Proceedings of the 101st Annual Meeting
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. Hunnicut
Chantal Thomas

CO-EDITORS OF THE PROCEEDINGS
William J. Aceves
Charles A. Hunnicut
Chantal Thomas

CONTENTS

Foreword ..............................................................

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

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

Feeling the Heat? Climate Change Litigation in the 21st Century
The Intersection of Scale, 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. Johnston ..................................................
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
CliffordBob ......................................................
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 Kneip .....................................................
Table of Contents

Simone Monasebian ................................................................. 148
Illegal Peace? Power Sharing with Warlords in Africa
Jeremy Levitt ................................................................. 152

Institutions and the Rule of Law: A New Voices Panel
Toward an Identity Theory of International Organizations
Sunghoon Cho ................................................................. 157
The Future of UN Peacekeeping and the Rule of Law
Jeremy Farrall ................................................................. 166
The Oil-for-Food Program and the Need for Oversight Entities to Monitor UN Sanctions Regimes
Susan A. Notar ................................................................. 166
Domestic Courts and Global Governance
Christopher A. Whytock ......................................................... 166

Collapse: Can International Law Protect the Earth's Natural Resources?
Carlin and Collapse
John K. Setear ................................................................. 171
Environmental Challenges
David Freestone ................................................................. 171
Judging Treaties
Lakshman Kadirgamar .............................................................. 171

The Globalization of the American Law School
Introductory Remarks by:
Chantal Thomas ................................................................. 18
Remarks by:
Alex Aleinikoff ................................................................. 18
William Alford ................................................................. 18
Joseph Weiler ................................................................. 18
Questions ................................................................. 19

The Future of Internet Governance ............................................ 20

Breaking Developments in International Law: A Conversation on the ICJ's Opinion in Bosnia and Herzegovina v. Serbia and Montenegro
Introductory Remarks by:
Theodor Meron ................................................................. 21
Discussion ................................................................. 21

The Future of International Law
Members' Reception and Plenary Panel ........................................ 22
Introductory Remarks by:
Alexander Aleinikoff .......................................................... 22
Remarks by:
Anne-Marie Slaughter .......................................................... 22
Hisashi Owada ................................................................. 23
Lori Damrosch ................................................................. 23
Barry Carter ................................................................. 29
António Augusto Cançado Trindade ........................................... 23
What Future for the Doha Development Agenda and the Multilateral Negotiating Regime?
Introduction
C. Donald Johnson ......................................................... 243
What Legal Framework for Developing Country Coalitions in the WTO?
Sonia E. Rolland .......................................................... 244
Implementation of International Health Law: A Challenge for the Future
Introductory Remarks by:
Fernando Gonzalez-Martin ............................................. 249
A Proposal for a Framework Convention on Global Health
Lawrence O. Gostin ......................................................... 249
Remarks by:
Gian Luca Barci .......................................................... 253
The World Health Organization’s International Health Regulations (2005)
Bruce Plotkin ............................................................... 256
Introduction: The Path to Sosa
Martin S. Flaherty ......................................................... 261
Accommodating Concerns for International Law and Proper Governance
David H. Moore ............................................................ 264
A No Decision: Sosa v. Alvarez-Machain and the Debate over the Domestic Status of Customary International Law
Julian Ku ................................................................. 267
Sosa, the Federal Common Law and Customary International Law: Reaffirming the Federal Courts’ Powers
Beth Stephens .............................................................. 270
The Traffic Light Theory of Sosa v. Alvarez-Machain
Ralph G. Steinhardt ....................................................... 272
Slave Trafficking 200 Years After Abolition
Introductory Remarks by:
Adrien Wing ............................................................. 277
Slave Trafficking as a Crime Against Humanity
Diane Marie Amann ....................................................... 277
Legal Foundations for Prohibiting the Profits and Products of Contemporary Slavery
Kevin Bates ............................................................... 279
Reparations and the Slave Trade
Adrienne Davis ........................................................... 285
Justice Should Be Done, But Where? The Relationship Between National and International Courts .......................... 289
Toward International Order in Migration and Trade?
Introduction
Joel P. Trachtman ......................................................... 301
Managing Migration: Whither the Missing Regime? How Relevant is Trade Law to Such a Regime?
Rimal Ghosh ............................................................... 303
An Overview of International Cooperation Over Migration
Susan Martin ............................................................... 306
How International Law Could Increase Wealth and Reduce Global Inequality by Liberalizing Migration
Howard F. Chang ......................................................... 311
Moral Aspects of International Labor Migration Regimes
Tomer Broude ............................................................ 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
Valerie Phillips ............................................................ 319
Ethics, Legitimacy, and Lawyering: How Do International Lawyers Speak Truth to Power?
Joseph M. Tomasin ....................................................... 325
The Supreme Court and the War on Terrorism
Hamdan and the Military Commissions Act of 2006: An Overview
Sean D. Murphy .......................................................... 339
What Does Hamdan Mean for Human Rights?
Dinah Pōkemonger ....................................................... 341
Was Hamdan v. Rumsfeld an Exercise in Judicial Futility?
Jide Nzelibe ............................................................. 345
Divergence and Harmonization in Private International Law
Introductory Remarks by:
David Stewart ........................................................... 349
Some Observations from the Hague Conference on Private International Law
Christophe Bernasconi .................................................. 350
Robert G. Spector ........................................................ 353
Commercial and Insolvency Law
Edwin E. Smith ........................................................... 357
Common Themes
Louise Ellen Teitz ........................................................ 360
The Future of Transnational Litigation in U.S. Courts: Distinct Field or Footnote? Is International Litigation a Field? Two Views of the Border
Paul R. Dubinsky ........................................................ 365
Democracy, Gender, and Governance
Introduction
Darren Rosenbloom ..................................................... 379
Remarks by:
Sonia E. Alvarez ........................................................ 380
Janie Chuang .............................................................. 381
Janet Halley ............................................................... 382
Kerry Rittich .............................................................. 383
Questions and Answers .................................................. 384
The Future of International Labor Law
Introductory Remarks by:
Adelle Blackett .......................................................... 385
Table of Contents

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

451

Adesegun A. Akin-Okudobade

Developments in Investor-State Arbitration—Reflections from the Classroom

454

Jack J. Coe, Jr.

An Empirical Analysis of Investment Treaty Awards

459

Susan D. Frantz

The Evolving International Standard and Sovereignty

462

W. Michael Reisman

International Investment and Administrative Law in Latin America

465

Javier Robalino-Orellana

Roundtable—A Multiplicity of Actors and Transnational Governance

466

Introductory Remarks by:

José Gabilondo

Non-State Actors and the International Institutional Order: Central Bank Capture and the Globalization of Monetary Amnesia

Timothy A. Canova

The Place of the Private Transnational Actor in International Law: Human Rights Norms, Development Aims, and Understanding Corporate Self-Regulation as Soft Law

Erika R. George

Remittance Liquidity and Citizen “Arbitrage”

José Gabilondo

101st Annual Meeting Theme Statement and Program

48

Forty-eighth Philip C. Jessup International Law Moot Court Competition

491

Appendices

50

Minutes of the ASIL Annual General Meeting

50

Memorial Notices

50

ASIL Officers and Executive Council

50

American Journal of International Law

51

International Legal Materials

51

Proceedings of the Annual Meeting

51

Index

51
Interestingly, several conventions, all drafted in the wake of the CISG, have sought to
address the conflicts-of-law issue. 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 commu-
nity 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 Schweizer*

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 number of criteria 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 ardently
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

* The Hague Conference on Private International Law has produced the Convention on the Law Applicable to
June 30, 2005. None is in force.

1 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.

The UN Sales of Goods Convention: Perspectives on the Current State-of-Pl
interpretation of the CISG provisions itself, namely the buyer’s duty to inspect the
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 concuring domestic remedies, for ex.
for some reason CISG remedies are excluded.

Let me first turn 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 inheres
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. Most
domain laws do not recognize any such obligation of the buyer at all. Even in those
domestic sales laws do contain such provisions, their function and interpretation
formulate. While Germanic legal systems require notice to be given without undue
delay, under Anglo-American and Dutch law, it is sufficient for it to
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
some 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 con
courts. Courts can require notice to be given by the buyer within as short a time
as three to five working days. 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
discriminatory buyer. Thus, more often than not, a period of more than one month is still
reasonable. It was against this backdrop to the inclusion of this obli
gation the buyer was one of the most highly debated issues when drafting the CISG. To
su

[Note: The text continues, but the rest of the document is not visible in the image.]
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.\textsuperscript{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.\textsuperscript{12} Similarly, periods of between 25 days and six weeks were not regarded as reasonably reasonable in cases concerning clothes and textiles.\textsuperscript{13} seven days was regarded as too long in the case of gerkfris.\textsuperscript{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.\textsuperscript{15}

In 1995, again 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.\textsuperscript{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."\textsuperscript{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.\textsuperscript{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.\textsuperscript{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 "royal 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.\textsuperscript{20} In contrast, the Austrian Oberster Gerichtshof's overall 14-day period is shared by authors\textsuperscript{21} whose approach to this issue is deeply rooted in the intricacies of traditional German sales law and its acceptance in Austria and Switz who try to interpret uniform law rules as closely as possible to their domestic forerunners. The German-speaking countries aside, most other countries have considerably few dealing with Articles 38 and 39. Still, a common interpretation can be applied throughout the non-German-speaking Continental European countries, there are harsh cases that deny the reasonableness of notice given within one month. Instead, there is a 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 the conformity defect which was not delivered after delivery, in this case, of frozen fish.\textsuperscript{22}

Until now, there has only been sparse Anglo-American case law interpreting Ar\textsuperscript{39} and 39. This phenomenon might be connected to the fact that—in contrast to their Ge colleagues—American sellers are not yet used to immediately raising the ob of the buyer's failure to give notice, as such tactics rarely succeed under domestic. 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, recent TeeVee Toons case decided by the U.S. District Court for the Southern Dist. New York in August 2006, two months for giving notice were held as reasonable, v further discussion being devoted to this issue.\textsuperscript{23}

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 and the buyer. However, under most legal systems, the mere existence of contractual zer does not preclude the buyer from relying on other remedies, particularly those based if the respective prerequisites are fulfilled. The crucial question then arises of what buyer under a CISG sales contract can assert concurring remedies under domestic notwithstanding that they may result in outcomes contrary to those reached under the provisions.\textsuperscript{24}

There are three main fields in which domestic remedies could interfere with the provisions on buyers' remedies in the case of non-confirming 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 contrahend
The UN Sales of Goods Convention: Perspectives on the Current State-of-Play

Quite a few Anglo-American scholars and courts seem to adopt a different stance. A there is agreement that concuring state contractual claims, including claims for production, are not preempted by the CISG, the prevailing opinion would appear to be that this is not the case as far as tort remedies are concerned. 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."

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, as the CISG. Otherwise, the well-balanced CISG system of conformity of the goods and re could easily be made redundant by national law. Therefore, the need to promote unif as it is laid down in CISG Article 7(1) must lead to the conclusion that, as the la Honndoll put it, the CISG displaces any domestic rules if the facts that invoke suing are the same facts that invoke the Convention. In other words, wherever concuring or remedies are only concerned with the non-conformity of the goods—such as negligi delivering non-conforming goods, negligent misrepresentation of the features of the 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 liability issues, thus leaving room for national concepts, such as fraudulent misrepresentation or product liability in case of property damage to property other than the goods sold.

SUMMARY

In summary, it is not only due to the fact that the CISG does not address all issues may arise in connection with an international sales contract that the intended uniformity 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 juridic arbitrators whose approaches are still deeply rooted in their domestic preconceived. Similarly precarious is allowing concuring 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 been taken to attenuate these risks. Thus, UNICTRAL itself has set up a system of ri reporters to gather all relevant CISG court and arbitral decisions and to make them aviable in English (at least, in abstract form) to all member states. The UNICTRAL Digest


Cf. Lookofsky, supra note 26, at 285 n.11; Miami Valley Paper, LLC v. Lending L'ing GmbH, D Gonzalez, supra note 26, at 113-14; PATTI, supra note 3, at 113-14.

Cf. Lookofsky, supra note 26, at 285 n.11; Miami Valley Paper, LLC v. Lending L'ing GmbH, D Gonzalez, supra note 26, at 113-14; PATTI, supra note 3, at 113-14.

Cf. Lookofsky, supra note 26, at 285 n.11; Miami Valley Paper, LLC v. Lending L'ing GmbH, D Gonzalez, supra note 26, at 113-14; PATTI, supra note 3, at 113-14.

Cf. Lookofsky, supra note 26, at 285 n.11; Miami Valley Paper, LLC v. Lending L'ing GmbH, D Gonzalez, supra note 26, at 113-14; PATTI, supra note 3, at 113-14.
emerged from this project. In addition, there are several databases that make CISG case
from all over the world readily accessible; many of them are available in English. A
of leading CISG scholars from all over the world has come together to form the CI
Advisory Council, which releases opinions on highly controversial issues. But proba
the most powerful incentive is the education of the younger generation. In this resp
special importance must be attributed to the Willem C. Vis International Arbitration Moc
now in its fourteenth year, which brings together more than a thousand students from air
200 law schools in more than 50 different countries annually to discuss CISG proble.
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 CI:
enters the leading law firms, legal departments of international businesses, and courts
tribunals, uniform application and interpretation of the CISG will be achieved as a ma
of course.

37 So far, the CISG Advisory Council has published six opinions; cf. <http://www.cisg-online.ch/cisgkit
opinions.html>.
38 At <http://cisg3.law.pace.edu/Vis.html>.