
Buyer's Duty to Examine Goods and Notify Seller of Lack of Conformity: Belgian Law Perspective Compared with the CISG and the CESL

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매수인의 물품검사 및 계약부적합성 통지의무; CISG 및 CESL과 비교된 벨기에법의 관점에서

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Abstract

This study aimed to provide the most accurate analysis possible regarding the buyer's duty to examine goods and give notice, or the like, of non-conformity to the seller under Belgian law in comparison with the CISG and CESL. Even though Belgium is the capital of the Europe Union, most of its laws remain untranslated in English. Therefore, this study may offer key insights into the specificities of Belgian law, which while being derived from the French Napoleon Code has its own practices coded into its Case Law. It also makes a comparison with the new CESL and CISG in order to evaluate their respective influence on national law and other infructuous attempts to harmonize Belgian law for the internal European market. Evaluating the differences of each system in the spirit of comparative law may be a good basis for the development of laws in each jurisdiction.

Keywords: Belgian Law, CESL, CISG, Notice Duty, Examination Duty, Sale of Goods, Conformity with the Contract

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I. INTRODUCTION

Europe is known to be more protective for the buyer in commercial dealings. It is even truer for the consumers with a well-developed network of consumer bodies throughout the continent (Kessler, 1964).¹⁾ We can take as an example the food chain safety where both at a local level and at a national level people are committed to increase the certainty for the consumer. This had of course an impact too on the Civil Law and the way the examination of goods is proceeded (Belvèze, 1999).

The purpose of the duty to examine the goods and to notify the seller serves both parties. For the buyer, it offers the possibility to inspect the goods and in the case of a lack of conformity to make use of the proper remedy (Kuoppala, 2000). For the seller, it gives him the assurance that he will not be accountable for the possible lack of conformity after the examination or the guarantee period to the buyer (Kuoppala, 2000). It brings certainty to his business dealings as there is a limit in the time for his responsibility towards the goods (Andersen 1988). Also in case of notification of lack of conformity received from the buyer, the seller can have the opportunity to examine the goods at his own turn, to determine whose responsibility is engaged in regards to the lack of conformity (De Luca, 2015).

There are generally 3 possible approaches as to the buyer's duty to examine the goods and to give notice to the seller in different domestic legal systems (Bergsten, 2004). In the first group, the buyer must give notice specifying the nature of the non-conformity

after delivery of the goods (Bergsten, 2004). The period for notice is short and may be specific or not. This configuration is more favourable for the seller. In the second group, the buyer must give notice before "acceptance" of the goods but without any particular requirements for the period to examine the goods and give notice of non-conformity (Bergsten, 2004). Here, the protection of the buyer is stronger as it gives a longer period for a possible compensation from the seller. The third group is a balanced solution of the former 2 groups where the buyer must give a notice specifying the non-conformity within a reasonable time which is less strict than the first group (Bergsten, 2004). This group emphasizes both security of the transaction for the seller and the protection of the buyer through a possible compensation for non-conformity.

The best consensus may be found in the rules of the United Nations Convention on Contracts for the International Sale of Goods (1980) (also known as The Vienna Convention; here-in-after CISG) (Bergsten, 2004). In the CISG, the buyer must examine the goods within as short a period as is practicable in the circumstances²⁾ and give notice to the seller specifying the nature of the lack of conformity within a reasonable time after he has discovered or ought to have it discovered.³⁾ The newly acted Common European Sales Law (2014) resembles a lot the CISG which appears to be a model for its foundation. The examination is to be made within as short a period as is reasonable not exceeding 14 days.⁴⁾ The notification is to be given to the seller within a reasonable time specifying the nature of the lack of conformity.⁵⁾ While the CISG and the

1) https://ec.europa.eu/info/strategy/consumers/consumer-protection/our-partners-consumer-issues/national-consumer-organisations_en#consumer-bodies-in-eu-countries

2) CISG Art 38 (1).

3) CISG Art 39 (1).

4) CESL Art 121 (1).

Common European Sales Law (here-in-after CESL) appear to be part of the third group, the Belgian Law is most likely to be part of the second group as the protection of the consumer is higher and the merchant buyers have a seemingly longer period to examine the goods. The draft of the CESL was first submitted in 2011 to serve as a pan-EU "optional instrument" that would have existed in parallel to Members States' contract law before being withdrawn in 2015.

This paper has two purposes. The first is to analyse the duties of the buyer to examine the goods - or the like - and to give any or proper notice of non-conformity to the seller under the Belgian Law in comparison with the CISG and the CESL. This study may offer a good understanding of the Belgian Civil Code (*Code civil belge*) to scholars and traders, and also the specificities of the Belgian Common Sales Law (here-in-after BCSL) with the importance of its own Case Law. The second is to analyse each jurisdiction law under the spirit of the comparative law as to provide a reflection for the development of each of them or even a reform.

II. General

1. Sphere of application

1) Belgian law, CISG and CESL

(1) Belgian law

Under Belgian law, all the sales contracts are governed by the BCSL, Guarantee for Consumer Goods (here-in-after GCG) and CISG.

First, the case law under the BCSL recognises the duties to examine the goods

and to give notice although there is no expressive provision as to those duties in the BCSL (Delforge and Zuylen, 2015).⁶⁾ These duties apply to all the buyers who are subject to the BCSL (Claeys and Feltkamp, 2013). Two conditions must be met on the people (*ratione personae*) and the goods (*ratione materiae*) for the sale to be governed by the BCSL and the underlying duties to examine the goods and give notice (Delforge and Zuylen, 2015). *Ratione personae* means that, by reason of the person, the BCSL rules the sales made between professionals unless the sale is governed by the CISG⁷⁾ or the GCG (Delforge and Zuylen, 2015).⁸⁾ *Ratione materiae* means that, by reason of the subject matter, the BCSL governs the sales and comprehends every contract for which a seller transfers the ownership to a buyer for a determined price (Delforge and Zuylen, 2015).⁹⁾ Under the case law of the BCSL, the duty to examine the goods is to be understood from the definition of a patent defect, or non-conformity of the goods with the contract. A patent defect is "which can be detected by careful but normal

6) The only trace we can find of a duty to examine the goods in the Belgian Civil Code is the practice to taste wine, oil and similar products before the sale without which no sale can be concluded, but this is a remnant from Roman Law. The contents of the duties are to be found in the Case Law where the examination is described as what "any normally diligent and careful buyer must do" (examen que doit faire tout acheteur normalement diligent et prudent). The "must" used in the description of the examination denotes the actual existence of a duty to examine the goods.

7) CISG Art 1, 2.

8) The "Belgian guarantee for consumer goods" is the name given to the transposition of the Directive 99/44/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 into Belgian Law.

9) Belgian Civil Code Art 1582, 1583.

5) CESL Art 122 (1).

examination immediately after delivery and which makes it unfit for the use for which it is normally intended” (« *qui peut être décelé par un examen attentif mais normal immédiatement après la livraison et qui la rend impropre à l’usage auquel elle est normalement destinée* ») (Alter and Thüngen, 2010).¹⁰ ¹¹ The examination takes place before what is referred to as *agrédation* (acceptance),¹² by which the buyer acknowledges the seller has fulfilled his obligation to deliver goods conforming to the contract’s specificities or accepts the goods while having the knowledge of some patent defects being present which waives his right to make a claim against any patent defects (De Page, 1997). The *agrédation* (acceptance) also marks the end of the examination at which he can accept or refuse the goods (Verheyden-Jeanmart and Clavie, 1997). The act by which the buyer refuses the goods is called *désagrédation* (unacceptance/refusal) and the name also stands for the name of the notice of lack of conformity (Verheyden-Jeanmart and Clavie, 1997). The case law also adds that a buyer “can only agree to which is detectable at the time of examination and examination only covers the patent defects” (Verheyden-Jeanmart and Clavie, 1997).¹³

10) Belgian Civil Code Art 1604, 1610.

11) Cass., 9 octobre 2006, Arr. Cass., 2006.

12) It can be express or tacit. The *agrédation tacite* (tacit acceptance) is the most common form as it is described as the buyer remaining silent or showing no sign of protest at the moment when he receives the goods or soon after but also assumes that he had the opportunity to examine them. However the tacit acceptance cannot always be deemed from the silence of the buyer. A case where the buyer already drove his car was not deemed as having agreed and another in which after having used a software for two years the judge decided it was too short of a period to fully test it.

13) R.C.J.B., 1995, n^o 38.

The second obligation of the seller on guarantee of latent defects remains applicable after the *agrédation* (acceptance) (Verheyden-Jeanmart and Clavie, 1997).¹⁴ A latent defect is a “defect which render the thing sold unfit for the use for which it was intended, or which so impair that use that the buyer would not have acquired it, or would only have given a lesser price for it, had he known of them”.¹⁵

Until the decision of 7th May 1880, the formal notice of summons (*mise en demeure*) from the General Law of Obligations was in application.¹⁶ But on that day the Court of Cassation defined the notification duty in sales as “the call of the creditor which is sufficiently imperative for the debtor to feel and know he is summoned to perform” (« *l’interpellation du créancier soit suffisamment impérative pour que le débiteur se sente et se sache sommé de s’exécuter* »).¹⁷

Second under the GCG - which is the transposition of the European Directive on the Consumer Guarantee in the Belgian Law and supersedes the BCSL under the *lex specialis* principle -, consumer sales fall in general under this special law if *ratione personae* the sale is made between a consumer and a final and professional seller and if *ratione materiae* the object of the sale is consumer goods.¹⁸ No reference is made to the examination duty but scholars state that the consumer has a duty of due diligence because the consumer is required

14) Liège, 11 February 1993, J.T., 1993, p. 556 ; Liège, 8 May 1992, J.L.M.B., 1993, p. 85.

15) Belgian Civil Code Art 1641.

16) Belgian Civil Code Art 1139.

17) Cass., 7 mai 1880, Pas., 1880, I, p. 138.

18) Belgian Civil Code Art 1649bis §2, 2^o : “consumer” shall mean any natural person who is acting for purposes which are not related to his/her trade, business or profession.

to inform the seller of the existence of the lack of conformity in the GCG.¹⁹⁾ It is understood by many scholars that the content Article 1649quater §2 of the GCG does not bar the consumer from examining the goods after delivery if a defect was to appear at that time and they also note that the consumer must exercise due diligence in examining the goods as soon as soon as possible (Delforge and Zuylen, 2015).

Third under the CISG, international sales of goods meeting the conditions under articles 1 and 2 of the CISG will be subject to its rules as Belgium is a member state. Those conditions will be explained below.

(2) CISG

There are express duties to examine the goods and to give proper notice of lack of conformity under the CISG.²⁰⁾ These duties are applied to all contracts governed by the CISG and respond to the conditions stated in Article 1 of the CISG. As stated in this first article, there is no limitation put on the character of the contract, which can be commercial or private,²¹⁾ and not even on the character of the parties performing the contract since those subjects may have different meanings and are not always well defined under national laws (Schlechtriem and Schwenger, 2016; DiMatteo et al., 2016; Kröll et al., 2011). The first condition covered by Article 1 is joined by a second condition in Article 2, especially the first paragraph limiting the coverage of the CISG to sales having a commercial purpose and thus excluding the ones for private use. There is nonetheless counter-exception known as discernibility protecting the seller

in case where he neither knew nor ought to have known that the intention of the buyer was to buy goods for his personal use, in which case the CISG should not apply (DiMatteo et al., 2016; Honnold, 2009; Kröll et al., 2011).

(3) CESL

There are express duties to examine the goods and to give proper notice of non-conformity under the CESL.²²⁾ There are two conditions to be fulfilled on the type of contract for which the CESL can be applicable and on the character of the parties to the contract that must be met for the CESL to be applicable as the governing law of the contract and be subject to these duties (Magnus 2012).²³⁾ First, they may be used for commercial contracts whether they concern goods, digital contents or a related service contract.²⁴⁾ Second, the seller must be a trader - any natural or legal person acting for purposes relating to that person's trade, business, craft or profession - and if all the parties are traders at least one of them must be a SME (Small or Medium-sized Enterprise) defined under the Regulation CESL as a trader which employs less than 250 persons and has an annual turnover not exceeding EUR 50 million or an annual balance sheet total not exceeding EUR 43 million.²⁵⁾ They also must reside in different countries and amongst them one must be a member country of the European Union.²⁶⁾ The buyer is required to examine²⁷⁾ the goods or the digital contents and to give notice²⁸⁾ in the

19) Belgian Civil Code Art 1649quater §2.

20) CISG Art 38(1) and 40(1).

21) CISG Art 1(3).

22) CESL Art 121(1) and 122(1).

23) RegCESL (P) Article 5-7.

24) RegCESL (P) Article 5.

25) RegCESL (P) Art 2(e), Article 7.

26) RegCESL (P) Art 13.

27) CESL Art 121.

28) CESL Art 122.

case of lack of conformity but that is only if he is a trader.²⁹⁾ Therefore, we can understand that the consumers have no duty to examine the goods or to give notice to the seller.³⁰⁾

2) Comparative assessment

The sphere of application for the duty to examine and to give notice varies strongly between the respective systems. Only sales made between a professional buyer and a professional seller fall under the scope of the BCSL. The character the buyer and the seller does not have any limitation under the CISG whether their character is commercial or private the CISG will apply.³¹⁾ The CESL only has a restriction on the seller who must be a trader if the buyer is a consumer and if both the seller and the buyer are traders, one of them must be a SME otherwise no limitation is put on the character of the buyer.³²⁾

Regarding consumer sales, the general scope of application is wider in the GCG because the consumer is not excluded from the duty to examine and must give notice (Delforge and Zuylen, 2015). Even though the CESL includes the consumer sales, the consumer is exempted from the duty to examine the goods and to notify the seller. For the CISG, it just cannot be used in consumer sales at all.

The time at which the defect is discovered under the BCSL will also affect its nature and the related duty to examine the goods. A patent defect discovered before the acceptance of the goods will be subject to the examination duty while a latent defect which is discovered after the acceptance will not be

subject to the said duty. Such difference does not exist under the CISG and the CESL.

III. Contents of examination and notice duty

1. Examination duty

1) Method of examination

(1) Belgian law, CISG and CESL

The method of examination is not defined in the BCSL but we can find a rough definition in the Case Law. The Belgian Court of Cassation defined a patent defect as one that could be found out by an “ordinary, close and careful” (*usuelle, attentive et prudente*) examination (Delforge and Zuylen, 2015).³³⁾ The examination should be appreciated by taking into account the nature of the goods and the relative expertise of the buyer (Cruquenaire et al., 2015; Delforge and Zuylen, 2015). The examination should be sufficient to discover all the patent defects of the thing sold that the *agrégation* (acceptance) covers (Verheyden-Jeanmart and Clavie, 1997).³⁴⁾ However no more detail is actually given according to the actual method to examine the goods but we can assume it is similar to what we can find under the CISG.

In the CISG, there are no provision explaining how the examination must be done but it is determined by the contractual agreements and commercial practices or usage. The examination should be in line

29) RegCESL (P) Art 2(e).

30) CESL Art 106 3(b).

31) CISG Art 1(3).

32) RegCESL (P) Art 7(2).

33) Cass., 9 October 2006, Arr. Cass., 2006, liv. 10, p. 1943.

34) Belgicism / Belgian French: action of accepting, giving one's approval. Also known as acceptance (*acceptation*) under French Law but certain principles are different.

with commercial practices and be sufficient as to reveal apparent non-conformities (DiMatteo et al., 2016). However in the case of absence of agreement or usage, the buyer must examine the goods in an appropriate manner which takes account of their nature, quantity, packaging and all other circumstances (Schlechtriem and Schwenger, 2016). The CESL is really similar as to the fact that the procedure is left unexplained but provides contractual freedom with regard to the examination procedure (Schulze, 2012).³⁵⁾

(2) Comparative assessment

The BCSL, CISG and CESL are really similar as none of them explains how the examination should be performed. They accordingly describe the intensity of a sufficient examination as one suitable to reveal possible lack of conformities.

Under the GCG, no reference is made to this duty except by scholars. We must also note that the consumer benefits from a 6 months presumption of non-conformity after delivery during which he only must prove the existence of a non-conformity. In the CESL the consumer does not have any duty to examine the goods.

2) Period of examination

(1) Belgian law, CISG and CESL

Recent decisions under the BCSL state that the examination should be performed within a reasonable time immediately after delivery of the goods (Cruquenaire et al., 2015; Delforge and Zuylen, 2015).³⁶⁾ But as seen before, the *agr ation* (acceptance) is the key moment that marks the end of the

examination and the obligation of the seller to deliver conforming goods. Therefore the correct method to determine the end of the period of examination is to determine the time of *agr ation* (acceptance) (Cruquenaire et al., 2015).³⁷⁾ In a case, the court stated that the patent defects were only covered after a period of test of the goods, where the buyer really used the goods.³⁸⁾ In another case, the court stated that the period for the examination was 2 years, which ended by the tacit acceptance of the goods, where only running a deep test of a software would reveal possible defects (Verheyden-Jeanmart and Clavie, 1997).³⁹⁾

For the CISG, the period for the examination of the goods must be done "within as short a period as is practicable in the circumstances" and when determining the duration of the period, the circumstances of the individual case and the parties' reasonable opportunities must be considered (Schlechtriem and Schwenger, 2016).⁴⁰⁾ The CISG chose this flexible period to better suit the extreme diversity of goods that might be the subject matter in international trade. The type of goods is really important as it can vary from perishable goods to durable goods (Schlechtriem and Schwenger, 2016; DiMatteo et al., 2016; Huber and Mullis, 2007; DiMatteo, 2014; Kr ll et al., 2011). But the circumstances evoked in Article 38(1) also include the seller's awareness of the buyer's position and the overall circumstances of the examination itself as well (Schlechtriem and Schwenger, 2016; DiMatteo, 2014; Kr ll et al., 2011). The period starts to run after delivery when the goods have arrived at their

35) CESL Art 121(1).

36) Cass., 9 October 2006, Arr. Cass., 2006, liv. 10, p. 1943.

37) Li ge, 6 March 2012, J.L.M.B., 2013, liv. 6, p. 388.

38) Li ge, 11 February 1993, J.T., 1993, p. 556.

39) Li ge, 8 May 1992, J.L.M.B., 1993, p. 85.

40) CISG Art 38(1).

place of destination and are handed over to the buyer if carriage of the goods is not involved.⁴¹⁾ If the contract involves carriage of the goods, the period to examine the goods will begin at their arrival at destination. This is also the case when the buyer redispaches the goods and the seller knew or ought to have known the buyer might proceed this way, the beginning of the period will be postponed.⁴²⁾ The seller can assume the buyer will redispach or redirect the goods if he has the knowledge the buyer is an intermediary or if the buyer expressed his intention to act accordingly (Schlechtriem and Schwenger, 2016).

The rules of the CESL have the same structure as the rules from the CISG. We can nevertheless note that the first paragraph of Article 121 provides a time limit by stating “within as short a period as is reasonable not exceeding 14 days” (Magnus, 2012).⁴³⁾ The period starts to run at the time of delivery, supply of digital content or provision of related services. If the contract involves carriage of the goods the examination may be deferred until after the goods have arrived at destination.⁴⁴⁾ Also, if the goods are redirected in transit or redispached before the buyer could have had a reasonable opportunity to examine them and the seller knew or could be expected to have known of such redirection or redispach at the time of conclusion of the contract, the examination may be deferred until after the goods have arrived at the new destination.⁴⁵⁾

(2) Comparative assessment

The period to examine the goods are

41) CISG Art 38(2).

42) CISG Art 37(3).

43) CESL Art 121(1).

44) CESL Art 121(2).

45) CESL Art 121(3).

respectively within a reasonable time under the BCSL, within as short a period as is practicable under the circumstances under the CISG and within as short a period as is reasonable not exceeding 14 days under the CESL. There is not sufficient evidence that could explain a difference between the reasonableness, under the BCSL and the CESL, and the practicableness, under the CISG and we can assume these periods may be quite similar. However the CISG and CESL seem to insist on that period being the shortest while the BCSL focuses on what it deems being a sufficient examination to discover the patent defects of the goods which are covered by the acceptance. The CESL is the only framework with a stated time limit for the period of examination. In the BCSL, the examination period will end when the examination comprising or not comprising a test will be deemed to be sufficient as to reveal any patent defect (Verheyden-Jeanmart and Clavie, 1997).

The time to begin the period is the same for the BCSL, CISG and CESL basically being the time of delivery. The only difference lies in the possibility for the examination to be postponed in case of carriage or redispach of the goods in the CISG and the CESL. No reference is made under the BCSL to a possible postponement of the period because the judge will usually only determine the time of acceptance of the goods and decide if the duration of examination was sufficient at that point.

Under the GCG, since the consumer does not have an express duty to examine the goods and benefits from a 6 months presumption of non-conformity, any period would need to be at least 6 months long.

1. Notice duty

1) Content, form and addressee

(1) Belgian law, CISG and CESL

Like in German law and Swiss law, in Belgium under the BCSL and GCG as well the notification duty is recognised as an *incombance* (*obliegenheit* in German).⁴⁶⁾ It is defined as the “duty the inobservation of which exposes its author not to a condemnation, but to the loss of the advantages attached to the fulfilment of the duty” (Wéry, 2011).⁴⁷⁾

Under the BCSL if a buyer finds a patent defect affecting the goods delivered, he must protest by “unaccepting” (refusing) them, under penalty of losing his right to recourse. This notice is referred to as *désagrégation* (“unacceptance”/refusal). Scholars refer to the notice for latent defect with the same name as they deem the notice is the expression of the refusal of the buyer to the actual state of the goods (Simon and Foiriers, 2014).

The content of the notice should be sufficient enough as to put the seller in a position to determine the origin of to the lack of conformity and exercise the right remedy or take action against the manufacturer.⁴⁸⁾ The content of the notice will differ according to the type of lack of conformity

(quantity, patent defect, latent defect, etc.) for details regarding to its nature. The difference between patent and latent defects lies in the need for additional details to be provided by the buyer relating to the seriousness of the latent defect or in other words what renders it unfit for the use for which it was intended and that it existed already at the time of delivery (Delforge and Zuylen, 2015).⁴⁹⁾ Also the amount of details required will differ according to the character of the buyer (merchant or non-merchant) and to the relative expertise of the buyer's capacity to examine the goods professionally or not (Mougenot, 2014a). In the GCG, the consumer benefits from a presumption of non-conformity for the first 6 months and must only send a notification stating the existence of a non-conformity. After 6 months he must provide a notice of non-conformity specifying the nature of the non-conformity and give details relating to its existence at the time of delivery (Delforge and Zuylen, 2015).⁵⁰⁾

The rules regarding the form of the notice come down from the possibility to the summons (*sommaton*) to be replaced by an equivalent document (*acte équivalent*) after which the case law gave birth to the notice of lack of conformity. It can be a telegram, a simple or registered mail or even an electronic mail (Wéry, 2011).⁵¹⁾ Even verbal communication is admitted but in case of denial from the seller, the buyer will bear the burden to prove the fact that he called out the seller (Mougenot, 2014a, 2014b).

According to the case law of the BCSL, the addressee must be the last seller (Steennot, 2010). That person is the one having a

46) This concept not existing in English law, both French and German designations are used instead.

47) The nature of the duty is to be understood as it was like an “obligation to oneself” and not to the seller (Fiser-Sobot, 2011). The seller cannot require performance from the buyer to perform the examination or to give notification as it is not a legal obligation by nature and the failure by the buyer to comply to those duties cannot represent a ground for a breach of contract (Fiser-Sobot, 2011).

48) Bruxelles, 11 octobre 2001, J.T., 2002, p. 132.

49) Belgian Civil Code Art 1641.

50) Belgian Civil Code Art 1649quater §4.

51) Belgian Civil Code Art 1135, Cass., 7 mai 1880, Pas., 1880, I, p. 138.

contract legally binding with the buyer and he is responsible for what he is selling to the buyer by means of the guarantee he is providing to the buyer. In the case where the final seller would not be responsible for the lack of conformity, then another claim must be brought on the precedent intermediary or the manufacturer.⁵²⁾ Similarly in the GCG, the consumer should send notification to the final seller only (Delforge and Zuylen, 2015).

In CISG, the buyer must indicate the intention to raise an objection and exactly specify the nature of the lack of conformity. It is intended to place the seller in a position where he can understand the lack of conformity (Schlechtriem and Schwenger, 2016).⁵³⁾ The amount of details required depends on the commercial situation of the buyer and the seller and also the nature of the goods (Schlechtriem and Schwenger, 2016). There is no required form but the medium of communication must be appropriate with the non-conformity. The seller bears the risk of the transmission of the notice and the sole dispatch of the notice by the buyer will let him uphold his rights. Ordinary post can be used for nearby regions well-served by postal services but nowadays faster means – like the fax or e-mail – must be used when readily available. Notice given orally or by telephone suffices even if the use of means of communication that leave evidence is advised (Schlechtriem and Schwenger, 2016). It must be addressed to the seller or a person authorised to receive the notice.

In the CESL, the notice must be given to the seller and must specify the nature of the defect.⁵⁴⁾ In the draft of the CESL reference is made for the content of the notice to the CISG. No form is required for the notification

duty and any mean of communication can be used.⁵⁵⁾ It should also be noted that the consumers are freed from this duty.⁵⁶⁾

(2) Comparative assessment

The BCSL, the GCG, CISG and CESL all require the buyer to inform the seller of the nature of the defect, and take into account the environment of the sale for the amount of details to be provided. There is however a difference under the BCSL between patent and latent defects. In the case of latent defects, the buyer will also need to give details relating to the seriousness of the defect. Also in the GCG, during the first 6 months after the delivery the consumer will benefit from the presumption of non-conformity and will only need to state the existence of a non-conformity in its notice to the seller. In the CESL the notification duty does not exist for the consumers.⁵⁷⁾ Concerning the form, the BCSL, GCG and CISG have similar rules. Only the CESL does not give any required form for the notification. The rules for the addressee are similar under all the frameworks with no apparent exception.

2) Period for giving notice

(1) Belgian law, CISG and CESL

Under the BCSL, a difference must be made between patent (*vice apparent*) and latent (*vice caché*) defect as the procedure and the period can be respectively different.⁵⁸⁾ For the patent defects, it depends on the *agrégation* (acceptance) since these are defects that should be discovered at the time

52) Brussels, 11 October 2001, J.T., 2002, p. 132.

53) CISG Art 39.

54) CESL Art 122(1).

55) CESL Art 6.

56) CESL Art 106 3(b).

57) CESL Art 105(2).

58) Belgian Civil Code Art 1648.

of examination which answers to the obligation of delivery (Verheyden-Jeanmart and Clavie, 1997). If a buyer discovers a patent defect affecting the goods delivered, he must protest by “unaccepting”/refusing (*désagrément*) the goods delivered and the “unacceptance” /refusal (*désagrément*) must happen as soon as possible (*bref délai*) (Simon and Foriers, 2014). The length of this period is left to the discretion of the judge without further details in the case law (Delforge and Zuylen, 2015).

As for the latent defects, it should be made as soon as possible (*bref délai*) as stated in the BCSL. The period depends on the nature of the lack of conformity and the respective commercial situation of the buyer and the seller. Usually the period will not exceed a few months after the discovery of the defect but its duration is left to the discretion of the judge (Kohl and Onclin, 2013).⁵⁹⁾ This period, unlike the period for patent defects, starts at the time of the discovery of the latent defect (Delforge and Zuylen, 2015).⁶⁰⁾ The final decision is left to the discretion of the judge who makes his judgement according to the following formula to determine the starting point and the duration of the *bref délai* (“as soon as possible”)⁶¹⁾: “by taking into account all the circumstances

of the case, especially the nature of the goods, the nature of the defect, the usages, the status of the parties and the judiciary or extra judiciary acts executed by them, such as the request for a judicial expertise” (Kohl and Onclin, 2013).

In the GCG, the period to give notice cannot be less than two months from the day the consumer discovered the existence of the non-conformity unless the parties agreed otherwise in their contracts but no limit for the period is specified as a maximum.⁶²⁾ This was transposed directly from the 1999/EC/44 directive without any modification knowing the period could have been longer (Delforge et al., 2013).⁶³⁾

In the CISG, the notification must be given within a reasonable time after any non-conformity was discovered or ought to have been discovered.⁶⁴⁾ This period to give notice and its starting point must be distinguished according to the type of lack of conformity: open defects cover all apparent non-conformities whether they can be found with or without a proper examination (that can be immediately detected by sensory perception alone) and hidden defects (DiMatteo et al., 2016; DiMatteo, 2014; Huber and Mullis, 2007; Kröll et al., 2011). First in the case of open defects that can be immediately discovered without the need of a proper examination, the starting point for the notice will be the time of delivery and the period is just the time needed to notify the seller. For the open defects found after a proper examination, a total notice period will be granted (Girsberger, 2005). It consists of both the time needed to examine the goods and to give notification (Schwenzer, 2006). It will start at the same time as the

59) Brussels, 2 October 2008, R.G.D.C., 2011, p. 30 (9 months being deemed too long); Antwerp, 30 June 2009, NjW, 2010, p. 504 (9 months being deemed too long); Antwerp, 21 December 2001, R.W., 2004-2005, p. 110 (5 months being deemed too long); Civ. Termonde, 24 April 1991-1992, R.W., 1991-1992, p. 1129.

60) Liège, 8 May 2003, J.T., 2003, p. 15 ; Liège, 30 September 2005, J.T., 2005, p. 772 ; Bruxelles, 5 October 2005, J.T., 2006, p. 414.

61) A substantive used in the Belgian Law referring to the “as soon as possible” period to give notice. The correct translation is “short notice” but avoided due to the legitimate possible confusion between both terminologies.

62) Belgian Civil Code Art 1649quater § 2.

63) EU Directive 1999/EC/44 Art 5(2).

64) CISG Art 39(1).

examination period. For hidden defects, the period will start at their discovery and the buyer will not be given a total notice period but only the time needed to send the notice to the buyer (DiMatteo et al., 2016; DiMatteo, 2014; Huber and Mullis, 2007; DiMatteo, 2014; Kröll et al., 2011). The reasonable period must take into account all the circumstances of the specific case such as the nature of the goods, trade usages and practices between the parties, the remedies the buyer is invoking, the need for impartial sampling or testing, the possibility of cure by the seller, and the steps already taken by the third party who suffered infringement of his title or if the buyer alleges an intentional breach of contract by the seller (Schlechtriem and Schwenger, 2016; DiMatteo et al., 2016; DiMatteo, 2014; Huber and Mullis, 2007; DiMatteo, 2014; Kröll et al., 2011).

In the CESL, it must be made within a reasonable time after the buyer is supplied with the goods or when the buyer discovers or ought to have discovered the lack of conformity of the goods.⁶⁵⁾ This suggests that the CESL might as well make a difference between open and hidden defects. Moreover, this period is added to the “short reasonable period” seen under the examination duty and it should be interpreted as almost immediately (Schulze, 2012). The period starts to run when the goods are supplied or when the buyer discovers or could be expected to discover the lack of conformity, whichever is the later.⁶⁶⁾

(2) Comparative assessment

The rule for the determination of the period to give notice differs among the BCSL case law, the CISG and the CESL. The notice

must be given as soon as possible in the BCSL while it must be given in a reasonable time in the CISG and CESL (Schlechtriem and Schwenger, 2016). Under the GCG, there is no rule for the determination of the period but only a minimum of 2 months for its duration.

The starting time of the notice period is the same under the CISG and the CESL, when the lack of conformity was discovered or ought to be discovered. However under the CESL, if the goods are supplied after the discovery of a defect, the period will start to run at the time when the goods are supplied. Under the BCSL, the starting time will be the time of acceptance in case of patent defect and at the time of discovery of the defect in case of a latent defect. Both starting times are left to the discretion of the judge. In the GCG, the period starts to run at the time the consumer discovers the defect.

No reference is made in Belgian law according to the time when the buyer ought to have discovered the defect but the declared time of discovery of the defect will be left to the discretion of the judge.⁶⁷⁾

3) Cut-Off Period

(1) Belgian law, CISG and CESL

Under the BCSL, the Court of Cassation recognised the *bref délai* (“as soon as possible”) as the applicable cut-off period.⁶⁸⁾ However the doubt still remains amongst scholars regarding the nature of the *bref délai* (“as soon as possible”) and the duration of this period which remains undefined (Kohl and Onclin, 2013).⁶⁹⁾ Part of the scholars argue that its nature is to be understood as a prescription period and the other half as a

65) CESL Art 122(1).

66) CESL Art 122(1).

67) Appeal Court Mons, 24 March 2005.

68) Cass., 29 novembre 2013.

69) Belgian Civil Code Art 1648.

conventional cut-off period like in the GCG even if the duration of the *bref délai* ("as soon as possible") is left to the discretion of the judge (Delforge et al., 2013). The judge will have the discretion to decide what the nature of the *bref délai* is ("as soon as possible") and if the applicable cut-off period is the limit fixed by the prescription period of 10 years for personal actions in the Belgian Civil Code or a conventional cut-off period.⁷⁰⁾ The legal uncertainty still remains because the possible application of the prescription period to the *bref délai* ("as soon as possible") was not excluded by the highest court (Delforge et al., 2013).

As for the consumers, there is under the GCG a legal guarantee that lasts 2 years starting from the day of delivery as stated in the European Directive of 1999.⁷¹⁾ The consumer also has 1 year to inform the seller of the non-conformity from the day he discovered it (Delforge and Zuylen, 2015).⁷²⁾ According to the above rules, there are 2 possible scenarios. First, if the non-conformity is discovered within the first year of the guarantee, the cut-off period will be the 2 years guarantee from the GCG. This is because the addition of the period from the delivery of the goods until the discovery of the non-conformity plus the 1 year notice period cannot be less than 2 years. Second, if the non-conformity is discovered during the second year of the guarantee the cut-off period will exceed 2 years and be up to 3 years if the non-conformity was discovered on the last day of the 2 years guarantee of the GCG because the consumer will still benefit from the 1 year period to inform the seller. The commercial guarantee cannot affect the legal GCG's period of 2 years and

70) Belgian Civil Code Art 2262bis.

71) European Directive 1999/44/EC Art 5(1).

72) Belgian Civil Code Art 1649quater § 3.

it will be suspended for the time necessary to put the goods in conformity (repair, exchange, negotiations).⁷³⁾ The parties can decide to shorten the guarantee for consumer goods to 1 year in the case of a sale of used goods.⁷⁴⁾ However considering this legal guarantee of 2 years from the European Directive was not protective enough of the consumer, the legislator decided the consumer would fall again under the guarantee for latent defects after the end guarantee period of 2 years of the GCG.⁷⁵⁾ Under these circumstances, if a consumer discovers a latent defect after the end of the guarantee period of the GCG he will have to give the seller a notice of latent defect and the applicable cut-off period could also be the prescription period of 10 years as seen under the BCSL. The time when the defect manifests will determine which regime applies as the periods are not cumulative (Ninane, 2015).

In the CISG, there is a cut-off period of 2 years that begins to run when the goods are actually delivered to the buyer, the physical handling of the goods to the buyer.⁷⁶⁾ The period can be shortened or extended and will not apply if it is inconsistent with a contractual period of guarantee (Schlechtriem and Schwenger, 2016; DiMatteo et al., 2016; DiMatteo, 2014; Honnold, 2009; Huber and Mullis, 2007; DiMatteo, 2014; Kröll et al., 2011).

In the CESL the cut-off period is 2 years and starts when the goods are actually handed over to the buyer in accordance with the contract.⁷⁷⁾ There are 2 exceptions to the expiration of this period in the CESL. First,

73) Belgian Civil Code Art 1649quater § 1.

74) Belgian Civil Code Art 1649quater § 1.

75) Belgian Civil Code Art 1649quater § 5.

76) CISG Art 39(1).

77) CESL Art 122(2), 122(3), 122(4).

the cut-off period will not apply when the lack of conformity results from third party's rights or claims. Second, the period can be prolonged if the parties have agreed that the goods must remain fit for their ordinary or special purpose for a fixed period of time. The period starts with the handing over of the goods (Schulze, 2012).

(2) Comparative assessment

Under the BCSL, the judge will decide in its own discretion of the nature of the *bref délai* ("as soon as possible") and the applicable cut-off period. Like for the notice duty, the time starts at the time of delivery for patent defects and at the time of discovery of the defect for latent defects (Kohl and Onclin, 2013).

In the GCG, the starting time of the cut-off period will be the time of delivery or the discovery of the defect, whichever gives the longest cut-off period to the customer. This period can be shortened to 1 year in the case of sales of used goods. Also, the GCG has an exception that deviates from the rules of the European Directive where the consumer is covered by the guarantee for latent defects of the BCSL at the end of the legal guarantee of 2 years of the GCG under which the cut-off period could be 10 years.

The CISG and CESL approach the cut-off period matter with a really concise but clear approach. The period is 2 years *ex officio* from the time of the passing of the goods. The period can be extended under the contractual agreement in both the CISG and CESL but it can only be shortened under the CISG.

IV. Consequences of failure to give proper notice

1. Belgian law, CISG and CESL

Under the BCSL and GCG, the failure to give proper notice will result in the loss of the right to remedies for the buyer, whether he is a professional or a consumer, associated with the lack of conformity or non-conformity (Kohl and Onclin, 2013). The buyer and the consumer alike have a duty of due diligence to inform the seller to benefit from legal remedies and any failure to act accordingly will result in a denial from the court to the buyer to benefit from any remedies (Delforge et al., 2013). In the BCSL, this is explained by the failure from the buyer to notify a patent defect resulting in a tacit acceptance of the goods or a failure to notify a latent defect which is described as the non-performance of his *incombance (obligenheit)* and the loss of the respective advantages (Delforge and Zuylen, 2015). In the GCG, it comes down from the duty of due diligence from the consumer to inform the seller which is also an *incombance (obligenheit)*. There is no exception in the Belgian law regarding the failure to give proper notice by the buyer or the consumer (Delforge and Zuylen, 2015).

Likewise under the CISG, the buyer will lose all his rights to remedies but there are 3 exceptions.⁷⁸⁾ The first is if the buyer had a reasonable excuse for his failure to give notice, he may still retain his right to reduce the price or claim damages (Loos and Schelhaas, 2013).⁷⁹⁾ An excuse is deemed reasonable if the buyer's conduct, although not in itself correct and in accordance with

78) CISG Art 39(1), 43(1).

79) CISG Art 44.

the rules, is excusable if, in the circumstances of the specific case, equity would command a certain degree of understanding and leniency (Schlechtriem and Schwenger, 2016). The second one is when the seller had or should have had the knowledge of the lack of conformity of the goods but failed to inform the buyer. In this case, the failure of the buyer to give appropriate or timely notice is of no consequence (Schlechtriem and Schwenger, 2016). The third one is when the buyer is in breach of articles 41 and 42 and knew of the right or claim of the third party and the nature of it unless the seller's lack of knowledge is solely due to his negligence (Schlechtriem and Schwenger, 2016).

Similarly for the CESL, the buyer loses the right to rely on remedies for a lack of conformity if he does not give proper notice.⁸⁰⁾ The buyer does not lose his right to remedies if seller did not disclose the lack of conformity whether he knew or ought to know there was one (Schulze, 2012).

2. Comparative assessment

First, under the BCSL, GCG, CISG and CESL the notification duty is recognised by scholars as an *incompliance (obliegenheit)*. They may be called duties but they resemble more of an *incompliance (obliegenheit)* which the failure to observe will result in a loss of the right to remedies (Fauvarque-Cosson and Mazeaud, 2009; Smits, 2016; Freleteau, 2015).

In both the CISG and the CESL, if the seller fails to inform the buyer of the lack of conformity of the goods he knew or ought to have known, the buyer will not lose his right to remedies. However under the BCSL, where the seller knew of the defects of the

thing, he is liable, in addition to restitution of the price which he received from him, for all damages towards the buyer.⁸¹⁾

In regards to consumer sales in the CESL, since there is no duty to notify and no cut-off period there is also no consequence to the failure of giving proper notice. However the consumer that does not give proper notice will lose its rights to remedies under the GCG.

V. Conclusion

As mentioned in the introductory remarks, the scope of this essay was to analyse the buyer's duty to examine or run an inspection of the goods and to give any or proper notice to the seller for lack of conformity under the Belgian law in comparison with the CISG and the CESL. It also attempted to provide analysis under the discipline of comparative law and can be summarised as follows.

As for the sphere of application of the examination and notice duties, the CISG, the CESL and the BCSL in its case law have such duties. While the CISG does not include the consumer sales and in the CESL the consumer is exempted from this duty, the consumer has a duty to give notice under the GCG. The Belgian law does not have a precise definition for the duty of the buyer to examine the goods or to give notice of lack of conformity whether it is under the BCSL or the GCG, reference is to be made to the relevant case law. The character of the parties are clearly defined in the BCSL - a professional buyer and a professional seller - and the GCG - a consumer and a professional seller - but the scope is wider

80) CESL Art 122.

81) Belgian Civil Code Art 1645.

for the CISG and the CESL. While the CISG does not put any limitation on the character of the buyer, only the CESL impose the condition that the seller must be a trader and if both parties appear to be traders one of them must be a SME.

The examination duty differs under BCSL as it has a strong connection for its content and period with the *agr ation* (acceptance) and a high level of discretion is given to the judge. The BCSL, CISG and CESL have similar method to examine the goods although the period of examination will depend on the determination of the time of *agr ation* (acceptance) under the BCSL. The consumers in both the GCG and CESL are exempted from the duty to examine the goods, there is a presumption of non-conformity under the GCG and the consumer is exempted from such duty under the CESL.

The information provided at the time of the notification depends a lot on the circumstances for both BCSL and the CISG. The rule seems similar under the CESL even though less details are provided but reference is made to the CISG in the draft. In the BCSL, the type of defect, patent or latent, will affect the amount of details expected from the buyer in the notice. The BCSL, CISG and CESL make a distinction between i) lack of conformity at the time of examination, although the definition of “open

defect” in the CISG and CESL is wider than the definition of patent defect under the Belgian Law, and ii) lack of conformity discovered after delivery. The consumer also has the duty to notify the seller under the GCG while there is an exemption from such duty under the CESL. In the first 6 months after the delivery, the consumer will only have to notify the existence of a non-conformity under the GCG. While the CISG, CESL and GCG provide clear rules for the period to give notice, the BCSL relies heavily on the *bref d lai* (“as soon as possible”) where its duration can only be determined by a judge.

As the cut-off period is easy to determine in the CISG and the CESL, the BCSL does not rule on the cut-off period which is left to the discretion of the judge. Under the GCG it is 2 years from the time of delivery and 1 year from the time of discovery of the defect, so the effective cut-off period will be between 2 to 3 years.

Similarly under the BCSL, GCG, CISG and CESL with the notification duty recognised as an *incombance (obliegenheit)*, the failure to give proper notice will result in the loss of rights to remedies. In the CISG and CESL they will not lose their right to remedies if the seller knew or ought to have known of the lack of conformity.

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