

## PANEL 2

### **Formal Defences of the Seller Against Non-Conformity Claims of the Buyer**

*Italian, Japanese, and Swedish Perspectives  
in comparison to the CISG*

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# Examination Duty of the Seller

- **CISG case law:**
  - ✓ As a rule of thumb, an inspection **period of two weeks is considered sufficient** and appropriate for non-perishable goods or goods that do not fluctuate greatly in price (CISG-online 4506, 24.04.2019, Germany)
  - ✓ Also with non-perishable goods, an **immediate examination** with regard to the **quantity** of the goods is to be expected (CISG-online 193, 05.04.1995, Germany)
  - ✓ Spot checks of the delivered **ham** could have been done within a time limit of not more than **three days** (CISG-online 358, 21.10.1994, Germany).
  - ✓ Examination: The random samples taken must represent the entire delivery of goods, i.e. they must always cover random boxes and stacks, and **not just the goods on top** (CISG-online 5638, 28.07.2021, Netherlands)

# Examination Duty of the Seller

Art. 38 CISG	Italian law (Art. 1495 Italian civil code)
<ul style="list-style-type: none"> <li>The buyer must examine the goods, or cause them to be examined, within <b>as short a period as is practicable in the circumstances</b>.</li> <li>If goods carried: at place of arrival</li> <li>If goods redirected or redispached and seller knew or ought to have known: after goods arrived at the new place.</li> </ul>	<ul style="list-style-type: none"> <li>No explicit time frame</li> <li>But implicitly examination has to be conducted within max. 1 year statute of limitation.</li> </ul>
Japanese law (Art. 526 (1) Com. Code)	Swedish law (SGA, sec. 31)
<ul style="list-style-type: none"> <li>In a sales transaction between merchants, upon receiving the object of the sales transaction the buyer must <b>inspect it without delay</b>.</li> </ul>	<p>Close to CISG:</p> <ul style="list-style-type: none"> <li>Following delivery of the goods, the buyer shall, <b>as soon as circumstances permit</b>, inspect the goods <b>in accordance with generally accepted business practises</b>.</li> <li>If goods carried: at place of arrival</li> <li>If goods redirected or redispached and seller knew or ought to have known: after goods arrived at the new place.</li> </ul>

# Notification Duty of the Seller

- **CISG case law:**
  - ✓ Notification of defects in an ironing machine **4 months after discovery too late** (CISG-online 5865, 29.11.2021, France)
  - ✓ Notification more than **10 weeks after receiving** the computer tablets too late (CISG-online 5638, 28.07.2021, Netherlands)
  - ✓ Notification of defects in tablets **1 month after delivery is too late** (CISG-online 5845, 29.03.2022, USA)
  - ✓ Content of notice: The **mere sending of a quality report** on the goods sold to the seller does not usually indicate a sufficient will to complain (CISG-online 5738, 08.12.2021, Netherlands)

# Notification Duty of the Seller

Art. 39 (1) CISG	Italian law (Art. 1495 Italian civil code)
<p>The buyer loses the right to rely on a lack of conformity of the goods if he does not <b>give notice</b> to the seller specifying the nature of the lack of conformity <b>within a reasonable time</b> after he has discovered it or ought to have discovered it.</p>	<p>The buyer loses the right to the warranty if he does not <b>report the defects to the seller within eight days</b> from the discovery, unless otherwise established by the parties or by law.</p> <p><i>Case-law:</i></p> <ul style="list-style-type: none"> <li>• For non-apparent defects time runs from actual discovery;</li> <li>• If transportation is involved, the period for notification of apparent quality defects runs from the day of receipt.</li> <li>• No details regarding the nature of the defect needed</li> </ul>
Japanese law (Art. 526 (2) Com. Code)	Swedish law – SGA, sec. 32
<p>[...], if the buyer, as a result of the inspection [...] discovers that the object of the sales transaction does not conform to the terms and conditions of the contract [...] the buyer may not use that nonconformity [...] unless <b>the buyer immediately issues notice of the nonconformity to the seller.</b></p> <p><i>Case-law:</i></p> <ul style="list-style-type: none"> <li>• as prompt as possible</li> <li>• not necessary to make a claim for damages within the period</li> </ul>	<p>Same as CISG:</p> <p>The buyer may not allege that the goods are defective if he has not, within a <b>reasonable time</b> after he detected or should have detected the defect, put the seller on notice thereof.</p> <p><i>Case-law:</i></p> <ul style="list-style-type: none"> <li>• Court practice concerning CISG and domestic law align.</li> <li>• "Neutral" notice is sufficient, but defect needs to be specified.</li> </ul>

# Maximum Period for Notice of Non-Conformity

- **CISG case law:**
  - ✓ The two-year period is a **notification period** and not a limitation or preclusion period (CISG-online 6748, 10.01.2024, France)
  - ✓ The **buyer loses the right** to invoke a lack of conformity if he does not notify it at the latest two years after delivery of the goods (CISG-online 6643, 21.11.2023, France)
  - ✓ If the contract provides for an effective **warranty period of more than two years**, this is incompatible with the exclusion period of Art. 39 II within the scope of its regulation (CISG-online 5933, 04.08.2020, Netherlands)

# Maximum Period for Notice of Non-Conformity

Art. 39 (2) CISG	Italian law (Art. 1495 Italian civil code)
<p>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 <b>within a period of two years</b> 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.</p>	<p>The action is time-barred, in any case, <b>within one year</b> from delivery; but the purchaser, who is summoned for the performance of the contract, can always assert the guarantee, provided that the defect in the good has been reported within eight days from the discovery and before the end of the year of delivery.</p>
Japanese law (Art. 526 (2) Com. Code)	Swedish law – SGA, sec. 32
<p>[...], The same applies if it is impossible to immediately discover that the object of a sales transaction does not conform to the terms and conditions of the contract within terms of its type or quality, when the buyer discovers that nonconformity <b>within six months</b>.</p>	<p>Same as CISG:</p> <p>If the buyer has not put the seller on notice of the defect <b>within two years</b> after receiving the goods, he shall have forfeited the right to invoke the defect, unless otherwise provided by a warranty or other similar undertaking.</p>

# Seller's Knowledge of Non-Conformity

- **CISG case law:**
  - ✓ Manufacturer status of the seller alone not sufficient to assume knowledge of the seller within the meaning of Art. 40 (CISG-online 5393, 13.02.2020 France)
  - ✓ No negligent lack of knowledge is assumed if the seller is aware of a potential lack of conformity, but assumes that this will not occur in the contractually stipulated use (CISG-online 3388, 11.07.2018, Netherlands)



# Seller's Knowledge of Non-Conformity

<p><b>Art. 40 CISG</b></p>	<p><b>Italian law (Art. 1495 (2) Italian civil code)</b></p>
<p>The seller is not entitled to rely on the provisions of articles 38 and 39 if the lack of conformity relates to <b>facts of which he knew or could not have been unaware</b> and which he did not disclose to the buyer.</p>	<p>No notice is required if the seller has acknowledged the existence of the defect or concealed it.</p>
<p><b>Japanese law (Art. 526 (3) Com. Code)</b></p>	<p><b>Swedish law – SGA, sec. 33</b></p>
<p>The provisions of the preceding paragraph do not apply <b>if the seller knows</b> that the object of the sales transaction does not conform to the terms and conditions of the contract in terms of its type, quality, or quantity.</p>	<p>Close to CISG:</p> <p>The buyer may allege that the goods are defective, notwithstanding sections 31 and 32, <b>if the seller has been grossly negligent or has acted in bad faith.</b></p>



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**Thank you very much for your attention**

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