Uniform Law Review, 2024, **29**, 260–286
https://doi.org/10.1093/ulr/unae028
Advance access publication 13 August 2024
Article

OXFORD

Interpretation and application of the CISG by the Supreme Court of the Republic of Latvia: an analysis of the judgment in the *Boom Conveyor* case

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Abstract

The judgment of the Supreme Court of the Republic of Latvia in *Boom Conveyor* provides an interpretation of Articles 38 and 39 of the United Nations Convention on Contracts for the International Sale of Goods (CISG). As there have not been many cases in Latvia in which the Supreme Court applies the CISG, this judgment offers a rather rare chance to analyse how Latvia's Supreme Court interprets and applies the Convention. This article provides an analysis of the Court's judgment and concludes that, unfortunately, the Court misinterpreted the CISG and missed a good chance to establish a sound practice in the interpretation of the CISG in Latvia.

I. Introduction

Even though the United Nations (UN) Convention on Contracts for the International Sale of Goods (CISG) is applied all around the world,[1] there is a significant lack of information (in English) regarding how it is applied by the courts in many of its contracting States. The CISG Database[2] is a very good source of information. However, it contains only those cases that have been reported to it. Research of the database content shows that most of the reported decisions are from only a few jurisdictions.[3] This means that the information available via the

The authors would like to thank Krista Paula Petere, Svitlana Yelanska, Christopher Goddard for their assistance. The authors are grateful to professor Dr Ulrich Schroeter for his valuable comments and suggestions.

1 The United Nations Convention on Contracts for the International Sale of Goods (1980) 1489 UNTS 3. Currently, there are 97 Contracting States. Latvia acceded to the CISG on 31 July 1997. See the UN Treaty Database <https://www.treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=X-10&chapter=10&clang=_en> accessed 14 November 2023.

2 The CISG Database is available online at <https://www.iicl.law.pace.edu/cisg/cisg> accessed 10 July 2023.

3 See Thomas Neumann, 'Is the Albert Kritzer Database Telling Us More than We Know' (2015) 27 Pace Int'l L Rev [i], 137–8.

database does not necessarily reflect the true state of application of the CISG.[4] A similar situation affects the UN Commission on International Trade Law's (UNCITRAL) Case Law Digest.[5] On the one hand, it contains quite a few cases. On the other hand, these cases are from only a few jurisdictions.

None of the other initiatives help to obtain a complete overview of how the CISG is applied in all of its contracting States. The CLOUT Database and the UNILEX Database contain only 1026 and 1048 references to CISG-related cases respectively,[6] which can be considered a rather insignificant number. The cases in the UNILEX Database are from 46 different countries. However, most of the cases are from only a few countries (for example, 212 cases from Germany and 111 cases from the USA). It can thus be concluded that neither the CLOUT Database nor the UNILEX database provides enough cases to allow one to draw conclusions on how the CISG is applied in its contracting States. The CISG-online research platform provides a more detailed and more in-depth overview of application of the CISG in the world, including a list of bibliography for many countries.[7] However, here the issue is with language barriers: the available judgments are in the official language of each jurisdiction, and it is thus not really possible to analyse them.

This strongly suggests a need for more information on how the CISG is interpreted and applied in its contracting States, especially those that are underrepresented in the various databases. The need derives from Article 7(1) of the CISG. The 'need to promote uniformity', among other things, requires that courts would use judgments from other jurisdictions,[8] which implies that these judgments need to be available. As it is understandable that, for practical reasons, it might not always be possible to access these judgments, commentaries on cases provided by legal scholars might provide an alternative source of information.

This article aims to offer an insight into how the CISG is interpreted and applied by the Supreme Court of Latvia by providing an analysis on CISG-related issues in the Supreme Court judgment in the *Boom Conveyor* case.[9] There have not been many cases in the Supreme Court of Latvia in which the CISG was interpreted and applied. In fact, *Boom Conveyor* is one of the few such cases.[10] It can therefore be argued that it is particularly important to analyse this case, as it gives a rather rare chance to see how the Supreme Court of Latvia interprets and applies the CISG.

This article consists of ten sections. First, we briefly introduce the judicial system in Latvia and offer an overview of the main facts of the case, before proceeding with the analysis, which begins with some brief general comments on interpretation of the CISG. This is followed by detailed analysis of the following issues: (i) the connection between the

[4] A similar conclusion has been expressed by Herbert I Lazerow. See Herbert I Lazerow, 'Uniform Interpretation of the CISG' (2019) 52 Int'l Law 369, 371–4.

[5] UNCITRAL Digest of Case Law on the United Nations Convention on Contracts for the International Sale of Goods (2016) <https://www.uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/cisg_digest_2016.pdf> accessed 10 July 2023.

[6] See the CLOUT Database <https://www.uncitral.org/clout/search.jspx?match=Search+cases&f=en%23cloutDocument.textTypes.textType_s1%3ACISG%5C+%5C%281980%5C%29> accessed 28 July 2024, and the UNILEX Database <https://www.unilex.info/cisg/cases/country/all> accessed 28 July 2024.

[7] See the CISG-online research platform <https://cisg-online.org/CISG-by-jurisdiction> accessed 16 November 2023.

[8] See, eg, Franco Ferrari, 'Applying the CISG in a Truly Uniform Manner: Tribunale di Vigevano (Italy), 12 July 2000' (2001) 6 Unif L Rev 203.

[9] Judgment of the Supreme Court of Latvia in case No. C29522018, *Samson Materials Handling Limited v SIA TTS (Transportation Technology Systems)*, 16 June 2022. The judgment (in Latvian) is available online at <https://www.manas.tiesas.lv/eTiesasMvc/lv/nolemumi> accessed 10 July 2023. A short abstract (in English) of the judgment is available on the CISG Database.

[10] Another case law example is case No C04357112 (see judgment of 21 April 2016 by the Supreme Court of Latvia). As indicated by Dr Reinis Markvarts, in only a few cases has the Senate of the Supreme Court of Latvia referred to or applied the CISG. See Reinis Markvarts, 'Senāta prakse 1980. gada 11. aprīļa Vīnes Konvencijas par starptautiskajiem preču pirkuma-pārdevuma līgumiem piemērošanā' (2021) 30 *Jurista Vārds* 25.

principle of *iura novit curia* and Article 3 of the CISG; (ii) the buyer's duty to examine the goods and notify the seller of any non-conformity; (iii) the effect of settlement on a claim for compensation; (iv) interaction between Article 44 of the CISG and loss of profit suffered by a third party and (v) interaction between EU Directive 2011/7 on Combating Late Payment in Commercial Transactions (EU Directive 2011/7) and the duty to examine goods under domestic law. The article ends with a brief conclusion.

II. A brief overview of the judicial system in Latvia

The judicial system of Latvia consists of three levels: district (city) courts, regional courts, and the Supreme Court.[11] In addition, there are the Economic Court and the Constitutional Court. Under Article 1(3) of the Law on Judicial Power,[12] courts of arbitration do not form part of the judicial system.

At the moment, there are seven district (city) courts, one of which is dedicated to administrative law cases.[13] Under Article 30(1) of the Law on Judicial Power, a district (city) court can decide on civil, administrative, and criminal law matters, and it also examines Land Register cases. There are six regional courts in Latvia, one of which is dedicated to administrative law cases.[14] Under Article 36 of the Law on Judicial Power, a regional court is the appellate court for civil, administrative, and criminal cases decided in the district (city) courts, unless otherwise stated in the law. The Supreme Court is the cassation instance, and, under Article 450(3) of the Civil Procedure Law of Latvia,[15] a judgment may be appealed in accordance with cassation procedures if the court has incorrectly applied a norm of substantive law, has breached a norm of procedural law, or, in examining a case, has acted outside its competence. Every cassation complaint is examined by a judicial collegium that consists of three judges.[16] If at least one judge considers that the case should be examined by a cassation court, then cassation proceedings will be initiated.[17]

Cases that derive from an international business-to-business sale of goods transaction would qualify as civil law cases and the first instance would be a district (city) court. Under Article 26(2) of the Civil Procedure Law of Latvia, claims against a legal person should be submitted to a court based on the defendant's legal address. At the same time, under Article 30(1), parties, upon entering into a contract, may agree on the district (city) court that would have jurisdiction in case of a dispute.

Although courts of arbitration do not form part of the judicial system in Latvia, if the parties have agreed, then a dispute that arises from an international business-to-business sale of goods transaction could be settled in a court of arbitration. At the moment, 57 courts of arbitration are registered in Latvia.[18] However, as their awards are not publicly available, it is unknown how the CISG is interpreted and applied by courts of arbitration in Latvia.

[11] See The Law on Judicial Power (*Likums 'Par tiesu varu'*), adopted on 15 December 1992, in force since 01 January 1993. *Latvijas Republikas Augstākās Padomes un Valdības Ziņotājs*, 1/2, 14 January 1993; *Diena*, 9, 15 January 1993.

[12] ibid.

[13] See the official list of courts online at <https://www.tiesas.lv/tiesas/saraksts> accessed 10 July 2023.

[14] ibid.

[15] The Civil Procedure Law (*Civilprocesa likums*), adopted on 14 October 1998, in force since 01 March 1999. *Latvijas Vēstnesis*, 326/330, 03 November 1998.; *Latvijas Republikas Saeimas un Ministru kabineta ziņotājs*, 23, 03 December 1998.

[16] Judgment of the Supreme Court of Latvia in case No. C29522018, Samson Materials Handling Limited v SIA TTS (Transportation Technology Systems), 16 June 2022. The judgment (in Latvian) is available online at <https://linkprotect.cudasvc.com/url?a=https%3a%2f%2fwww.manas.tiesas.lv%2feTiesasMvc%2flv%2fnolemumi&c=E,1,wgL74hk2ea8fD2mVb3ai3NJ2n2wzcEchVm-0dVSlNMmK8vE6XFrloVvvzEeFw4d–JAT1uMTYj9jDoBB-b3GGawbFV4NOXidxiLL1Cwf&typo=1> accessed 10 July 2023.

[17] Art 464(2) Civil Procedure Law of Latvia.

[18] See the official list of courts of arbitration at <https://www.ur.gov.lv/lv/registre/organizaciju/skirejtiesa/skirejtiesu-saraksts/> accessed 28 July 2024.

III. The main facts and the chronology of the case[19]

On 18 September 2015, the claimant (a company registered in the United Kingdom) submitted a purchase order to the defendant (a company registered in Latvia). The claimant ordered steel machinery (a boom conveyor), which the defendant would make based on drawings submitted by the claimant and then deliver to the port of Antofagasta in Chile. The machinery was intended for another party that was not involved in this court case. In February 2016, the machinery was received in the designated place in Chile. During the assembly process, under the supervision of the claimant's engineer, many manufacturing defects were found (mainly during April–May 2016). The defects were recorded by photo capture and an expert's report. Additional work was needed to remedy the defects. For this reason, the machinery was not ready and could not be used in the initially planned time.

On 8 June and 24 August 2016, the claimant informed the defendant about a claim, deriving from manufacturing defects, by a third party (for whom the machinery was assembled) and asked the defendant to take part in resolving the claim. On 5 September 2016, the defendant confirmed that the letter had been received. This was followed by further communication between the claimant and the defendant. However, the defendant ignored the claimant's attempts to resolve the situation. On 4 April 2017, the claimant submitted to the defendant an official statement about the engineering costs that the claimant had incurred due to the manufacturing defects in the project developed by the defendant. Again, this was followed by further communication between the parties, which did not bring any results.

On 11 December 2018, the claimant submitted a claim against the defendant in the city court of Rēzekne (*Rēzeknes tiesa*) for compensation of damages (€136,879.60). The claim was based on Articles 45 and 74 of the CISG and Articles 1613, 1614, 1620, and 1779 of the Civil Law of Latvia. The defendant rejected the claim. One of the defendant's main arguments was that the first time the claimant notified the defendant about possible defects was approximately six months after delivery. On 14 April 2020, the city court of Rēzekne satisfied the claimant's claim. It must be noted that the court applied the CISG based on Article 1(1)(b), and considering the available facts of the case, it can be concluded that the court had taken the correct steps to identify the applicable law.

The defendant submitted an appeal. In the appeal, the defendant, among other things, indicated that the court had to apply Article 1668[5] of the Civil Law of Latvia, which states that compliance of the goods with the contract must be examined within 30 days after the goods have been received. On 24 February 2021, the regional court of Latgale (*Latgales apgabaltiesa*) rejected the defendant's appeal. The defendant submitted a cassation complaint. Regarding the CISG, the cassation complaint contained the following arguments:[20]

- The court (the appellate court—the regional court of Latgale) had wrongly applied Articles 3 and 4 of the CISG, as it had not evaluated whether the transaction was a sale of goods contract. The defendant pointed out that the obligation to evaluate the transaction (even if the parties had not directly pointed it out) derives from the principle of *iura novit curia*.
- The court had wrongly applied Articles 38 and 39 of the CISG.
- The court had wrongly applied Articles 35 and 74 of the CISG.

On 16 June 2022, the Supreme Court of Latvia rejected the defendant's cassation complaint. One of the main arguments of the Supreme Court as to why the cassation complaint was rejected was that the buyer (the claimant) had examined the goods and notified the

[19] An overview of the facts and the chronology of the case is based on the judgments of the court of first instance, the appellate court and the Supreme Court, as the portrayal of facts is not the same in all three judgments.

[20] See paras. 4–4.7 of the judgment of the Supreme Court of Latvia.

seller (the defendant) in compliance with Articles 38 and 39 of the CISG (even though in this case, the time used for examination and notification was approximately four months).

This article will analyse how the Supreme Court of Latvia interpreted and applied the above-mentioned provisions of the CISG. In addition, the article will focus on two more issues—general compliance with Article 7 of the CISG, and the potential implications of EU Directive 2011/7 (in the hypothetical situation that the CISG had not been applied).

IV. Brief general comments on the interpretation of the CISG in *Boom Conveyor*

Article 7 of the CISG is well-researched,[21] and its key features are well known. This article will therefore only very briefly summarize the main rules for interpreting the CISG and then offer some general comments on whether, in *Boom Conveyor*, the Supreme Court interpreted the CISG in compliance with those rules.[22] This will be followed by a more elaborate analysis of two interpretation-related issues that can be identified in the Supreme Court judgment.

Article 7(1) of the CISG states that, '[i]n the interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade'. It has been described as 'the single most important provision in ensuring the future success of the Convention'.[23] Considering the importance of this article, it is crucial that courts follow it when interpreting the CISG. The three main elements of Article 7(1) are: (i) the international character of the CISG; (ii) the need to promote uniformity; and (iii) the observance of good faith. The international character of the CISG and the need to promote uniformity, among other things, mean that the CISG must be interpreted autonomously.[24] Autonomous interpretation means that interpreting the CISG as if it were one of the domestic laws is not allowed and that it 'must be interpreted on its own terms'.[25] Mankowski points out that: 'Autonomous interpretation implies, firstly, that grammatical interpretation should be based on the binding and authoritative language versions of the CISG'.[26] Additionally, it is suggested that, in certain situations, it would be necessary to look at the literal meaning of norms in all authentic texts.[27] However, it can be admitted that, in practice, this would be rather impossible (unless the person is fluent in all six official languages of the UN). Looking into even one of the binding versions of the CISG might be problematic as well. A judge in a country in which none of the six official languages of the UN is an official language cannot be reasonably expected to be proficient in, for example, English or French.

[21] It is not possible to list all contributions on this topic. It is equally not possible to state that any of the publications are more important than others. Therefore, the further listed works should be viewed only as selected examples (not as leading publications). See, eg, André Janssen and Olaf Meyer, *CISG Methodology* (Sellier, European Law Publishers, Munich 2009); Ulrich Magnus, 'Comparative editorial remarks on the provisions regarding good faith in CISG Article 7(1) and the UNIDROIT Principles article 1.7' in John Felemegas (ed), *An International Approach to the Interpretation of the United Nations Convention on Contracts for the International Sale of Goods (1980) as Uniform Law* (CUP, Cambridge 2007) 45–48; Joseph Lookofsky, 'Walking the Article 7(2) Tightrope between CISG and Domestic Law' (2005) 25 JL & Com 87.

[22] This approach is not novel. Commentators have used the theoretical framework of Art 7 CISG to evaluate court decisions. See, eg, Harry Flechtner and Joseph Lookofsky, 'Nominating Manfred Forberich: The Worst CISG Decision in 25 Years?' (2005) 9 Vindobona J Intl Com L & Arb 199, 200–1.

[23] Phanesh Koneru, 'The International Interpretation of the UN Convention on Contracts for the International Sale of Goods: An Approach based on General Principles' (1997) 6 Minn J Global Trade 105, 106.

[24] Ferrari (n 8) 203–7.

[25] Lazerow (n 4) 376.

[26] Peter Mankowski, 'Article 7', in Peter Mankowski (ed), *Commercial Law. Article-by-Article Commentary* (C. H. Beck, 2019) 38 (referring to Urs Peter Gruber, *Methoden des Internationalen Einheitsrechts* (Mohr, Tübingen 2004) 134–48).

[27] Martin Gebauer, 'Uniform Law, General Principles and Autonomous Interpretation' (2000) 5 Unif L Rev 683, 687.

Marianne Roth and Richard Happ summarized opinions regarding methods of autonomous interpretation and concluded that 'supporters of autonomous interpretation actually derive the meaning of terms from the wording in context, keeping object and purpose in mind, and resorting to the preparatory work of the treaty when necessary'.[28] Even though this approach is undoubtedly challenging, it is crucial that the courts follow it. However, in practice, it might be difficult to evaluate to what extent a court has interpreted the CISG autonomously, as the final wording of a judgment might not always give a full overview of how the court reached its conclusions.

If a court does not follow the requirements stated in Article 7(1) of the CISG and does not interpret the CISG autonomously, this might lead not only to an inaccurate interpretation, and consequently an inaccurate judgment but also to the so-called homeward trend that could be considered the opposite of autonomous interpretation.[29] A well-known example of the homeward trend in case law is *Raw Materials Inc. v Manfred Forberich GmbH*,[30] which was once even nominated as the worst CISG case in 25 years.[31] In this case, the court used domestic law in order to interpret and apply Article 79 of the CISG. A similar approach can be found in a judgment by a Dutch court in which domestic law is used to interpret Articles 38 and 39 of the CISG.[32] Moreover, judgments by Latvian courts provide examples. For example, one court, despite the fact that the claimant had based its claim on the norms of the CISG (and the CISG was objectively applicable to the case), based its judgment solely on domestic law without providing any explanation.[33]

Much has been written about the third element of Article 7(1) of the CISG: '[O]bservance of good faith'.[34] Arguably, this might be the most controversial of the three elements of Article 7(1). One of the main issues concerning this element is the scope of its application. More specifically, the question is whether it applies only to interpretation of the CISG or to the parties and their contract as well.[35] Lisa Spagnolo has listed and analysed six arguments regarding the purpose of the principle of good faith under the CISG (these include, for example, that it is 'an aid to interpreting the CISG itself', 'a general principle to assist in gap-filling', or 'a direct, positive obligation imposed upon parties'),[36] thus illustrating the breadth of the principle's scope, which gives a basis for academic discussions. Two other issues that have been debated by commentators are the meaning of the principle of good faith[37] and the impact of the different understandings of this principle in the civil law and common law legal systems on its application under the CISG.[38] As the purpose of

[28] Marianne Roth and Richard Happ, 'Interpretation of the CISG According to Principles of International Law' (1999) 4 Int'l Trade & Bus L Ann 1, 3.

[29] See, eg, Franco Ferrari, 'Homeward Trend and Lex Forism in International Sales Law' (2009) 2009 Int'l Bus LJ, 333.

[30] *Raw Materials Inc. v. Manfred Forberich GmbH*. 2004 WL 1535839 (US District Court for the Northern District of Illinois, 7 July 2004).

[31] Flechtner and Lookofsky, (n 22) 199–208.

[32] See decision of Rechtbank Noord –Nederland in case No. C/18/157888/HA ZA 15-139 (19 April 2017) <https://www.uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBNNE:2017:1498&showbutton=true&keyword=weens+koopverdrag> accessed 10 July 2023.

[33] See judgment of Riga City Northern District Court (Rīgas pilsētas Ziemeļu rajona tiesa) in case No C32318116 (12 April 2017) <https://www.manas.tiesas.lv/eTiesasMvc/lv/nolemumi> accessed 10 July 2023.

[34] See, eg, Nina Tepes, Hrvoje Markovinovic, 'The CISG and the Good Faith Principle' (2019-2020) 38 JL & Com 11; Bruno Zeller, 'Good Faith—The Scarlet Pimpernel of the CISG' (2001) 6 Int'l Trade & Bus L Ann 227; Nathalie Hofmann, 'Interpretation Rules and Good Faith as Obstacles to the UK's Ratification of the CISG and to the Harmonization of Contract Law in Europe' (2010) 22 Pace Int'l L Rev 145.

[35] See, eg, Christopher Kee, Edgardo Munoz, 'In Defence of the CISG' (2009) 14 Deakin L Rev 99, 104–5; Steven D Walt, 'The Modest Role of Good Faith in Uniform Sales Law' (2015) 33 BU Int'l LJ 37, 41–9.

[36] Lisa Spagnolo, 'Opening Pandora's Box: Good Faith and Precontractual Liability in the CISG' (2007) 21 Temp Int'l & Comp LJ 261, 274.

[37] Jori Munukka, 'Harmonization of Contract Law: In Search of a Solution to the Good Faith Problem' (2005) 48 Scandinavian Stud L 229, 238–42.

[38] See, eg, Michael Bridge, 'Good Faith, the Common Law, and the CISG' (2017) 22 Unif L Rev 98; Jori Munukka, (n 37), 230–38.

this section was only to outline the main issues regarding Article 7(1), further elaboration on these issues will not be provided.

Regarding the *Boom Conveyor* case, overall, no major issues (such as applying domestic law instead of the CISG) can be detected in the Supreme Court's approach to interpreting the CISG. From the text of the judgment, it can be concluded that the Court has tried to interpret the CISG autonomously (for example, the Court even created its own test for interpretation of Article 39(1) of the CISG, which alone could be considered as an attempt to interpret the CISG autonomously). However, the Court's interpretation is not entirely in line with the requirements of Article 7(1). It is possible to identify two problematic issues that require further analysis. One is use of terminology, and the other is use of sources. We will elaborate on these issues in the following sections.

1. Use of terminology

Under Article 13(1) of the Civil Procedure Law of Latvia, court proceedings must take place in the official language—Latvian. Taking this into account, and also the fact that the judgment is written in Latvian, it is highly likely that the court might have used the Latvian translation of the CISG. Even though the CISG has authentic texts in six languages,[39] and, thus, the Latvian translation (or translations into any other language in which the text of the CISG has not been authenticated) is not legally binding, it is understandable that courts might use the CISG text in the language of the country in which the court is located. However, a court that uses a non-authenticated text of the CISG has to be very careful with the wording and terminology. The court should ensure that the translation does not contain inaccuracies.[40] In addition, the court should not deviate from the terminology used in the CISG.

In *Boom Conveyor*, the Supreme Court and the appellate court (the regional court of Latgale) did not use the precise wording of the 'within as short a period as is practicable in the circumstances' standard (in the Latvian translation), as it appears in Article 38(1). In the official Latvian translation of the CISG,[41] this standard has been translated as '*tik īsā laikā, kāds ir dotajos apstākļos praktiski iespējams*'. The appellate court (the regional court of Latgale) had paraphrased it as '*tik īsā laikā, kāds dotajos apstākļos iespējams*' (omitting the word 'practicable'). The Supreme Court, at one point, left out the phrase 'as short' by using the wording '*laikā, kas attiecīgajos apstākļos praktiski iespējams*' (within a period as is practicable in the circumstances), and at another point it significantly altered the standard by referring to it as '*iespējami īsā laikā*' (within as short a time as possible). This should be evaluated negatively, and indeed, might be a sign of a homeward trend. More specifically, the norm that would be equivalent to Article 38(1) in domestic law (Article 411 of the Commercial Law of Latvia)[42] does include a standard '*iespējami īsā laikā*' (within as short a time as possible [also translatable as 'as soon as possible']). So, it could be (although this is not possible to prove) that the Court confused the time for examination of goods in the Commercial Law of Latvia with the time for the same duty in the CISG. If so, then this would be a sign of a homeward trend.

The need to promote uniformity, established in Article 7(1) of the CISG, requires that courts should use the exact terminology and wording as they appear in the CISG. It is

[39] The authentic texts are in English, French, Spanish, Chinese, Arabic and Russian.

[40] For example, a Dutch court (*Rechtbank Overijssel*) in case No C/08/175962/HA ZA 15-468 used an inaccurate translation of CISG Art 3(2). The English text of Art 3(2) contains the 'preponderant part' standard. However, the Dutch court used the phrase '*het belangrijkste deel*' (which can be translated as 'the most important part'). This can be evaluated negatively.

[41] See the Latvian translation of the CISG – 'ANO Konvencija par starptautiskajiem preču pirkuma-pārdevuma līgumiem', *Latvijas Vēstnesis*, 170, 03 July 1997, *Latvijas Republikas Saeimas un Ministru Kabineta Ziņotājs*, 15, 07 August 1997.

[42] The Commercial Law of Latvia (*Komerclikums*), adopted on 13 April 2000., in force since 01 January 2002. *Latvijas Vēstnesis*, 158/160, 04 May 2000.; *Latvijas Republikas Saeimas un Ministru Kabineta Ziņotājs*, 11, 01 June 2000.

certainly not permissible to paraphrase or change the wording of norms when being interpreted and applied. This is particularly important if courts interpret and apply the legal standards of the CISG. One might argue that changes in the wording are not that significant, and they still reflect the meaning of the norms. However, this argument cannot be substantiated. If courts do not use precisely the same terminology, uniform application of the CISG becomes endangered. Moreover, regarding the use of terminology, it would be worth remembering the famous quote by David Mellinkoff, who once stated that: 'The law is a profession of words.'[43] Every word matters, and even the slightest alteration of the wording of a legal standard can change its meaning. As we explain further below, in our opinion, the Supreme Court did not correctly apply Articles 38 and 39.[44] One can only guess if the rather generous time that the Court gave to the buyer for examination of the goods was because of wrongly applied wording of the 'within as short a period as is practicable in the circumstances' standard.

2. Use of sources

Commentators have already established that interpretation of the CISG requires using additional sources—for example, cases (preferably from various jurisdictions) and academic writings.[45] Case law has been described as 'perhaps the most important vehicle for establishing uniformity'.[46] This can, therefore, be used as an objective criterion for evaluating the Supreme Court judgment—that is, whether and to what extent the court has used additional sources—especially cases—to interpret the CISG.

In relation to CISG issues, the Supreme Court has referred (twice) to the UNCITRAL Case Law Digest[47] to interpret Article 38 of the CISG. Overall, use of the Digest can be evaluated positively, as this source can, indeed, be helpful for interpreting the CISG. Moreover, in terms of the publicly available database, it seems that this case might be the first time when a court in Latvia has referred to this source in a CISG-related case.[48]

At the same time, there are no references in the text of the judgment to any additional sources regarding interpretation of the 'reasonable time' standard (Article 39(1)), and, seeing how the Court has approached this standard, it can be concluded that a lack of sources is highly problematic. The Court concluded that in this case a 'reasonable time' started when: (i) all parts of the machinery had been assembled; (ii) defects had been documented and their source identified; and (iii) the amount of damages had been determined.[49] It can be argued that such an approach to the 'reasonable time' standard under Article 39(1) of the CISG would definitely require reference to sources that would support this interpretation, as it seemingly gives the buyer considerable time for notification, which is not in line with general trends in interpreting the standard.[50] In this case, in order to facilitate uniform interpretation of the CISG, it would have been absolutely necessary to analyse (and mention in the text of the judgment) other cases in which Article 39(1) has been applied. The Supreme Court should have followed the well-known example set by the Tribunale di

43 David Mellinkoff, *The Language of the Law* (Boston, Toronto: Little, Brown and Company, 1963) vii.

44 See section VI of this paper.

45 João Ribeiro-Bidaoui, 'The International Obligation of the Uniform and Autonomous Interpretation of Private Law Conventions: Consequences for Domestic Courts and International Organizations' (2020) 67 Neth Int Law Rev 139, 148–50. See also John Felemegas (n 21) 14–22.

46 Andreas Ehlers, 'Establishing a Uniform Interpretation of the CISG: A Case Study of Article 74' (2013) 2013 NJCL [v], 11.

47 UNCITRAL Digest of Case Law on the United Nations Convention on Contracts for the International Sale of Goods (2016) <https://www.uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/cisg_digest_2016.pdf> accessed 10 July 2023.

48 A search in the publicly available database (<https://www.manas.tiesas.lv/eTiesasMvc/nolemumi> accessed 10 July 2023) by using the keyword 'UNCITRAL' yielded 57 results. However, in only one case (the presently analysed *Boom Conveyor's* case) was the reference to the UNCITRAL Case Law Digest.

49 See section 8.1 of the judgment.

50 See section VI of this paper.

Vigevano on how to have regard to the CISG's international character.[51] By analysing and referring to other cases, the court could have ensured that its interpretation of the reasonable time standard complied with already developed and well-established practice.

Additionally, considering the complexity of Articles 38(1) and 39(1), a more in-depth reasoning would have been necessary. Moreover, it would have been beneficial if it were clearly indicated in the text of the judgment when the 'reasonable time' started running (a concrete date) and when notice was sent (a concrete date). As we explain later in this article, the text of the judgment does not really provide a coherent timeline, which makes application of Articles 38(1) and 39(1) even more challenging.

An interesting question (that could be developed into separate research) would be how and why the court decided to refer to the UNCITRAL Case Law Digest instead of, for example, the CISG Advisory Council's Opinion no. 2, 'Examination of the Goods and Notice of Non-Conformity: Articles 38 and 39'.[52] It is, of course, not possible to say that one source is better than the other. Both sources are highly authoritative and equally applicable. Additionally, there are many academic publications on Articles 38 and 39.[53] This allows one to conclude that there were many sources that the Court could have used, and that could have helped to interpret Articles 38(1) and 39(1). Although, as mentioned earlier, use of the Digest can be evaluated positively, it would have been beneficial if the Court had used more sources.

We have already noted that the so-called homeward trend exists in the Latvian courts.[54] As the Supreme Court's interpretation of law is considered highly authoritative and other courts frequently quote judgments of the Supreme Court, this case was also a chance to start to eliminate (or at least to minimize) the homeward trend in CISG-related cases in Latvia by setting a sound example on how to promote uniform application of the CISG by using various sources. Interestingly, from the text of the judgment, it can be seen that the Supreme Court was aware of Article 7(1) of the CISG, as there is an explicit reference to this norm[55] in order to justify use of the UNCITRAL Case Law Digest, which would imply that the Court might have known about its importance as well. However, unfortunately the use of sources (or, rather, the lack of use of sources) suggests that the reference to Article 7(1) might have been symbolic.

V. *Iura novit curia* and Article 3 of the CISG

It can be seen from the Supreme Court judgment that the principle of *iura novit curia* in connection with applicability of the CISG was indirectly involved in the case. Although the Supreme Court rightly did not analyse this principle (as the parties had not invoked it in earlier instances), it is still worth including it in this article, as it highlights an issue that can be observed in other cases as well. More specifically, the issue is whether, and to what

[51] See judgment in *Rheinland Versicherungen v. S.r.l. Atlarex and Allianz Subalpina s.p.a.* Published (in Italian) in *Giurisprudenza italiana* (2000) 280–90. See also Ferrari (n 8).

[52] 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 online at: <https://www.cisgac.com/wp-content/uploads/2023/02/CISG_Advisory_Council_Opinion_No_2.pdf> accessed 10 July 2023.

[53] See, eg, Harry M Flechtner, 'Funky Mussels, a Stolen Car, and Decrepit Used Shoes: Non-Conforming Goods and Notice Thereof under the United Nations Sales Convention (CISG)' (2008) 26 BU Int'l LJ 1, 14–28. Daniel Girsberger, 'The Time Limits of Article 39 CISG' (2005) 25 JL & Com 241. Ulrich Schroeter, 'A Time-Limit Running Wild: Article 39(2) CISG and Domestic Limitation Periods' (2017) 2017 NJCL 152.

[54] Sindija Damberga, '*Homeward trends* Latvijas Republikas tiesu praksē' ('Existence of Homeward Trend in the Case Law of the Republic of Latvia') (2021) 1(19) *Socrates: Rīgas Stradiņa universitātes Juridiskās fakultātes elektroniskais juridisko zinātnisko rakstu žurnāls* (*Rīga Stradiņš University Faculty of Law Electronic Scientific Journal of Law*) 184, 188–91. See also Valts Nerets, Agita Sprūde, Elvis Grinbergs, 'ANO Konvencijas par starptautiskajiem preču pirkuma-pārdevuma līgumiem piemērošana Latvijas tiesu praksē', *Jurista Vārds*, 30(1140) (28.07.2020), 23–7.

[55] See para 8 of the Supreme Court judgment.

extent, a court should evaluate the applicability of the CISG based on the principle of *iura novit curia*, if the parties have not raised this point themselves.

In the present case, the defendant indicated in the cassation complaint that the appellate court had not applied Articles 3 and 4 of the CISG and had not evaluated whether the transaction was a sale of goods contract. As the appellate court had not addressed this issue, then, in the opinion of the defendant, the CISG had been applied incorrectly. The defendant based this argument on the principle of *iura novit curia*, implying that, even though this issue was not explicitly raised by the parties, the court had a duty to evaluate the applicability of the CISG by itself (that is, even if the parties did not explicitly raise the issue about whether the transaction could be qualified as a sale of goods).

In this case, based on the facts indicated in the judgment, it can be concluded that the transaction between the parties could be qualified as a sale of goods, and that there were no grounds to dispute this. The defendant considered that under Article 3(2) of the CISG, the transaction was not a sale of goods transaction because the preponderant part was supply of labour.[56] The defendant indicated the following main arguments: (i) the defendant manufactured only some parts of the machinery (approximately 30 per cent of the machinery); and (ii) the claimant had provided drawings for these parts. As it is clear that the defendant misinterpreted Article 3(2) of the CISG, these claims will not be analysed further in this article. Nor will Article 3(1) be considered either, as the CISG Advisory Council has clearly stated that the fact that the buyer supplies the seller with drawings does not by itself lead to inapplicability of the CISG.[57] Instead, this article will focus on a hypothetical issue: what if it was questionable whether it was a sale of goods contract under Article 3 of the CISG (and thus whether the CISG was applicable) but the parties had not raised it, and the court had not evaluated it either? How should such a situation be resolved within the scope of the principle of *iura novit curia*?

The principle of *iura novit curia* is 'traditionally associated with the civil law tradition',[58] meaning that 'the court is presumed to know the law'.[59] One commentator has stated that the judge does not necessarily have to know the law but that 'it is mandated to actively find out and apply (all) the relevant law(s)'.[60] It has been suggested that the principle has two forms—the 'strict' approach and the 'soft' approach.[61] Under the strict approach, the principle 'obliges the court *ex officio* to identify and apply the substantive law it considers applicable to the case'.[62] In contrast, under the soft approach, the principle 'authorises this but does not demand it'.[63] These explanations suggest that the principle of *iura novit curia* means that the court should know which law is to be applied (or that the court has a duty to find out which law should be applied). In the case of the CISG, the question that indirectly arises from *Boom Conveyor* is to what extent the court needs to examine the potential applicability of the CISG under the principle of *iura novit curia*. Should the court look only at the applicability criteria stated in Article 1 of the CISG, or should the court examine all Articles that might potentially affect application of the CISG in a particular case (for instance, Articles 2, 3, 4, 5, and 6)? This question being deserving of separate research and

[56] See para 4.1 of the Supreme Court judgment.

[57] CISG-AC Opinion no 4, Contracts for the Sale of Goods to Be Manufactured or Produced and Mixed Contracts (Article 3 CISG), 24 October 2004. Rapporteur: Professor Pilar Perales Viscasillas, Universidad Carlos III de Madrid.

[58] Joanna Jemielniak & Stefanie Pfisterer, 'Iura Novit Arbiter Revisited: Towards a Harmonized Approach' (2015) 20 Unif L Rev 56, 58.

[59] Ieva Kalniņa, 'Iura Novit Curia: Scylla and Charybdis of International Arbitration' (2008) 8 *Baltic Yearbook of International Law* 89, 91.

[60] Ingrid A Muller, 'Iura Novit Curia versus Iura Novit Arbiter in International Arbitration' (2022) 2 Int'l Inv LJ 137, 138.

[61] Lisa Spagnolo, 'Exclusion by Conduct of Legal Proceedings: Iura Novit Curia and Opting out of the CISG' (2014) 17 Int'l Trade & Bus L Rev 477, 483.

[62] ibid.

[63] ibid.

publication, this article will consider only the interaction of the principle with Article 3 of the CISG in the context of the Civil Procedure Law of Latvia.

The principle of *iura novit curia* is known and applied by the courts in Latvia,[64] and it has been described as 'a general principle which must be observed in every case'.[65] The Supreme Court of Latvia, in case No. C29585713, described the meaning of this principle. The Court stated that this principle does not entitle a court to determine the circumstances of the case that would be related to the desired outcome of the case for one of the parties.[66] Under Article 192 of the Civil Procedure Law of Latvia, the court must observe the limits of the claim, which means that the court can find the applicable law only within the limits of the facts as indicated by the parties.[67] In the context of *Boom Conveyor*, this would mean that under Article 192 of the Civil Procedure Law of Latvia, a court can evaluate whether the CISG is applicable under Article 1(1) of the CISG, as the parties have not contested that there is an international sale of goods contract. However, the court cannot evaluate if there might be a possibility that the contract actually is not a sale of goods contract if neither of the parties has indicated any facts that would be the basis for such evaluation, and, of course, if the contract itself does not give any doubts.

Regarding the applicability of the CISG, it can be concluded that it can be reasonably expected that the court, irrespective of whether the parties refer to the CISG or not, applies Articles 1 and 2 of the CISG. However, a court cannot reasonably be expected to evaluate the applicability of the CISG based on, for instance, Articles 3 and 6, especially if there is no obvious evidence that the CISG might not be applicable because of these norms and if neither of the parties has brought this issue to the court's attention. In other words, if the parties explicitly or implicitly agree that the transaction is a sales contract and do not dispute this fact, and the case materials do not provide any evidence to the contrary, then the court cannot reasonably be expected to apply Article 3 of the CISG *ex officio* and without a reason.

On a final note, under the Civil Procedure Law of Latvia, it is not permissible to invoke the principle of *iura novit curia* for the first time in a cassation claim to argue that, under Article 3, the CISG is not applicable if, at the first two instances, the CISG has been applied and the parties have had no objections. Under the Civil Procedure Law of Latvia, during litigation proceedings, the parties have several chances to state their objections.[68] Moreover, Article 10 of the Civil Procedure Law of Latvia stipulates that the proceedings are adversarial, which, among other things, means that it is the responsibility of the parties to submit evidence, state claims, and point out all objections. This means that a party who considers that the CISG is not applicable must express this objection under the rules of civil procedure, instead of expecting the court to apply Article 3 of the CISG *ex officio* and without a reason and waiting until the cassation instance to mention it.

VI. Duty to examine goods and notify non-conformity under the CISG

1. Relevant facts and conclusions of the Supreme Court

The core analysis of the Supreme Court concerns the duty of the buyer to examine the goods and notify non-conformity. While the analysis is not that long, its critical assessment

[64] A search by using the phrase 'iura novit curia' in the publicly available database of court decisions led to 128 results (128 decisions), and a search by using the phrase 'jura novit curia' lead to 430 results (430 decisions). The results were obtained on 17 November 2023.

[65] See para 11 of the judgment of the Supreme Court of Latvia in case No C30435820 (28 November 2022).

[66] See para 7.2 of the judgment of the Supreme Court of Latvia in case No C29585713 (10 December 2018).

[67] See para 7.2 of the judgment of the Supreme Court of Latvia in case No C29585713 (10 December 2018).

[68] For example, the claimant can use the statement of claim (Art 128), the defendant can use the defendant's explanations (Art 148(2)). Both parties can submit requests to the court (Art 162), state all circumstances upon which their claims or objections are based (Art 165(5)), and ask questions of each other (Art 167(1)).

is impossible without a grasp of the facts of the case. Therefore, before assessing the Supreme Court's analysis, we must reiterate and emphasize the most crucial facts of the case concerning the conformity of goods. First, the original contract included the EXW term that the goods would be available at the defendant's factory. However, later the claimant ordered the defendant to send the unassembled goods to the port of Antofagasta in Chile. Second, on 18 December 2015, the defendant sent the goods in unassembled form to Antofagasta. Third, at some date—not identified in the judgments—the goods reached the place of destination. Fourth, it was intended that, at the port in Antofagasta, the sub-buyer, under supervision of the claimant's engineer, would assemble the parts and transport the assembled whole to its own venue. Therefore, in the following analysis of the case, we assume that the goods were not re-dispatched to the sub-buyer but assembled by the sub-buyer together with the claimant. We also assume that this implies that all defects known to the sub-buyer were equally known to the claimant. Fifth, when the sub-buyer began to assemble the product, it identified multiple defects. The sub-buyer began to eliminate the defects, but, in order to do that, it hired a third-party engineer (TPE), who, together with the claimant's engineer, supervised the process of repairs. Sixth, on 30 May 2016,[69] the TPE prepared a detailed report (30 May Report) of all the defects, likewise identifying their cause. Finally, one week later—on 8 June 2016 (8 June Notice) —the claimant sent an email to the defendant informing it about the sub-buyer's claims against the claimant. From the text of the judgments, it is not entirely clear whether the email included the 30 May Report as an attachment. However, according to the claimant it had described the defects identified, albeit it is not clear whether in the email, the claimant already explained which defects, in its opinion, were attributable to the defendant. On 24 August 2016, the claimant once again sent an email to the defendant informing the defendant about the sub-buyer's claims against the claimant. Unfortunately, the judgments do not explain the content of this notification and its connection with the 8 June Notice.

It is not hard to see that the facts as presented to the courts (and reproduced in judgments) are confusing and lack essential details. For example, it is unclear why it took so long for the TPE to prepare the 30 May Report. Our guess would be that this was because the TPE was, first and foremost, supervising the repair of goods, and only after that finished the 30 May Report. Second, it seems clear that the claimant, whose engineer was supervising the assembly and repairs, should have been aware of some of the defects once they were discovered by the sub-buyer attempting to assemble the machinery. But seemingly, the claimant did not inform the defendant. Moreover, it is not clear what exactly was included in the 8 June Notice. Was the 30 May Report attached to the email? Did the 30 May Report already indicate attribution of defects to the claimant or the defendant? And why did the claimant notify the defendant once more on 24 August? All these elements are left in the mist behind numerous facts somewhat chaotically mentioned in all three judgments.

That said, we can still draw some conclusions about the application of the CISG. First, the presence of non-conformity was not questioned by the courts at first and second instance. They found that the goods produced by the defendant were defective. However, the findings of the courts of first and second instance lack details as they do not explain what

[69] The judgments of the first instance court and the appellate court seem to assign three different dates to this report: 30 March, 30 May and 30 June. All three judgments state at least once that the report was prepared on 30 May or 30 June. The cause of this problem is that the first instance court decision contained three dates, of which two were just typos. The higher courts simply copied and pasted text from the first instance court decision, hence reproducing the confusion. From the context, it seems that the correct date is—30 May. The judgments reproduce the argument by the claimant that a week after it acquired information from the report it sent notice to the defendant. That notice was sent on 08 June, 2016. Hence, the report was actually prepared on 30 May.

kind of criterion of non-conformity was used. Article 35(1) of the CISG makes it clear that the seller must deliver goods that conform to the contract.[70] However, it is not always the case that the contract itself explicitly describes all the characteristics of the goods.[71] Article 35(2) then steps in and provides special standards to assess conformity when the characteristics of the goods are not expressly stated in the contract.[72] Most likely, the case concerned specific characteristics because the defendant produced the parts of the machinery that were to be assembled together with other parts, and they were produced based on technical drawings. Therefore, it is most likely that the benchmark for assessing conformity was the contract itself or technical drawings provided by the claimant.

Interestingly, as a matter of fact, the first- and second-instance judgments relied on external evaluation of proof and assessment of the defects. As noted above, the claimant relied on the 30 May Report to substantiate its argument of non-conformity. Based on the 30 May Report, the claimant insisted that 73 defects in the goods were attributable to the defendant. Courts at all three instances took this for granted, although, strictly speaking, the engineer working for the company hired by the sub-buyer—the TPE—could not produce a report binding on the courts.[73] However, the judgments contain no information that would prompt us to distrust the 30 May Report. At the end of the day, the existence of each separate case of non-conformity is a question of the standard of proof and the national courts of the first and second instance were satisfied by the proof provided in the 30 May Report.

Second, on the surface, the case might seem to involve re-dispatch of goods covered by Article 38(3). Goods are considered re-dispatched 'where the buyer, after having received the goods, sends them off to a different destination'.[74] Re-dispatch allows deferral of the moment when the period of examination starts until the goods reach their final destination.[75] Additionally, for Article 38(3) to apply, it is not enough to have re-dispatch of goods; it is also necessary that the 'seller knew or ought to have known of the possibility of their … redispatch'.[76]

However, Article 38(3) is not mentioned in any of the judgments—and rightly so. In this case, the claimant did not re-dispatch the goods. Rather, the parties agreed to modify the original EXW term by the defendant agreeing to send the machinery to the port city of Antofagasta. Such a modification of a contract is permitted by Article 29(1) of the CISG. And, in fact, once having arrived, the machinery was not received exclusively by the sub-buyer. It follows from the facts of the case that the assembly works executed by the sub-buyer began under the supervision of the claimant's engineer. Therefore, the conclusion is simple: after the contract was modified, the place of delivery was Antofagasta, without any re-dispatch. This means that the Latvian courts acted correctly in not applying (or even mentioning) Article 38(3).

Third, for the outcome of the case, a vital element was the substantive analysis of Articles 38 and 39 undertaken by the Supreme Court. The Court even formulated a special test to determine when the buyer has to notify the seller about hidden defects in the goods.

[70] Christoph Brunner and Michael Schifferli, 'Article 35' in Peter Mankowski (n 26) 191; Stefan Kröll, 'Article 35' in Stefan Kröll, Loukas Mistelis and Pilar Perales Viscasillas (eds), *UN Convention on Contracts for the International Sale of Goods (CISG). A Commentary* (CH Beck, 2nd edn, 2018), 496; Christoph Brunner, *UN-Kaufrecht—CISG* (Stämpfli Verlag, 2004) 193.

[71] Kröll (n 70) 503; Brunner (n 70) 194.

[72] ibid.

[73] Regarding the evidence see Arts 104–26 Civil Procedure Law of Latvia.

[74] For similar definitions, see also: Fritz Enderlein and Dietrich Maskow, *International Sales Law: United Nations Convention on Contracts for the International Sale of Goods; Convention on the Limitation Period in the International Sale of Goods* (Oceana Publications, 1992) 157; Cesare Massimo Bianca, 'Article 38' in Cesare Massimo Bianca and Michael Joachim Bonell (eds), *Commentary on the International Sales Law* (Giuffrè, 1987) 300; Article 38: Secretariat Commentary, <https://www.iicl.law.pace.edu/cisg/page/article-38-secretariat-commentary-closest-counterpart-official-commentary> accessed 7 July 2023.

[75] Stefan Kröll, 'Article 38' in Kröll et al (n 70) 578; Sonja Kruisinga, *(Non-)conformity in the 1980 UN Convention on Contracts for the International Sale of Goods: A Uniform Concept?* (Intersentia, 2004) 75.

[76] Kröll (n 75) 579.

This test was built on the basis of several statements by the Supreme Court about the interpretation of Articles 38 and 39 of the CISG. The test led to a finding that the claimant notified the defendant in time. Let us now take a closer look at the Court's actual line of reasoning.

From the outset, we must note that the Supreme Court set a correct—even if incomplete—theoretical framework with a few statements on the content of Articles 38 and 39 of the CISG. The manner in which the Supreme Court approached the description of this framework can be divided into two steps. The first step concerns the nature of the duty to examine the goods and notify the seller. Here the Supreme Court first observed that Articles 38 and 39 must be seen in combination, as the examination itself is only a means to determine when the time limit for notification should kick in.[77] The Court went on to state that when the examination is unable to uncover a hidden defect, the end of the examination period does not start the period for sending notification.[78] Moreover, the Court explained that absence of examination does not involve any negative consequences for the buyer if the defects were such that they could not have been discovered during examination.[79]

After these very general statements, the Court took a step forward towards the specific context of the case. Yet, still within the theoretical framework, the Supreme Court made the following statements:

- For hidden defects that cannot be identified during the initial visual inspection, the period for notification runs from the moment when the defect was discovered or ought to have been discovered.
- Under Article 38(1), the examination must be carried out in a period that is practical in the circumstances.[80]
- The Supreme Court, basing its finding on the UNCITRAL Digest, recognized that the period when the examination had to be performed is flexible and depends on the objective and subjective circumstances of the concrete case, for example, the buyer's business situation, the features of the goods, the timing of the buyer's expected use of the goods, and the complexity of the goods.[81]

These two groups of statements served as premises for applying Articles 38 and 39 to the given case. The Supreme Court began its exercise in subsumption by observing that the machinery was consigned to Chile in six containers. It followed that any visual inspections could only identify obvious defects. Hidden defects were discoverable only during assembly. In the Court's eyes, the 30 May Report, and possibly another report[82] by the

77 Supreme Court judgment (n 16). As some scholars say the examination has 'merely numerical value'. See: Christoph Brunner and Flavio Peter, 'Article 38' in Christoph Brunner and Benjamin Gottlieb (eds), *Commentary on the UN Sales Law (CISG)* (Kluwer Law International, 2019) 254.

78 Supreme Court judgment (n 16).

79 Ibid. To substantiate all these findings, the Supreme Court referred to page 156 of the UNCITRAL Digest of Case Law on the United Nations Convention on Contracts for the International Sale of Goods, 2016 Edition, <https://www.uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/cisg_digest_2016.pdf>, accessed 7 July 2023.

80 Supreme Court judgment (n 16). It is, probably, no accident that the Supreme Court failed to quote the provision correctly, leaving out the words 'within as short […]'. However, it must be noticed that later in the text – in para 8.2 – the Supreme Court quotes the said provision correctly.

81 Ibid, para 8. The Supreme Court took the entire line of reasoning and the specific examples from page 158 of the UNCITRAL Digest of Case Law on the United Nations Convention on Contracts for the International Sale of Goods, 2016 Edition, <https://www.uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/cisg_digest_2016.pdf>, accessed 7 July 2023.

82 From the facts of the case it is clear that the 30 May Report was a central piece of evidence in the case. However, the decisions seem to allude to the existence of a separate report prepared by the claimant's engineer. The content of this second report is not clear, but at least for the Supreme Court it seemed to corroborate the 30 May Report.

claimant's engineer, demonstrated the complexity of the assembly work, elimination of defects, and final assembly of the repaired parts. The 30 May Report recorded the defects, creation of new parts and tests of machinery that allowed discovery of new defects, and execution of new rounds of repairs.

From this set of arguments, the Supreme Court created its own test to determine when the total notification period started to run for such hidden defects in the goods that had to be assembled. According to the Supreme Court, three requirements had to be met:

1) All the parts of the machinery are assembled (including those produced and delivered by the defendant).
2) All defects discovered during assembly are recorded and their causes identified.
3) The amount of damage is determined.

It is based on this formula that the Supreme Court found, without further inquiry, that the claimant had complied with the notification period even if notification took place approximately four months after delivery of the goods to the place of assembly.

2. Critical assessment of the Supreme Court's methodology and conclusions

A. Symptoms of non-conformity and recurring examination of goods

Unfortunately, it is doubtful whether the test complies with the traditional methodology used for interpretation of Articles 38 and 39 of the CISG. The first error is directly visible from the very reasoning of the Supreme Court. It seems believable that the parts of the machinery were sufficiently complex that the sub-buyer, together with the claimant (via its engineer), could not spot the defects before assembly began. Hence, we are dealing with hidden defects that were not discoverable via visual inspection but that would have been discovered during assembly.

In this context, the view that examination is of no relevance needs further elaboration. If a hidden defect is discovered, then the question of examination is out of the picture as the defect is already known. A more subtle question is how to approach a situation where a defect could not be initially discovered via reasonable examination but, later, a buyer acquires information leading to suspicions about the conformity of the goods. Different answers have been proposed. According to one answer, examination in accordance with Article 38 'is a single, discrete event, to occur soon … after the goods become available for examination by the buyer'.[83] If this examination is unable to uncover the defects, then the buyer is left with a secondary obligation to discover defects arising from 'the language [of Article 39(1)] requiring a buyer to give notice of lack of conformity (including latent lack of conformity) within a reasonable time after the buyer "discovered *or ought to have discovered it*."'[84] This is, however, a minority view.

According to the dominant view, 'whenever there are symptoms discovered which should alert the buyer that the goods contain latent defects not discovered during the initial examination, the buyer is requested to engage in a more sophisticated examination to verify whether such defects exist or not'.[85] In these circumstances, the buyer might be required to engage an expert that could determine the cause of the symptoms.[86]

[83] Harry M Flechtner, 'Buyer's obligation to give notice of lack of conformity (Articles 38, 39, 40 and 44)' in Franco Ferrari, Harry Flechtner and Ronald A. Brand (eds), *The Draft UNCITRAL Digest and Beyond* (Sellier, 2004) 389.

[84] Flechtner (n 83) 390 (original emphasis preserved). Described as a minority view: Kröll (n 75) 566.

[85] Kröll (n 75) 566. Also in support of this view: Brunner and Peter (n 77) 255; Ingeborg Schwenzer, 'Article 39' in Ingeborg Schwenzer & Ulrich G. Schroeter (eds), *Schlechtriem & Schwenzer: Commentary on the UN Convention on the International Sale of Goods (CISG)* (OUP, 5th edn, 2022) 881; Ulrich Magnus, 'Art. 39' in Heinrich Honsell (ed), *Kommentar zum UN-Kaufrecht* (Springer, 2nd edn, 2010) 429.

[86] Kröll (n 75) 566.

B. Examination of complex goods and reasonable time for notification

These theoretical statements have been tested in practice. In 1999, the German Supreme Court[87] heard a case dealing with conformity of grinding equipment for a paper machine for production of moist tissues. There, the issue concerned a hidden defect that could not have been discovered via reasonable examination. However, during the use of the paper machine, it was discovered that the paper produced had deficiencies. The Supreme Court observed that a normal period for notification of non-conformity is one month. Yet the case was exceptional as it was not clear whether the inadequate quality of paper was due to non-conformity of the grinding equipment or an operational error. The German Supreme Court considered that:

> [e]ven if the [buyer] could have excluded a possible operating error quickly by internal investigation … it had to be allotted, in any case, a certain period of approximately one week for the decision as to what to do next and for the initiation of necessary measures—e.g., the selection and commissioning of an expert—followed by the two weeks … for the expert's investigation, followed by the—regular—one-month notice period pursuant to Art. 39(1) CISG.[88]

Hence, altogether, the Court gave the buyer a period of seven weeks from the moment when the possible symptoms were observed until the day of notification. And even then, Schlechtriem was suspicious of the Court's generosity, noting that '[it] is understandable, especially in cases of complex machines, where the causes of malfunction can be difficult to ascertain and perhaps only through specific experts, although this should not become a rule for all cases'.[89]

It is useful to point out that the German Supreme Court reiterated that the period for actual notification itself was one month. Some authors would disagree with this interpretation of Article 39(1), arguing that once the defect is established, the buyer has to notify immediately, as there is no reason for delay.[90] The latter opinion is incompatible with the wording of Article 39 that expressly speaks about a reasonable time[91] and, thus, also deviates from the possibly more demanding Article 39 of the Convention Relating to a Uniform Law on the International Sale of Goods that speaks about an obligation 'to notify the seller promptly'.[92] For the majority of scholars and courts, the combined average time for examination and notification could be from approximately 14 days[93] to one month.[94] Hence, a period of notification of one month seems a very generous option, which might still be adequate if the buyer can persuade the adjudicator that it was necessary to hire an expert and perform an in-depth examination of the complex goods.

87 Germany 3 November 1999 Bundesgerichtshof [Federal Supreme Court], <https://www.iicl.law.pace.edu/cisg/case/germany-bger-bundesgerichtshof-federal-supreme-court-german-case-citations-do-not-identi-2>, accessed 7 July 2023.

88 ibid.

89 Peter Schlechtriem, 'Comments on Bundesgerichtshof VIII ZR 287/98, 3 November 1999' (2000), <https://www.iicl.law.pace.edu/cisg/case/germany-bger-bundesgerichtshof-federal-supreme-court-german-case-citations-do-not-identi-2>, accessed 7 July 2023.

90 Karl H Neumayer and Catherine Ming, *Convention de Vienne sur les contrats de vente internationale de marchandises. Commentary* (CEDIDAC, 1993) 303–4; Enderlein and Maskow (n 74) 159.

91 Kruisinga (n 75) 77.

92 Convention Relating to a Uniform Law on the International Sale of Goods, opened for signature July 1, 1964, 3 I.L.M. 854, 855; André Tunc, *Commentary on the Hague Conventions of the 1st of July 1964 on International Sale of Goods and the Formation of the Contract of Sale* 58, <https://www.unidroit.org/wp-content/uploads/2021/06/ulis-ulfc-explanatoryreport-e.pdf>, accessed 7 July 2023.

93 Ulrich Magnus, 'CISG Art 39' in Ulrich Magnus and Dagmar Kaiser (eds), J von Staudingers Kommentar zum Bürgerlichen Gesetzbuch: Staudinger BGB—Buch 2: Recht der Schuldverhältnisse: Wiener UN-Kaufrecht (CISG) (Sellier, 2018), para 49; Schwenzer (n 85) 878.

94 Christoph Brunner and Flavio Peter, 'Article 39' in Brunner and Gottlieb (n 77) 273; Schwenzer (n 85) 879–80.

C. Criticism of the approach used by the Latvian Supreme Court

Unlike the German Supreme Court, the Latvian Supreme Court did not divide the time used by the claimant and sub-buyer into separate periods and also missed the opportunity to analyse a few relevant facts. Unlike in the German case, in the Latvian case, there were no symptoms of possible non-conformity. Instead, certain defects were discovered immediately once assembly began. Perhaps there was uncertainty as to their cause—deficient production or deficient technical drawings. However, if their cause was known, the claimant would have been obliged to inform the defendant about them in a reasonable time under Article 39. If their cause remained unknown, then additional time could have been granted in order to appoint an expert and discover the root cause of the defect.

However, other defects were not immediately discovered, although the presence of defects already discovered must have planted seeds of doubt in the mind of the claimant and the sub-buyer. This is demonstrated by the fact that the sub-buyer hired the TPE, thus foreseeing that new defects would be discovered. If we were to apply the methodology used by the German Supreme Court, we could conclude that once the initial defects were discovered, the claimant and the sub-buyer had approximately one week to hire an expert—and then had approximately two weeks for the expert to prepare a report identifying the defects and, probably, their attribution.

It follows from the Latvian Supreme Court judgment that the defects were discoverable only upon assembly of the machinery. We have no technical information to challenge this statement. However, it is important to note that Article 39(1) speaks about 'the nature of the lack of conformity'; hence, in order to fulfil the duty of time notice, the claimant was not obliged to inform the defendant about each and every defect found in the goods but rather to alert the seller, in principle, about the defect present in the goods.[95] Even if the claimant and the sub-buyer, or a hired expert, already suspecting the existence of other defects, were willing to make a holistic comparison of the actual goods and the technical information (for example, technical drawings) to assess whether the goods complied with the buyer's order, was it really impossible to make it faster? It would seem to us that the claimant and the sub-buyer could simply hire an expert who would have undertaken an assessment of the goods without their direct involvement and without simultaneous assembly of the machinery. Alternatively, they could have focused on the assembly as far as was possible with defective parts, simultaneously discovering new defects, though this course of action would perhaps take more time, with or without hiring the TPE to supervise the process.

The sub-buyer and the claimant chose neither of these routes. Instead, they started to carry out actual assembly alongside simultaneous repair of the defective goods. Unsurprisingly, the whole process lasted for approximately four months. It is more than believable that the claimant and the sub-buyer could have significantly cut the period needed to discover the defects and their cause by postponing the repairs—and perhaps cut the period needed even further if they had hired an expert to perform a purely technical examination of the goods without assembly. At the end of the day, the CISG does not contemplate an option where the buyer first repairs the goods and only thereafter notifies. The sequence of events chosen by the claimant and the sub-buyer meant that discovery and attribution of defects, entwined with the repairs, was delayed, while the defects discovered at the outset were not notified for months.

Moreover, it follows from the Supreme Court's reasoning that the total period of notification also included the time needed to calculate the amount of damages claimed by the buyer. This implies that notification should mention the remedy. But this is not the case. Article 39(1) does not lay down a duty to mention a remedy in a notification, and no such

[95] The authors would like to thank Professor Ulrich G. Schroeter for emphasizing this characteristic of Art. 39(1).

duty has been supported by scholars.[96] *A fortiori*, there was no duty to mention the amount of loss caused to/sustained by the sub-buyer or the claimant. Thus, to be precise, the Supreme Court should have assessed whether the time for calculations added to the total period of time prior to notification and considered it as time that was not reasonably spent by the claimant.

In light of these circumstances, we cannot agree with the Latvian Supreme Court. The period of four months for notification (and examination in order to discover new defects) was just too long if we compare it with existing practice and scholarly interpretation of Articles 38 and 39 of the CISG. The initial defects should have been notified to the seller within 14–30 days. As stated above, this should, in principle, be enough to alert the defendant about the nature of the non-conformity. Nonetheless, if the Latvian Supreme Court understood the duty of notification as requiring the claimant to notify every single defect, then after the initial defects were discovered, the claimant and the sub-buyer could have used one week to decide on the course of action and then two weeks to actually identify other defects and the *prima facie* attribution. So, we find it hard to imagine why the claimant did not notify the defendant within seven weeks, at most, which would have been somewhere between the end of March and the first half of April.

The criticism might have been less justified if a totally different test had been used. For example, an original test proposed by Harry Flechtner, who argues that the question to be asked must be: 'whether the seller suffered substantial prejudice from the buyer's delay in giving notice'.[97] The goods in question were not perishable and if the defects were based on the low level of competence on the part of the defendant, who was unable to create parts in accordance with technical drawings, then the defendant hardly had any recourse against anyone (such as its own supplier). So, it is possible that, pursuant to this test, the claimant's interests could trump those of the defendant. Hypothetically, the claimant could even argue that immediate repairs meant less downtime and lower losses, therefore being advantageous to the defendant. Nonetheless, in line with the dominant approach, Articles 38 and 39 contain a temporal test that cannot be reduced to purely balancing the interests of the parties. According to its mainstream understanding, even seven weeks for examination and notification might approach the limit, but four months was just far too long.

3. An alternative route: Article 44?

We have already expressed the opinion that we do not find the test proposed by the Latvian Supreme Court for determining the total period of notification under Articles 38 and 39 to be correct. Hence, in our opinion, the claimant delayed notification of defects. The Supreme Court thought otherwise, so it had no reason to analyse the relevance of Article 44 to the given case. As in our reading, the claimant was in delay, so we must assess a hypothetical question: does the claimant preserve the right to claim damages even from our point of view? Here, we must clarify that we cannot offer an actual answer. The application of Article 44 was not analysed by the Supreme Court (or the lower courts). As a result, we do not have the facts that would have been necessary for analysis. Therefore, this is a conjecture on the basis of the facts presented in the decisions and our assumptions about the missing facts.

Under Article 44, 'the buyer may reduce the price in accordance with Article 50 or claim damages, except for loss of profit, if he has a reasonable excuse for his failure to give the required notice'. The provision was introduced in the draft of the CISG in order to mitigate the harsh sanction for failure to give notice [...] in due time'.[98] The provision allows the buyer to benefit from two remedies arising from non-conformity, provided there was a

[96] Brunner and Peter (n 94) 271; Stefan Kröll, 'Article 39' in Kröll et al (n 70) 594; Kruisinga (n 75) 95.

[97] Harry M Flechtner, *Honnold's Uniform Law for International Sales under the 1980 United Nations Convention* (Kluwer Law International, 5th edn, 2021) 495; Flechtner (n 83) 377, 387–8.

[98] Kruisinga (n 75) 117. See also: David Tebel, 'Article 44' in Brunner and Gottlieb (n 77) 323.

reasonable excuse for failure to notify.[99] The remedies that remain at the disposal of a buyer are: reduction of price and a claim for compensation by way of damages, excluding loss of profit.[100]

Historically, some authors have used language that might be understood to suggest that Article 44 applies only when notice has not been given in due time, while 'the *failure to examine the goods* [is] *not* excusable on the basis of Article 44'.[101] This opinion is rejected by modern scholarship, as it would have been the purpose of the drafters who included Article 44 in the Convention to restrict the stringent duty of notification to a short period of time.[102] Moreover, as stated above, since the total period for notification includes the period of examination, it would have been artificial to break this intrinsic connection between two periods uniquely for the purposes of Article 44.

What is a 'reasonable excuse'? This is a complex question that is hard to answer without knowing all the facts of an individual case.[103] Yet it is necessary to observe that reliance on Article 44 is 'seldom successfu[l]'.[104] And it is precisely the buyer that must prove that all the requirements of the provision are satisfied.[105] The buyer must prove that its 'failure to give notice must be forgivable from the perspective of a reasonable businessman and thus the consequence of a total loss of the right to rely on the defect must appear inappropriate'[106] or, in other words, that 'under the circumstances of the individual case, he equitably deserves a certain understanding and a certain consideration'.[107]

In more concrete terms, this includes 'objective and subjective reasons for the "lack of care" in examination and notice of the non-conformity'.[108] While practice scarcely applies the provision, scholars have come up with numerous possible justifications, such as buyer's technical limitations on testing the goods; [109] the buyer's lack of knowledge about the duty of notification and the absence of the duty in its own domestic law,[110] although this justification should mostly work with inexperienced buyers;[111] the buyer's limited financial possibilities if this fact could have affected the examination;[112] and language difficulties.[113] Nonetheless, these excuses themselves seem irrelevant as they are not assessed *in abstracto*, but rather against the background of the balance of interests of the parties.[114] On the one

99 Christoph Brunner and Michael Schifferli, 'Article 44' in Mankowski (n 26) 229; Kruisinga (n 75) 117.

100 Flechtner (n 96) 503–504; Brunner and Schifferli (n 99) 229.

101 Peter Schlechtriem, *Uniform Sales Law—The UN-Convention on Contracts for the International Sale of Goods* (Mainz, 1986) 71 (emphasis in original). The idea is also mentioned as being supported in German practice by: Vincent Heuzé, *La vente internationale de marchandises. Droit uniforme* (LGDJ, 2000) 273.

102 Flechtner (n 97) 504–5; Stefan Kröll, 'Article 44' in Kröll et al (n 70) 660; Ingeborg Schwenzer, 'Article 44' in Schlechtriem & Schwenzer (n 85) 933–4.

103 Flechtner (n 97) 503; Peter Huber and Alastair Mullis, *The CISG: A New Textbook for Students and Practitioners* (Sellier, 2007) 166.

104 UNCITRAL Digest of Case Law on the United Nations Convention on Contracts for the International Sale of Goods, 2016 Edition, 214, <https://www.uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/cisg_digest_2016.pdf>, accessed 7 July 2023. See also: Peter Schlechtriem and Claude Witz, *Convention de Vienne sur les contrats de vente internationale de marchandises* (Dalloz, 2008) 229; Larry A DiMatteo, Lucien J Dhooge, Boston College et al, *International Sales Law: A Critical Analysis of CISG Jurisprudence* (CUP, 2005) 92.

105 Brunner and Schifferli (n 99) 232; Kröll (n 102) 667; Schwenzer (n 102) 938.

106 Tebel (n 98) 325.

107 UNCITRAL Digest of Case Law on the United Nations Convention on Contracts for the International Sale of Goods, 2016 Edition, 213, <https://www.uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/cisg_digest_2016.pdf>, accessed 7 July 2023.

108 Anselmo Martinez Cañellas, 'The Scope of Article 44 CISG' (2006-2006) 25 JL and Commerce 261, 266, <https://www.iicl.law.pace.edu/cisg/scholarly-writings/scope-article-44-cisg#19> accessed 7 July 2023. See also: Kröll (n 102) 664.

109 Tebel (n 98) 326–7; Kröll (n 102) 661–2.

110 Tebel (n 98) 325–6; Kröll (n 102) 661–2.

111 Tebel (n 97) 325–6.

112 Brunner and Schifferli (n 99) 230; Tebel (n 98) 327.

113 Brunner and Schifferli (n 99) 230.

114 ibid, 231; Tebel, (n 98) 327.

hand, the buyer's loss of all remedies is due to belated notice—albeit that the longer the delay, the more significant must be the justification.[115] On the other hand, it is in the seller's interest that evidence of non-conformity does not deteriorate and that the seller preserves the ability to claim recourse against its own suppliers.

In casu, since Article 44 was not analysed by the courts, it is not clear what actual excuses the claimant could have used. We could speculate that they could have been:

- lack of awareness that there was a duty to make rapid notification;
- desire to reduce downtime and thus mitigate damage by simultaneous repair and examination; and
- desire to provide the defendant with unambiguous and complete information about all the defects and their attribution in one go.

At the same time, the claimant could also indicate that the goods were not perishable and, if it is true that the defects attributable to the defendant were mostly caused by imprecise compliance with the technical drawings supplied by the claimant, then probably there would have been no recourse claims by the defendant against any of its own suppliers. Hence, there might have been grounds for the claimant to argue for application of Article 44.

Yet we doubt that this would have worked before a court. As stated above, in practice, Article 44 is seen as an exceptional provision, to be applied rarely. In our case, the claimant is a company buying and reselling expensive and complex machinery that was to be assembled under the supervision of its engineer. It may difficult for such a company to argue that it lacks knowledge about the duty to notify the buyer in a reasonable time. Moreover, as we stated above, in similar cases, adjudicators could consider that a reasonable period for examination of goods and notification is, in total, approximately seven weeks. Article 44 could have been used to extend the time somewhat further—for instance, to two months. However, *in casu*, the total period was twice that. Hence, the mainstream interpretation of the CISG seems to be contrary to such generosity under the veil of Article 44. In fact, the claimant's behaviour seems antithetical to the underlying philosophy of the CISG. The latter seems to be based around, and encourages, communication between the parties, while the claimant kept silent for months—behaviour that does not comply with the underlying policy of the CISG.

4. The missed relevance of Article 40?

Although we think that Articles 38, 39, and 44 should not have favoured the position of the claimant, the latter could have relied on another provision—Article 40. The provision could absolve the buyer from the duty of notification if the seller knew or could not have been unaware of the problem but did not disclose it to the buyer. While the judgments do not indicate that the claimant would have been able to positively prove knowledge on the part of the defendant, the claimant could have tried its luck with so-called 'constructive' knowledge.[116] In fact, Article 40 does not require the seller's actual knowledge of defects;[117] it suffices that the circumstances are such that the person simply could not have been unaware of the inadequate quality of the goods. While the specific standard of constructive knowledge is controversial,[118] for some authors it is enough if the seller has acted with simple negligence,[119] while others prefer the term 'gross negligence'.[120] Typical

115 Kröll (n 102) 663; Schwenzer (n 102) 933-4.

116 Stefan Kröll, 'Article 40' in Kröll et al (n 70) 621.

117 Christoph Brunner and Michael Schifferli, 'Article 40' in Mankowski (n 26) 213.

118 Kruisinga (n 75) 111.

119 Enderlein and Maskow (n 74) 164.

120 Christoph Brunner and Matthias Rey, 'Article 40' in Brunner and Gottlieb (n 77) 282; Brunner and Schifferli (n 117) 212; Kröll (n 116) 621; Schlechtriem (n 101) 70. See for a minority view that only obvious defects are covered by Art 40: Ingeborg Schwenzer, 'Article 40' in Schlechtriem & Schwenzer (n 85) 892.

examples of such negligence are 'grave discrepancies from the mutually agreed conditions of the goods if the lack of conformity occurred in the seller's sphere',[121] or formulated otherwise, 'clear deviations from the agreed upon characteristics of goods as long as the deviation occurred within the seller's sphere of influence'.[122]

If, indeed, 73 discrepancies from the technical drawings were attributable to the defendant, then it would seem to us possible to argue that the defendant had acted with gross negligence. And while scholars have argued that '[w]hether the seller knew or ought to have known about the breach of contract must be determined separately for each defect',[123] in such a case the extent of non-conformity would serve as proof that a diligent producer—an expert in the field—would know that its product did not comply with its own obligations. As a result, if the number of defects was actually so significant, then it cannot be excluded that Article 40 could have been the real key that would have opened the door for the claimant to all the remedies available under Article 45. It is, once again, necessary to underline that this is a conjecture on the part of the authors. The facts of the case as presented in the judgments do not provide sufficient information about the nature and circumstances surrounding the defects.

VII. The effect of settlement on a claim for compensation

As already indicated, all three Latvian courts found that the claimant had complied with the duty of notification and had activated remedies against the defendant. For the claimant, the remedy of choice was a claim for compensation. However, the amount of the claim was affected by a number of factors.

In the 8 June Notice, the claimant informed the defendant about its claim for compensation. However, in the context of the judgments, it is not clear whether the notice contained specific calculations of the claimant's claim or that of the sub-buyer. Be that as it may, the claimant's loss was directly linked to that of the sub-buyer. Initially, the sub-buyer claimed compensation from the claimant in the amount of US $474,000. Later, the sub-buyer's claims increased drastically to US $2.8 million. The judgments do not explain how this could happen. Finally, the claimant and the sub-buyer settled. Under the terms of the settlement, the claimant was obliged to pay US $184,106 to the sub-buyer for additional costs incurred due to repairs of the product, and, in addition, the sub-buyer retained US $223,449 from the price that it would have been obliged to pay as remuneration for the goods had there been no non-conformity. All together this amounted to US $407,555. Yet, in the words of the claimant, since the loss exceeded the price paid by the claimant to the defendant, the former claimed only damages in the amount of €136,879. 60 from the defendant.

This scenario poses two questions: (i) Can such expenses be qualified as damages?; and (ii) if so, does the fact that they were fixed by the settlement affect the creditor's rights? Article 74 of the CISG provides that:

> [d]amages for breach of contract by one party consist of a sum equal to the loss, including loss of profit, suffered by the other party as a consequence of the breach. Such damages may not exceed the loss which the party in breach foresaw or ought to have foreseen at the time of the conclusion of the contract, in the light of the facts and matters of which he then knew or ought to have known, as a possible consequence of the breach of contract.

The provision is said to contain: 'the principle of full compensation … and limitation of liability by the foreseeability rule'.[124] Specifically, the loss to be compensated includes

[121] Brunner and Rey (n 119) 282–3.
[122] Brunner and Schifferli (n 116) 212–3.
[123] ibid, 213.
[124] Ingeborg Schwenzer, 'Article 74' in Schlechtriem & Schwenzer (n 85) 1294.

'economic losses from dealing with third parties':[125] for instance, loss that the buyer had to compensate to its own customers, who did not receive the promised goods due to the seller's delay.[126]

In this instance, the exact nature of the entire loss suffered by the sub-buyer is not fully presented in the judgments. Clearly, part of it related to the repair expenses, and part probably to downtime when the sub-buyer was unable to use the machinery. In principle, the claimant could request compensation of such loss, provided it was not unforeseeable. In this case, the type of loss could hardly be unforeseeable: unforeseeability, at most, could have been related to its amount. However, neither can we assess in the absence of any factual benchmarks to do so nor do we need to make the assessment, as the claimant did not require full compensation from the defendant.

This leaves us with the next question: are the defendant's obligations under Article 74 of the CISG affected by the settlement agreement concluded between the claimant and the sub-buyer? In our view, normally, a settlement functions as a mitigation measure under Article 78 of the CISG. This is an attempt to decrease the amount of liability. However, settlement can bring with it hidden dangers to the seller. For instance, via settlement, the buyer can acknowledge losses that were not actually caused by the seller's breach. Such losses would be outside the breach-loss causality and could not be incurred by the seller. A more realistic risk is that through settlement the buyer trades off some of the defences that it could have used against the sub-buyer in exchange for avoidance of litigation with all its unpredictability. In our opinion, in such cases, it is important 'that the settlement itself must be reasonable'.[127] Even if it results in the loss of defences by the buyer, nevertheless, it is overall a reasonable trade-off, as the settled loss can be transferred to the seller.

This approach is confirmed by the case law. For instance, in a China International Economic and Trade Arbitration Commission (CIETAC) case, following non-delivery by the seller, the buyer settled with the sub-buyer and claimed the settled loss from the seller. The tribunal held that the settled payment of liquidated damages under the settlement agreement 'was the direct result of [Seller]'s breach of Contract, and … the settlement, which has gone into effect, is reasonable and legally binding'.[128]

In our case, the decisions did not analyse in detail the reasonableness of the settlement agreement. It can be concluded generally that the defendant was liable for the claimant's liability to a third party resulting from the breach. Normally, such liability is foreseeable. The settlement concluded by the claimant can be qualified as a mitigation measure and does not undermine the defendant's rights towards the claimant, provided that these are, overall, reasonable.

In our case, the sub-buyer had a widely different calculation of loss: from US $474,000 to $2.8 million. Without sufficient detail, we could guess that the sum of settlement US $407,555 was, *prima facie*, a reasonable compromise. This should shift the burden on to the defendant to show that it was unreasonable, for example, because the claimant could have used such defences allowing it, with high probability, to further reduce its liability or exclude it altogether in an adjudication. Later, the claimant passed on only a fraction of these losses (slightly more than one-third) to the defendant, claiming only €136,879.60 from the defendant. Taking into account the gap between the two sums, even if compensation under the settlement was excessive, the fraction claimed from the defendant most likely fell within the margin of foreseeability and was not excessive.

[125] Milena Djordjevic, 'Article 77' in Kröll et al (n 70) 975.

[126] cf, ibid.

[127] Djakhongir Saidov, *The Law of Damages in International Sales. The CISG and Other International Instruments* (Hart, 2nd edn, 2021) 46.

[128] CIETAC October 17 1996 (Tinplate), <https://www.iicl.law.pace.edu/cisg/case/china-october-17-1996-translation-available>, accessed 7 July 2023.

VIII. Interaction between Article 44 of the CISG and loss of profit suffered by a third party

Our previous discussion raises a question that is purely theoretical in the context of this commentary, but still not without interest. If Article 44 had been applied in this case and the courts had found that the claimant could claim compensation of loss under that provision, then that would exclude compensation of loss of profit. Could the buyer claim—under Article 44—compensation of lost profit suffered by a third party (sub-buyer) and already compensated by the buyer?

Typically, it is explained that under Article 44, the buyer could claim compensation for repair expenses,[129] wasted costs of assembly or construction and transportation costs,[130] loss that the defective goods caused to other goods of the buyer,[131] or legal expenses incurred when defending against third parties.[132] In contrast, loss of profit is not covered. But let us think about a situation where the buyer has compensated loss of profit suffered by the sub-buyer due to the defective nature of the goods. Formally, this is not a loss of profit for the buyer. And, unlike loss of profit, the buyer not only fails to increase its assets, but must reduce them by paying the sub-buyer. Formally, one could argue that such a payment to a sub-buyer is covered by Article 44.

However, in our opinion, the opposite view, based on the teleology of Article 44, seems more persuasive. The history of Article 44 contains several formulations explaining exclusion of loss of profit. During the Vienna Diplomatic Conference, where the text of the CISG was developed, the delegate from Ghana explained that loss of profit was excluded 'in order to discourage fictitious claims'.[133] The context to this statement is found in the next sentence, where the delegate clarifies that '[i]t had been argued that the seller would have difficulty in assembling evidence in the case of very tardy claims'.[134] The US delegate proposed a similar explanation for the late notification problem—the inability of the seller to secure evidence and testimonies needed to oppose the buyer's claim.[135] This explanation of the ratio behind Article 44 can be complemented by that found in modern texts—late notification may create several problems: preventing the seller from rapidly repairing the defect,[136] an inability to oppose unjustified (that is, fictitious) claims due to loss of evidence, but likewise loss of evidence that the seller may need in order to have recourse against its own suppliers, or simply loss of the right to such recourse due to the passage of time.[137] Taking into account these risks for the seller, Article 44, by restricting remedies, encourages the buyer to act promptly, simultaneously limiting the negative consequence that the seller faces either because of inability to oppose a fictitious claim or because of inability to compensate expenses via recourse against suppliers.

129 Dietmar Baetge, 'Art. 44 CISG' in Maximilian Herberger, Michael Martinek, Helmut Rüßmann et al (eds), Juris PraxisKommentar BGB. Band 6 – Band 6 Internationales Privatrecht und UN-Kaufrecht (Juris, 10th edn, 2023), para 15; Ulrich Magnus, 'Art 44 [Entschuldigung für unterlassene Rüge]' in Dagmar Kaiser (ed) J. von Staudingers Kommentar zum Bürgerlichen Gesetzbuch: Wiener UN-Kaufrecht (CISG) (Sellier, 2018), para 17.

130 Schwenzer (n 102) 936.

131 Brunner and Schifferli (n 99) 232; Schwenzer (n 102) 936.

132 Baetge (n 129) para 15; Magnus (n 129) para 17.

133 Summary Records of Meetings of the First Committee 21st meeting Tuesday, 25 March 1980 at 10 am, para 2, <https://www.iicl.law.pace.edu/sites/default/files/cisg_files/Meeting21.html> accessed 7 July 2023.

134 ibid.

135 ibid. ('For example there would be the problem of deciding whether the goods were defective when delivered or became defective later through use. If there was considerable delay in giving notice of lack of conformity, the seller might legitimately complain that evidence with regard to testing and testimony of relevant witnesses was no longer available for his defence in a suit brought against him by the buyer.').

136 Flechtner (n 97) 487; Christoph Brunner and Michael Schifferli, 'Article 39' in Mankowski (n 117) 206; Bernard Audit, *La vente internationale de marchandises. Convention des Nations Unies du 11 avril 1980* (L.G.D.J., 1990) 104.

137 Dietmar Baetge, 'Art. 38 CISG' in Herberger et al (n 129), para 2; Flechtner (n 97) 487; Christoph Brunner and Flavio Peter, 'Article 39' in Brunner and Gottlieb (n 77) 265; Kröll (n 96) 589; Audit (n 136) 104.

From a teleological point of view, loss of profit could not be compensable even if suffered by the sub-buyer. This is principally because loss of profit—even within the limits of foreseeability—can be a very impressive number, not comparable to the value of the goods. For instance, dysfunctional machinery in a computer chip factory leading to downtime could result in millions in lost profits—millions that the seller might be required to pay under a fictitious claim or without the ability to transfer these expenses to the faulty suppliers. Moreover, exclusion of this type of loss on the basis of its substantive similarity with loss of profit further discourages belated behaviour and thus complies with the policy of Article 44. Hence, our conclusion is that, in a hypothetical case where the seller has a claim under Article 44 and claims compensation of loss incurred via payment to a sub-buyer, that claim must be rejected to the degree it covers the loss of profit suffered by the sub-buyer.

IX. Beyond the CISG: interaction between EU Directive 2011/7 and duty to examine goods under domestic law

1. Using EU Directive 2011/7 to curtail the period of examination of goods

The case in point raises another interesting issue that is directly linked not to the CISG but to European Union (EU) law. The texts of the judgments show that the defendant, on several occasions, argued that if the CISG were not to be applicable, then the courts should have prevented the claimant from invoking non-conformity discovered more than 30 days after delivery of the goods. The argument revolved around Article 1668(5) of the Latvian Civil Law. It is an interesting argument that deserves a few observations.

If the CISG were inapplicable, then under Article 4(1)(a) of EC Regulation 593/2008 on the Law Applicable to Contractual Obligations, the habitual residence of the seller would determine the applicable law. In the given case, the defendant (seller) had its habitual residence in Latvia; hence Latvian law would apply. Under Latvian law, in the sale of movable property between merchants,[138] Article 411 of the Latvian Commercial Law applies.

Article 411(1) states that 'a purchaser has an obligation to check the goods as soon as possible after receipt thereof. In determining deficiencies of the goods, the purchaser has an obligation to notify the seller regarding them without delay, indicating their type and scale'.[139] Article 411(2) specifies that if the purchaser fails to notify promptly, then it loses the rights arising out of non-conformity unless the deficiency was impossible to determine during examination of the goods. Article 411(3) further explains that if such a hidden deficiency is identified later, then the seller must immediately inform the buyer.

It is easy to see that Article 411, *grosso modo*, strongly resembles Articles 38 and 39 of the CISG. Similarly to those provisions, Article 411 does not set any specific date for the examination of goods, but only mentions that goods must be examined (checked) as soon as possible. This leaves the door open for the court's discretion. The defendant tried to oppose this discretion, with a rather interesting argument, by referring to Article 1668(5) of the Latvian Civil Law to persuade the court that the period for examination could not last beyond 30 days. As we will show, this argument is not persuasive, since Article 1668(5)

138 Interestingly, Art 1(1) of the Latvian Commercial Law defines a merchant as 'a natural person (sole proprietorship) or a commercial company (partnership and capital company) registered with the Commercial Register.' Taken literally the provision treats only persons registered in the Latvian Commercial Register as merchants. Most provisions of the Latvian Commercial Law devoted to commercial contracts apply if at least one party is a merchant (Art 389). However, Art 411(5) specifies that Article 411 applies only when both the buyer and the seller are merchants. *In casu* the claimant was a company registered in the UK. Hence, formally, it was possible to argue that Art 411 was in any event inapplicable. However, it is clear that Art 1(1) refers to registration in the Latvian Commercial Register simply because registration therein is a precondition for becoming a merchant in Latvia. Clearly, the legislator did not intend the definition to limit the scope of those few provisions of the Latvian Commercial Law that deal with commercial contracts only to Latvian merchants.

139 Art 411(4) states that the entire provision does not apply 'if the seller has concealed or hidden the deficiencies of the goods in bad faith or convincingly asserted that the goods have certain properties.' This means that the exemption is significantly broader than in Art 40 CISG as it also covers all situations when the seller has promised certain properties, which may be interpreted to cover all properties expressly described in a contract.

implements EU Directive 2011/7 and does not intend to restrict the time available to the buyer to examine the goods for defects.

2. EU Directive 2011/7: the meaning of examination of goods

Article 1668(5) of the Latvian Civil Law states that '[t]he conformity of the supply of goods, purchase or service shall be verified within thirty days from the day of the receipt of goods or service, unless the contracting parties have definitely agreed otherwise, and such disclaimer is apparently unfair in respect of the creditor'. The provision implements EU Directive 2011/7 on Combating Late Payment in Commercial Transactions.[140] The purpose of the Directive is to prevent buyers of goods and services from delaying their payment obligations. The core rule of the Directive is that it eliminates the reminder to the buyer to pay as a precondition for accrual of interest.[141] According to the Directive, interest accrues automatically once the buyer fails to pay on time.[142]

Article 3 of the Directive is the central provision that determines when the buyer is in delay. Article 3(3)(a) establishes a general rule: interest starts to accrue from the day following the date or the end of the period for payment fixed in the contract. Article 3(3)(b) deals with scenarios when the date or period for payment is not set in the contract. One such scenario is regulated in Article 3(3)(b)(iv), when the contract does not set a fixed date or a period for payment, but either the contract or the law provided for the procedure of acceptance or verification (inspection) to ascertain the conformity of goods or services. In this case, if the debtor receives an invoice before or on the date of acceptance/verification, then a period of 30 calendar days is counted from the date of acceptance or verification. The buyer has a duty to pay the price within that 30 days. To further limit this period, Article 3(4) of the Directive requires Member States to ensure that the procedure for acceptance/verification has a maximum duration of 30 calendar days from the date of receipt of the goods or services, unless otherwise expressly agreed in the contract, and provided such an extension is not grossly unfair to the creditor.

The formulations of the Directive, on the surface, might be hard to grasp. This is so, in particular, in combination with Recital 26, stating that 'Member States should ensure that in commercial transactions the maximum duration of a procedure of acceptance or verification does not exceed, as a general rule, 30 calendar days'. At first impression, one could understand that any examination of goods is to be carried out during the period of 30 calendar days.

However, looking below the surface, we must come to the conclusion that Article 3(4) of the Directive and Recital 26 have no impact on the examination period under Article 411 of the Latvian Commercial Law or similar legislation in other EU Member States. The explanation lies in the teleology of the Directive. As stated above, the Directive is concerned with timely payment of monetary remuneration for goods and services. The Directive covers only acceptance or examination of goods which serves as a precondition for payment.[143] Member State law should provide that such a procedure for acceptance or verification only extends beyond 30 days if the requirements mentioned in Article 3(4) of the Directive are satisfied.

Examination of goods as laid down in Article 411 of the Latvian Commercial Law and similar national provisions in other Member States does not act as a precondition for

140 Kristers Toms Losāns, 'Kavēto maksājumu direktīvas ietekme uz komercdarījumiem' (2021) 12. <https://www.ellex.legal/wp-content/uploads/2021/04/bjp_nr-8_74_kristers-toms-losans.pdf> accessed 7 July 2023.

141 Rec 16 of the Directive. cf, Pilar Perales Viscasillas, 'Late Payment Directive 2000/35 and the CISG' (2007) 19 Pace Int'L L Rev. 125, 126–7.

142 Arts 3(1) and 4(1).

143 cf, Astrid Stadler, 'BGB § 271a' in Rolf Stürner (ed), *Jauernig Bürgerliches Gesetzbuch: BGB* (C. H. Beck, 19th edn, 2023) 358 ('Ist eine Überprüfung oder Abnahme der Ware oder Dienstleistung erforderlich und die Entgeltleistung erst im Anschluss zu erfüllen, so ist eine Vereinbarung, die eine Überprüfungs- und Abnahmefrist von mehr als 30 Tagen enthält, nur wirksam, wenn sie ausdrücklich getroffen und im Hinblick auf die Belange des Gläubigers nicht grob unbillig ist […].').

payment. Its purpose is to ensure that notification of non-conformity is sent to the seller as soon as possible, so that the buyer does not lose the right to rely on non-conformity. This type of examination is not related to the purpose behind the Directive and, hence, is not affected by Article 3 of the Directive.[144]

In fact, the CISG itself also provides this second type of examination. This is codified in Article 58(3), stating that '[t]he buyer is not bound to pay the price until he has had an opportunity to examine the goods, unless the procedures for delivery or payment agreed upon by the parties are inconsistent with his having such an opportunity'. Scholars correctly observe that this examination is different from that found in Article 38.[145] Article 58(3) 'only allows for a short and superficial inspection',[146] which functions as a privilege granted to the buyer that allows it to immediately reject the goods if their non-conformity amounts to a fundamental breach and, as a consequence, refuse payment.[147] If, however, the non-conformity does not amount to a fundamental breach, or it does but the buyer does not want to exercise the right of avoidance, then the buyer preserves the right to 'withhold the purchase price as much as the buyer can claim as damages or as reduction of price because of the seller's breach of contract'.[148]

According to the predominant view, Article 58(3) of the CISG prevails over domestic law even when domestic law implements EU law.[149] As a result, Article 3 of the Directive cannot affect the content of the CISG. However, when the contract does not fall within the scope of the CISG, and the applicable domestic law grants the buyer a right of examination similar in its nature to Article 58(3), then the length of examination is affected by Article 3(4) of the Directive in Member States.

In light of the foregoing, the Latvian courts correctly ignored the defendant's references to Article 1668(5) of the Latvian Civil Law. This provision, which implements Article 3(4) of the Directive, does not apply to examination of goods whose purpose is to secure buyer's remedies, albeit that the text of the Directive is not sufficiently subtle in that respect. It is only through teleological interpretation that the scope of the Directive, in this respect, can be restricted.

X. Conclusion

Even though the Supreme Court judgment in *Boom Conveyor* suffers from several shortcomings, it allows us to draw conclusions that might be useful in other cases, and that expand the overall knowledge as to how the CISG is applied in practice. It could be argued that in *Boom Conveyor* the Supreme Court missed an opportunity to set the foundations

144 For the same conclusions on the influence of the legislation implementing the Directive on § 377 of the German Commercial Law (HGB), see: Sebastian Overkamp and Yvonne Overkamp, '§ 271a BGB Vereinbarungen über Zahlungs-, Überprüfungs- oder Abnahmefristen' in Maximilian Herberger, Michael Martinek, Helmut Rüßmann et al (eds), *Juris PraxisKommentar BGB. Band 2—Schuldrecht* (Juris, 10th edn, 2023), para 23; Wolfgang Krüger, 'BGB § 271a' in Wolfgang Krüger (ed), *Münchener Kommentar zum Bürgerlichen Gesetzbuch: BGB, Band 2: Schuldrecht—Allgemeiner Teil I §§ 241–310* (C H Beck, 9th edn, 2022), para 13; Sebastian Kolbe, '§ 271a Vereinbarungen über Zahlungs-, Überprüfungs- oder Abnahmefristen' in Georg Caspers, Cornelia Feldmann, Sebastian Kolbe and Roland Schwarze (eds), *J. von Staudingers Kommentar zum Bürgerlichen Gesetzbuch: Staudinger BGB—Buch 2: Recht der Schuldverhältnisse: BGB §§ 255-304* (Sellier, 2019), para 16.

145 Flechtner (n 97) 642; Christoph Brunner, Matthias Lerch and Lukas Rusch, 'Article 58' in Brunner and Gottlieb (n 77) 421.

146 Petra Butler and Arjun Harindranath, 'Article 58' in Kröll et al (n 70) 808. See also: Brunner, Lerch and Rusch (n 144) 421; Florian Mohs, 'Article 58' in Schlechtriem & Schwenzer (n 86) 1113; Huber and Mullis (n 103) 308.

147 Brunner, Lerch and Rusch (n 145) 421; Peter Schlechtriem and Petra Butler, UN Law on International Sales (Springer, 2009) 155.

148 Peter Schlechtriem and Petra Butler ibid.

149 Martin Schauer and Magdalena Gruber, 'XI. Directive 2011/7/EU on Combating Late Payment in Commercial Transactions' in Mankowski (n 111) 1310–1. For a broader discussion on the relations between the CISG and EU law, see also: Johnny Herre, 'Article 90' in Kröll et al (n 70) 1170–1.

for establishing sound practice in Latvia regarding interpretation and application of the CISG. However, the Supreme Court should not be criticized too harshly. The issues identified in this judgment are not original (that is, they can be seen in many earlier judgments by courts all around the world). This case, as well as all other cases in which the CISG has not been entirely accurately applied, assigns the task to the legal community to continue researching these issues and, more importantly, to come up with realistic solutions that could help to achieve more uniformity in application of the CISG.

Uniform Law Review, 2024, 29, 260–286
https://doi.org/10.1093/ulr/unae028
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