

# A Time-Limit Running Wild? Article 39(2) CISG and Domestic Limitation Periods

*Ulrich G. Schroeter*

## 1. Introduction

Professor Joseph Lookofsky, in whose honour the present contribution was written, has devoted a significant part of his oeuvre to the United Nations Convention on Contracts for the International Sale of Goods of 11 April 1980 (CISG). Having published his first article on the CISG very soon after the Convention had been adopted,<sup>1</sup> he has since authored contributions on almost every interpretative issue under the CISG and has also actively accompanied new developments in international sales law, as eg the recent withdrawals of the Nordic declarations under Article 92 CISG.<sup>2</sup> In doing so, he has greatly contributed to the quest for an interpretation of the CISG's provisions which is both practically sensible and internationally uniform (see Article 7(1) CISG). While one aspect of this quest, namely the Convention's interpretation by courts in the various Contracting States, has been likened to an or-

1. His first contribution listed in the bibliography of the Albert H. Kritzer CISG Database is J. Lookofsky, "CISG: The Basis of Liability. A comparative analysis of the fault and no-fault theories of contractual liability pursuant to the Danish Sale of Goods Act, the American Uniform Commercial Code and the United Nations Convention on Contracts for the International Sale of Goods", 4 *Justitia*, Copenhagen (1981) No. 5, 1-72.
2. See J. Lookofsky, "The Rise and Fall of CISG Article 92", in P. Mankowski/W. Wurmnest (Eds.), *Festschrift für Ulrich Magnus* (2014), p. 243 et seq. as well as the papers in J. Lookofsky/M.B. Andersen (Eds.), *The CISG Convention and Domestic Contract Law: Harmony, Cross-Inspiration, or Discord?* (2014).

chestra without conductor,<sup>3</sup> the parallel discussions between CISG commentators resemble a global academic town hall meeting, with a free exchange of ideas in search for the best solution. In this spirit, the following pages are dedicated to one among the issues that have emerged, because “the CISG is not always understood by all arbiters and commentators in an identical way”, and that Professor Lookofsky has aptly characterised as “anomalies, particularly as they impact on merchants (and their lawyers) in the real CISG world”.<sup>4</sup>

### 1.1. Tracing the Borderline between the CISG and Domestic Law

A general issue that features prominently in Professor Lookofsky’s writings is the delimitation of the CISG’s sphere of application, ie the relationship between the Convention and domestic law.<sup>5</sup> In this context, he has recently cautioned against “running wild with the CISG”,<sup>6</sup> warning that “those who run wild with the CISG – stretching its borders to solve controversial problems which it was not designed to solve – might unwittingly provide commercial certainty-seekers with an excuse to opt out of the Convention regime altogether.”<sup>7</sup> The point is well taken. And although I suspect that I may well qualify as a CISG academic running wild in the eyes of some, given the positions that I have advocated elsewhere on the relationship between the CISG and domestic remedies for misrepresentation<sup>8</sup> or on the “validity exception” in Article 4 sentence 2(a) CISG,<sup>9</sup> I will in the following join those who argue

3. P. Schlechtriem, “Einheitskaufrecht in der Rechtsprechung des Bundesgerichtshofs”, in C.-W. Canaris/A. Heldrich et al. (Eds.), *50 Jahre Bundesgerichtshof: Festgabe aus der Wissenschaft, Vol. 1: Bürgerliches Recht* (2000), p. 407 at 408.
4. J. Lookofsky, *Understanding the CISG*, 4<sup>th</sup> ed. (2012), p. xi.
5. See e.g. J. Lookofsky, “CISG Case Commentary on Preemption in *Geneva Pharmaceuticals and Stawski*”, Review of the Convention on Contracts for the International Sales of Goods (2003-2004), 115 et seq.
6. J. Lookofsky, “Not Running Wild with the CISG”, 29 *Journal of Law and Commerce (J.L. & Com.)* (2011), 141.
7. J. Lookofsky, 29 *J.L. & Com.* (2011), 141, 144.
8. U.G. Schroeter, “Defining the Borders of Uniform International Contract Law: The CISG and Remedies for Innocent, Negligent or Fraudulent Misrepresentation”, 58 *Villanova Law Review (Vill. L. Rev.)* (2013), 553.
9. U.G. Schroeter, “The Validity of International Sales Contracts: Irrelevance of the ‘Validity Exception’ in Article 4 Vienna Sales Convention and a Novel Approach to Determining the Convention’s Scope”, in I. Schwenzer/L. Spagnolo (Eds), *Boundaries and Intersections: The 5<sup>th</sup> Annual MAA Schlechtriem CISG Conference* (2014), p. 95.

in favour of a narrower construction of the Convention, as far as one borderline issue is concerned.

## 1.2. Fixed Time-Limits for the Buyer's Rights in Cases of Non-Conforming Goods as a Borderline Issue

The borderline issue to be discussed in the present contribution is the application of fixed time-limits to the buyer's rights arising from a delivery of non-conforming goods (Article 45 CISG). In his seminal book on the CISG, Professor Lookofsky merely touches upon this matter in passing, inviting the reader in a footnote to "compare" a decision by a Swiss court<sup>10</sup> in which the problem was first addressed.<sup>11</sup> Accepting this invitation, the following remarks will try to compare the position adopted by courts and academic writers<sup>12</sup> with an alternative view to be developed below.<sup>13</sup>

### 1.2.1. The Cut-Off Period in Article 39(2) CISG

The only time-limit in the CISG that takes the form of a fixed period (and not a flexible period, as notably the ubiquitous "reasonable time"<sup>14</sup>) is found in Article 39(2).<sup>15</sup> Article 39 CISG reads:

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

10. Cour de Justice Genève, 10 October 1997, CISG-online No. 295, Schweizerische Juristen-Zeitung (SJZ) 1998, 146, to be further discussed below at 2.2.1.

11. J. Lookofsky, note 4 above, §4.10.

12. See 2. below.

13. See 3.

14. Throughout its text, the CISG uses the term "reasonable time" no less than fifteen times (in Articles 18(2), 33(c), 39(1), 43(1), 46(2), (3), 48(2), 49(2)(a), (b), 64(2)(b), 65(1), (2), 73(2), 75(2) and 79(4) CISG).

15. This statement only takes into account time-limits directed at the parties to international sales contracts. In addition, Part IV of the CISG contains some fixed periods applicable to declarations under public international law made by Contracting States to the CISG.

At the Vienna Diplomatic Conference, the two-year cut-off period in Article 39(2) CISG was one of the most contentious issues in the entire Convention,<sup>16</sup> variously described by commentators as “probably the most heatedly debated” provision<sup>17</sup> or “one of the most dramatic debates” of the conference.<sup>18</sup> Professors Enderlein and Maskow explain:

“Latent defects, which in spite of an examination at the time of the taking over of the goods could not be discovered, can become visible while the goods are being used. The later the defects are discovered, the more difficult it is to decide whether they were caused by a breach of an obligation of the seller or by outside influence after the passing of the risk, e.g. wrong use by the buyer or normal wear and tear. Therefore, a maximum period of two years after the taking over of the goods is laid down in the Convention. [...] This exclusive period was greatly disputed during the preparation of the Convention [...]. After long discussions, a two-year exclusive period was stipulated in the CISG because at a later date difficulties would almost inevitably arise with regard to evidence on the status of the goods at the time of delivery, and the seller would no longer be in a position to take action against his suppliers (of the goods themselves or of the material needed for their manufacture).<sup>19</sup> A period that would be equally suitable for all goods cannot be established. Whether or not the two-year period is too short or too long depends on the goods in question ...”<sup>20</sup>

### 1.2.2. *The Limitation (Prescription) under Domestic Laws*

By contrast, the CISG contains no statute of limitations, and time-limits for bringing legal actions (limitation or prescription) are generally considered to be a matter not governed by the Convention.<sup>21</sup> When the CISG was drafted,

16. P. Schlechtriem, *Uniform Sales Law – The UN Convention on Contracts for the International Sale of Goods* (1986), p. 70; I. Schwenzer, in I. Schwenzer (Ed.), *Slechtriem & Schwenzer Commentary on the UN Convention on the International Sale of Goods (CISG)*, 3<sup>rd</sup> ed. (2010), Art. 39 para. 2.
17. K. Sono, in C.M. Bianca/M.J. Bonell (Eds), *Commentary on the International Sales Law* (1987), Art. 44 para. 1.2.
18. G. Eörsi, “A Propos the 1980 Vienna Convention on Contracts for the International Sale of Goods”, 31 *American Journal of Comparative Law* (1983), 333 at 350.
19. K. Sono, note 17 above, Art. 39 para. 1.11.
20. F. Enderlein/D. Maskow, *International Sales Law* (1991), Art. 39 CISG para. 6.
21. ICC Arbitration Case No. 11333 of 2002, 31 *Yearbook Commercial Arbitration (YB Comm. Arb.)* (2006), 117, 124-125; Cour d’appel (Court of Appeals) de Versailles, 13 October 2005, CISG-online No. 1433; J.O. Honnold/H.M. Flechtner, *Uniform Law for International Sales under the 1980 United Nations Convention*, 4<sup>th</sup> ed. (2009), § 254.2; P. Schlechtriem/U.G. Schroeter, *Internationales UN-Kaufrecht*, 5<sup>th</sup> ed. (2013), para. 200. Only very rarely has opposition been voiced by academic writers, see A. Williams, “Limitations on Uniformity in International Sales Law: A Reasoned Argument for the Application of a Standard Limitation Period Under the Provisions of the CISG”, 10 *Vindobona Journal of International Commercial Law and Ar-*

questions relating to the limitation of actions were intentionally left to “UNCITRAL’s first-born”,<sup>22</sup> the Convention on the Limitation Period in the International Sale of Goods that was first adopted in New York on 14 June 1974 and subsequently modified during the 1980 Diplomatic Conference in Vienna in order to make it compatible with the new CISG. Therefore it was probably the Limitation Convention’s four-year limitation period (Article 8 Limitation Convention) which was primarily present in the CISG drafters’ minds when Article 39(2) CISG was discussed, given that the coexistence between these two different-but-related time-limits did not seem to adversely affect the CISG’s two-year cut-off period.<sup>23</sup>

The situation can be different whenever Article 39(2) CISG has to coexist with a domestic limitation period that is shorter than two years. The laws of a surprisingly large number of CISG Contracting States impose such relatively brief limitation periods on buyers’ claims, an approach that often can be traced back to Roman law under which a buyer’s *actio redhibitoria* or *actio quanti minoris* had to be brought within short time-limits.<sup>24</sup> Currently, limitation periods that run for less than two years from the handing over of the goods can e.g. be found in the domestic laws of African States (Madagascar, Morocco and Tunisia – thirty days; Egypt – sixty days, six months or one year; Algeria, Libya and Syria – six months or one year), of American States (Peru and Venezuela – three months; Bolivia – one year; Mexico – six months; Argentina, Chile, Colombia, Ecuador and El Salvador – six months or one year), of Asian States or territories (Taiwan – six months; Cambodia – one year), of European States (Spain – six months; Italy – one year) and of Middle-Eastern States (Lebanon – thirty days; United Arab Emirates – sixty days or six months; Bahrain, Kuwait, Qatar and Yemen – six months or one year).<sup>25</sup> In addition, many African States

bitration (VJ) (2006), 229 at 244-259. What is less clear are the precise consequences of the CISG not governing prescription; see 3.1.2. below.

22. See H. Smit, “The Convention on the Limitation Period in the International Sale of Goods: UNCITRAL’s First-Born”, 23 Am. J. Comp. L. (1975) 337-62.
23. Compare e.g. Secretariat’s Commentary, in *United Nations Conference on Contracts for the International Sale of Goods, Vienna 10 March – 11 April 1980, Official Records: Documents of the Conference and Summary Records of the Plenary Meetings and the Meetings of the Main Committees* (1981), Art. 37 para. 6, p. 35; I. Schwenzer, note 16 above, Art. 39 para. 29.
24. See R. Zimmermann, *The Law of Obligations: Roman Foundations of the Civilian Tradition* (1996), pp. 305, 317-8, 327-8.
25. I. Schwenzer/P. Hachem/C. Kee, *Global Sales and Contract Law* (2012), para. 51.27; E. Muñoz, *Modern Law of Contracts and Sales in Latin America, Spain and Portugal* (2011), p. 524 et seq.

(Benin, Burkina Faso, Cameroon, Central African Republic, Chad, Congo, Cote d'Ivoire, Gabon, Guinea, Mali, Niger and Togo) as well as Belgium and Luxembourg have maintained the rule formerly contained in Article 1648 French Civil Code, according to which an action for a hidden defect must be brought within a short time (*bref délai*).

Furthermore, a number of European States until not too long ago also had short limitation periods for buyers' action for defects, but have since replaced them either in the course of implementing the 1999 EU Consumer Sales Directive (which requires a two-year limitation period for consumer sales)<sup>26</sup> or in unrelated domestic law reforms. Examples include Germany and Greece, which until 2001/2002 respectively had a limitation period of six months,<sup>27</sup> as well as Switzerland, which in 2013 replaced its traditional one-year limitation period for buyers' claims for non-conformity with a two-year period.<sup>28</sup> It was primarily those three rather brief limitation periods (now all abolished) that in the past gave rise to discussions about the relationship between Article 39(2) CISG and shorter domestic limitation periods. However, the topic is of general importance and continuing practical relevance, given the numerous similar limitation laws cited above.<sup>29</sup>

## 2. The Cut-Off Period in Article 39(2) CISG and Shorter Domestic Limitation Periods: The Prevailing View

While the "prevailing view" upon a given interpretative question may sometimes be difficult to identify,<sup>30</sup> such a difficulty hardly arises in the present

26. Article 5(1) Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees, Official Journal of the European Communities No. L 171 of 7 July 1999, pp. 12-16.

27. § 477 *Bürgerliches Gesetzbuch* (German Civil Code) as in force until 31 December 2001 contained a six-months limitation period for the buyer's rights which commenced with the handing-over of the goods. Since 1 January 2002, the new § 438(1) No. 3 German Civil Code instead provides for a two-year limitation period; see in more detail 2.1.3.1 below. Similarly, Greece amended Article 554 of the Greek Civil Code through Law No. 3043/2002 (which entered into force on 21 August 2002) and replaced the former limitation period of six months with a two-year limitation period.

28. See further 2.1.3.2 below.

29. See in this sense also I. Schwenzler/P. Hachem/C. Kee, note 25 above, para. 51.31: "Although this problem arises in many civil law legal systems – especially in Latin America – up to now it has been discussed in Germany and Switzerland only."

30. Compare the critical remarks by J. Lookofsky, 29 *J.L. & Com.* (2011) 141, 143 on the oblique use of the term "prevailing opinion" by German authors (like myself).

context: As will be demonstrated in the following section,<sup>31</sup> courts from a number of CISG Contracting States, academic writers from various countries as well as the domestic legislators that have addressed the question almost unanimously agree that limitation periods of less than two years are incompatible with the cut-off period in Article 39(2) CISG. In contrast, there is significantly less agreement about the precise effect that the alleged incompatibility has upon the application of domestic limitation laws.<sup>32</sup>

## 2.1. The Alleged Incompatibility between Article 39(2) CISG and Shorter Domestic Limitation Periods

### 2.1.1. Case Law

In case law under the Convention, courts have almost uniformly held that the two-year cut-off period in Article 39(2) CISG is “incompatible” or “in conflict” with shorter limitation periods. Maybe most prominently, the Swiss Federal Supreme Court described the underlying reasoning as follows:<sup>33</sup>

“Pursuant to Article 210 OR [*Obligationenrecht* – Swiss Law of Obligations],<sup>34</sup> a buyer’s claims arising out of a lack of conformity of the goods become time-barred one year after the goods have been delivered to it by the seller. In certain cases, an application of this one-year limitation period (Article 210 OR) to contracts governed by the CISG will be problematic: It might happen that claims arising out of a lack of conformity of the goods would already be time-barred although the period for notification under Article 39(2) CISG has not even expired. As stated earlier, the buyer loses the right to rely on a lack of conformity of the goods in accordance with Article 39(2) CISG, if he does not give the seller notice thereof at the latest within a period of two years from the date on which the goods were actually handed over to the buyer. Therefore, legal scholars tend to argue that Article 210 OR should be inapplicable to sales contracts governed by the CISG.<sup>35</sup> The

31. See 2.1. below.

32. See 2.2. below.

33. Bundesgericht (Swiss Federal Supreme Court), 18 May 2009, CISG-online No. 1900, Internationales Handelsrecht (IHR) 2008, 27 para. 10.3. This decision was later approvingly referred to in Bundesgericht, 16 July 2012, CISG-online No. 2371, Entscheidungen des Schweizerischen Bundesgerichts (BGE) 138 III 601 para. 7.5.

34. The reference was to Article 210 OR as in force until 31 December 2012.

35. The Swiss Federal Supreme Court cites C. Brunner, *UN-Kaufrecht – CISG* (2004), Art. 4 para. 25; F. Dasser, in *Basler Kommentar, Internationales Privatrecht*, 2<sup>nd</sup> ed. (2007), Art. 148 IPRG para. 3; H. Honsell, *Schweizerisches Obligationenrecht, Besonderer Teil*, 8<sup>th</sup> ed. (2006), p. 154; M. Keller/D. Girsberger, in *Zürcher Kommentar zum IPRG*, 2<sup>nd</sup> ed. (2004), Art. 148 IPRG para. 7; T. Koller, “Die Verjährung von Ansprüchen des Käufers aus der Lieferung nicht vertragskonformer Ware im Spannungsfeld zwischen UN-Kaufrecht (CISG) und nationalem Partikularrecht”, recht

Court holds that this is an appropriate solution. The one-year limitation period provided for in Article 210 OR cannot be applied at least to those cases where it would subject a claim to limitation even before the two-year notification period of Article 39(2) CISG has expired. Otherwise, there would be a violation of provisions of public international law.”

In addition to various earlier decisions by Swiss courts of first and second instance which had considered the one-year statute of limitation under the former Article 210(1) OR to be incompatible with Article 39(2) CISG,<sup>36</sup> at least two Greek courts adopted the same position with respect to the former Article 554 Greek Civil Code and its six-months limitation period, expressly referring to the discussion in Switzerland and following its reasoning.<sup>37</sup> An Italian court similarly declared the one-year limitation period in Article 1495(3) Italian Civil Code to be incompatible with Article 39(2) CISG.<sup>38</sup>

By contrast, a French court of appeal<sup>39</sup> applied the former Article 210(1) OR to a CISG contract without mentioning Article 39(2) CISG.<sup>40</sup> However, neither this decision nor its subsequent reversal by the French Supreme Court<sup>41</sup> should be taken as a statement about the incompatibility question, as the issue was apparently overlooked by the court of appeal and also remained unaddressed in the Supreme court, where the reversal occurred for procedural reasons only.

(2003), 41, 47 et seq.; M. Will, “Zum Wiener UN-Kaufrecht/Verjährung”, SJZ 1998, 146 et seq.

36. See 2.2. below.

37. Monomeles Protodikio Larisa (Single-Member Court of First Instance of Larissa), Case No. 165/2005, reported by E. Zervogianni, “Greece”, in F. Ferrari (Ed.), *The CISG and its Impact on National Legal Systems* (2008), p. 172 et seq.; Polimeles Protodikio Athinon (Multi-Member Court of First Instance of Athens), Case No. 4505/2009, CISG-online No. 2228, para. 2.2.6.

38. Tribunale di Bolzano (District Court Bolzano), 27 January 2009, CISG-online No. 2344, IHR 2012, 42, 43. But see Hof van Beroep (Belgian Appellate Court) Ghent, 17 May 2004 – *Noma B.V.B.A. v. Misa Sud Refrigerazione S.p.A.*, CISG-online No. 990, para. 6.2, where the court applied Article 39(2) CISG and Article 1495(3) Italian Civil Code concurrently (given that a full seven years had passed since the delivery of the goods and six years since the discovery of the defect, the relationship between the two time-limits arguably did not matter in this case, as both periods had clearly expired).

39. Cour d’appel de Lyon, 22 June 2010, Docket No. 08/08864.

40. The decision has been criticised by C. Witz/B. Köhler, IHR 2014, 89, 94.

41. Cour de cassation, chambre commerciale, 13 February 2013 – *Société Solodem v. Société Codefine*, CISG-online No. 2435.

2.1.2. *Scholarly Writings*

Mirroring the case law under the CISG, academic writers almost uniformly agree that domestic limitation periods of less than two years are incompatible with Article 39(2) CISG.<sup>42</sup> In doing so, they also frequently echo the Swiss Supreme Court's view that an application of such statutes of limitation would constitute a violation of public international law.<sup>43</sup> Only very exceptionally have authors argued in favour of a different position (among them the author of the present contribution).<sup>44</sup>

42. F. Enderlein/D. Maskow, note 20 above, Art. 39 CISG para. 6; F. Ferrari et al., *Internationales Vertragsrecht*, 2<sup>nd</sup> ed. (2011), Art. 39 CISG para. 34; D. Girsberger, "The Time Limits of Article 39 CISG", 25 J.L. & Com. (2005-06) 241, 249; P. Hachem/F. Mohs, "Verjährung von Ansprüchen des Käufers wegen Nichtlieferung und Lieferung vertragswidriger Ware aus CISG nach internem Schweizer Recht: Zugleich eine Urteilsanmerkung zum Entscheid des Bundesgerichts vom 18. Mai 2009, CISG-online 1900", Aktuelle Juristische Praxis (AJP) 2009, 1541, 1547; V. Heuzé, *Traité des Contrats: La vente internationale de marchandises – Droit uniforme*, 2000, para. 313; A. Janssen, "Das Verhältnis nationaler Verjährungsvorschriften zur Ausschlussfrist des Art. 39 Abs. 2 CISG in der Schweiz", Praxis des Internationalen Privat- und Verfahrensrechts (IPRax) 2003, 369, 370; J.-M. Joerin, "Discrepancies Between Lack of Conformity Notification Requirements in CISG 39(2) and the Statute of Limitations in CO 210(1): Gap Filling by Arbitral Tribunals or Prerogative of Legislator?", ASA Bull. 2000, 82, 83; T. Koller, recht 2003, 41, 47; St. Kröll, in St. Kröll/L. Mistelis/P. Perales Viscasillas (Eds.), *UN Convention on Contracts for the International Sale of Goods (CISG) Commentary* (2011), Art. 39 para. 121; T. Murmann/M. Stucki, in C. Brunner (Ed.), *UN-Kaufrecht – CISG*, 2<sup>nd</sup> ed. (2014), Art. 4 para. 23; I. Schwenger, note 16 above, Art. 39 para. 29; I. Schwenger/P. Hachem/C. Kee, note 25 above, para. 51.31; I. Schwenger/S. Manner, "The Claim is Time-Barred: The Proper Limitation Regime for International Sales Contracts in International Commercial Arbitration", Arb. Int. (2007), 293, 305; P. Tannò, *Die Berechnung der Rügefrist im schweizerischen, deutschen und UN-Kaufrecht* (1993), p. 288; M. Will, "Meine Großmutter in der Schweiz...": Zum Konflikt zwischen Verjährung und Rügefrist nach UN-Kaufrecht", in Thomas Rauscher/Heinz-Peter Mansel (Eds.), *Festschrift für Werner Lorenz zum 80. Geburtstag* (2001), p. 623 at 626; C. Witz, "Panorama: Droit uniforme de la vente internationale de marchandises (janvier 2012–juillet 2013)", Recueil Dalloz (D.) 2013, 2874, 2877; C. Witz/B. Köhler, "Der neueste Beitrag der französischen Gerichte zur Auslegung des CISG (2012–Juli 2013)", IHR 2014, 89, 94.
43. P. Hachem/F. Mohs, AJP 2009, 1541, 1547; T. Koller, recht 2003, 41, 47; T. Murmann/M. Stucki, note 42 above, Art. 4 para. 23; M. Will, note 42 above, p. 635; C. Witz/B. Köhler, IHR 2014, 89, 94.
44. A. Mullis, in P. Huber/A. Mullis, *The CISG – A new Textbook for Students and Practitioners* (2007), p. 163; P. Schlechtriem/U.G. Schroeter, note 21 above, para. 428.

2.1.3. Domestic Legislators

Furthermore, it is instructive to consider the view of domestic legislators in some CISG Contracting States who have also identified an incompatibility between Article 39(2) CISG and their brief statutes of limitation. The reason why their position is mentioned last in the present context lies in the inherent risk to the international character of the Convention and the need to promote uniformity in its application, which are both listed in Article 7(1) CISG as interpretative goalposts.<sup>45</sup> With the ratification of the CISG, the legislative organs of ratifying States relinquish their influence on the content of the Convention<sup>46</sup> and leave all interpretative power to the community of courts in CISG Contracting States.<sup>47</sup> Any guidance from a Contracting State about the “correct” interpretation of CISG provisions – may it be in form of an interpretative declaration<sup>48</sup> or a domestic law<sup>49</sup> – therefore constitutes a threat to Article 7(1) CISG’s principles and should be avoided. Against this background, domestic legislators’ opinion about the issue discussed here must similarly be viewed through an Article 7(1) CISG lens.

45. Compare H.M. Flechtner, “Uniformity and Politics: Interpreting and Filling Gaps in the CISG”, in *Festschrift für Ulrich Magnus*, note 2 above, p. 193 at 197 et seq., who convincingly points out that the two interpretative principles should not be equated with each other.
46. Although the text of the CISG was fixed when the Convention was adopted in Vienna on 11 April 1980, individual States retained the possibility to declare one or more of the reservations authorized in Articles 92-96 CISG, thereby influencing the text version to be applied; see H.M. Flechtner, “The Several Texts of the CISG in a Decentralized System: Observations on Translations, Reservations and other Challenges to the Uniformity Principle in Article 7(1)”, 17 *J.L. & Com.* (1998), 187, 194. See also J. Basedow, “Uniform Private Law Conventions and the Law of Treaties”, *Uniform Law Review* (2006), 731, 735: “With the exception of reservations permitted in the convention, the binding treaty only leaves national legislators a choice between ‘yes’ and ‘no’.”
47. U.G. Schroeter, “Backbone or Backyard of the Convention? The CISG’s Final Provisions”, in C.B. Andersen/U.G. Schroeter (Eds), *Sharing International Commercial Law across National Boundaries: Festschrift for Albert H. Kritzer on the Occasion of his Eightieth Birthday* (2008), p. 425, at 455.
48. As e.g. the former Hungarian declaration on Article 90 CISG or the German declaration on Articles 1(1)(b) and 95 CISG; see U.G. Schroeter, note 47 above, pp. 452-454.
49. As e.g. the laws interpreting Article 6 CISG enacted by many Canadian provinces; see J. Ziegel, “Canada Prepares to Adopt the International Sales Convention”, 18 *Canadian Business Law Journal* (1991), 1, 3.

As far as could be ascertained, there are in any case only two States in which the domestic legislator has specifically addressed the relationship between Article 39(2) CISG and the local statute of limitation:

2.1.3.1. *Germany*

When the ratification of the CISG was prepared in the Federal Republic of Germany in 1988, the staff in the Federal Ministry of Justice noticed the discrepancy between the then six-months limitation period in § 477 of the German BGB and the two-year cut-off period in Article 39(2) CISG. The explanations to the parliamentary act of ratification therefore explain that an unfettered application of § 477 BGB could lead to “problems” if the buyer did not and could not identify the non-conformity with these six months, as his rights would then be affected by limitation, although Article 39(2) CISG gives him the right to rely on a non-conformity until two years have passed since the goods were actually handed over.<sup>50</sup> “In order to not erode” the latter provision through the short limitation period in § 477 BGB,<sup>51</sup> a special provision was introduced in Article 3 of the Act implementing the CISG into German law (*Vertragsgesetz*)<sup>52</sup> according to which the limitation period only began to run in case of CISG contracts at the moment the buyer had given notice of non-conformity in accordance with Article 39(1) CISG.

In doing so, the German legislator removed every potential for conflict between § 477 BGB and Article 39(2) CISG, because the limitation period only ever commenced once a notice of non-conformity had been given by the buyer, while Article 39(2) CISG concerns situations in which no notice under Article 39(1) CISG was given. Notwithstanding this effective legislative solution, it is interesting to note that the *travaux préparatoires* remain surprisingly vague when it comes to the question whether there was, legally speaking, a conflict of norms looming between the two provisions, or whether it was merely an unfortunate practical effect the German legislator sought to avoid.

50. Deutscher Bundestag (German Federal Parliament), 11. Wahlperiode, *Entwurf eines Gesetzes zum Übereinkommen der Vereinten Nationen vom 11. April 1980 über Verträge über den internationalen Warenkauf sowie zur Änderung des Gesetzes zu dem Übereinkommen vom 19. Mai 1956 über den Beförderungsvertrag im internationalen Straßengüterverkehr (CMR)* of 7 October 1988, Drucksache 11/3076, p. 7.

51. *Entwurf eines Gesetzes ...*, note 50 above, p. 7.

52. Gesetz zum Übereinkommen der Vereinten Nationen vom 11. April 1980 über Verträge über den internationalen Warenkauf sowie zur Änderung des Gesetzes zu dem Übereinkommen vom 19. Mai 1956 über den Beförderungsvertrag im internationalen Straßengüterverkehr (CMR) of 5 July 1989, Bundesgesetzblatt (German Federal Legal Gazette) 1989 II, p. 586.

The non-legalistic terms employed in the parliamentary materials (“problems” (*“könnte allerdings zu Problemen führen ...”*), avoiding an “erosion” of the two-year cut-off period (*“Um diese Regelung nicht durch die [...] kurze Verjährungsfrist auszuhöhlen”*)) hardly support the assessment of a true conflict between § 477 BGB and Article 39(2) CISG, so that the German legislator should arguably not be counted among those that regard the CISG’s cut-off period and shorter limitation periods as legally incompatible.

The rule in Article 3 of the German *Vertragsgesetz* remained in force until 31 December 2001, when the provision was changed in connection with a fundamental overhaul of the German law on limitation periods. In this context, § 477 BGB was replaced by a two-year period of limitation, which generally (including in case of CISG contracts) starts to run with the delivery of the goods.<sup>53</sup> The legislative materials on the modification of Article 3 *Vertragsgesetz* explain that postponing the beginning of the limitation period was viewed as “no longer necessary”, given the significant extension of its length from six months to two years.<sup>54</sup>

#### 2.1.3.2. Switzerland

In Switzerland, where the CISG’s ratification was prepared soon after it had been in Germany, the time gap between Article 39(2) CISG and the local one-year limitation period (Article 210(1) OR) was equally noticed. The Swiss government’s explanations accompanying the parliamentary act of ratification point out that an “unsatisfactory solution” could be the result for buyers wanting to bring an action in a Swiss court after a year has passed.<sup>55</sup> Contrary to the German legislator, the Swiss parliament nevertheless took no steps to remedy the situation, but left it to the parties to solve the problem by contractually harmonising the two time-limits, merely noting that both Article 39(2) CISG’s cut-off period and the Swiss statute of limitation are subject to contrary party agreements.<sup>56</sup>

The passive approach adopted by the Swiss legislator has been criticized for merely shrugging the problem off,<sup>57</sup> and the resulting conflict of norms

53. § 438(1) Nr. 3, (2) BGB as in force since 1 January 2002.

54. Deutscher Bundestag, 14. Wahlperiode, *Entwurf eines Gesetzes zur Modernisierung des Schuldrechts* of 14 May 2001, Drucksache 14/6040, p. 284.

55. *Botschaft betreffend das Wiener Übereinkommen über Verträge über den internationalen Warenkauf* of 11 January 1989, Bundesblatt (Swiss Federal Gazette) 1989, 745, 793: “... eine unbefriedigende Lösung ...”.

56. *Botschaft*, note 55 above, p. 793.

57. M. Will, note 42 above, p. 631: “*achselzuckender Hinweis*”.

has even been referred to as “absurd”.<sup>58</sup> The Swiss authorities took this criticism to heart and later expressly acknowledged the incompatibility with the CISG when extending the limitation period of Article 210(1) OR in 2013.<sup>59</sup>

#### 2.1.4. Summary

In summary, courts in various CISG Contracting States, the overwhelming majority of academic writers as well as domestic legislators all agree: According to them, the borderline issue of fixed time-limits for buyers’ rights under CISG contracts is marked by an incompatibility between Article 39(2) CISG and domestic limitation periods with a length of less than two years.

### 2.2. The Assumed Incompatibility’s Effect on the Application of Domestic Statutes of Limitation

What is less clear are the legal consequences to be drawn from this incompatibility. In other words: Who should do what about it? There is general agreement that the CISG must “prevail”,<sup>60</sup> i.e. that the alleged conflict of norms needs to be resolved in favour of the CISG. Support can be found in the general law of treaties, where it has long been recognized as a rule of customary public international law that “[a] party [i.e. a State] may not invoke the provisions of its internal law as justification for its failure to perform a treaty”.<sup>61</sup> Since the application of a domestic statute of limitation in spite of its incompatibility with Article 39(2) CISG would constitute a partial failure to perform the treaty (through non-application of Article 39(2) CISG), such a step would be a violation of treaty law. However, neither the general law of treaties nor the CISG specify how the full application of the

58. P. Widmer, “Droits et obligations du vendeur”, in *The 1980 Vienna Convention on the International Sale of Goods: Lausanne Colloquium of November 19-20, 1984* (1985), p. 91 at 102: “résultat peu convaincant – pour ne pas dire absurde –”.

59. Eidgenössisches Justiz- und Polizeidepartement, Bundesamt für Justiz, *Obligationenrecht (Revision des Verjährungsrechts), Bericht zum Vorentwurf* (August 2011), p. 34: “Die allgemeinen Verjährungsregeln sind WKR-konform. Dies im Unterschied zum geltenden Recht. ...”

60. Tribunale di Bolzano, 27 January 2009, CISG-online No. 2344, IHR 2012, 42, 43; F. Ferrari, note 42 above, Art. 39 CISG para. 34; D. Girsberger, 25 J.L. & Com. (2005-06) 241, 249: “no doubt”; St. Kröll, note 42 above, Art. 39 para. 121; I. Schwenzer, P. Hachem & C. Kee, note 25 above, para. 51.32.

61. Article 27 first sentence Vienna Convention on the Law of Treaties of 23 May 1969. This provision codifies a rule of customary law; see K. Schmalenbach, in O. Dörr/K. Schmalenbach (Eds), *Vienna Convention on the Law of Treaties* (2012), Art. 27 para. 4; M.E. Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties* (2009), Art. 27 para. 1.

CISG's provisions can be achieved in a situation in which a domestic statute of limitation, similarly equipped with the force of law, on its face also demands to be applied.

When the incompatibility issue addressed above was discussed at an academic conference in Lausanne in 1985, Professor Loewe (who had acted as Chairman of the First Committee during the 1980 Vienna Diplomatic Conference) described the two generally available ways of solving the difficulty: In such a situation, a Contracting State has to resolve the conflict either through legislature or through judicature.<sup>62</sup> Presented with these options, only the German parliament tried to remedy the situation through an express tailor-made provision,<sup>63</sup> while legislators in all other States left it to the courts to handle the situation. In the resulting case law,<sup>64</sup> two approaches can be distinguished:<sup>65</sup>

### 2.2.1. Extension of the Limitation Period ("Geneva Approach")

The first approach consists in an extension of shorter domestic limitation periods to a period of two years. It was adopted by the Court of Justice Geneva in a 1997 decision<sup>66</sup> based on the authorization granted to Swiss courts in Article 1(2) Swiss Civil Code to act *modo legislatoris*;<sup>67</sup> it has therefore become

62. R. Loewe, Discussion, in *Lausanne Colloquium*, note 58 above, p. 106: "Hier müsste ein solcher Staat eine Lösung zur Vereinbarung dieser beiden Fristen durch Gesetzgebung und Judikatur finden." Accord F. Enderlein/D. Maskow, note 20 above, Art. 39 CISG para. 6.

63. See on the former Article 3 *Vertragsgesetz* 2.1.3.1. above.

64. Note that the Swiss Federal Supreme Court explicitly left open how the incompatibility should be resolved; see Bundesgericht, 18 May 2009, CISG-online No. 1900, IHR 2008, 27 para. 10.3.

65. In addition, commentators have suggested yet different approaches, as e.g. the application of a longer, "general" limitation period (where available); see V. Heuzé, note 42 above, para. 313; S. Marchand, *Les limites de l'uniformisation matérielle du droit de la vente internationale* (1994), p. 291 et seq.

66. Cour de Justice Genève, 10 October 1997, CISG-online No. 295, SJZ 1998, 146.

67. Article 1(2) Swiss Civil Code (*Zivilgesetzbuch*) reads: "In the absence of a provision, the court shall decide in accordance with customary law and, in the absence of customary law, in accordance with the rule that it would make as legislator"; see A.E. von Overbeck, "Some Observations on the Role of the Judge under the Swiss Civil Code", 37 *Louisiana Law Review* (1977) 681, 688 et seq. The court of first instance (Tribunal Geneva, 14 March 1997, CISG-online No. 89) had instead applied the general limitation period of ten years (Article 127 Swiss OR).

known as the “Geneva approach”. Many academic writers have voiced their agreement with this solution.<sup>68</sup>

2.2.2. *Postponing the Commencement of the Limitation Period (“Berne Approach”)*

The second approach does not focus on the length of the limitation period, but rather its beginning, which under many domestic limitation statutes is the moment the goods are handed over (or “delivered”) to the buyer. By instead letting the limitation period commence only with the receipt of the notice of non-conformity given in accordance with Article 39(1) CISG,<sup>69</sup> the Commercial Court of the (Swiss) Canton Berne chose an alternative path towards removing the presumed incompatibility (the “Berne approach”). In doing so, it relied on Article 1(2) Swiss Civil Code (as the Geneva court had done), but followed the solution implemented by the German legislator in the then Article 3 German *Vertragsgesetz*. The two Greek courts mentioned earlier adopted the same approach when applying the former Article 554 Greek Civil Code to CISG contracts.<sup>70</sup> A few authors agree.<sup>71</sup>

68. D. Akikol, *Die Voraussetzungen der Sachmängelhaftung beim Warenkauf* (2008), p. 36; G. Benedick, *Die Informationspflichten im UN-Kaufrecht und ihre Verletzung* (2008), para. 635 et seq.; D. Girsberger, 25 J.L. & Com. (2005-06) 241, 250; P. Hachem/F. Mohs, AJP 2009, 1541, 1548; J.-M. Joerin, ASA Bull. 2000, 82, 89 et seq. (reporting an unpublished ICC arbitral award in which the sole arbitrator adopted this solution); T. Koller, recht 2003, 41, 53; T. Murmann/M. Stucki, note 42 above, Art. 4 para. 23; P. Tannò, *Die Berechnung der Rügefrist im schweizerischen, deutschen und UN-Kaufrecht* (1993), p. 288; M. Will, note 42 above, p. 638.
69. Handelsgericht des Kantons Bern (Commercial Court of the Canton Berne), 30 October 2001, CISG-online No. 956, Schweizerische Zeitschrift für internationales und europäisches Recht (SZIER) 2002, 142; Handelsgericht des Kantons Bern, 17 January 2002, CISG-online No. 725, recht 2003, 48.
70. Monomeles Protodikio Larisa, Case No. 165/2005, reported by E. Zervogianni, “Greece”, in F. Ferrari (Ed.), *The CISG and its Impact on National Legal Systems* (2008), p. 172 et seq.; Polimeles Protodikio Athinon, Case No. 4505/2009, CISG-online No. 2228, para. 2.2.6.
71. F. Ferrari, note 42 above, Art. 39 CISG para. 34; A. Janssen, IPRax 2003, 369, 371.

### 3. Challenging the Prevailing View: Why the Cut-Off Period in Article 39(2) CISG is Compatible with Shorter Domestic Limitation Periods

Given the impressive cross-border uniformity displayed by courts and commentators when it comes to the relationship between Article 39(2) CISG and shorter statutes of limitation, one might wonder whether it is worthwhile, or indeed admissible, to challenge the prevailing view. After all, Article 7(1) CISG aims at uniformity in the Convention's application, and this goal would clearly be much easier reached by the few remaining sceptics joining the almost uniform ranks, than through a further extension of the discussion.

Luckily, Article 7(1) CISG's uniformity goal is not quite as strict, and should not be read as stymieing an academic exchange of ideas.<sup>72</sup> (From a formal perspective, it could be pointed out that Article 7(1) CISG's principles are legally binding only for courts in CISG Contracting States,<sup>73</sup> but are a mere inspiration to academic writers.) Maybe more important, Professor Flechtner has noted that attempts to apply the uniformity principle in a rigid or absolutist fashion are generally unjustified by the Convention.<sup>74</sup> And quite similarly, Professor Lookofsky has reminded us that the command of Article 7(1) CISG even to courts "does *not* mean that a given CISG majority view is necessarily persuasive, let alone 'right'", and that "numbers should not count for much, especially if the reasoning of the (first-in-time) majority is *unpersuasive*."<sup>75</sup>

Thus encouraged, I will try to demonstrate that the prevailing view in fact has it wrong. My disagreement in this context is not with the general position that the CISG should prevail over domestic law in case of an incompatibility<sup>76</sup> (with this, I do agree), but rather with the assumption that Article 39(2) CISG and shorter statutes of limitation are incompatible.<sup>77</sup> In my opinion, no such incompatibility or conflict exists.<sup>78</sup>

72. See already I. above.

73. See J. Lookofsky, "Digesting CISG Case Law: How Much Regard Should We Have?", 8 VJ (2004) 181, 184: "Article 7(1) contains a clear (public international law) command to all CISG Contracting States and their courts ...".

74. H.M. Flechtner, 17 J.L. & Com. (1998), 187, 188.

75. J. Lookofsky, 8 VJ (2004) 181, 188 (emphases in the original).

76. See 2.2. above.

77. See 2.1. above.

78. See already P. Schlechtriem/U.G. Schroeter, note 21 above, para. 428.

### 3.1. Technical Nature or Doctrinal Characterisation of Time-Limits as the Decisive Issue?

A first possible reason why the CISG's cut-off rule and domestic limitation periods are not in conflict could be that both time-limits belong to different categories, from either a technical or a doctrinal perspective. In my opinion, such a reasoning should not be followed, irrespective of whether the focus is on the technical nature or the doctrinal character of the time-limits concerned:

#### 3.1.1. Article 39(2) CISG's Technical Nature

As to their technical nature, it has frequently been stressed that limits on the time for instituting legal proceedings are technically distinct from the cut-off period in Article 39(2) CISG.<sup>79</sup> This distinctness appears first and foremost in the steps that are needed in order to comply with the respective time-limits: While limitation periods require the introduction of an action at law as defined in the respective statute of limitation, Article 39 CISG merely requires a notice of non-conformity to be given to the seller, without court action being involved.<sup>80</sup> The distinctness further manifests itself in a number of technical features that are present in Article 39(2) CISG (as notably that the cut-off period has to be observed *ex officio*,<sup>81</sup> and that it cannot be interrupted or suspended<sup>82</sup>), but presumably not in limitation periods. The latter assumption must nevertheless not necessarily be true for all domestic limitation regimes, because of the technical differences between the ways in which different domestic laws construct the instrument of prescription.<sup>83</sup> These differences in turn mean that the technical construction of limitation laws cannot in itself be

79. D. Girsberger, 25 J.L. & Com. (2005-06) 241, 248; J.O. Honnold/H.M. Flechtner, note 21 above, § 261.1; St. Kröll, note 42 above, Art. 39 para. 119; I. Schwenzler, note 16 above, Art. 39 para. 28; K. Sono, note 17 above, Art. 39 para. 1.9. See also the Secretariat's Commentary, note 23 above, Art. 37 para. 6, p. 35, stressing that the obligation under Article 39(1) CISG to give notice "is a completely separate obligation from that to commence judicial proceedings under the Prescription Convention".

80. Cour d'appel de Versailles, 29 January 1998, CISG-online No. 337.

81. Oberlandesgericht (Austrian Court of Appeals) Linz, 24 September 2007, CISG-online No. 1583, IHR 2008, 28, 30; St. Kröll, note 42 above, Art. 39 para. 94; U. Magnus, in H. Honsell (Ed.), *Kommentar zum UN-Kaufrecht*, 2<sup>nd</sup> ed. (2010), Art. 39 para. 29; I. Schwenzler, note 16 above, Art. 39 para. 23; C. Witz/B. Köhler, IHR 2014, 89, 93.

82. Cour de cassation, chambre commerciale, 13 February 2007, CISG-online No. 1562; F. Enderlein/D. Maskow, note 20 above, Art. 39 CISG para. 6; A. Janssen, IPRax 2003, 369; U. Magnus, note 81 above, Art. 39 para. 29.

83. See R. Zimmermann, note 24 above, p. 769; see also M. Müller-Chen, in *Schlechtriem & Schwenzler Commentary*, note 16 above, Art. 1 Limitation Convention para. 7.

decisive for Article 39(2) CISG's relation toward them, simply because such an influence of domestic legal orders would be irreconcilable with the CISG's international character (Article 7(1) CISG).<sup>84</sup>

### 3.1.2. *Doctrinal Characterisation of Time-Limits*

The doctrinal characterisation of the concurring rules is another potential point of reference, as it at first sight indeed appears possible to distinguish between limitation periods on one hand and cut-off rules like Article 39(2) CISG on the other hand, using normative, theoretical categories.<sup>85</sup> In legal writings, Article 39(2) CISG's two-year period has therefore variously been qualified as not a limitation period, but a period of exclusion,<sup>86</sup> a statute of repose,<sup>87</sup> a *Verwirkungsfrist*,<sup>88</sup> a *Präklusionsfrist*<sup>89</sup> or an *Ausschlussfrist*.<sup>90</sup> However, these characterisations should not determine the relationship between Article 39(2) CISG and rules of domestic law, because the categories used are once more categories of domestic legal systems and not of the CISG. This alone is a sufficient reason not to rely on time-limits' character in legal doctrine or "domestic law ideology",<sup>91</sup> as the resulting (albeit indirect) influence of domestic law and jurisprudence is – again<sup>92</sup> – disfavoured by Article 7(1) CISG.

The decisive question is therefore whether Article 39(2) CISG, when interpreted in accordance with Article 7(1) CISG, aims at displacing concurring

84. See U.G. Schroeter, 58 Vill. L. Rev. (2013), 553, 562 et seq.

85. See Cour de cassation, chambre commerciale [French Supreme Court, commercial chamber], 3 February 2009 – *Société Novodec/Société Sigmakalon v. Sociétés Mobbacc et Sam 7*, CISG-online No 1843: "Attendu qu'en statuant ainsi, alors que le délai de deux ans de l'article 39 de la Convention de Vienne est un délai de dénonciation du défaut de conformité et non un délai pour agir, la cour d'appel a violé le texte susvisé ..." (thereby reversing and remanding the decision of a lower court that had treated Article 39(2) CISG as a limitation period); P. Hachem/F. Mohs, AJP 2009, 1541; Janssen, IPRax 2003, 369, 371.

86. F. Enderlein/D. Maskow, note 20 above, Art. 39 CISG para. 6.

87. C.P. Gillette/S.D. Walt, *The UN Convention on Contracts for the International Sale of Goods: Practice and Theory* (2014), § 5.03[5].

88. T. Koller, recht 2003, 41, 44.

89. P. Hachem/F. Mohs, AJP 2009, 1541; H. Honsell, note 35 above, p. 150.

90. Oberster Gerichtshof (Austrian Supreme Court), 19 December 2007, CISG-online No. 1628, IHR 2008, 106; A. Janssen, IPRax 2003, 369; U. Magnus, in *J. von Staudinger's Kommentar zum Bürgerlichen Gesetzbuch, Wiener UN-Kaufrecht (CISG)* (2012), Art. 39 CISG para. 63.

91. This expression is used by H.M. Flechtner, 17 J.L. & Com. (1998), 187, 200.

92. See already 3.1.1. above.

statutes of limitations in part or entirely, or rather wants to leave rules of prescription untouched. The Limitation Convention, sister convention to the CISG,<sup>93</sup> specifically addresses this question of legislative intent in its Article 1(2), where it provides that “[t]his Convention shall not affect a particular time-limit within which one party is required, as a condition for the acquisition or exercise of his claim, to give notice to the other party or perform any act other than the institution of legal proceedings”.<sup>94</sup> In explaining the term “shall not affect”, the official commentary states that the Limitation Convention “is not applicable” to time-limits as Article 39(2) CISG and “has no effect” on such rules.<sup>95</sup> What is not entirely clear is whether this lack of applicability and effect is a specific result of Article 1(2) Limitation Convention or would have been the case anyway, as the Limitation Convention is at the outset not concerned with time-limits for notices of non-conformity. It is furthermore interesting to note that the CISG does not include a counterpart to Article 1(2) Limitation Convention addressing its relationship with statutes of limitation. The Secretariat’s Commentary on the draft CISG contains somewhat contrary indications, in that it stresses that “the principles which lie behind [Article 39(2) CISG and Articles 8, 10 Limitation Convention] are the same”, only to add that the obligation under Article 39(1) CISG to give notice “is a completely separate obligation from that to commence judicial proceedings under the Prescription Convention”.<sup>96</sup> Arbitral decisions have stressed the latter point.<sup>97</sup> By contrast, commentators have argued that it might be difficult to reconcile the policies underlying the two Conventions,<sup>98</sup> and have

93. See 1.2.2. above.

94. Article 1(2) Limitation Convention refers to time-limits as those imposed by Article 39 CISG (F. Enderlein/D. Maskow, note 20 above, Art. 2 Limitation Convention para. 8).

95. K. Sono, “Commentary on the Convention on the Limitation Period in the International Sale of Goods, done at New York, 14 June 1974 (A/CONF.63/17)”, UNCITRAL Yearbook X (1979), 145, 149.

96. Secretariat’s Commentary, note 23 above, Art. 37 para. 6, p. 35.

97. ICC Arbitration Case No. 7565 of 1994, CISG-online No. 566, ICC International Court of Arbitration Bulletin (ICC Bull.) (November 1995), 63; Article 39(2) CISG “has nothing to see with claims or other means of action in justice. It just deals with notice of a lack of conformity, which must take place within two years from the delivery of the goods. It leaves entirely open the matter of the time during which, after that notice, a Claimant may or may not file its claim within a Court or an Arbitral Tribunal. This matter depends on the proper law of limitation ...”; ICC Arbitration Case No. 7660 of 1994, ICC Bull. (November 1995), 69.

98. K. Sono, note 17 above, Art. 39 para. 1.10. During the preparatory work on the CISG within UNCITRAL, the conflict between the different policies was frequently noted

even spoken of a “clash of policies” between the two time-limits.<sup>99</sup> These concerns in turn support the view that notice requirements like those of Article 39 CISG and limitation periods, while belonging to doctrinally separate categories of rules, may still collide where results of their respective application interfere.

To the present author, the correct answer to the above question is not obvious. Given the complexity of the problem and the fact that it does not merely arise in the context discussed here, but is of a more general nature, the present contribution is not a suitable place to attempt a solution. Rather, this must be left for another day. For the remaining part of the contribution, I will therefore proceed under the assumption that statute of limitations can be incompatible with rules on notices of non-conformity at least where they interfere with the intended functioning of such rules,<sup>100</sup> thereby accepting *arguendo* an assumption (implicitly) underlying the prevailing view.

### **3.2. Protection of the Seller’s (and not the Buyer’s) Interests as Article 39(2) CISG’s Sole Purpose**

The decisive factor must therefore be the interpretation of Article 39(2) CISG, which has to elucidate whether the concurrent application of a shorter limitation period to a buyer’s rights is really incompatible with the two-year cut-off rule. It is submitted that the answer is in the negative:

#### *3.2.1. Article 39(2) CISG’s Purpose*

As a starting point, it must be noted that in order to be able to conflict with any shorter time-limit, Article 39(2) CISG would have to be read as fixing a two-year *minimum* period for giving notice. And the prevailing view<sup>101</sup> indeed interprets Article 39(2) CISG variously as granting the buyer two years within which to give notice that the goods were non-conforming,<sup>102</sup> as essen-

and discussed; see UNCITRAL Yearbook IV (1973), 13, 48, 49, 66-67 and UNCITRAL Yearbook VI (1975), 99-100.

99. K. Sono, note 17 above, Art. 39 para. 1.12.

100. Whether such an interference really exists in case of Article 39(2) CISG will be investigated in 3.2. below.

101. See in detail 2.1. above.

102. *Sky Cast, Inc. v. Global Direct Distribution, LLC*, U.S. District Court (Eastern District of Kentucky), 18 March 2008, CISG-online No. 1652: “Assuming the light poles were non-conforming because of the delay in shipments, under Article 39, it appears that Global [i.e. the buyer] had two years from the date of delivery of the light poles to the construction project within which to give Sky Cast [i.e. the seller] notice that the goods were non-conforming.” But see the critical remarks about this judgment by

tially protecting the buyer from hidden defects during two years<sup>103</sup> or as providing the buyer with a duty, but also with a right to give notice of non-conformity within two years after handing over of the goods.<sup>104</sup> It is submitted that it is with this understanding of Article 39(2) CISG that the prevailing view goes wrong.

The construction just described is for once at odds with the wording of Article 39(2) CISG, which makes no positive statement whatsoever about the time for giving a notice granted to the buyer; the provision in contrast only stipulates a further reason (“In any event, ...”) why the buyer *loses* his right to rely on a lack of conformity of the goods. Its common description as a “cut-off rule” points in the same direction. In addition, Article 39(2) CISG’s purpose makes amply clear that the provision is of no help to the buyer, but only to the seller.<sup>105</sup> The Secretariat’s Commentary describes the purpose as

“to protect the seller against claims which arise long after the goods have been delivered. Claims made long after the goods have been delivered are often of doubtful validity and when the seller receives his first notice of such a contention at a late date, it would be difficult for him to obtain evidence as to the condition of the goods at the time of delivery, or to invoke the liability of a supplier from whom the seller may have obtained the goods or the materials for their manufacture. Paragraph (2) recognizes this interest by requiring the buyer to give the seller notice of the non-conformity at the latest two years from the date the goods were actually handed over to him.”<sup>106</sup>

In the same vein, courts applying the Convention have held that the provision serves to provide the seller with certainty that he no longer needs to reckon

I. Bach, “Neuere Rechtsprechung zum UN-Kaufrecht”, IPRax 2009, 299, 303 (“*geht doppelt fehl*”), by C.P. Gillette/S.D. Walt, note 87 above, § 5.03[5] and by I. Schwenger, note 16 above, Art. 39 para. 28 footnote 139 (“incorrect”).

103. U. Magnus, note 81 above, Art. 39 para. 29: “*Die Vorschrift [Article 39(2) CISG] schützt den Käufer damit im Ergebnis für zwei Jahre vor verborgenen Sachmängeln.*“

104. A. Janssen, IPRax 2003, 369: “*dass der Käufer grundsätzlich die Pflicht, aber auch das Recht hat, Vertragswidrigkeiten der Ware innerhalb von zwei Jahren ab Übergabe anzuzeigen.*“

105. See also St. Kröll, note 42 above, Art. 39 paras 7, 12: “The primary purpose of Art. 39 is to protect the interests of the seller in the finality of transactions.” On the purpose of Article 39(2) CISG in particular, see already F. Enderlein/D. Maskow, note 20 above.

106. Secretariat’s Commentary, note 23 above, Art. 37 paras 5-6, p. 35.

with claims after a certain point in time, and that he may finally regard the transaction as finished.<sup>107</sup>

Finally, the drafting history of Article 39(2) CISG indicates the protection of the seller as its sole designated purpose. In fact, concerns were raised at the 1980 Vienna Diplomatic Conference that buyers “might be unduly penalized”<sup>108</sup> by Article 39(2) CISG, and the provision was criticised as “draconian” from the buyer’s point of view.<sup>109</sup> More recently, Article 39(2) CISG has even been challenged for allegedly violating the buyer’s right to a fair trial as guaranteed by Article 6 of the 1950 European Convention on Human Rights.<sup>110</sup> On the contrary, nobody seems to have considered the cut-off rule as potentially helpful for the buyer’s position, as it was never designed to be. Against this background, it is unconvincing to draw from Article 39(2) CISG a minimum two-year notice period in favour of the buyer, which could be disturbed by the application of shorter domestic limitation periods.

### 3.2.2. Article 39(2) CISG as a Supplement to Article 39(1) CISG

It is furthermore necessary to take into account Article 39(2) CISG’s systematic position within the Convention. The provision supplements Article 39(1) CISG, which in turn positively defines the time frame available to the buyer for giving notice, namely “a reasonable time” after he has discovered the non-conformity or ought to have discovered it. The supplementary function of Article 39(2) CISG has equally been neglected by the proponents of the prevailing view, thereby contributing to the misunderstanding about the cut-off rule’s purpose and effect:

It is Article 39(1) CISG which – first – provides that the buyer only has to give notice of non-conformity if he has discovered the non-conformity or ought to have discovered it, and – second – thereafter grants the buyer a “reasonable time” for giving notice (instead of requiring notice to be given “promptly”, as the predecessor in Article 39(1) ULIS did), with the time’s reasonability *inter alia* being influenced by the buyer’s skill (or lack there-

107. Oberster Gerichtshof, 19 December 2007, CISG-online No. 1628, IHR 2008, 106, citing I. Schwenzer, note 16 above, Art. 39 para. 22.

108. Delegate Date-Bah (Ghana), in Official Records, note 23, p. 320 at No. 32.

109. Delegate O’Flynn (United Kingdom), in Official Records, note 23, p. 320 at No. 35.

110. See Cour de cassation, chambre commerciale, 16 September 2008 – *Société Industrielle et Agricole du Pays de Caux (SIAC) v. Agrico Cooperatieve Handelsvereniging Voor Akkerbouwgewassen BA*, CISG-online No. 1821, D. 2009, 1568 with note by C. Witz. (The French Supreme Court rejected the argument for procedural reasons.)

of).<sup>111</sup> Article 39(1) CISG accordingly *also* protects the buyer's interests through these two requirements,<sup>112</sup> although the notice requirement primarily serves the seller's interest.<sup>113</sup> Article 39(1) CISG does not, however, guarantee that the buyer's opportunity to give notice remains undisturbed for two years, but merely for a reasonable time. To this scenario, Article 39(2) CISG adds its two-year cut-off rule which "[i]n any event" takes away the buyer's right to rely on a lack of conformity once two years have passed since the goods were actually handed over, notwithstanding the fact that the buyer could at no point in time discover the respective non-conformity.<sup>114</sup> Article 39(2) CISG accordingly does *not* give the buyer *any time at all*; it only takes away rights that other provisions in the CISG have given him. If one was to liken Article 39 CISG to a "good cop, bad cop" scenario with the buyer as the subject, Article 39(1) CISG would occupy the role of the (to a limited extent) good cop, with Article 39(2) CISG resembling the aggressive, purely negative colleague. This role once more excludes any potential for conflict with concurring limitation periods if it arises from the aim to preserve the buyer's rights.

Article 39(2) CISG's merely supplementary function has yet another effect on its relation to statutes of limitation, albeit only an indirect one: As the cut-off rule only applies to cases in which the reasonable time for giving no-

111. *Shuttle Packaging Systems v. Tsonakis et al.*, U.S. District Court (Western District of Michigan), 17 December 2001, CISG-online No. 773: "The [buyer]'s employees lacked the expertise to inspect the goods and needed to rely on [seller]'s engineers even to use the equipment ..."; *Miami Valley Paper, LLC v. Lebbing Engineering & Consulting GmbH*, U.S. District Court (Southern District of Ohio), 26 March 2009, CISG-online No. 1880; *Gerechtshof [Dutch Appellate Court] Arnhem*, 18 July 2006, CISG-online No. 1266, para. 5.7: "When determining a reasonable time for notice of defects, it is finally relevant, that [buyer] is a professional and – facing the amount of compensation requested – a large scale manufacturer"; *Oberlandesgericht (German Court of Appeals) Munich*, 11 March 1998, CISG-online No. 310: "A thorough and expert examination of the goods can be expected from a business of [buyer]'s size, which owns various retail stores ..."; St. Kröll, note 42 above, Art. 39 para. 76.
112. See U. Magnus, note 90 above, Art. 39 CISG para. 4; I. Schwenzler, note 16 above, Art. 39 para. 1.
113. J. Lookofsky, note 4 above, §4.9: purpose underlying Article 39(1) CISG "is to provide the seller with a reasonable and timely opportunity to consider and perhaps refute a given non-conformity claim, as well as an opportunity to cure an existing defect. etc."; St. Kröll, note 42 above, Art. 39 paras. 7, 12 (citation in note 105 above).
114. See *Oberster Gerichtshof*, 19 December 2007, CISG-online No. 1628, IHR 2008, 106, 108; P. Schlechtriem, note 16 above, p. 70 who speaks of "the absolute exclusion of all claims after two years, whether or not the defects were discoverable during that time"; U. Magnus, note 90 above, Art. 39 CISG para. 63.

tice under Article 39(1) CISG has not yet expired<sup>115</sup> (most often because the non-conformity has remained hidden, so that the reasonable time has not even started to run), Article 39(2) CISG's alleged pre-emptive effect could similarly only apply in situations in which the reasonable notice period has not passed. In case law following the prevailing view,<sup>116</sup> this was sometimes overlooked, with short domestic limitation periods being treated as displaced although the cut-off rule did not even apply in the particular case, given that the buyer had complied with Article 39(1) CISG.<sup>117</sup> Article 39(2) CISG's pre-emptive effect accordingly reached further than the scope of the provision – a further sign of the prevailing view's weaknesses.

### 3.2.3. Summary

Contrary to the currently prevailing opinion, Article 39(2) CISG is not incompatible with limitation periods of less than two years of length, because the CISG's cut-off rule neither according to its wording and legislative history nor to its purpose and systematic position within the Convention aims at granting the buyer two years for giving notice of non-conformity. Correctly understood, Article 39(2) CISG protects exclusively the interests of the seller, and not the buyer; it can therefore not be in conflict with statutes of limitations, which give the buyer less than two years time for commencing legal proceedings.

### 3.3. The “Reasonable Time” under Article 39(1) CISG as the Only Rule in the CISG Potentially Affecting Domestic Statutes of Limitation

Accepting the non-prevailing interpretation of Article 39(2) CISG suggested here<sup>118</sup> does nevertheless not mean that all potential for conflict between Article 39 CISG and brief domestic limitation periods is removed. But the conflict-

115. Oberster Gerichtshof, 19 May 1999, CISG-online No. 484; Oberster Gerichtshof, 19 December 2007, CISG-online No. 1628, IHR 2008, 106, 108; Audiencia Provincial (Spanish Appellate Court) de Pontevedra, 8 February 2007, CISG-online No. 1802; see also I. Schwenzler, note 16 above, Art. 39 para. 22: Article 39(2) CISG applies furthermore where the buyer has a reasonable excuse in accordance with Article 44 CISG.

116. See 2.1.1. above.

117. Cour de Justice Genève, 10 October 1997, CISG-online No. 295, SJZ 1998, 146: notice given by buyer within reasonable time (Article 39(1) CISG), but statute of limitation (former Article 210(1) Swiss OR) nevertheless held to be displaced by Article 39(2) CISG; Tribunale di Bolzano, 27 January 2009, CISG-online No. 2344, IHR 2012, 42, 43: notice given by buyer within reasonable time (Article 39(1) CISG), but statute of limitation (Article 1495(3) Italian Civil Code) nevertheless held to be displaced by Article 39(2) CISG.

118. See 3.2. above.

ing provision within Article 39 CISG is a different one: Instead of the cut-off rule in Article 39(2) CISG, it is the rule in Article 39(1) CISG governing the details of the required notice of non-conformity, in particular its time-frame (“within a reasonable time after he has discovered it or ought to have discovered it”) that may be incompatible with brief domestic statutes of limitation.

### 3.3.1. *Source of the Conflict Potential*

The reason is that the “within reasonable time” requirement in Article 39(1) CISG – as noted earlier<sup>119</sup> – is indeed supposed to protect the buyer’s interests, insofar as it no longer requires the notice to be given “promptly” and takes into account the buyer’s skills. In case a domestic limitation period expires before the “reasonable time” under Article 39(1) CISG has passed, domestic law may therefore indeed infringe upon the buyer’s rights as given to him by the Convention, if one accepts the assumption that time-limits for giving notice of non-conformity and limitation periods can conflict at all.<sup>120</sup>

In order to determine whether such a conflict exists, one cannot resort to an abstract, numerical comparison of the notice period under Article 39(1) CISG and the respective limitation period, because the time-limit of Article 39(1) CISG is fact-specific, requiring an assessment according to the circumstances of each particular case.<sup>121</sup> It is accordingly necessary to determine when the “reasonable time” granted to the buyer has passed under the circumstances at hand, and whether the applicable domestic limitation period has expired before this point in time. If it has, we are faced with a conflict of norms, which has to be resolved in favour of the Convention’s time-limit in line with one of the approaches developed by courts under Article 39(2) CISG.<sup>122</sup>

### 3.3.2. *“Reasonable Time” v. “bref délai”: A Possible Case of Conflict*

In view of the experience with the interpretation of Article 39(1) CISG’s “reasonable time” and notwithstanding the “crazy decisional quilt”<sup>123</sup> that has developed in this context, courts have relatively rarely concluded that a period of more than one or two months was still reasonable for giving notice of

119. See 3.2.2. above.

120. See 3.1.2. *in fine* above.

121. See *Miami Valley Paper, LLC v. Lebbing Engineering & Consulting GmbH*, U.S. Dist. Ct. (S.D. Ohio), 26 March 2009, CISG-online No. 1880; C.P. Gillette/S.D. Walt, note 87 above, § 5.03[1].

122. See 2.2. above.

123. J. Lookofsky, 8 VJ (2004), 181, 193.

non-conformity,<sup>124</sup> although such cases have occasionally occurred.<sup>125</sup> This raises the question whether there is a relevant likelihood of domestic limitation periods falling short of Article 39(1) CISG's period. Such situations will probably be rare, though at least three possible constellations come to mind: First, a few domestic laws know limitation periods which only run for thirty or sixty days,<sup>126</sup> thereby using a fixed time-limit that may occasionally be briefer than Article 39(1) CISG's "reasonable time". Second, statutes of limitation not infrequently let their limitation begin to run with the delivery of the goods, irrespective of the non-conformity's recognisability: In cases of hidden defects (i.e. the ones also governed by Article 39(2) CISG), such limitation periods may well expire before the reasonable notice period, which under Article 39(1) CISG only commences once the buyer ought to have discovered the non-conformity. And third, the *bref délai* for actions in cases of hidden defects modelled on the former Article 1648 French Civil Code<sup>127</sup> may collide with Article 39(1) CISG – a conflict potential that deserves closer consideration.

Commencing with the plain language of *bref délai* rules ("within a short time"), it may at first appear that such limitation periods will frequently expire earlier than the "reasonable time" of Article 39(1) CISG. The legislative history of Article 38 CISG seems to support this expectation, given that a (similarly framed) "short period" was clearly regarded as shorter than a "reasonable time".<sup>128</sup> In practice, however, the former Article 1648 French Civil Code was often construed more generously, so that the conflict potential between the *bref délai* requirement and Article 39(1) CISG may be narrower than it first appears: On one hand, the French courts have predominantly ruled that the *bref délai* only begins to run once the defect is discovered by the buyer, and not already on the moment of delivery.<sup>129</sup> And on the other

124. See U. Magnus, note 90 above, Art. 39 CISG para. 41.

125. See P. Schlechtriem/U.G. Schroeter, note 21 above, para. 414.

126. For examples, see 1.2.2. above.

127. See 1.2.2. above.

128. Compare the extensive discussions about a Canadian proposal (UN Doc. A/CONF.97/C.1/L.118) to modify the wording of today's Article 38(1) CISG accordingly; see Official Records, note 23, p. 106 (proposal) and pp. 310-312 (discussion).

129. Cour de cassation, chambre commerciale, 22 November 1965, Bulletin des arrêts des chambres civiles de la Cour de cassation (Bull. civ.) III, No. 593; Cour de cassation, chambre commerciale, 18 February 1992, Bull. civ. IV, No. 82; see also V. Heuzé, note 42 above, para. 313. Slightly different J. Ghestin/B. Desché, *Traité des Contrats: La Vente*, 1990, para. 737, who focus on the defect's discoverability. Note that since

hand, the “short” (*bref*) period has often been measured rather tolerantly, with actions brought after two<sup>130</sup> or more than three years<sup>131</sup> having been accepted as still meeting the *bref délai* requirement. On at least one occasion, Article 1648 French Civil Code has even been interpreted in light of Article 39(2) CISG and its two-year period.<sup>132</sup>

In addition to the generous interpretation of *bref délai* rules, the scope of such rules has often been narrowly construed within domestic limitation laws. Buyers’ actions under CISG contracts have therefore frequently been subjected to (longer) general limitation periods instead of *bref délai* rules,<sup>133</sup> as the latter are usually designated for certain categories of defects only, as notably the *vices rédhibitoires* of Article 1648 French Civil Code. Due to the construction of these limitation rules in practice, their conflict potential with Article 39(1) CISG turns out to be relatively small.

However, there remains the possibility that in some circumstances a *bref délai* will expire before the “reasonable time” for giving notice under the Convention has passed. It is submitted that in such circumstances, the *bref délai*-style limitation periods that remain in force today, as eg those in Belgium, Benin, Congo, Gabon, Guinea and Luxembourg as well as in a number of non-CISG Contracting States in francophone Africa,<sup>134</sup> should be regarded as pre-empted, in order to preserve the time for giving notice of non-conformity that the Convention grants the buyer through Article 39(1) CISG.

#### 4. Conclusion

The time-limits applicable to the buyer’s rights under the CISG in cases of non-conforming goods are a borderline issue, in that the Convention’s rules

its reform in 2005, Article 1648 French Civil Code explicitly specifies the beginning of the period (“... à compter de la découverte du vice”).

130. Cour appel de Paris, 26 June 1980 – *Savie v. Logabax*, cited in J. Ghestin/B. Desché, note 129 above, para. 737.

131. Cour appel de Paris, 25 February 1980 – *Pitney Bowes France v. Albin*, cited in J. Ghestin/B. Desché, note 129 above, para. 737.

132. ICC Arbitration Case No. 8453 of October 1995, CISG-online No. 1275, ICC Bull. (Fall 2000), 55 (although the arbitral tribunal ruled that the CISG was inapplicable to the contract at hand).

133. ICC Arbitration Case No. 11333 of 2002, 31 YB Comm. Arb. (2006), 117, 126 (applying the ten-year limitation period of Article 189*bis* French Commercial Code); V. Heuzé, note 42 above, para. 313: “*la seule solution raisonnable*”.

134. See 1.2.2. above.

compete with domestic laws on the limitation (prescription) of actions.<sup>135</sup> The prevailing view among courts, academic writers and domestic legislators regards the perceived incompatibility between the two-year cut-off period in Article 39(2) CISG and shorter domestic limitation periods as the main area of conflict, eventually arguing that Article 39(2) CISG must prevail over domestic law.<sup>136</sup> The present contribution has tried to demonstrate that this prevailing view misunderstands the purpose of the cut-off period in Article 39(2) CISG, resulting in its time-limit indeed “running wild”. A more convincing construction leads to a parallel application of the two-year cut-off period and shorter limitation periods.<sup>137</sup>

Nevertheless an area of conflict between uniform international and domestic time-limits remains, namely between the “reasonable time” in Article 39(1) CISG and short domestic limitation periods.<sup>138</sup> If a limitation period exceptionally expires while the buyer’s reasonable time for giving notice of non-conformity is still running, the domestic statute of limitation must be regarded as pre-empted by Article 39(1) CISG. As this effect on domestic laws is restricted to situations in which there is an actual discrepancy between the two time frames under the circumstances of the case at hand, incompatibilities will be much less frequent than under the prevailing view, which compares the fixed length of the two time-limits in an abstract manner. In consequence, the approach presented here may well depart from an (almost) uniformly held view on the matter, but promises to deliver a more convincingly defined scope of the Convention in return.

135. See 1.2. above.

136. See 2. above.

137. See 3.1., 3.2. above.

138. See 3.3. above.