of conformity.

Due to their complexity, issues of method and scope of examination should be analyzed separately.

### 5.1. Method of examination

The CISG does not expressly define the methods of examination of the goods. On the contrary, pursuant to the Article 38(4) of the ULIS, the

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<sup>25</sup> See C.M. Bianca in: C.M. Bianca, M.J. Bonell (ed.), Art. 38, para 2.3.; M.J. Bonell, F. Liquori, "The UN Convention on the International Sale of Goods: a Critical Analysis of Current International Case Law (Part II)", *Uniform Law Review*, 2/1996, 359; U. Magnus in: H. Honsell (Hrsg.), Art. 38, para 15; UN DOC. A/CONF. 97/5, *Secretariat Commentary*, Official Records, 34.

"Der Käufer müsse die Ware entsprechend ihrer Art, ihrer Menge, ihrer Verpackung und unter Berücksichtigung aller weiteren Umstände in angemessener Weise untersuchen." CISG-online 1889, Austria, *Oberster Gerichtshof*, 2 April 2009.

<sup>26</sup> H. Bernstein, J. Lookofsky, *Understanding the CISG in Europe – A Compact Guide to the 1980 United Nations Convention on Contracts for the International Sale of Goods*, Dordrecht 1997, 62.

"The defective composition of the PVC could only be discovered by virtue of special chemical analyses, which the buyer was not bound to have made." Germany, *Landgericht Paderborn*, 25 June 1996, <http://www.unilex.info/case.cfm?pid=1&do=case&id=191&step=Abstract>, last visited February 2011.

<sup>27</sup> F. Enderlein, D. Maskow, *International Sales Law*, Oceana Publications, New York 1992, 155.

"The Court stated that in case of sale of wine, unless there are some particular reasons to do so, the buyer is not bound to have the wine examined with respect to possible water additions, since this kind of examination is not included among the ones generally undertaken in the wine branch." Germany, *Landgericht Trier*, 12 October 1995, <http://www.unilex.info/case.cfm?pid=1&do=case&id=185&step=Abstract>, last visited February 2011.

methods of examination shall be governed by the agreement of the parties or, in the absence of such agreement, by the law or usage of the place where the examination is to be effected. This provision is problematic when existing law or usage of the place of the examination does not impose the duty to examine the goods and to notify the seller of lack of conformity. It should be noted that Article 38(4) of the ULIS could not exonerate the buyer from examination<sup>28</sup> because this article cannot derogate Article 38(1) of the ULIS, but would affect the way in which the examination is to be carried out. Accordingly, Article 38(4) of the ULIS made sense only when the place of the examination was in the country whose domestic law of sales required inspection of the goods. In practice, however, the parties from these countries generally resolved the issue of examination in their contract. The main difficulty arising from the Article 38(4) of the ULIS is somewhat different. If the method and scope of the examination were to be governed by the law and usages of the place of the examination, then the examination of the same goods could potentially be completely different in industrially developed and developing countries. Therefore, Article 38(4) of the ULIS did not sufficiently take into consideration the international character of the transaction. This provision has been criticized and left out of the CISG, so that the method of the examination can be determined according to the international character of the transaction and international usages.

However, it does not necessarily mean that the application of usages of the place of examination is always excluded. Namely, the usages will be relevant when parties reach such agreement, when it results from express or tacit application of the general terms and conditions or when the basis for their application lies in Article 9 of the CISG.

The examination must be objectively suitable for disclosing recognizable defects<sup>29</sup> in the given circumstances. The goods must be examined with care and skill.<sup>30</sup> The examination with care does not necessarily imply the use of an expert, but it means that the person examining the goods is obliged to act with due diligence.

Generally, the method of the examination is determined by the relevant circumstances. This depends on the nature of the goods, their quantity, packaging, complexity, as well as on the time in which the examination is to be effected. If the existence of the defects can be relatively

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<sup>28</sup> See different opinion C.M. Bianca in: C.M. Bianca, M.J. Bonell (ed.), Art. 38, para 2.3.

<sup>29</sup> While the CISG does not explicitly distinguish visible (apparent) and latent (hidden) defects, it can be deduced from the rule under Article 39 of the CISG that a distinction is made between visible and latent non-conformity.

<sup>30</sup> See more R. Herber, B. Czerwenka, Art. 38, para 5.

easily established or if, in cases of perishable goods, the examination has to be effected in a quick manner, a simple examination would be sufficient, especially viewing, smelling, cutting open individual fruits and/or counting, weighting etc.<sup>31</sup> If the examination is used to identify the composition of the goods or their chemical or physical characteristics, it would be necessary to conduct a chemical or laboratory analysis or specific expert inspection.<sup>32</sup> In cases where the lack of the conformity of the goods can be ascertained through operation and performance tests, the examination purports trial runs.<sup>33</sup> Examination of cloth material should include a test of shrinkage by carrying out washing and ironing tests on all sorts and colours, at least a simple test of colour fastness, as well as dyeing on a trial basis.<sup>34</sup> However, pieces of clothing do not have to be randomly washed in order to test their tendency to shrink.<sup>35</sup> The examination of delivered sticky foil consists of sticking attempts.<sup>36</sup>

Based on the abovementioned, it follows that the method of the examination is primarily determined by using objective criteria. Exceptionally, subjective factors influencing the buyer's position may be taken into consideration (e.g. the buyer's lack of experience) if they were known to the seller or if he should have been aware of them at the time of the conclusion of the contract.<sup>37</sup> Accepting a broader interpretation and acknowledging other subjective factors (e.g. the buyer's illness, difficulties in conducting a business, confiscation of the goods in accordance with the decision of the official body...) would be erroneous and contrary to the purpose of Article 44 of the CISG.

<sup>31</sup> See more W.A. Achilles, Art. 38, para 4; I. Schwenzer in: P. Schlechtriem, I. Schwenzer (ed.), Art. 38, para 14. Netherlands, *Arrondissementsrechtbank Zwolle*, 5 March 1997 (perishable food products), available at [www.unilex.info](http://www.unilex.info).

<sup>32</sup> See more W.A. Achilles, Art. 38, para 4.

<sup>33</sup> “The Court stated that in a sale concerning a machine or other complicated technical device, the proper examination of the goods according to Art. 38(1) must involve a testing of the functions of the machine.” Germany, *Oberlandesgericht Oldenburg*, 5 December 2000, <http://www.unilex.info/case.cfm?pid=1&do=case&id=500&step=Abstract>, last visited February 2011.

<sup>34</sup> I. Schwenzer in: P. Schlechtriem, I. Schwenzer (ed.), Art. 38, para. 14.

“In the opinion of the Court, even if in the case at hand the defects could only be detected once the cloth had been dyed, the buyer should have dyed a sample of the cloth shortly after delivery.” Germany, *Landgericht Berlin*, 21 March 2003, <http://www.unilex.info/case.cfm?pid=1&do=case&id=921&step=Abstract>, last visited February 2011.

<sup>35</sup> I. Schwenzer in: P. Schlechtriem, I. Schwenzer (ed.), Art. 38, para. 14. See also I. Saenger in: H.G. Bamberger, H. Roth (Hrsg.), Art. 38, para 4.

<sup>36</sup> See more I. Saenger in: H.G. Bamberger, H. Roth (Hrsg.), Art. 38, para 4.

<sup>37</sup> I. Schwenzer in: P. Schlechtriem, I. Schwenzer (ed.), Art. 38, para. 13. See also U.P. Gruber in: W. Krüger, H.P. Westermann (Hrsg.), Art. 38, para 23.

Finally, the person examining the goods is precluded from performing forbidden acts of manipulation on the goods (e.g. adding water to wine).<sup>38</sup>

## 5.2. Scope and intensity of examination

The nature of defects that have to be discovered through the examination, i.e. how intense the examination should be, is a very important issue. The scope and intensity of the examination should be such to, as quickly as possible, accomplish the goal of ascertaining the lack of conformity of the delivered goods.<sup>39</sup> The examination is sufficient when it is suitable to reveal possible defects. In other words, it is not necessary to perform chemical analysis if the lack of conformity can be established by observation.

The examination does not have to be of such an intensity to reveal every imaginable lack of conformity.<sup>40</sup> The inspection of technical goods (e.g. machinery, cars) should prove their functionality, i.e. that they function correctly. On the other hand, it is not necessary to effect the examination that would detect the cause of the non-conformity.<sup>41</sup>

The scope of the examination depends on the circumstances of each individual case. In particular, it is firstly influenced by the type of the goods. In the case of perishable goods, the buyer has to react promptly and reasons of urgency cannot justify a time consuming and complex examination. In contrast, durable goods may be examined in a manner that is more intensive and lasts longer.

Secondly, the quantity of the goods and their packaging affect the scope of examination. Whenever possible, the buyer should examine all the goods. When the goods are too complex or too numerous the buyer is neither bound to undertake a thorough examination of every single good nor of every single part.<sup>42</sup> In case of large quantities, the buyer should perform a reasonable number of random spot checks (*die Stichprobe*).<sup>43</sup> In other words, for large quantities, it should be considered reasonable to

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<sup>38</sup> See more I. Saenger in: H.G. Bamberger, H. Roth (Hrsg.), Art. 38, para 4; W.A. Achilles, Art. 38, para 6; I. Schwenzer in: P. Schlechtriem, I. Schwenzer (ed.), Art. 38, para 13.

<sup>39</sup> See more R. Herber, B. Czerwenka, Art. 38, para 5; C. Brunner, Art. 38, para 12.

<sup>40</sup> Germany, *Landgericht Paderborn*, 25 June 1996, available at [www.unilex.info](http://www.unilex.info).

<sup>41</sup> See more C. Brunner, Art. 38, para 12.

<sup>42</sup> C.M. Bianca in: C.M. Bianca, M.J. Bonell (ed.), Art. 38, para. 2.3.

<sup>43</sup> U. Magnus in: H. Honsell (Hrsg.), Art. 38, para 16; C. Brunner, Art. 38, para 13; I. Schwenzer in: P. Schlechtriem, I. Schwenzer (ed.), Art. 38, para 14.

take random samples, instead of examining all the delivered goods.<sup>44</sup> In order to be considered representative, random samples should be taken from different parts of the goods. Spot checks will not be suitable whenever the costs of a single check are too high in comparison to the value of the delivered goods.<sup>45</sup> If random sampling renders the goods unsaleable, the examination has to be performed but should be less extensive. It is arguable whether the same principle is applicable to the goods in original packaging, which are precluded from further sale after opening and examination (e.g. canned fruits, sterile medical equipment). It is commonly accepted in international sales law theory that in this case the buyer is required to perform a small number of spot checks.<sup>46</sup> Namely, the damage caused by the opening of the original packaging dictates the scope of the examination to be limited to what is needed. Furthermore, examined goods do not have to represent an average sample in a strict sense, considered the entire amount of goods, unless the condition of the goods does not induce doubts.<sup>47</sup> In that case, the buyer will not be deprived of the right to rely on the lack of conformity later, even when it was possible to disclose the non-conformity with a more detailed examination. In our opinion, it would be more suitable for the examination of the goods in original packaging to be restricted only to the exterior packaging, while possible lack of conformity of the goods should be treated as a latent defect. This conception seems to be more appropriate because a limited number of spot checks cannot provide an objective impression of the actual condition of the goods.

Thirdly, the intensity of the examination is influenced by the buyer's capabilities. If at the place of the inspection the buyer does not have technical equipment that is required for the specific type of the examination, the buyer is not bound to perform it, even if this scope of the examination is common in other places.<sup>48</sup> This position could be arguable and one should be very careful when evaluating the capability of the buyer.

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<sup>44</sup> Germany, *Oberlandesgericht Düsseldorf*, 10. February 1994 – “The buyer failed to examine the goods on delivery. The court held that the notice of lack of conformity (sent two months after delivery) has not been sent in a good time as the buyer could have (and therefore ought to have) immediately examined at least a sample of the goods received.” Quoted from M.J. Bonell, F. Liguori, “The UN Convention on the International Sale of Goods: a Critical Analysis of Current International Case Law (Part II)”, *Uniform Law Review*, 2/1996, 360.

<sup>45</sup> See more C. Brunner, Art. 38, para 13.

<sup>46</sup> C. Brunner, Art. 38, para 13; I. Schwenzer in: P. Schlechtriem, I. Schwenzer (ed.), Art. 38, para 14.

<sup>47</sup> See more W.A. Achilles, Art. 38, para 5.

<sup>48</sup> See more C. Brunner, Art. 38, para 12; U. Magnus in: H. Honsell (Hrsg.), Art. 38, para 17.

Fourthly, the costs of the examination and time needed for its completion also have to be considered. The costs should be reasonable in comparison to the expected results. Sometimes, the buyer will examine the goods in a simple manner (e.g. limited number of random samples) because more expensive methods are not at his disposal.

Fifthly, the probability of defects is also important (non-conformity of previous deliveries, damaged packaging...). Sometimes, there is no need for a particularly intensive inspection if the buyer can rely on the seller's statements and if he believes that the goods have specific characteristics (e.g. when the goods are purchased on the basis of express evidence of examination or of measurement of quantity).<sup>49</sup> The same applies when specific distinctive features of the goods are agreed upon and when the buyer is assured that the goods have already been checked (e.g. the goods are in compliance with specific standards: ISO, HACCP, HALAL, TÜV...). If the parties have a long-standing business relationship and if previous deliveries were in conformity with the contract, the buyer's trust should not preclude his duty to examine the goods.<sup>50</sup> According to case law, the lack of conformity of previously delivered goods, or the non-conformity of the goods ascertained by random sampling requires the buyer to act with more care and to effect the examination in a more detailed manner.<sup>51</sup> The aforementioned position is too harsh and it does not justify imposing any additional and stricter obligations on the buyer due to the seller's breach of contract.<sup>52</sup>

Finally, the intensity of the examination also depends on potential losses caused by undisclosed defects.<sup>53</sup> If there is a risk of ultimately large consequential losses, the examination must be more thorough than in a normal case<sup>54</sup>.

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<sup>49</sup> See more W.A. Achilles, Art. 38, para 4.

<sup>50</sup> W.A. Achilles, Art. 38, para 4.

<sup>51</sup> See more U. Magnus in: H. Honsell (Hrsg.), Art. 38, para 18.

“With respect to the examination of the goods the court found that the buyer should have examined all the pairs of shoes from the second order and not only a few of them, having been forewarned by customer complaints concerning the first delivery.” Germany, *Landgericht Stuttgart*, 31 August 1989, <http://www.unilex.info/case.cfm?pid=1&do=case&id=1&step=Abstract>, last visited February 2011.

<sup>52</sup> Opposite opinion B. Piltz, *UN-Kaufrecht: Gestaltung von Export- und Importverträgen; Wegweiser für die Praxis*, para 243; I. Schwenzer in: P. Schlechtriem, I. Schwenzer (ed.), Art. 38, para 13; W.A. Achilles, Art. 38, para 4.

<sup>53</sup> W.A. Achilles, Art. 38, para 3; U.P. Gruber in: W. Krüger, H.P. Westermann (Hrsg.), Art. 38, para 26.

<sup>54</sup> I. Schwenzer in: P. Schlechtriem, I. Schwenzer (ed.), Art. 38, para. 13.

## 6. CONCLUSION

On the basis of the studied literature, the interpretation of the abovementioned provisions of the CISG and relevant case law, there would seem to be several important conclusions. The buyer must examine the goods in order to establish every possible lack of conformity. The inspection of the goods serves for the preparation of the notice of non-conformity. The examination of the goods is, by its nature, a duty. The requirements imposed on the buyer in relation to the inspection of the goods should not be too strict because the risk of non-conformity of the goods would thereby be shifted to the buyer.

Secondly, the CISG explicitly provides that the buyer has the duty to examine the goods, but is silent on the method and the scope of examination. However, according to the generally accepted opinion, it is to be assumed that those issues are governed by the CISG. It is of essential importance not to apply the criteria established in domestic laws of sales to the examination in the international sale of goods. Therefore, in assessing the nature of the examination, one should have in mind the need of an autonomous interpretation of the CISG and the need to promote uniformity in its application.

Finally, the main principle underlying the method and scope of the examination is the principle of reasonableness. In other words, the examination has to be reasonable in the given circumstances and has to enable non-conformity to be revealed within a short period.