



Proceedings of the 101st Annual Meeting

THE
FUTURE
OF
INTERNATIONAL
LAW



March 28-31, 2007
Washington, DC

THE AMERICAN SOCIETY OF INTERNATIONAL LAW

The Society is a professional association devoted to the study and use of law in international affairs. Membership is open to people of all nations, lawyers and non-lawyers, who are interested in the challenging problems of law and policy. Its large and diverse membership of some 4,000, drawn from nearly one hundred countries, includes scholars, practitioners, government officials, international civil servants, and students.

Founded in 1906, the Society serves as a meeting place, forum, and collegial research center, hospitable to all viewpoints in its meetings, publications, and other activities. Publications include the *American Journal of International Law*, *International Legal Materials*, *Studies in Transnational Legal Policy*, the *ASIL Newsletter*, and reports and books produced by its programs of research, study, and outreach.

The Society is a nonpartisan, tax-exempt, nonprofit corporation headquartered at Tillar House on Sheridan Circle in Washington, DC.

It is the policy of the American Society of International Law not to take an official position, by resolution or otherwise, upon controversial questions. The views expressed in the addresses, remarks, and discussions delivered at the ASIL Annual Meeting and appearing in its printed *Proceedings* are those of the individual speakers and are not to be taken as representing the views of the Society.

SUBSCRIPTION AND AUTHORIZATION-OF-USE INFORMATION

The *Proceedings of the 101st Annual Meeting* (ISBN 0-9729423-8-6) is available by advance subscription to ASIL members for \$105.00 for delivery within the United States and \$115.00 for delivery outside the United States; and non-members for \$115.00 for delivery within the United States and \$125.00 for delivery outside the United States. ASIL members and nonmembers may subscribe to the *Proceedings* of future ASIL Annual Meetings through the Society's Web site at <www.asil.org>. Back issues of this and other *Proceedings* are available from William S. Hein & Co., Inc., 1285 Main Street, Buffalo, NY 14209-1987; phone (800) 828-7571 (U.S.) and (716) 882-2600 (outside U.S.). ASIL members receive a 10% discount on all ASIL publications sold by Hein.

For permission to reuse material from the *Proceedings*, please access www.copyright.com, or contact the Copyright Clearance Center, Inc. (CCC), 222 Rosewood Drive, Danvers, MA 01923, (978) 750-8400. CCC is a not-for-profit organization that provides licenses and registration for a variety of users.

PROPER CITATION

The *Proceedings* should be cited according to the following example:
101 ASIL Proc. 214 (2007).

© 2007 The American Society of International Law

PROCEEDINGS OF THE ONE HUNDRED FIRST ANNUAL MEETING
OF THE AMERICAN SOCIETY OF INTERNATIONAL LAW

CHAIRS OF THE COMMITTEE
OF THE ANNUAL MEETING

William J. Aceves
Charles A. Hunnicutt
Chantal Thomas

CO-EDITORS OF THE PROCEEDING

William J. Acey
Charles A. Hunnic
Chantal Thom

CONTENTS

Foreword

An Introduction: The Future of International Law
William J. Aceves, Charles A. Hunnicutt, and Chantal Thomas

Ninth Annual Grofius Lecture
Multinational Corporations: Balancing Rights and Responsibilities
Joseph E. Stiglitz

Feeling the Heat? Climate Change Litigation in the 21st Century
The Intersection of Science, Science, and Law in *Massachusetts v. EPA*
Hari M. Osofsky

International Litigation Over Global Climate Change: A Skeptic's View
Darin R. Bartram

The Canada-U.S. Border: Free Trade in a Time of Enhanced Security
Remarks by:
Ambassador Wilson

Free Trade in a Time of Enhanced Security
Jon R. Johnson

Remarks by:
Peter Lichtenbaum

Social Justice Advocacy in the United States: What Role for International Law?
Introduction
Steven M. Watt

Bringing Human Rights Home? The Promises and Pitfalls of Rights Strategies
in American Social Justice Advocacy
Clifford Bob

Remarks on Social Justice Advocacy in the United States
Aryeh Neier

The Human Right to a Healthy and Safe Environment: The Right of Displaced
Hurricane Katrina Survivors to Return Home With Dignity and Justice
Monique Harden

Roundtable on Citizenship
An Emerging International Law of Citizenship?
Peter J. Spiro

Remarks by:
Linda Bosniak

The Private Side of Citizenship
Karen Knop

The Resilience of Nationality <i>Gerald L. Neuman</i>	97	Africa, International Criminal Courts, and Peace Building: Reflections on the Experience of Ad-hoc and Mixed Tribunals <i>Simone Monassebian</i>	148
Rethinking Nationality in International Law <i>Kim Rubenstein</i>	99	Illegal Peace? Power Sharing with Warlords in Africa <i>Jeremy Levitt</i>	152
The Future of Food		Institutions and the Rule of Law: A New Voices Panel	
The Future of Food: Elements of Integrated Food Security Strategy for South Africa and Food Security Status in Africa <i>D. Moyo</i>	103	Toward an Identity Theory of International Organizations <i>Sungjoon Cho</i>	157
The Future of Food Subsidies <i>Peggy A. Clarke</i>	109	The Future of UN Peacekeeping and the Rule of Law <i>Jeremy Farrall</i>	160
Tsunamis, Hurricanes, Earthquakes, and Asteroids: Are We Ready for the Next 100 Years?		The Oil-for-Food Program and the Need for Oversight Entities to Monitor UN Sanctions Regimes <i>Susan A. Notar</i>	162
Introductory Remarks by: <i>James Gathii</i>	113	Domestic Courts and Global Governance <i>Christopher A. Whytock</i>	166
International Disaster Relief: A Growing Regulatory Dilemma <i>David Fisher</i>	114	Collapse: Can International Law Protect the Earth's Natural Resources?	
Queering International Law		Carlin and Collapse <i>John K. Setear</i>	171
Introduction <i>Ralph Wilde</i>	119	Environmental Challenges <i>David Freestone</i>	172
"Taking a Break" from "Normal": Thinking Queer in the Context of International Law <i>Dianna Otto</i>	119	Judging Treaties <i>Lakshman Guruswamy</i>	172
Queering International Legal Authority <i>Doris E. Buss</i>	122	The Globalization of the American Law School	
On a Certain Queer Discomfort with <i>Orientalism</i> <i>Amr Shalakany</i>	125	Introductory Remarks by: <i>Charital Thomas</i>	182
Queer Theory and International Human Rights Law: Does Each Person Have a Sexual Orientation? <i>Aeyal Gross</i>	129	Remarks by: <i>Alex Aleinikoff</i>	182
Africa: A New Voices Panel		<i>William Alford</i>	182
Introductory Remarks by: <i>Joel M. Ngugi</i>	133	<i>Joseph Weiler</i>	182
The Convergence of Local and International Law: Family Law in the Protocol on the Rights of Women in Africa <i>Chinwe Esiama</i>	135	Questions	192
Participatory Constitution-Making in Post-Conflict States <i>Angela M. Banks</i>	138	The Future of Internet Governance	202
The Chad Cameroon Pipeline Project (CCPP) and the Dilemmas of the Government of Chad <i>Stefaan Smis and Stephen S. Kingah</i>	141	Breaking Developments in International Law: A Conversation on the ICJ'S Opinion in <i>Bosnia and Herzegovina v. Serbia and Montenegro</i>	
On the Origin of Fear in the World Trade System: Excavating the Roots of the Berlin Conference of 1884-1885 <i>Marjorie Florestal</i>	143	Introductory Remarks by: <i>Theodor Meron</i>	212
aving the Way? Africa and the Future of International Criminal Law		Discussion	212
Introduction <i>Vincent O. Nnemeielle</i>	147	The Future of International Law	
		Members' Reception and Plenary Panel	222
		Introductory Remarks by: <i>Alexander Aleinikoff</i>	222
		Remarks by: <i>Anne-Marie Slaughter</i>	222
		<i>Hisashi Owada</i>	223
		<i>Lori Damrosch</i>	223
		<i>Barry Carter</i>	223
		<i>Antônio Augusto Cançado Trindade</i>	223

What Future for the Doha Development Agenda and the Multilateral Negotiating Regime?	
Introduction	243
<i>C. Donald Johnson</i>	243
What Legal Framework for Developing Country Coalitions in the WTO?	244
<i>Sonia E. Rolland</i>	244
Implementation of International Health Law: A Challenge for the Future	
Introductory Remarks by:	249
<i>Fernando Gonzalez-Martin</i>	249
A Proposal for a Framework Convention on Global Health	249
<i>Lawrence O. Gostin</i>	249
Remarks by:	253
<i>Gian Luca Burci</i>	253
The World Health Organization's International Health Regulations (2005)	256
<i>Bruce Plotkin</i>	256
Customary International Law as Federal Law After <i>Sosa v. Alvarez-Machain</i>	
Introduction: The Path to <i>Sosa</i>	261
<i>Marrin S. Flaherty</i>	261
Accommodating Concerns for International Law and Proper Governance	264
<i>David H. Moore</i>	264
A No Decision: <i>Sosa v. Alvarez-Machain</i> and the Debate over the Domestic Status of Customary International Law	267
<i>Julian Ku</i>	267
<i>Sosa</i> , the Federal Common Law and Customary International Law: Reaffirming the Federal Courts' Powers	270
<i>Beth Stephens</i>	270
The Traffic Light Theory of <i>Sosa v. Alvarez-Machain</i>	272
<i>Ralph G. Steinhardt</i>	272
Slave Trafficking 200 Years After Abolition	
Introductory Remarks by:	277
<i>Adrien Wing</i>	277
Slave Trafficking as a Crime Against Humanity	277
<i>Diane Marie Amann</i>	277
Legal Foundations for Prohibiting the Profits and Products of Contemporary Slavery	279
<i>Kevin Bales</i>	279
Reparations and the Slave Trade	285
<i>Adrienne Davis</i>	285
Justice Should Be Done, But Where? The Relationship Between National and International Courts	289
Introduction	301
<i>Joel P. Trachtman</i>	301
Managing Migration: Whether the Missing Regime? How Relevant is Trade Law to Such a Regime?	303
<i>Bimal Ghosh</i>	303
An Overview of International Cooperation Over Migration	
<i>Susan Martin</i>	306
How International Law Could Increase Wealth and Reduce Global Inequality by Liberalizing Migration	311
<i>Howard F. Chang</i>	311
Moral Aspects of International Labor Migration Regimes	313
<i>Tomer Broude</i>	313
Indigenous Rights, Traditional Knowledge, and Access to Genetic Resources—New Participants in Future International Law Making	
Indigenous Peoples and the Role of the Nation-State	319
<i>Valerie Phillips</i>	319
Ethics, Legitimacy, and Lawyering: How do International Lawyers Speak Truth to Power?	325
The Supreme Court and the War on Terrorism	
<i>Hamdan</i> and the Military Commissions Act of 2006: An Overview	339
<i>Sean D. Murphy</i>	339
What Does <i>Hamdan</i> Mean for Human Rights?	341
<i>Dinah PoKempner</i>	341
Was <i>Hamdan v. Rumsfeld</i> an Exercise in Judicial Futility?	345
<i>Jide Nzelibe</i>	345
Divergence and Harmonization in Private International Law	
Introductory Remarks by:	349
<i>David Stewart</i>	349
Some Observations from the Hague Conference on Private International Law	350
<i>Christophe Bernasconi</i>	350
The Hague Convention on Child Support and Other Forms of Family Maintenance: Divergent Private International Law Rules and the Limits of Harmonization	353
<i>Robert G. Spector</i>	353
Commercial and Insolvency Law	357
<i>Edwin E. Smith</i>	357
Common Themes	360
<i>Louise Ellen Teitz</i>	360
The Future of Transnational Litigation in U.S. Courts: Distinct Field or Footnote?	
Is International Litigation a Field? Two Views of the Border	365
<i>Paul R. Dubinsky</i>	365
Democracy, Gender, and Governance	
Introduction	379
<i>Darren Rosenblum</i>	379
Remarks by:	380
<i>Sonia E. Alvarez</i>	380
<i>Janie Chuang</i>	381
<i>Janet Halley</i>	382
<i>Kerry Rittich</i>	383
Questions and Answers	384
The Future of International Labor Law	
Introductory Remarks by:	385
<i>Adelle Blackett</i>	385

The Future of the International Labour Organization <i>Laurence R. Helfer</i>	391
The Future of ILO Law, and the ILO <i>Brian Langille</i>	394
The OECD: An Unusual Actor for International Labor Law (and an Introductory Aside on the Lack of U.S. Interest in International Labor Law) <i>Virginia A. Leary</i>	396
Three Challenges Facing International Labor Law <i>Janelle M. Diller</i>	398
Plenary Corporate Counsel Forum: The Impact of International Law on Multinational Corporations Summary of Panel Discussion	403
Remarks by: <i>Thomas Gottschalk</i>	403
<i>Alberto Mora</i>	404
Remarks by: <i>Paul Wright</i>	405
The UN Sales of Goods Convention: Perspectives on the Current State-of-Play Fundamental Breach of Contract Under the CISG: A Controversial Rule <i>Eduardo Grebler</i>	407
Does the CISG Fill a Much-Needed Gap? <i>Paul B. Stephan</i>	414
Buyer's Remedies in the Case of Non-conforming Goods: Some Problems in a Core Area of the CISG <i>Ingeborg Schwenzer</i>	416
Strengthening Human Rights Mechanisms Around the World Introductory Remarks by: <i>John Cerone</i>	423
Remarks on the Human Rights Council <i>Ngonardje Mbatidjol</i>	423
The Case of the European Court of Human Rights <i>Christos L. Rozakis</i>	424
The Reform of the African System of Human Rights Protection <i>Fatsah Ouguergouz</i>	427
How Can The Nuclear Nonproliferation Regime be Repaired? What if it Can't? Enforcement and the Future of the Nuclear Nonproliferation Regime <i>Orde F. Kirtie</i>	433
The Nuclear Nonproliferation Regime and Nuclear Realities: Repair or Reassessment? <i>Jack M. Beard</i>	438
Replacing a Failed Nuclear Strategy <i>Joseph Cirincione</i>	442
Counter-Insurgency and the War on Terror: A Deadly Convergence? Introductory Remarks	447
Transnational Movements <i>Philip Sundel</i>	447
Investment Law, Dispute Resolution, and the Development Promise: Back to the Future The African Development Bank's Contribution to the Harmonization of Investment Laws in Africa and Prospects for Future Harmonization of Such Laws <i>Adesgun A. Akin-Olugbade</i>	451
Developments in Investor-State Arbitration—Reflections from the Classroom <i>Jack J. Coe, Jr.</i>	454
An Empirical Analysis of Investment Treaty Awards <i>Susan D. Franck</i>	459
The Evolving International Standard and Sovereignty <i>W. Michael Reisman</i>	462
International Investment and Administrative Law in Latin America <i>Javier Robalino-Orellana</i>	465
Roundtable—A Multiplicity of Actors and Transnational Governance Introductory Remarks by: <i>José Gabilondo</i>	465
Non-State Actors and the International Institutional Order: Central Bank Capture and the Globalization of Monetary Annnesia <i>Timothy A. Canova</i>	465
The Place of the Private Transnational Actor in International Law: Human Rights Norms, Development Aims, and Understanding Corporate Self-Regulation as Soft Law <i>Erika R. George</i>	471
Remittance Liquidity and Citizen 'Arbitrage' <i>José Gabilondo</i>	471
<i>101st Annual Meeting Theme Statement and Program</i>	481
<i>Forty-eighth Philip C. Jessup International Law Moot Court Competition</i>	491
Appendices	501
Minutes of the ASIL Annual General Meeting	501
Memorial Notices	501
ASIL Officers and Executive Council	501
American Journal of International Law	501
International Legal Materials	511
Proceedings of the Annual Meeting	511
<i>Index</i>	511

Interestingly, several conventions, all drafted in the wake of the CISG, have sought to address the conflicts-of-law issue.⁵ None has attracted much support, and none is in effect. What should one make of the international community's apparent failure to deal directly with the root source of legal instability in international sales contracts?

Several rejoinders are possible. First, the trend toward arbitration may obviate the need for an international consensus on choice of law. Arbitrators have their own reasons to reduce the legal risk associated with the disputes they consider: If they develop a reputation for reaching outcomes that contracting parties don't want, they won't get hired. Second, many of the parties to an international sales contract that do not negotiate a choice-of-law or choice-of-forum clause, or who might be sued in a forum where such clauses are unenforceable, may find this risk acceptable. In most cases, a forum state will apply its own law, which means the legal risk is closely tied to the location of attachable assets. If a party has assets only in its home jurisdiction, then as a practical matter it will find itself exposed only to that jurisdiction's contracts law. Multinational firms with assets in multiple jurisdictions presumably can respond to their specific risk by bargaining for choice-of-forum or choice-of-law clauses. If these conjectures bear some relation to reality, then the commercial community may not have any great reason to pressure governments for international regulation of choice of law.

Law reform, whether international or domestic, is a passion of a certain kind of legal academic. As thought experiments and the basis for a research agenda, these projects can be invaluable. But, as our experience with the CISG illustrates, the execution of law reform may do more harm than good.

BUYER'S REMEDIES IN THE CASE OF NON-CONFORMING GOODS: SOME PROBLEMS IN A CORE AREA OF THE CISG

By Ingeborg Schwenzer*

INTRODUCTION

Non-conformity of the goods and the buyer's respective remedies constitute the core of any law of sales. More than 50 percent of all cases that have been litigated and decided under the CISG at this stage have involved questions surrounding these issues. The CISG has set up a consistent scheme for determining non-conformity and the remedies that the buyer can resort to in the case of non-conformity. I would dare say that this system is superior to any domestic sales law that I know, including both traditional civil-law systems such as Germany, Switzerland, and France, as well as common-law systems such as England and the United States. This statement not only holds true with respect to the prerequisites for non-conformity but also with respect to the consequences of non-conformity of the goods. However, uniformity in this core area of international sales law, which has been arduously achieved, risks being endangered by domestic preconceived views of judges and arbitrators.

I would like briefly to explore two fields in which uniformity has been jeopardized during recent application of the CISG. The first might be regarded as an intrinsic problem of

⁵ The Hague Conference on Private International Law has produced the Convention on the Law Applicable to Contracts for the International Sale of Goods, Dec. 22, 1986, and the Convention on Choice of Court Agreements, Jun. 30, 2005. None is in force.

* Professor of Private Law, University of Basel, Switzerland. The author would like to express her gratitude to her research assistant, Olivier Mosimann, for his assistance in preparing these remarks.

interpretation of the CISG provisions itself, namely the buyer's duty to inspect and to notify the seller of any non-conformity. The second one is a kind of extrinsic: namely the possibility of the buyer to turn to concurring domestic remedies, for example for reasons CISG remedies are excluded.

Let me first turn to the buyer's duty to inspect and notify.

THE BUYER'S DUTY TO INSPECT AND NOTIFY

This duty is laid down in Articles 38 and 39 of the CISG. The problem inherent interpretation of these articles is the divergence of domestic sales laws concerning of the buyer to inspect the goods and give notice of any non-conformity.¹ Most sales laws do not recognize any such obligation of the buyer at all.² Even in those whose domestic sales laws do contain such provisions, their function and interpretation greatly differ. While Germanic legal systems require notice to be given without undue delay immediately,³ under Anglo-American⁴ and Dutch⁵ law, it is sufficient for it to be given within a reasonable time or within an appropriate period after the actual discovery or discovery of the defect. Thus, in practice, the outcomes when applying these interpretations of the notice period vary considerably. Under the domestic laws in speaking countries, failure to comply with the duty to give notice is apparently the weapon used by sellers to defeat any claims by the buyer based on a lack of conformity of the goods. Courts can require notice to be given by the buyer within as short a time as three to five working days.⁶ In contrast to the Germanic approach, U.S. courts hold the purpose of the duty to give notice to be the prevention of fraud by a dilatory buyer.⁷ Thus, more often than not, a period of more than one month is still held reasonable.⁸ It was against this diverse background that the inclusion of this obligation in the CISG was one of the most highly debated issues when drafting the CISG.⁹ To such drafting history, the CISG provisions on examination and notice may be fairly characterized as being closer to those legal systems that provide for a duty to give notice within a re-

¹ See CISG ADVISORY COUNCIL, OP. NO. 2, EXAMINATION OF THE GOODS AND NOTICE OF NON-CONFORMITY, ARTICLES 38, 39, June 7, 2004, ERIC BERGSTEIN (Rapporteur), paras. 2.1.1–2.4, available at <http://www.cisg.org/docs/CISG-AC_Op_no_2.pdf>.

² Cf., e.g., France and Belgium: Art. 1648 Code civil [C.C.—Civil Code].

³ See §§377, 378 German and Austrian Handelsgesetzbuch [HGB—Commercial Code].

⁴ See Art. 201 Swiss Obligationenrecht [O.R.—Code of Obligations].

⁵ See §2-607(3)(a) UCC; see also §§2-607(3)(a) UCC 2003, 35(1) SGA 1979.

⁶ See Art. 7:23.1 Burgerlijk Wetboek [B.W.—Civil Code].

⁷ Cf. for Austria: §§377, 378 Austrian HGB; Ernst A. Kramer, §§377, 378, para. 41, in KONNEKTE: HANDELSGESETZBUCH MIT EINSCHLÜSSELN RECHTSVORSCHRIFTEN (Manfred Straube ed., 2003); for Germany: Ulfert Stuhlfelder, §377, para. 8, in HANDELSRECHT KOMMENTAR ZUM HANDELSGESETZBUCH (Klausen Schmidt ed., 2007); Barbara Grunewald, §377, para. 72, in MÜNCHENER KOMMENTAR ZUM HANDELSRECHT (Klausen Schmidt ed., 2004); for Switzerland: Art. 201 Swiss OR; Herbert Schönlé & Peter Higi (Arthur Meier-Hayoz ed., 1979).

⁸ Cf. JAMES I. WHITE & ROBERT S. SUMMERS, Uniform Commercial Code §419 (5th ed., 2000) (Carpenter, Inc. v. Boyer Potato Chips, 28 Agric. Dec. 1557 (1969), 1969 WL 10993); G. & D. Poultry v. Long Island Butter & Egg Co., Sup. Ct. NY, Nov. 3, 1969, 33 A.D.2d 685, 306 N.Y.S.2d 243.

⁹ Opp v. Nieuwma, Sup. Ct. SD, July 3, 1990, 458 N.W.2d 352, 1990 S.D. LEXIS 87 (four months); v. Gaines, Ct. App. GA, Feb. 27, 1991, 199 Ga.App. 70, 1991 Ga. App. LEXIS 378 (eight months); Indus., Inc. v. Kraftman Group, Inc., App. Ct. CT, June 2, 1992, 27 Conn. App. 688, 1992 Conn. App. 220 (two months).

¹⁰ Harry M. Flechtner, *Buyer's Obligation to Give Notice of Lack of Conformity* (Articles 38, 39, 4 in THE DRAFT UNIFORM DIGEST AND BEYOND: CASES, ANALYSIS AND UNRESOLVED ISSUES IN THE CONVENTION 378 (Ronald A. Brand et al. eds., 2004) [hereinafter DIGEST AND BEYOND]).

time in their domestic laws than to those that do not stipulate any notice requirement at all, or to those with very strict notice periods.¹¹

However, it does not come as a big surprise that national preconceptions have heavily influenced the interpretation of the CISG provisions concerned. As could be expected, during the first years after the CISG came into force, most of the case law emanated from those countries that had already implemented the forerunner of the CISG, the Uniform Law on the International Sale of Goods (ULIS). In the first German decision concerning Article 39, the court held that giving notice of a defect concerning shoes 16 days after delivery was not within a reasonable time.¹² Similarly, periods of between 25 days and six weeks were not regarded as reasonable in cases concerning clothes and textiles.¹³ seven days was regarded as too long in the case of gherkins.¹⁴ One court expressly stated that in the case of textiles, it would consider one week for examination and one week for giving notice as reasonable.¹⁵ In 1995, against this background and with the situation in other legal systems in mind, I suggested that, for durable goods and in the absence of any special circumstances, one should accept one month as a rough average period for timely notice.¹⁶ Only shortly after publication of this opinion, the German *Bundesgerichtshof*, the Supreme Court, for the first time, referred to the one-month period in the well-known "mussels case."¹⁷ In 1999 the *Bundesgerichtshof* explicitly ruled in favor of a four-week period starting at the time the buyer knew or ought to have been aware of the lack of conformity of the goods. The court described the four-week period for giving notice as "regelmässig, i.e., 'regular' or 'normal.'" Since then, the supreme court of Switzerland, the *Bundesgericht*, has followed this line of interpretation by expressly upholding a finding of the lower court that allowed the buyer one week for examination, followed by one month for giving notice, in the case of a defective second-hand textile cleaning machine.¹⁸

In contrast, the Austrian Supreme Court still stubbornly adopts an approach that is still predominantly influenced by domestic law, by applying an overall period of 14 days for examination and notice.¹⁹ Thus, there is a real divide within the German-speaking countries, not only with respect to the holdings of the respective supreme courts, but also with respect to scholarly writing. The "noble month," which is favored by the German *Bundesgerichtshof* as well as the Swiss *Bundesgericht*, is backed by scholars who are comparatists and who are particularly acquainted with the Anglo-American legal mentality.²⁰ In contrast, the Austrian *Oberster Gerichtshof's*

overall 14-day period is shared by authors²¹ whose approach to this issue is deeply in the intricacies of traditional German sales law and its acceptance in Austria and Switzerland who try to interpret uniform law rules as closely as possible to their domestic fore.

The German-speaking countries aside, most other countries have considerably fewer dealing with Articles 38 and 39. Still, a common interpretation can easily be discerned throughout the non-German-speaking continental European countries, there are hard cases that deny the reasonableness of notice given within one month. Instead, there is case law holding that a period for giving notice of more than one month is still reasonable the longest period currently accepted by the courts is two months after discovery of conformity and three months after delivery, in this case, of frozen fish.²³

Until now, there has only been sparse Anglo-American case law interpreting Article 39. This phenomenon might be connected to the fact that—in contrast to their German colleagues—Anglo-American sellers are not yet used to immediately raising the objection of the buyer's failure to give notice, as such tactics rarely succeed under domestic law. Where courts and tribunals have had to decide on the issue of timely notice, however, interpretation of what constitutes a reasonable time has been rather generous. Thus, in the recent *TeeVee Toons* case decided by the U.S. District Court for the Southern District of New York in August 2006, two months for giving notice were held as reasonable, with further discussion being devoted to this issue.²⁴

Let me now turn to the second issue, the question of concurring remedies.

CONCURRING REMEDIES

The CISG is exclusively concerned with the contractual relationship between the seller and the buyer. However, under most legal systems, the mere existence of contractual remedies does not preclude the buyer from relying on other remedies, particularly those based on domestic law if the respective prerequisites are fulfilled. The crucial question then arises of whether a buyer under a CISG sales contract can assert concurring remedies under domestic law notwithstanding that they may result in outcomes contrary to those reached under the CISG provisions.²⁵

There are three main fields in which domestic law remedies could interfere with the provisions on buyers' remedies in the case of non-conforming goods:

The first one is tortious remedies or—in continental, mostly German-speaking legal systems—quasi-contractual remedies under the Latin doctrine of *culpa in contrahendo*

¹¹ Cf. CISG-AC Op. No. 2, *supra* note 1, para. 4.4.

¹² Landgericht Stuttgart, Aug. 31, 1989, CISG-online 11.

¹³ Cf. Landgericht Stuttgart, Aug. 13, 1991, CISG-online 33; Landgericht Mönchengladbach, May 22, 1992, CISG-online 56; Oberlandesgericht Düsseldorf, Mar. 12, 1993, CISG-online 82; *see also* Tribunale civile di Cuneo, Jan. 31, 1996, CISG-online 268 (clothes: 23 days after delivery too long).

¹⁴ Cf. Oberlandesgericht Düsseldorf, Jan. 8, 1993, CISG-online 76.

¹⁵ *See* Landgericht Mönchengladbach, May 22, 1992, CISG-online 56.

¹⁶ Cf. Ingeborg Schwenzler, *Art. 39*, para. 7, in *KOMMENTAR ZUM EINHEITLICHEN UN-KAUFRECHT—CISG—(Ernst v. Caemmerer & Peter Schlechtriem eds., 2d (German) ed. 1995)*.

¹⁷ Bundesgerichtshof, Mar. 8, 1995, CISG-online 144.

¹⁸ Cf. Bundesgerichtshof, Nov. 13, 2003, CISG-online 840.

¹⁹ Cf. Oberster Gerichtshof, Oct. 15, 1998, CISG-online 380; Oberster Gerichtshof, Aug. 27, 1999, CISG-online 485; Oberster Gerichtshof, Jan. 14, 2002, CISG-online 643.

²⁰ Cf. Daniel Girsberger, *Outline for Discussion—Art. 39, 43 and Statutes of Limitation, 25 Years United Nations Convention on Contracts for the International Sale of Goods (CISG)*, Vienna, March 15–16, 2005, 25 I.L. & Com.

²¹ Cf. Daniel Girsberger, *Substantiierung der Mängelrüge: Bundesgericht, I. Zivilabteilung, Urteil 4 C.395/2001 vom 28. Mai, RECHT*, 115, 120–21 (2003).

²¹ Cf. Martin Karollus, *UN—Kaufrecht: Anwendungsbereich, Holzhandelsanwesen, Mängelrüge*, JURIS-BLÄTTER 321 (1999); Ulrich Magnus, *Art. 39*, para. 49, in *JULIUS VON STAUFENBERGERS KOMMENTAR ZUM BÜRGERLICHEN GESETZBUCH MIT EINFÜHRUNGSGESETZ UND NEBENGESETZEN, WIENER UN-KAUFRECHT (Staudinger ed., 13th rev. ed. 2005) [hereinafter: STAUDINGER]*; Ulrich Magnus, *Art. 39*, para. 22, in *KOMMENTAR ZUM UN-KAUFRECHT (Heinrich Honsell ed., 1997)*; Christoph Benicke, *Art. 39 CISG*, para. 7, in *MÜNCHE KUNDELEHRE DER VEREINigten NATIONEN ÜBER VERTRÄGE ÜBER DEN INTERNATIONALEN WARENKAUF (CISG) (Hä Soergel & Alexander-Lidertitz eds., 13th ed. 2000)*; Ernst A. Kramer, *Rechtzeitige Untersuchung und Mängelrüge bei Sachmängeln nach Art. 38 und 39 UN-Kaufrecht—Eine Zwischenbilanz*, in *BEITRÄGE ZUM UNTERNEHMERRECHT, FESTSCHRIFT HANS-GEORG KOPPENSTEINER 617, 628 (Ernst A. Kramer ed., 2001)*.

²² *See, e.g.*, Cour de Cassation, May 26, 1999, CISG-online 487 (five weeks); Cour d'appel de Versailles (1998), CISG-online 337 (six & eleven months); Cour d'appel de Colmar, Oct. 24, 2000, CISG-online 578 (months).

²³ *See* Audiencia Provincial de Pontevedra, Oct. 3, 2002, CISG-online 1108.

²⁴ *TeeVee Toons, Inc. v. Gerhard Schubert GmbH*, S.D. NY, Aug. 22, 2006, CISG-online 1272.

²⁵ Cf. Sonja A. Krusina, *(NON-)CONFORMITY IN THE 1980 UN CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS: A UNIFORM CONCEPT?* 187–213 (2004).

negligent misrepresentation of certain features of the goods at the time of the conclusion of the contract.²⁶ The second field is tort recovery for purely economic loss caused by defective goods, as well as for property damages, especially in legal systems that recognize a tort claim for damage to the chattel itself.²⁷ Finally, under certain legal systems, notwithstanding sales law remedies, in the case of non-conforming goods the buyer may rescind the whole contract on the basis of a mistake made when entering into the contract.²⁸ All these domestic remedies may heavily interfere with the results reached under the CISG, for example, where the buyer is precluded from relying on the non-conformity of the goods because he/she did not inspect them, if damages were not within the contemplation of the parties, as required by the CISG, or if avoidance of the contract under the CISG is not possible because the breach does not amount to a fundamental one.

Until now, the question of whether the buyer may have resort to concurring domestic law remedies in all of these cases has not been thoroughly discussed either in case law or in scholarly writings. However, certain tendencies can be discerned from the existing debate.

Many representatives of the civil legal tradition favor a clear pro-convention approach to this issue. Even if domestic law provides, for example, for the possibility to rescind a sales contract on the grounds of unilateral mistake concerning the quality of the goods, it is almost unanimously held that this cannot apply if the sales contract is governed by the CISG.²⁹ Likewise, it has been held that, although domestic German law allows a buyer to claim damages based in tort in the case of property damage to the chattel itself, this remedy is not available if the buyer is precluded from relying on its CISG remedies because it did not give timely notice of the non-conformity of the goods.³⁰

²⁶ Cf. Joseph Lookofsky, *In Dubio Pro Conventione? Some Thoughts About Opt-Outs, Computer Programs, and Preemption Under the 1980 Vienna Sales Convention (CISG)*, 13 *Duke J. Comp. & Int'l L. Rev.* 263, 283 (2003); Markus Müller-Chen, *Art. 45, para. 30, in COMMENTARY ON THE UN CONVENTION ON THE INTERNATIONAL SALE OF GOODS (CISG)* (Peter Schlechtriem & Ingeborg Schwenzer eds., 2d (Engl.) ed. 2005) [hereinafter *SCHLECHTRIEM COMMENTARY*]; RENÉ FRANZ HENSEL, *THE CONFORMITY OF GOODS IN INTERNATIONAL SALES 74* (2005); Peter Hüber, *Some Introductory Remarks to the CISG*, 6 *INTERNATIONALES HANDELSRECHT* 228, 234 (2006); Peter Schlechtriem, *The Borderland of Tort and Contract—Opening a New Frontier?*, 21 *CORNELL INT'L L.J.* 467, at II.A. (1988) [hereinafter *Schlechtriem, Tort*]; Helen Elizabeth Hartnell, *Raising the Sleeping Dog: The Validity Exception to the Convention on Contracts for the International Sale of Goods*, 18 *YALE J. INT'L L.* 1, at IV.A.4.b. (1993); CECILIE KJELLAND, *DAS NEUE KAUFRECHT DER NORDISCHEN LÄNDER IM VERGLEICH MIT DEM WIENER KAUFRECHT (CISG) UND DEM DEUTSCHEN KAUFRECHT 94* (1999).

²⁷ Cf. Markus Müller-Chen, *Art. 45, para. 31, in SCHLECHTRIEM COMMENTARY, supra note 26*; JOHN O. HONNOLD, *UNIFORM LAW FOR INTERNATIONAL SALES UNDER THE 1980 UNITED NATIONS CONVENTION 73–76* (3d ed. 1999); HENSEL, *supra note 26*, at 75; Hüber, *supra note 26*, at 233.

²⁸ Cf. Patrick C. Leyens, *CISG and Mistake: Uniform Law vs. Domestic Law, The Interpretative Challenge of Mistake and the Validity Loophole, in REVIEW OF THE CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS (CISG) 2003–2004*, at 3–51 (Pace Int'l L. Rev. ed. 2005); HONNOLD, *supra note 27*, at 261–63; Lookofsky, *supra note 26*, at 282–83; HENSEL, *supra note 26*, at 134–38; Hüber, *supra note 26*, at 232; Schlechtriem, *Tort, supra note 26*, at III.A.; Christoph R. Heitz, *Validity of Contracts Under the United Nations Convention on Contracts for the International Sale of Goods, April 11, 1980, and Swiss Contract Law*, 20 *WAND. J. TRANSNAT'L L.* 639–63 (1987).

²⁹ Ingeborg Schwenzer, *Art. 35, para. 45, in SCHLECHTRIEM COMMENTARY, supra note 26*; Markus Müller-Chen, *Art. 45, para. 32, in SCHLECHTRIEM COMMENTARY, supra note 26*; HENSEL, *supra note 26*, at 138; Claude Witz, *D. 2007 Pan.*, at 550, 533 (2007); Leyens, *supra note 28*, at 50; Hüber, *supra note 26*, at 232.

³⁰ Oberlandesgericht Thüringen, 26 May 1998, CISG-online 513; cf. Rolf Herber, *Zum Verhältnis von UN-Kaufrechtshilfen und deliktischer Haftung, in FESTSCHRIFT FÜR PETER SCHLECHTRIEM ZUM 70. GEBURTSTAG 2007*, 218–20 (Ingeborg Schwenzer & Günter Hager eds., 2003); Franco Ferrari, *Art. 4, paras. 24, 46, in KOMMENTAR ZUM EINHEITLICHEN UN-KAUFRECHT—CISG—(Peter Schlechtriem & Ingeborg Schwenzer eds., 4th (Ger.) ed. 2004)*; Ulrich Magnus, *Art. 45, para. 43, in STAUDINGER, supra note 21*; Dietrich Maskow, *Art. 4, para. 31, in INTERNATIONALES KAUFRECHT (Fritz Enderlein et al. eds., 1991)*; SONJA A. KRUSING, *supra note 25*, at 212; Hüber, *supra note 26*, at 233; cf. Peter Schlechtriem, *Art. 4, para. 23a, in SCHLECHTRIEM COMMENTARY, supra note 26*; *id.*, *Tort, supra note 26*, at III.A.; Joseph Lookofsky, *UNDERSTANDING THE CISG IN THE USA 25–26*, 71–73 (2d ed. 2004) [hereinafter *CISG USA*]; HERBERT BERNSTEIN & JOSEPH LOOKOFSKY, *UNDERSTANDING THE CISG IN EUROPE 71–73* (1997) [hereinafter *CISG EUROPE*].

Quite a few Anglo-American scholars and courts seem to adopt a different stance. A there is agreement that concurring state contractual claims, including claims for pro estoppel,³¹ are preempted by the CISG, the prevailing opinion would appear to dict this is not the case as far as tort remedies are concerned.³² It is argued that "contract delictual remedies have coexisted in many jurisdictions for centuries, and a given ratification of the sales Convention does not imply its intention to merge contra tort."³³

However, if one seeks to achieve the greatest level of uniformity, it cannot be individual states to apply their domestic laws, whether contractual or based in tort, al the CISG. Otherwise, the well-balanced CISG system of conformity of the goods and re could easily be made meaningless by national law. Therefore, the need to promote uni as it is laid down in CISG Article 7(1) must lead to the conclusion that, as the la Honnold³⁴ put it, the CISG displaces any domestic rules if the facts that invoke suc are the same facts that invoke the Convention. In other words, wherever concurring dt remedies are only concerned with the non-conformity of the goods—such as negli delivering non-conforming goods, negligent misrepresentation of the features of the C or mistake as to the features of the goods—such remedies must be preempted by the C On the other hand, the CISG does not deal with fraud or safety requirements under l liability issues, thus leaving room for national concepts, such as fraudulent misrepres or product liability in case of property damage to property other than the goods sol

SUMMARY

In summary, it is not only due to the fact that the CISG does not address all issu may arise in connection with an international sales contract that the intended uniform legal certainty in international trade is at risk in daily practice. Rather, the main emanates from the interpretation of the CISG provisions themselves by both judge arbitrators whose approaches are still deeply rooted in their domestic preconceived Similarly precarious is allowing concurring domestic remedies to co-exist, which may mine even the uncontroversial interpretation of CISG provisions in a core area.

What remedy can be suggested to prevent such a divergence? Several steps have a been taken to attenuate these risks. Thus, UNICTRAL itself has set up a system of re reporters to gather all relevant CISG court and arbitral decisions and to make them av in English (at least, in abstract form) to all member states. The UNICTRAL Dige

³¹ Cf. Geneva Pharmaceuticals Technology Corp. v. Barr Lab. Inc., S.D. NY, May 10, 2002, CISG-online of also LARRY A. DIMATTEO ET AL., *INTERNATIONAL SALES LAW, A CRITICAL ANALYSIS OF CISG JURISPR 35–37* (2005); Franco Ferrari, *Scope of Application: Articles 4–5, in DIGEST AND BEYOND, supra note 10*, 113, 108–09.

³² Cf. Lookofsky, *supra note 26*, at 285 n.11; Miami Valley Paper, LLC v. Lebbing Eng'g GmbH, D OH, Oct. 10, 2006, CISG-online 1362; Hartnell, *supra note 26*, at IV.A.4.b.; PATRICK S. ATIYAH, *THE S GOODS 501–02* (9th ed. 1995); MARCO TORSELLO, *COMMON FEATURES OF UNIFORM COMMERCIAL LAW CONVE 20* (2004); Johan Erauw, *CISG Articles 66–70: The Risk of Loss and Passing It*, 25 *ILL. & COM.* 203, 208; Henry Mather, *Choice of Law for International Sales Issues Not Resolved by the CISG*, 20 *J.L. & COM.* 1; (2001); cf. *English law ANDREW BURROWS, REMEDIES FOR TORTS AND BREACH OF CONTRACT 6–7* (3d ed. 2001); cf. *English law ANDREW BURROWS, REMEDIES FOR TORTS AND BREACH OF CONTRACT 6–7* (3d ed. 2001), at 56–59.

³³ Lookofsky, *supra note 26*, at 286; cf. also CISG USA, *supra note 30*, at 71–73 and CISG EUROPE, *supr 30*, at 56–59.

³⁴ See HONNOLD, *supra note 27*, at 67–68.

³⁵ Cf. HONNOLD, *supra note 27*, at 74, 262; Ingeborg Schwenzer, *Art. 35, para. 47, in SCHLECHTRIEM COMMENT supra note 26*.

³⁶ Cf. Ingeborg Schwenzer, *Art. 35, para. 48, in SCHLECHTRIEM COMMENTARY, supra note 26*; Hüber, *supr 26*, at 232.

emerged from this project. In addition, there are several databases that make CISG case law from all over the world readily accessible; many of them are available in English. A group of leading CISG scholars from all over the world has come together to form the CISG Advisory Council, which releases opinions on highly controversial issues.³⁷ But probably the most powerful incentive is the education of the younger generation. In this respect special importance must be attributed to the Willem C. Vis International Arbitration Moot now in its fourteenth year, which brings together more than a thousand students from almost 200 law schools in more than 50 different countries annually to discuss CISG problems. This new generation is able to appreciate the superiority of uniform sales law over respective domestic solutions. I am confident that once this generation, trained in the CISG, enters the leading law firms, legal departments of international businesses, and courts and tribunals, uniform application and interpretation of the CISG will be achieved as a matter of course.

³⁷ So far, the CISG Advisory Council has published six opinions; cf. <<http://www.cisg-online.ch/cisg/ci opinions.html>>.

³⁸ At <<http://cisgw3.law.pace.edu/vis.html>>.