

ARTICLE 39 OF THE CISG AND ITS “NOBLE MONTH” FOR NOTICE-GIVING; A (GRACEFULLY) AGEING DOCTRINE?*

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INTRODUCTION

Over 15 years ago, a fair amount of controversy was created in the attempts by some (Germanic) tribunals applying the CISG to introduce more predictability in to the difficult issues of determining what “reasonable time” should be for notice giving under Article 39 of the CISG. The notion of a “noble month” was introduced to English academic scholarship in 1997.¹ That term was originally transposed from Ingeborg Schwenzer’s “großzügigen Monat” from the Van Caemerer/Schlectriem commentary (in the days before we had the benefit of this important book in English),² and was subsequently given a seal of approval by Professor Schwenzer.³ The notion became popular in case law from some regions of the CISG; but while a number of cases sprang up confirming the need for more predictability in this area, a number of commentators as well as the CISG Advisory Council distanced themselves from the notion of any benchmark for determining reasonable time. The scene for a battle between flexible uncertainty and more rigid predictability seemed set. I think it fair to say that a certain timidity has dominated the subject in recent years in academia, and that case law has fragmented itself into regional approaches which belie the uniform nature of the CISG as it was intended.

* This paper is dedicated to Ingeborg Schwenzer, whose birthday we celebrate this year. A shorter version of the paper is available in the tributary volume which was presented to her in October 2011; Dr. Camilla B. Andersen, *Noblesse Oblige . . . ? Revisiting the ‘Noble Month’ and the Expectations and Accomplishments it has prompted*, in *FESTSCHRIFT FÜR INGEBORG SCHWENZER* (Muller-Chen ed., 2011).

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1. Camilla Baasch Andersen, *Reasonable Time in the CISG—is Article 39(1) Truly a Uniform Provision?*, in *REVIEW OF THE CISG 63–177* (1998) (winner of the PACE Essay competition in International Commercial Law, 1997), available at <http://www.cisg.law.pace.edu/cisg/biblio/andersen.html>.

2. ERNST VON CAEMMERER ET AL., *KOMMENTAR ZUM EINHEITLICHEN UN-KAUFRECHT* 362, at art. 39, ¶ 17 (2d ed. 1995).

3. See Ingeborg Schwenzer, *Noble Month (Articles 38, 39 CISG)—The Story Behind the Scenery*, 7 *EUR. J. L. REFORM* 353, 353–66 (2006), and Ingeborg Schwenzer, *National Preconceptions that Endanger Uniformity*, 19 *PACE INT’L L. REV.* 103 (Spring 2007) (especially at n.5).

This paper will analyse the benchmark of the “Noble Month” by charting its success, contextualising its difficulties, and analysing the Article 39 cases from the German courts whence it sprang, to ascertain whether it is still alive and kicking, if it has been laid to rest or—perhaps more controversially—whether it *should* have been laid to rest.

THE RISE OF THE “NOBLE MONTH”—1995 TO 2004

As mentioned, the notion originated in Schwenger’s comparative analysis of transnational domestic timeframes for notice giving in the original German von Caemmerer CISG commentary edited by Professor Peter Schlechtriem in 1995.⁴ After looking at French, American and German notification frameworks, Schwenger concludes that: “Will man allzu großen Auslegungsdivergenzen vorbeugen, erscheint eine Annäherung der Standpunkte unabdingbar. Als grobem Mittelwert sollte man deshalb wenigstens von ca. einem Monat ausgehen.” In the English version of the text, this has since been translated as: “if excessive differences in interpretation are to be prevented, it would appear that a convergence of views is crucial. Consequently a period of approximately one month should at least be adopted as a rough average.”⁵

This solution makes perfect sense in theory. The consequence of failing to give the required notice of non-conformity is a complete lack of remedy (subject to some rarely applied exceptions in Articles 40 and 44), so it is of crucial importance to parties in any dispute regarding non-conforming goods. Add to that the fact that transnational case law shows a deplorable tendency to adopt more homeward trends in deciding what a reasonable time should be,⁶ and we have a serious potential pitfall for the unwary business man, with timeframes ranging from six months being on time⁷ and a few days being too

4. VON CAEMMERER ET AL., *supra* note 2, at art. 39, ¶ 17 (2d ed. 1995).

5. See the recently published 3rd edition of the same commentary in English (now edited by Schwenger herself): PETER SCHLECHTRIEM & INGEBORG SCHWENGER, COMMENTARY ON THE UN CONVENTION ON THE INTERNATIONAL SALE OF GOODS 632 (Ingeborg Schwenger ed., 3d ed. 2010).

6. This tendency is illustrated most clearly in the appendix to CISG-AC Opinion No. 2, Examination of the Goods and Notice of Non-Conformity: Articles 38 and 39, 7 June 2004. Rapporteur: Professor Eric E. Bergsten, Emeritus, Pace University School of Law, New York, available at <http://www.cisg.law.pace.edu/cisg/CISG-AC-op2.html>; but see *supra* note 1.

7. Tribunal de commerce de Besançon [Commercial Court of Besançon] France, 19 Jan. 1998, available at <http://cisgw3.law.pace.edu/cases/980119fl.html> (where the French court found that 6 months was timely in a transaction regarding sporting clothes).

late,⁸ on comparable types of goods. Schwenger's promotion of a single median timeframe gleaned from a diversity of jurisdictions represented a sound attempt at creating a more predictable approach to Article 39, which is exactly the kind of increased predictability that commercial practice welcomes.

The concept of a "Noble Month" is not to be taken too literally as always being one month. It is intended as a yardstick, an outer framework of one month for notification, which can then be altered depending on the specific factors concerning the goods: perishability, seasonable nature, etc. At least to this Civil Law trained mind—which may arguably be fonder of predictability than unpredictable flexibility—this would seem to be a significant advantage over utter uncertainty.

Following Schwenger's suggestion, it was not long before the "Noble Month" surfaced in judicial court practice. With its predilection towards reverence for, and reference to, leading scholarship, the German Supreme Court cited Schwenger in 1995. The German Supreme Court applied the "Noble Month" to the well-known case of cadmium-infested mussels where notice had not been given.⁹ They transposed the one month timeframe, and stated that "Selbst wenn man insoweit nach Auffassung des erkennenden Senats sehr großzügig wegen der unterschiedlichen nationalen Rechtstraditionen von einem 'groben Mittelwert' von etwa einem Monat ausgehen wollte, war die Rügefrist vor dem 3 März 1992 abgelaufen," with reference to Schwenger whom they were paraphrasing. So—even if the very generous timeframe of about one month as a median value of differing national notification rules were applied, notice was still not timely. This seemed to indicate that even though the Supreme Court considered a timeframe for notice of one month very generous ("sehr großzügig"), they were willing to consider it a new benchmark for the measuring of Article 39 timeframes. And of course, once this approach was rubber-stamped by the Supreme Court, other German courts soon followed, with reference to the

8. See, e.g., Landgericht Stuttgart [District Court of Stuttgart] Germany, 31 Aug. 1989, available at <http://cisgw3.law.pace.edu/cases/890831g1.html> (where German Courts found that 16 days was not timely in a transaction regarding shoes).

9. Bundesgerichtshof [Federal Supreme Court] Germany, 8 Mar. 1995, available at <http://cisgw3.law.pace.edu/cases/950308g3.html>. The case was previously tried in Landgericht Darmstadt of 22 Dec. 1992 [14 O 165/92] and Oberlandesgericht Frankfurt of 20 April 1994 [13 U 51/93]. Both previous instances neglected to take Article 39 into independent consideration. Landgericht Darmstadt [District Court of Darmstadt] Germany, 22 Dec. 1992, available at <http://cisgw3.law.pace.edu/cases/921222g1.html>; Oberlandesgericht Frankfurt [Provincial Appellate Court of Frankfurt] Germany, 20 Apr. 1994, <http://cisgw3.law.pace.edu/cases/940420g1.html>.

1995 case.¹⁰ Support for the “Noble Month” was also seen in the Swiss Supreme Court, where it has been held that one week for examination and four weeks for giving notice is the common approach, affirming a decision from a lower instance.¹¹

The German Supreme Court went on, in 1999,¹² to enter a decision which Schwenzer herself rightly called “striking.”¹³ It referred to the “Noble Month” as its regular or normal timeframe for measuring Article 39, and found that a total period of seven weeks after delivery (allowing three weeks for examination and four weeks for notice giving) was timely, even though this was essentially a recalculation of all the timeframes involved in examination and notification. Notice had been given within a few days of discovery of the non-conformity, but examination had been tardy. Bluntly put, the Court was essentially using formalistic timeframes to post-rationalise the decision to find in favour of the buyer. While the Court must be commended for departing from previous domestically-based interpretations where a week or two would normally not be considered timely, as well as for their distinction of the two timeframes of Articles 38 and 39,¹⁴ this case does not represent an entirely healthy swing at the problematic ball of Article 39 timeframes. The Court’s rigid application of the doctrine as “regular” (“*regelmässig*”) in this context stretches it too far; reliance on a standard timeframe in this way belies the existence of the “Noble Month” as a flexible yardstick which takes into account all circumstances, and may well be seen to sacrifice flexibility on the altar of certainty. One might even say that in the effort to formulate a predictable and certain timeframe, the Supreme Court has not only been “striking,” but has struck out.

10. See, e.g., Oberlandesgericht Stuttgart [Provincial Appellate Court of Stuttgart] Germany, 21 Aug. 1995, available at <http://cisgw3.law.pace.edu/cases/950821g1.html>; Amtsgericht Kehl [Petty District Court of Kehl] Germany, 6 Oct. 1995, available at <http://cisgw3.law.pace.edu/cases/951006g1.html>; Amtsgericht Augsburg [Petty District Court of Augsburg] Germany, 29 Jan. 1996, available at <http://cisgw3.law.pace.edu/cases/960129g1.html>; Oberlandesgericht Köln [Provincial Appellate Court of Cologne] Germany, 21 Aug. 1997, available at <http://cisgw3.law.pace.edu/cases/970821g1.html>.

11. Bundesgericht [Supreme Court] Switzerland, 13 Nov. 2003, available at <http://cisgw3.law.pace.edu/cases/031113s1.html>.

12. Bundesgerichtshof [Federal Supreme Court] Germany, 3 Nov. 1999, available at <http://cisgw3.law.pace.edu/cases/991103g1.html>.

13. Schwenzer, *supra* note 3, at 103, 113.

14. These two distinct timeframes are often mixed together in case law, offering one timeframe for both without either being discernible. For more on this, see Andersen, *supra* note 1, at § II 1.3.2, available at <http://cisgw3.law.pace.edu/cisg/biblio/andersen.html>.

Interestingly, the most recent¹⁵ reported swing at the Article 39 timeframe from the Supreme Court in Germany on Article 39 can be viewed ambiguously on the “Noble Month” point. The case is from 2004, and concerns paprika powder.¹⁶ While the outcome of the case falls well within the framework of the “Noble Month” by finding that notice given almost two months after initial test results is not timely, it does so by affirming a lower instance which prescribes a general duty of two weeks, with no mention of the “Noble Month” doctrine which it has previously so [over-]strenuously supported. If seen in isolation, this may seem immaterial. But the lower Court’s reference to a standard two week timeframe—which has been a competing timeframe benchmark in other cases, as well as the leading one in Austria—is repeated in the Supreme Court’s judgment and is not dismissed or even disputed. This *could* be construed as the German Supreme Court backing away from a guideline that is not used internationally and is therefore not appropriate. There are subsequent lower instances that affirm the “Noble Month,”¹⁷ but the fact remains that the Supreme Court itself has not done so since 1999. As Schwenzer points out herself, there is not a consistent use of the “Noble Month” in the lower instances,¹⁸ but a very varied picture of German case law emerges if the surface is scratched. Certainly, for the predictability of German jurisprudence, consistency on this point would be welcome.

And it is not just for the sake of German law that such a snapshot of the state of the doctrine on its own home front is useful. If the “Noble Month” has found equilibrium in a jurisdiction where the legal mentality so radically differs from its essence, then it reinforces its potential value transnationally. Disparately, it could be argued that if the “Noble Month” cannot survive on its own home front, then it will not stand a chance on the international arena.

15. See Bundesgerichtshof [Federal Supreme Court] Germany, 11 Jan. 2006, *available at* <http://cisgw3.law.pace.edu/cases/060111g1.html> (the Court did not engage in any deliberations on timeframes).

16. See Bundesgerichtshof [Federal Supreme Court] Germany, 30 June 2004, *available at* <http://cisgw3.law.pace.edu/cases/040630g1.html>.

17. See Landgericht Bamberg [District Court of Bamberg] Germany, 23 Oct. 2006, *available at* <http://cisgw3.law.pace.edu/cases/061023g1.html>. See also Landgericht Stuttgart [District Court of Stuttgart] Germany, 15 Oct. 2009, *available at* <http://cisgw3.law.pace.edu/cases/091015g1.html>. See also Oberlandesgericht Koblenz [Provincial Appellate Court of Koblenz] Germany, 2 Apr. 2009, *available at* <http://cisgw3.law.pace.edu/cases/061019g2.html> (beautifully stating that “[t]he period of time regarded as reasonable under Article 39 CISG must be seen in the particular circumstances of the case. Perishable or seasonal goods must be discerned. In general, however, an average of about one month after the goods have or ought to have been discovered the defect ought to be regarded as reasonable.”).

18. Schwenzer, *supra* note 3, at 103, 114 (“However, both in Germany and in Switzerland, the decisions of the respective supreme courts are yet to be unanimously followed by the lower courts”).

It is therefore worthwhile to take a good look at more recent German case law as a whole, in the determination of the current state of the “Noble Month” doctrine in Germany and its potential longevity.

NOBILITY AT HOME, 2005 AND ONWARDS

Given the lack of reasoning on the omission of its own “Noble Month” doctrine offered by the Supreme Court, it is unclear whether the 2004 BGH case above represents a distancing from the doctrine or not. Given this fact, it is difficult to see how this may have influenced the doctrine in subsequent case law.

German law is not subject to strict *stare decisis*. Lower instances can depart from a guideline set out in a Supreme Court ruling, if prepared to risk scholarly criticism and successful appeals. And even before 2004, it was clear that this was happening, as the “Noble Month” was experiencing a very varied success. An analysis of all German cases involving Article 39 reported after the disputed 2004 BGH case above may therefore not be indicative of how the Supreme Court’s reasoning on this point is perceived by its own lower courts. But it will be an indication of how the German Courts are dealing with this problematic issue, and just how much influence the “Noble Month” is enjoying. The following looks at cases decided in Germany after the 2004 BGH case was judged. For simplicity in avoiding specific cut-off dates that will rarely be indicative of the availability of the 2004 BGH case as a source of law, I have chosen to look at cases from 2005 and onward reported in the Kritzer Database.¹⁹ These can be categorised in 3 basic groups:

- 1) Cases from Germany judged after 2005 which are not incompatible with the “Noble Month” as developed by the German Supreme Court, but do not lend it obvious support;
- 2) Cases from Germany judged after 2005 which—at least in appearance—distance themselves from the “Noble Month” doctrine as applied by the German Supreme Court, either by being incompatible with it, or by advocating another benchmark for measuring the timeframe of Art. 39; and
- 3) Cases from Germany judged after 2005 that embrace the “Noble Month” doctrine as developed by the German Supreme Court clearly.

19. The Kritzer CISG database at www.cisg.law.pace.edu is run by the Institute of International Commercial Law at Pace University, New York, and renamed for its founder, the recently deceased Albert H. Kritzer.

If looking at the cold statistics of the 23 cases reported from German Courts since 2005 on Article 39, seventeen (or rather, eighteen, see the Hamburg case below) fall in the first category and are of little help in ascertaining whether the “Noble Month” is considered a valuable benchmark for Article 30 timeframes before German Courts. This is either because they are decided on other aspects of Article 39 than timeframe (typically specificity of notice) or because they would have been compatible with many other competing benchmarks or ideologies concerning Article 39 (typically because notices given in these cases are swift). For obvious reasons, these cases are not discussed in detail.

The two other categories, however, merit a closer look. In the second category, one case from Frankfurt seems incompatible with the “Noble Month” doctrine of the Supreme Court, and one from Hamburg bears a label claiming it is. In the third category, I have found four cases which clearly support the doctrine. These are outlined below.

The Frankfurt case from category two concerns used shoes,²⁰ and essentially hinges on examination of goods rather than notice giving, much like the 1999 BGH case above. The shoes in question were delivered in a “bad and unhygienic condition,” but this was not noticed until three weeks after delivery, when examination took place. Notice was then given immediately, the day after. The Court reasoned that such an immediately discernible non-conformity should have been discovered much sooner and then immediately enforced the sanction of Article 39 for this breach of Article 38. This judgement is interesting because of what the Court does NOT do. The Court does NOT follow the precedent set by the Supreme Court in 1999 in a very similar scenario. The Court does NOT construct a fictitious date for when it considers the notice requirement triggered by Article 38, and then add on the period for notice giving to reach an acceptable final time for notice. It does NOT use a rigid construction of a doctrine to mathematically formulate a solution in support of the buyer. If it had followed that 1999 precedent and its “Noble Month” construction as standard, then it should have reasoned that, at the earliest, Article 39 would have been breached one month after delivery, if examination under the separate timeframe of Article 38 was set to be carried out on the same day. There are no extraneous factors in this case requiring shorter timeframes for notice—no seasonal affiliation for the goods, no unstable financial market for the goods, and no perishables involved. But this

20. See Landgericht Frankfurt [District Court of Frankfurt] Germany, 11 Apr. 2005, available at <http://cisgw3.law.pace.edu/cases/050411g1.html>.

case does the opposite of the Supreme Court in 1999. And that raises an interesting point: this case may not follow the “Noble Month” as it was interpreted by German Supreme Court. But it is not a “bad” judgement, to coin an overly simplistic descriptor. The Court demonstrates awareness of the need to apply the CISG outside the influence of domestic law by quoting Schwenger in acknowledgement that the notification timeframes under the CISG are more generous than those of the German domestic law.²¹ Moreover, considering the criticism for formalistic interpretation which the 1999 BGH case can be subject to above, it is perhaps better to allow a more direct sanctioning of a failure to examine properly, in a case where the buyer demonstrated that swift communication and notice was possible (by giving it the next day after discovery). Had the Court followed the 1999 precedent, the buyers notice would have been timely, despite the fact that examination was clearly delayed and notice could (and was) given within a day. The reasoning in this case does seem more palatable. And although this case departs from the “Noble Month” doctrine as the German Supreme Court have applied it, is it really so hostile to way it was originally envisioned by Schwenger? While it is true the Article 38 is not independently sanctioned, and should not be, a poor examination procedure could nevertheless be one of the overall factors of a case that can be looked at in determining whether the sanction in Article 39 should apply. Such a consideration would not be outside the scope of the “Noble Month” as it was designed, in looking at all the circumstances of a case, and being a flexible benchmark rather than a doctrine.

The Hamburg case, which has been mistaken for a category two case, involves inventory for a Café, more specifically allegedly non-conforming machines for the production of ice cream.²² This case is cited in the *Internationales Handelsrecht* as advocating the Magnus-doctrine²³ for examination and notification: “goods have to be examined and a lack of conformity noticed within two weeks from their receipt.”²⁴ If this were the

21. The Court states: “The strict measure of § 377 Handelsgesetzbuch (German Commercial Code) [translator’s note: “immediately”] cannot be applied here.” (citing Schlechtriem/Schwenger, *Handbuch zum Einheitlichen UN-Kaufrecht*, 4 ed. Art. 38, para. 16). Landgericht Frankfurt [District Court of Frankfurt] Germany, 11 Apr. 2005, available at <http://cisgw3.law.pace.edu/cases/050411g1.html>.

22. Oberlandesgericht Hamburg [Provincial Appellate Court of Hamburg] Germany, 25 Jan. 2008, available at <http://cisgw3.law.pace.edu/cases/080125g1.html>.

23. So called because Magnus has advocated it steadily in his CISG commentary. See MAGNUS, ULRICH/MARTINEK, MICHAEL 2005 and *Wiener UN-Kaufrecht (CISG)* [Vienna Sales Law (CISG)—in German], in J. von Staudinger’s *Kommentar zum Bürgerlichen Gesetzbuch mit Einführungsgesetz und Nebengesetzen*, Berlin: Sellier/De Gruyter (1999).

24. Oberlandesgericht Hamburg [Provincial Appellate Court of Hamburg] Germany, 25 Jan. 2008,

case, then this case would be incompatible with the “Noble Month.” However, this is not an entirely correct classification of this case, as it does not solely rely on this one (competing) doctrine. Nor does it even hinge on timeliness. The dates in question are complicated to discern, as there are disputes in fact. The ice cream machinery was delivered on the March 30, 1995, but it is unclear *when* the technician made the machinery operable, and thus examinable. The latest date that is undisputed is the opening date of the cafe on April 13, 1995 when the machinery was used. So this date must arguably be constructed as the first day of the examination period. Given that the first notice is sent on April 18, 1995, even applying the rigorous Magnus-doctrine to this case, the notice would be timely. But timeliness is irrelevant. The case ultimately hinges entirely on specificity of notice. It does refer to timeliness of notice, but with the following summation of the state of law:

With respect to the examination and notification in terms of Articles 38 and 39 CISG, the preceding jurisprudence usually applied a time limit of about fourteen days, up to a maximum of one month after receipt of the goods, except where particular circumstance must be considered which may lead to a shorter or longer period.²⁵

The court made reference to Magnus AND to Schwenzer, both of whom are cited in the “preceding jurisprudence” so loosely referred to. So, despite the label in *Internationales Handelsrecht*, this case is not incompatible with the Noble Month, and it belongs in the first category with the other seventeen cases, as a typical Article 39 case, which is of no use in an analysis of Article 39 timeframes. It referred loosely to some “Noble Month” case law, alongside that of a competing doctrine, but the outcome was ultimately determined by a completely different aspect of Article 39.

That leaves us with the cases that clearly support the “Noble Month” doctrine. Of these four cases, two are from 2006 and two are from 2009. More importantly, three concern non-perishable goods; respectively T-Shirts, cars and a printing machine. One concerns perishable goods, namely plants. They all refer to the general standard of one month for notice giving.

The case on perishables, live plants, is from Bamberg.²⁶ In this case, the buyer wrote a comprehensive letter, detailing most aspects of the problems with the live plants three days after delivery, and also took out reservation on

available at <http://cisgw3.law.pace.edu/cases/080125g1.html> (Internationales Handelsrecht [3/2008] 98).

25. Oberlandesgericht Hamburg [Provincial Appellate Court of Hamburg] Germany, 25 Jan. 2008, *available at* <http://cisgw3.law.pace.edu/cases/080125g1.html>.

26. Landgericht Bamberg [District Court of Bamberg] Germany, 23 Oct. 2006, *available at* <http://cisgw3.law.pace.edu/cases/061023g1.html>.

the delivery documents as he was concerned about their appearance. While such a notice would be timely under any doctrine or ideology, as it is arguable instantaneous, the buyer raised an additional issue during the proceedings which he had not notified the seller of. The Court took the correct view that the buyer be barred from raising this during the proceeding, several years after the defect. In doing so, the Court refers to the notice timeframe thus: “notice of non-conformity must be given in the applicable time period of not more than one month after delivery,”²⁷ with reference to the original BGH case utilising the “Noble Month.” The Court does not further qualify how the timeframe in this case ought to have been briefer due to the perishable nature of the goods—but nor does it have to. The entire mention of the “Noble Month” and Article 39(1) is somewhat of an *obiter dictum*, as the cut-off rule in Article 39(2) would apply anyway to bar any claim for a non-latent defect almost five years after the delivery of the goods. What is interesting is the choice of precedent. The Court here refers solely to the 1995 Supreme Court Case, and does not list others. Of course, the 1995 *Mussels* case is a more famous one, and the one that springs easily to mind in this context because it introduced the doctrine into German law. I may be reaching here, but the failure to refer to the more recent use of the doctrine could also be interpreted as a conscious choice not to lend weight to this particular case. Perhaps others would agree with me in the over-stretching of the doctrine in this case. Or perhaps I am seeing phantoms. My phantom-viewing is, however, reinforced by another case from Koblenz.

This case, from 2006,²⁸ concerns T-shirts and also solely refers to the 1995 *Mussels* case in support of the fact that:

The period of time regarded as reasonable under Article 39 CISG must be seen in the particular circumstances of the case. Perishable or seasonal goods must be discerned. In general, however, an average of about one month after the goods have or ought to have been discovered the defect ought to be regarded as reasonable.²⁹

It is nice to note the specific *obiter* consideration for perishable goods and the inherent flexibility of the timeframe here. The goods in this case were not perishable, and notice was given within six days of delivery. Although arguably a notice that would fit any competing doctrine or ideology of Article 39 as timely, the reference to the “Noble Month” as the state of law is

27. *Id.*

28. Oberlandesgericht Koblenz [Provincial Appellate Court of Koblenz] 19 Oct. 2006, available at <http://cisgw3.law.pace.edu/cases/061019g2.html>.

29. *Id.*

undeniable and strengthens its position, not as a regular standard, but as a more flexible benchmark. This is—whether deliberately or not—a return to the ideology of the “Noble Month” and a departure from the over-reaching of the 1999 case from the Supreme Court. Interestingly, no competing doctrine is mentioned here.

Competing doctrines are elegantly side-stepped in a case from 2009 from Hamm concerning cars.³⁰ In determining a notice given six weeks after discovery of a defect, the Court refers to both Magnus AND Schwenzer in pronouncing that either would have agreed that the notice was late: “Eine Zeitspanne, die einen Monat—deutlich—überschreitet, ist regelmäßig nicht mehr als angemessene Frist im Sinne des Art[icle] 39 CISG anzusehen” [A timeframe which has—clearly—extended beyond one month is normally not considered timely in the spirit of Article 39 CISG—my translation].³¹ Like the case above from Koblenz, this case also makes an effort to indicate the flexibility of the assessment of the timeframe, by adding: “Besondere Umstände, die es hier gebieten, dem Kläger eine längere Frist für die Mängelrüge einzuräumen, gibt es nicht” [There are no special circumstances which would merit a longer timeframe—my translation].³²

A similar sensitivity is shown by the District Court in Stuttgart in a case from 2009,³³ although they admit to the difficulty in having competing doctrines, AND take a clear stand in support of the “Noble Month” as the more significant one. In determining that a notice given over three months after delivery of a printing-machine is not timely, the Court provides us with this lovely citation: “[i]t is disputed how to measure the ‘reasonable time’ regarding the defect determined under Article 39 CISG, however, according to jurisprudence and the leading doctrine, the gross average is approximately one month.”³⁴

This last quote, from Stuttgart, nicely sums up the overall assessment of the current German state of law as to Article 39 timeframes in cases from 2005 and onwards. There is some difficulty in having competing doctrines. But based on these cases, the “Noble Month” emerges as the clear leader in setting a benchmark for reasonable time. There are no cases that clearly

30. Oberlandesgericht Hamm [Provincial Appellate Court of Hamm] 2 Apr. 2009, *available at* <http://cisgw3.law.pace.edu/cases/090402g1.html>.

31. *Id.*

32. *Id.*

33. Landgericht Stuttgart [District Court of Stuttgart] 15 Oct. 2009, *available at* <http://cisgw3.law.pace.edu/cases/091015g1.html>.

34. *Id.*

contradict its ethos, on closer scrutiny, but there are more than a few which do. And there are none that favour a competing doctrine.

So, although the “Noble Month” has not been affirmed by the German Supreme Court for a decade, the Supreme Court has entered a decision not incompatible with it, and the lower Courts seem to clearly favour it as a benchmark. And, perhaps more importantly, since 2005 there have been no reported instances of very short Germanic-style timeframes in operation under Article 39—in other words, no more homeward trend of German domestic law influencing Article 39. Glorious.

In influencing the German Court system away from their previous practices, where they were demonstrably influenced by domestic law in their interpretation of the CISG, Schwenger indubitably made her mark on German CISG case law on Article 39. This is a fine feather in her hat, as well as a credit to adaptability of German Courts in recognizing the need to distinguish the CISG from domestic law thinking. In facilitating this, the “Noble Month” has been a true aristocrat.

But, of course, the true test of the “Noble Month” is not on the German home front alone, but rather on the international arena as a whole. If this blueprint—however international in design—is only utilised in Germany, it will still not advance a unified transnational yardstick for measuring Article 39; it would represent a different form of homeward trend in reliance on scholarship and a single mentality towards determining a more predictable timeframe, shared only by some Germanic legal systems. So, armed with relative success of the “Noble Month” in Germany today, let us take a more sobering look at its international context.

DIFFERING MENTALITIES—TO EACH HIS OWN?

As evidenced above, the whole point of needing an amalgamation of timeframes was to stop an increasing diversification in setting of timeframes under Article 39 transnationally. The root of these differences lay—and lies—in the differing attitudes in various domestic laws to the role of, and thus the length of, time frames for notice-giving. Previous scholarship has expanded on this from a comparative perspective, and found different domestic laws in place, which influence the timeframe.³⁵ And there is no

35. See Andersen, *supra* note 1. Sections II and IV look at the notification rules of Germany, Austria, Netherlands, Belgium, France, Switzerland, Italy, Denmark and the US.

doubt that the phenomenon which Ferrari dubs the “homeward trend”³⁶ is demonstrable here. With the above analysis, it seems we can now eradicate Germany from this list of homeward trend sinners. And the “Noble Month” with its approach so different to the domestic German approach, is largely to thank. But—presumably—the point of the “Noble Month” was not to shock the Germanic systems away from their homeward trend by presenting them with something radically different. It was to formulate a solution that would be palatable to all member states—in the spirit of the CISG itself.

If forced to take a wider view of the problem of diversity in Article 39 case law, it is more one of mentality than of law. In her 2007 paper on the national perceptions that endanger uniformity, Schwenger refers to those who understand the Anglo-American legal mentality as better understanding the need for the “Noble Month.”³⁷ This merits a closer examination.

This difference in legal mentality lies in the attitude towards formalities of law. The problem is—essentially—that in some legal systems there is no need to introduce formalities for notice, as aspects associated with this are treated separately in categories like fraud, mitigation, hidden/latent defects, market price rules, etc.³⁸ Notices are there for practical reasons; usually for curing the defect or preventing the buyer from speculating in the seller's breach. This mentality will affect the interpretation of the international law—even if an effort is made to distinguish the domestic rule from the international rule.

One case that illustrates this is the American case of *Siskiyou Evergreen*, from the Bankruptcy Court of Oregon.³⁹ The case considers carefully whether notice given in the sale of allegedly non-conforming evergreen trees was timely. It compares the CISG with the similar provisions of the UCC, and rightly finds them different. It even refers loosely to “European cases construing the Convention,” indicating that foreign case law has been consulted. But it then concludes something somewhat unusual—at least from

36. Franco Ferrari, *Homeward Trend and Lex Forism Despite Uniform Sales Law*, 13 VINDOBONA J. INT'L COM. L. & ARB., 15-42 (2009), available at <http://www.cisg.law.pace.edu/cisg/biblio/ferrari17.html>.

37. Schwenger, *supra* note 3, at 103, 151 n.78.

38. Most notably the American legal system, which—through diverse States—favours the approach of the U.C.C. in setting a timeframe of reasonable time, in U.C.C. § 2-607(3)(a), which can mean anything from a few days (where the seller's receipt of a letter notifying of non-conformity 12 days after delivery of non-conforming potatoes was untimely as the goods were perishable) to over 60 weeks. See *A.C. Carpenter, Inc. v. Boyer Potato Chips*, 1969 WL 10993, 7 U.C.C. Rep. Serv. 493 (U.S. Dept. Agric. 1969).

39. *In re Siskiyou Evergreen, Inc.*, 2004 Bankr. Lexis 1044 (Bankr. Or. 2004) available at <http://cisgw3.law.pace.edu/cases/040329u2.html>.

the civil law perspective: “[a] more practical interpretation would hold that the notice must [be] given in time, and in sufficient detail, to allow the seller to cure the defect in a manner allowing the buyer the benefit of his bargain.” This is restated further on, with the words:

Another factor in the equation is whether there was time to cure. Here, the selling season in Mexico had run its course by the time the defects were discovered, and little or no time remained to remedy the non-conformity by delivery of new trees. The purpose of the notice provision could not have been served in any event.⁴⁰

It is this “does-it-actually-make-a-difference” attitude towards the function of notice-giving which ultimately alienates some jurisdictions from any considerations of notice as a formal requirement.

The thinking behind *Siskiyou* also throws light on another possible rationale for these differing ideologies concerning notice-giving. The issue of remedies is inextricably tied to the requirement of notice—and notice-giving is anchored in the right to cure the goods and thus specifically perform as a remedy for non-conformity.⁴¹ In jurisdictions where specific performance is unusual under domestic law, and can thus be discounted under the CISG by way of Article 28,⁴² notice-giving will make very little difference outside of fraud and mediation. This may also provide an explanation for why these jurisdictions would not find it necessary to communicate with haste to the seller.

And it can well explain the attitude of some scholars that Article 39 must remain flexible and not be mired in a fixed framework.⁴³ Schwenzer’s own disappointment in the position taken by the CISG Advisory Council in its

40. *Id.*

41. See U.N. SECRETARIAT, COMMENTARY ON THE DRAFT CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS PREPARED BY THE SECRETARIAT, Art. 37, ¶ 2, U.N. Doc. A/CONF.97/5 (1979) (now Art. 39) mentioning the buyers right to require cure as a driving force behind the notice provision.

42. United Nations Convention on Contracts for the International Sale of Goods art. 6, U.N. Doc. A/CONF.97/18, Annex 1 (Apr. 11, 1980) (“If, in accordance with the provisions of this Convention, one party is entitled to require performance of any obligation by the other party, a court is not bound to enter a judgement for specific performance unless the court would do so under its own law in respect of similar contracts of sale not governed by this Convention.”).

43. CISG Advisory Council Opinion 2, drafted by Eric Bergsten, advocates retaining flexibility, despite the plea from the New York Bar Association who commissioned it to aid in promoting its certainty. This can seem all the more puzzling given the case appendix which demonstrates clearly the homeward trends prevailing. See Eric Bergsten, *CISG Advisory Council Opinion No. 2 Examination of the Goods and Notice of Non-Conformity Articles 38 and 39*, in CAMILLA BAASCH ANDERSEN, MAZZOTTA FRANCESCO & BRUNO ZELLER, PRACTITIONERS GUIDE TO THE CISG (2010), available at <http://www.cisg.law.pace.edu/cisg/CISG-AC-op.html>.

opinion No. 2 is well documented.⁴⁴ And, as someone who drafted the case law appendix to the opinion, which demonstrates the need for a more predictable yardstick for measuring the timeframe, I share this disappointment.

This is a frustrating issue. The “Noble Month” was rejected by the CISG Advisory Council because it was perceived as an absolute fixed timeframe. The main culprit for this perception was the 1999 Supreme Court Case discussed above, which applied the benchmark as a mathematical and inflexible doctrine. I would agree with the rejection of such a timeframe, as it would remove the flexibility inherent in the CISG and Article 39. But—and perhaps this should be a capitalised BUT—the “Noble Month” as an inflexible timeframe was never the intention behind the concept; it was always meant to be a yardstick for flexible timeframes to become slightly more predictable. Not to become absolute. The apparent “overreaction” of some courts in grasping for a fixed solution may have ultimately doomed the viability of this solution on an international scale. There are still very good reasons to advance the “Noble Month” as it was designed. And the analysis of current German case law demonstrates many balanced and nuanced uses of it. Nevertheless, the rejection of that which can be perceived as a more inflexible doctrine is well founded.

The tightrope is a difficult one to walk. At the danger of flogging a lame hobby-horse, I once again turn to the global jurisconsultorium as a potential solution.⁴⁵ If more Courts were to utilise the “Noble Month” as they liked to see it applied, and more Courts were to look at these cases, then a balance might be struck over time. But any high-flying idealism is grounded by the comparative lack of cases referring to foreign case law, and by the reasoning of footnote 1 of the *TeeVee Tunes* case,⁴⁶ which may well be symptomatic of a widespread mentality.

In *TeeVee Tunes*, the court considered the timeliness of a notice under Article 39 CISG with regard to a packaging system. They felt that “the time interval from . . . ‘late August 1997’ delivery to the October 1997 notification was ‘reasonable’ as required by CISG Article 39(1).”⁴⁷ Such a period of seven weeks could well be justified by transnationally recognized means. But the

44. See Schwenger, *supra* note 3, at 103, 119-22.

45. The Global Jurisconsultorium which advances uniformity in application of the CISG on the grounds that we should share precedents where we share law. See, Camilla Andersen, *The Global Jurisconsultorium of the CISG Revisited*, 13 VINDOBONA J. INT’L COM. L. & ARB., 43–70 (2009) (Austria), available at <http://www.cisg.law.pace.edu/cisg/biblio/andersen7.html>.

46. *Teevee Toons, Inc. v. Gerhard Schubert GMBH*, 2002 WL 498627 (S.D.N.Y. Mar. 29, 2002), available at <http://cisgw3.law.pace.edu/cases/060823u1.html>.

47. *Id.* at *5.

footnote accompanying this text is alarming: “[a]lthough courts in other countries have, in some cases, held periods as short as 22 days between delivery and notification to be unreasonable . . . regardless, those foreign decisions do not bind this Court.”⁴⁸ First of all, it is worrying that this case from 2006 should only be looking at these older cases, which represent a trend that has been more or less steadily reversed over the preceding eleven years. In this case, the reliance on out-dated case law was caused by solely referring to an old textbook and not actually looking at cases—one may well blame legal counsel for that. But what happens here is one (outdated) homeward trend frightening another into following its own homeward trend because the solution is not commonly palatable. Secondly, while it is true that foreign decision do not bind any domestic Court, the duty to look at foreign precedents remains, based on comity.

The reasoning is, however, not overly surprising. A search of all reported CISG cases on Article 39 from the United States has failed to turn up a single one referring to the “Noble Month” or a comparable reasoning that strikes a compromise with other legal systems. The Anglo-American mentality as demonstrated here, is clearly not embracing a comparative approach, or attempting to formulate a more predictable guideline for this notice. And it will wonder why it should—law is in the business of solving disputes, not creating doctrine with which it may lock itself in under a system of binding precedents.

This stands in stark contrast to the Germanic legal mentality, which seems to be always looking for doctrines and certainties in its approach. It is not just the “Noble Month” which has become subject to the ravenous appetite for predictability and doctrine in the interpretation of the Article 39 timeframe. In Austria, Article 39 is subject to a general rule of two weeks for giving notice.⁴⁹ And in Germany, there is evidence of an attempt to formulate a further specific doctrine for perishable goods, in two separate cases from 2006 and 2009. In a case from Köln concerning potatoes, the court refers to an accepted doctrine that perishables be examined and notice given within

48. *Id.* at *5 n.1.

49. This doctrine was first developed by Martin Karollus, in *Anmerkung zu BGH 8.3.1995, VIII ZR 159/94 (UN-Kaufrecht: Vertragswidrigkeit der Ware—Muscheln mit Cadmiumbelastung)*, JURISTISCHE RUNDschau 27–28 (1996), who thought the Noble Month was inappropriate and too long. Austrian Supreme Court cases involving this two-week doctrine include: Oberster Gerichtshof [Supreme Court] Austria, 15 Oct. 1998, available at <http://cisgw3.law.pace.edu/cases/981015a3.html>; Oberster Gerichtshof [Supreme Court] Austria, 27 Aug. 1999, available at <http://cisgw3.law.pace.edu/cases/990827a3.html>; Oberster Gerichtshof [Supreme Court] Austria, 14 Jan. 2002, available at <http://cisgw3.law.pace.edu/cases/020114a3.html>.

twenty-four hours.⁵⁰ A similar attempt at formulating doctrine has found its way into a 2009 case from München regarding flowers; there, it was generally stated that notice should be given in a matter of hours or at the most a few days where perishables are involved.⁵¹

IS NOBILITY AGEING GRACEFULLY?

There are clearly [at least] two different legal mind-sets at work here. Many more can be found and isolated—but that will have to await a larger research project. Schwenger's attempt to develop a comparative approach to find a middle way between them has not been paved with ease.

On one hand, the doctrine-hungry Germanic legal mentality has stretched the “Noble Month” too far by making it seem more of a fixed doctrine than a flexible yardstick. This has led to a lack of acceptance on some levels on the home front, and has acted as a deterrent for some international scholars who have not understood its promise. But the German Supreme Court has commendably tried to embrace compromise and it must be praised for departing from its previous practice of undue influence of domestic law so well.

On the other hand, the Anglo-American legal mind-set continues to ward off the development of any certainty by distancing itself from doctrine, and by continuing to be relatively uninterested in striking a compromise with other legal systems in the development of this shared law.

Nevertheless, the theory remains sound. The “Noble Month” can still work to establish a functioning, flexible average from which more certainty can spring. It continues to inspire great cases, in pursuit of its noble goal of fair flexibility. I conclude with this excerpt of the translation of a case from Koblenz from 2006,⁵² which applies the “Noble Month” with perfection:

The period of time regarded as reasonable under Art. 39 CISG must be seen in the particular circumstances of the case. Perishable or seasonal goods must be discerned. In general, however, an average of about one month after the goods have or ought to have been discovered the defect ought to be regarded as reasonable.⁵³

50. Oberlandesgericht Köln [Regional Appellate Court of Cologne] Germany, 14 Aug. 2006, available at <http://cisgw3.law.pace.edu/cases/060814g1.html>.

51. Landgericht München [District Court of München] Germany, 18 May 2009, available at <http://cisgw3.law.pace.edu/cases/090518g1.html>.

52. Oberlandesgericht Koblenz [Provincial Appellate Court of Koblenz] Germany, 19 Oct. 2006, available at <http://cisgw3.law.pace.edu/cases/061019g2.html>.

53. *Id.*

If only that they could all be like that. But there is time yet—Nobility is nothing if not patient.