
**FUNKY MUSSELS, A STOLEN CAR, AND
DECREPIT USED SHOES: NON-CONFORMING
GOODS AND NOTICE THEREOF UNDER
THE UNITED NATIONS SALES
CONVENTION (“CISG”)**

Harry M. Flechtner*

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I. INTRODUCTION

According to a leading scholar of international commercial law, the success of the United Nations Convention on Contracts for the International Sale of Goods¹ has “surpassed all expectations,” and the treaty “represents the most successful attempt to unify an important part of the many and various rules of the law of international commerce.”² This

* Professor of Law, University of Pittsburgh School of Law. A.B. 1973, Harvard College; M.A. 1975, Harvard University; J.D. 1981, Harvard Law School. This article is an adaptation of a paper delivered at a conference at Istanbul Bilgi University in November 2006 entitled “The United Nations Convention on Contracts for the International Sale of Goods: What Challenges for Turkish Sales Law?” The original paper will be published, in Turkish, in the Conference Proceedings. The author wishes to express his very deep gratitude to Associate Professor Yesim M. Atamer of Istanbul Bilgi University, who organized a truly superb conference, substantially advanced the cause of uniform international sales law, and made all who participated feel most welcome and comfortable in the wonderful city of Istanbul.

¹ United Nations Convention on Contracts for the International Sale of Goods, Apr. 11, 1980, S. TREATY DOC. NO. 98-9, 1489 U.N.T.S. 3 (entered into force on Jan. 1., 1988) [hereinafter “CISG” or “Convention”].

² Peter Schlechtriem, *Preface to the COMMENTARY ON THE UN CONVENTION ON THE INTERNATIONAL SALE OF GOODS (CISG)* at v (Peter Schlechtriem & Ingeborg Schwenzer eds., 2d English ed. 2005); *see also* Peter Huber, *Some introductory*

glowing assessment is confirmed by the fact that, as this is written, the CISG is in force in seventy countries,³ and countries continue to ratify.⁴ The most significant challenge arising from the CISG's success is how to maintain the Convention as a source of *uniform* international sales rules (its primary function) when it is being applied by courts, arbitral tribunals and lawyers in such a large group of countries with diverse domestic legal cultures.⁵ Article 7(1) of the Convention obligates all Contracting States to interpret the Convention from an international perspective and with a view to maintaining uniformity in its application. There is consensus among CISG commentators that one important tool in fulfilling this obligation is consultation of past CISG decisions, particularly those rendered by tribunals in jurisdictions other than that of the interpreter.⁶ An impressive variety of tools for gaining access to such "foreign" decisions have evolved. These include Case Law on UNCITRAL Texts ("CLOUT"), the UNCITRAL system for disseminating abstracts of decisions in the six official languages of the United Nations⁷; the UNILEX database sponsored by the Centre for Comparative and Foreign Law

remarks on the CISG, 6 INTERNATIONALES HANDELSREICHT 228, 228 (2006) ("It is therefore fair to say that the CISG has in fact been one of the success stories in the field of the international unification of private law.").

³ United Nations Commission on International Trade Law ("UNCITRAL"), Status: 1980 – United Nations Convention on Contracts for the International Sale of Goods, http://www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG_status.html (last visited Mar. 23, 2008).

⁴ As this is written the most recent CISG ratification was by El Salvador, which ratified on November 27, 2006 and where the Convention will enter into force on December 1, 2007. *See id.*

⁵ No dedicated or specialized courts were created to hear disputes governed by the CISG. Instead, the Convention is applied by regular courts of competent jurisdiction or by arbitral tribunals designated by the parties.

⁶ *See, e.g.,* Antonio Boggiano, *The Experience of Latin American States in INTERNATIONAL UNIFORM LAW IN PRACTICE: ACTS AND PROCEEDINGS OF THE 3RD CONGRESS ON PRIVATE LAW HELD BY THE INTERNATIONAL INSTITUTE FOR THE UNIFICATION OF PRIVATE LAW* 47 (1988); V. Susanne Cook, *The U.N. Convention on Contracts for the International Sale of Goods: A Mandate to Abandon Legal Ethnocentricity*, 16 J. L. & COM. 257, 263 (1997); Franco Ferrari, *CISG Case Law: A New Challenge for Interpreters?*, 17 J. L. & COM. 245, 246-47, 259 (1998); Harry M. Flechtner, *Recovering Attorneys' Fees as Damages under the U.N. Sales Convention (CISG): The Role of Case Law in the New International Commercial Practice, with Comments on Zapata Hermanos v. Hearthside Baking*, 22 N.W. J. INT'L L. & BUS. 121, 122-23 (2002); Peter Schlechtriem, *Article 7, supra* note 2, at 97; V. Susanne Cook, *The U.N. Convention on Contracts for the International Sale of Goods: A Mandate to Abandon Legal Ethnocentricity*, 16 J. L. & COM. 257, 263 (1997).

⁷ For information on the CLOUT system, and access to CLOUT abstracts, see the UNCITRAL website, http://www.uncitral.org/uncitral/en/case_law.html.

Studies in Rome⁸; and the extraordinary CISG website maintained by the Institute of International Commercial Law at Pace University School of Law.⁹ Another extremely useful tool is the “UNCITRAL Digest of Case Law on the United Nations Convention on the International Sale of Goods,” which provides an article-by-article textual guide to decisions that apply the CISG.¹⁰

The purposes of this paper are to provide an overview of one of the more important parts of the Convention, and to sample some decisions rendered thereunder in order to measure how well decision makers are observing the mandate of Article 7(1) and its goal of interpreting the CISG in a fashion that promotes uniform international application. The chosen subject is Part III, Chapter II, Section II of the CISG, entitled “Conformity of the goods and third party claims.”¹¹ This division of the Convention encompasses ten provisions (Articles 35-44) that address a central question for any regime of sales law: in what circumstances may a buyer claim that goods the seller has delivered failed to satisfy the seller’s contractual obligations? The provisions of Section II can be divided into two groups: Articles 35-37 and 41-42 describe a seller’s obligations concerning the quality and quantity of goods covered by a contract for sale, as well as the legal rights in the goods that the buyer is to receive; Articles 38-40 and 43-44 specify the procedures the buyer must follow to preserve its claims for breach of the foregoing obligations, as well as the legal effect of failing to follow those procedures. The following discussion will follow these groupings.

The provisions in Part III, Chapter II, Section II are, in actual practice, among the most important in the Convention. For example, complaints about the quality of delivered goods, a matter governed by one of those provisions (Article 35), may well be the most frequently asserted claims by buyers under the CISG.¹² Such claims are advanced not only in buyers’ suits against sellers,¹³ but also as a defense in sellers’ suits to collect

⁸ UNILEX is available free-of-charge at <http://www.unilex.info>. The service also covers the UNIDROIT Principles of International Commercial Contracts.

⁹ This website is available free-of-charge at <http://www.cisg.law.pace.edu>.

¹⁰ The Digest is available in the six official U.N. languages through the “Case Law (CLOUT)” section of the UNCITRAL website (<http://www.uncitral.org/uncitral/en/index.html>) [hereinafter UNCITRAL Digest of Case Law]. The English-language version is also available on the Pace CISG website, <http://www.cisg.law.pace.edu>.

¹¹ CISG, *supra* note 1, arts. 35-44.

¹² As of this writing, the CISG website maintained by the Pace University Center for International Legal Education (<http://www.cisg.law.pace.edu/>) lists 275 cases that have applied Article 35, which governs the seller’s obligation as to the quality of goods covered by a contract of sale. See http://www.cisg.law.pace.edu/cgi-bin/isearch?DATABASE=cases2&SEARCH_TYPE=ADVANCED&ISEARCH_TERM=articles%2F35&ELEMENT_SET=TITLE&MAXHITS=500.

¹³ See, e.g., *TeeVee Toons, Inc. v. Gerhard Schubert GmbH*, No. 00 Civ. 5189 (RCC), 2006 WL 2463537 (S.D.N.Y. Aug. 23, 2006); *Obergericht des Kantons Zug*

the price of delivered goods.¹⁴ In addition, the seller's obligations relating to the quantity and packaging of delivered goods, the property rights in the goods that the buyer is to receive, and the freedom from intellectual property claims the buyer can expect – matters encompassed by Articles 35-37 and 41-42 – are of considerable (and in some cases growing) significance. Furthermore, Section II's important and controversial rules on the steps a buyer must take to preserve its claims relating to delivered goods (Articles 38-40 and 43-44) are invoked in CISG litigation with remarkable frequency.¹⁵

Given the number of decisions that have applied Section II provisions (as well as the many scholarly commentaries thereon), and the crucial importance of the issues addressed in those provisions, it would take several full volumes to address Articles 35-44 comprehensively. This article merely provides a glimpse of a few of the significant issues that have arisen under those provisions and in so doing, identifies several of the more important themes and challenges that arise from the attempt to create a uniform international sales law.¹⁶

II. PROVISIONS GOVERNING THE SELLER'S OBLIGATIONS

A. Article 35: Seller's Obligations Concerning Quality

Article 35 of the Convention governs the seller's obligations with respect to the "quantity, quality and description" as well as the packaging of the goods being sold.¹⁷ The basic rule in this area is stated in Article 35(1): The goods must conform to the requirements of the contract. In other words, the parties' agreement defines the seller's obligations concerning the quality (as well as the quantity and packaging) of the goods that are to be delivered under the contract. Article 35(1) is thus consis-

[Cantonal Court of Appeals] July 5, 2005 (Switz.), available at <http://cisgw3.law.pace.edu/cases/050705s1.html>.

¹⁴ See, e.g., *Chicago Prime Packers, Inc. v. Northam Food Trading Co.*, 408 F.3d 894, 898 (7th Cir. 2005); *Oberster Gerichtshof [OGH] [Supreme Court]* May 23, 2005 (Austria), available at <http://cisgw3.law.pace.edu/cases/050523a3.html>.

¹⁵ For example, at the time this is written the Pace University CISG website lists 375 cases that have applied Article 39, a provision that requires a buyer to notify the seller of any claimed lack of conformity in delivered goods. See http://www.cisg.law.pace.edu/cgi-bin/isearch?DATABASE=cases2&SEARCH_TYPE=ADVANCED&I_SEARCH_TERM=articles%2F39&ELEMENT_SET=TITLE&MAXHITS=500.

¹⁶ To bring even this modest goal within practical reach, this article does not attempt to discuss certain provisions of Section II that focus on matters addressed more extensively in other parts of the Convention. Thus the article will not further discuss Article 36, which deals with questions relating to risk of loss, see Articles 66-70 of the Convention, or Article 37, which governs the seller's right to cure a non-conforming delivery prior to the contractual delivery date (an issue closely related to the matters addressed in Articles 31-34 and 48).

¹⁷ CISG, *supra* note 1, art. 35.

tent with a central principle of the Convention: the primacy of party autonomy in defining the legal rights and duties that arise from a CISG contract of sale.¹⁸ Unlike some domestic systems of sales law, the Convention imposes no special requirements for creating contractual duties relating to the quantity, quality or packaging of the goods.¹⁹ The process for creating the contractual obligations addressed in Article 35(1) is simply the general contracting process described in Part II of the CISG (“Formation of the Contract”) and in provisions of Part I.²⁰

It is notable that Article 35(1) (as well as the rest of the Convention) avoids using the term “warranty,” which in the common law tradition designates contractual obligations relating, *inter alia*, to the quality of goods to be delivered. This is an overarching drafting principle employed in the CISG: to avoid (where possible) terminology commonly used in (and thus more likely to convey unintended meanings derived from) domestic sales law, particularly where the terminology is associated with a particular legal tradition.²¹ This methodology aims at avoiding what has been termed the “homeward trend” – the tendency to see the international text of the CISG through the lens of preconceptions derived from domestic law.²² The methodology is part of the effort to create sales rules that will be interpreted and applied “autonomously” – *i.e.*, in a fashion

¹⁸ See, *e.g.*, JOHN O. HONNOLD, *UNIFORM LAW FOR INTERNATIONAL SALES UNDER THE 1980 UNITED NATIONS CONVENTION* § 4 (3d ed. 1999).

¹⁹ U.S. law, for example, once required the use of special terminology in order to impose an obligation on a seller to deliver goods of a particular quality. *Cf.* U.C.C. § 2-313(3) (abrogating any requirement the parties employ expressions such as “warrant” or “guarantee” in order to create an express warranty concerning the quality of goods covered by a contract of sale).

²⁰ See, *e.g.*, CISG, *supra* note 1, arts. 8, 9 (interpretation of the parties’ expressions and actions and the role of usages and practices in defining the parties’ obligations).

²¹ See “Guide to the Pace Database on the CISG and International Commercial Law” in the CISG website maintained by the Pace University Institute for International Commercial Law at <http://www.cisg.law.pace.edu/cisg/guide.html> (“The drafters of the CISG did not use . . . domestic analogs [for concepts employed in the Convention] because they did not want to carry them forward with their domestic baggage. The legislative intent is to have the CISG interpreted autonomously, without reference to such baggage.”); HONNOLD, *supra* note 18, § 17 at 15 (referencing “[t]he effort, in drafting the Convention, to avoid legal idioms that have divergent local meanings”).

²² The phrase “homeward trend” was coined by Professor John O. Honnold, a former Secretary of UNCITRAL who was intimately involved in the creation of the Convention and who is the leading U.S. commentator on the CISG. See John O. Honnold, *Introduction to DOCUMENTARY HISTORY OF THE UNIFORM LAW FOR INTERNATIONAL SALES 1* (John O. Honnold ed., 1989). For further discussion of the phenomenon, see Harry M. Flechtner, *The Several Texts of the CISG in a Decentralized System: Observations on Translations, Reservations and other Challenges to the Uniformity Principle in Article 7(1)*, 17 J.L. & COM. 187, 200 nn. 48-49 and accompanying text (1998).

(as expressed in Article 7(1)) that reflects the Convention's "international character" and the need for "uniformity in its application."

Article 35(2) fine-tunes the rule of party autonomy in Article 35(1) by identifying obligations concerning the quality and packaging of the goods that the parties are presumed to have intended unless they affirmatively agree otherwise. These implied quality and packaging obligations ("implied" in the sense that they arise automatically, without the parties affirmatively agreeing to them) include requirements that the goods: be "fit for the purposes for which goods of the same description would ordinarily be used; be fit for particular purposes "expressly or impliedly made known to the seller at the time of the conclusion of the contract" (unless the circumstances show a lack of reasonable reliance by the buyer on the seller's skill and judgment); have the same qualities as any "sample or model" that the seller has held out to the buyer; and be "contained or packaged in the manner usual for such goods or, where there is no such manner, in a manner adequate to preserve and protect the goods."²³

The second and third of the implied obligations described in Article 35(2) – that the goods be fit for particular purposes disclosed by the buyer to the seller by the time the contract was concluded, and that the goods conform to any sample or model that the seller had held out to the buyer – do not arise automatically in every sale: they are triggered only if one of the parties has taken specified actions. Thus Article 35(2) is only implicated if the buyer informs the seller, at or before the time of contract conclusion, that it intends to use the goods for a particular purpose. Similarly, Article 35(2)(c) is triggered only if the seller shows the buyer a sample or model of the goods covered by the contract. The obligations in Article 35(2)(a) and (d), in contrast, arise in every contract for sale governed by the Convention, unless the parties agree otherwise. Because they describe general obligations applicable in the full range of sale of contracts governed by the CISG, subparts (a) and (d) by necessity employ very broad and flexible standards: Article 35(2)(a) refers to the "ordinary" purposes of goods of the "same description"; Article 35(2)(d) cites the "usual" manner of containing or packaging the goods or, in the alternative, a manner that is "adequate to preserve and protect them."²⁴ As mentioned above, the drafters of the Convention attempted to create a text that avoids confusion with domestic law concepts, that can be interpreted autonomously from an international perspective, and that can be applied uniformly by fora working in vastly different systems and legal traditions. The necessarily vague standards in Article 35(2)(a) and (d), however, create a real danger that they will be interpreted in a manner that unconsciously reflects the training and conceptions – what might be called the "ideology" – of the domestic law in which those interpreting

²³ CISG, *supra* note 1, art. 35(2)(a)-(d).

²⁴ *Id.* art. 35(2)(d).

and applying them are trained. In other words, these provisions are particularly susceptible to the pernicious influence of the “homeward trend.”

This is a particular concern with respect to Article 35(2)(a), which describes one of the most substantively significant concepts of the Convention – the basic standard of quality that a buyer is entitled to expect (unless it affirmatively agrees to forego it) in sales governed by the CISG. A prominent issue that has arisen under Article 35(2)(a) illustrates the intractability of the “homeward trend” when tribunals interpret this provision, even where the interpreters have made good faith efforts to avoid the problem. The issue is whether a seller who knows or should know that the buyer intends to resell in its own State is obliged to deliver goods that meet the applicable regulatory requirements of that State if the parties did not refer to those regulations in their negotiations or final agreement. The argument for the buyer is that, if the goods purchased for resale purposes cannot legally be resold in the intended jurisdiction, the goods are not “fit for the purposes for which goods of the same description would ordinarily be used” as per Article 35(2)(a). The seller’s argument is that it cannot be expected to know the laws of the buyer’s State but the buyer can; thus as long as the goods could be resold in the seller’s own State, the seller’s obligations under Article 35(2)(a) should be deemed fulfilled.

The highest German court with jurisdiction in CISG cases – the Bundesgerichtshof (“BGH”) – has addressed this issue in one of the best-known decisions in CISG jurisprudence: the “Mussels Case.”²⁵ The Swiss seller in this case delivered mussels from New Zealand to the German buyer’s storage facility in Germany, where they were inspected and determined to contain cadmium at levels exceeding those recommended (but not mandated) in German health regulations. After notifying the seller of the cadmium problem,²⁶ the buyer refused to pay and asked the seller to take the mussels back. In other words, the buyer attempted to avoid the contract.²⁷ Avoidance requires the buyer to show that the seller has committed a “fundamental breach,”²⁸ but in the seller’s subsequent action to recover the price, the BGH found that the buyer had failed to show that the seller had breached at all. The buyer argued that the excessive cadmium levels in the mussels meant that the seller failed to meet its obligation under Article 35(2)(a) to deliver goods “fit for the purposes for which goods of the same description would ordinarily be used” (as well as its Article 35(2)(b) obligation to deliver goods “fit for any particu-

²⁵ Bundesgerichtshof [BGH] [Federal Court of Justice] March 8, 1995 (F.R.G.), available at <http://cisgw3.law.pace.edu/cases/950308g3.html>.

²⁶ The buyer would have lost the right to remedies based on the elevated cadmium levels had it not given the seller notice specifying the problem within a reasonable time after the buyer discovered (or ought to have discovered) it. See *infra* Part III.

²⁷ CISG, *supra* note 1, art. 81.

²⁸ *Id.* arts. 41(1)(a), 25.

lar purposes expressly or impliedly made known to the seller at the time of the conclusion of the contract”). The BGH, however, held that Article 35(2) did not, on the facts of this case, require the seller to deliver goods that complied with the “specialized” public regulations of the buyer’s jurisdiction. The court reasoned that the seller cannot normally be expected to be familiar with those requirements (and thus should not be liable for failure to meet those standards) unless one of three exceptions applied: 1) if the seller’s own jurisdiction imposed the same standards; 2) if the buyer had pointed out the regulations to the seller; or 3) if the seller knew or should have been aware of the standards because of “special circumstances” – i.e., the seller maintained a branch in the buyer’s jurisdiction, had a long-term business relationship with the buyer, or regularly exported to or promoted its products in the buyer’s jurisdiction. Because none of these exceptions were applicable, the court affirmed the lower courts’ ruling that the seller was entitled to collect the price of the mussels.

The BGH has confirmed this opinion in later decisions,²⁹ and it has been followed outside Germany. For example, it was invoked by two different tribunals that heard a dispute between a U.S. buyer and an Italian seller over the purchase of medical equipment that failed to meet U.S. safety regulations.³⁰ The dispute was submitted to arbitration, where the panel cited the BGH Mussels Case and concluded that the situation fell into one of the decision’s described exceptions to the usual rule that the seller is not responsible for meeting public law standards applicable to the goods in the buyer’s jurisdiction. The panel held that the Italian seller was required, under Article 35, to comply with the U.S. regulations because there were “special circumstances” suggesting that the seller should have been familiar with those regulations.³¹ The seller challenged this holding in a U.S. federal court, arguing that the arbitral panel had not properly applied the approach of the BGH. The U.S. court, however, refused to overturn the ruling of the arbitral panel, reasoning that “[i]t is clear from the arbitrators’ written findings . . . that they carefully considered [the BGH] decision and found that this case fit the exception and not the rule as articulated in that decision.”³² Thus both the arbitration panel and the U.S. court accepted the approach adopted by the BGH in the Mussels Case. These are encouraging examples of fora working to

²⁹ See, e.g., Bundesgerichtshof [BGH] [Federal Court of Justice] March 2, 2005 (F.R.G.), available at <http://cisgw3.law.pace.edu/cases/050302g1.html>.

³⁰ See *Med. Mktg Int’l Inc. v. Internazionale Medico Scientifica, S.r.l.*, No.CIV.A. 99-0380, 1999 WL 311945 (E.D. La. May 17, 1999).

³¹ *Id.* (suggesting that the seller maintained a branch office in the U.S. – one of the “special circumstances” which, according to the BGH opinion in the Mussels Case, constituted an exception to the rule that the seller is not expected to know the public law regulations of the buyer’s jurisdiction.)

³² *Id.* at *2.

view the Convention from an international perspective³³ as mandated by CISG Article 7(1).³⁴

Thus it is clear that the *Mussels Case* has become an internationally-accepted guide to the question of whether a seller is obligated under Article 35(2) to deliver goods that meet the public law standards in the buyer's jurisdiction. The decision fully deserves the respect and authority it has been accorded: it is the well-reasoned and carefully-researched product of an extremely well-qualified tribunal – the highest court with jurisdiction in CISG matters in one of the largest and most commercially-sophisticated CISG Contracting States, and a forum with extensive experience interpreting and applying the Convention.³⁵ In addition, the court considered “a broad spectrum of German and foreign authorities”³⁶ on the question of whether a seller must comply with the public law standards of the buyer's jurisdiction. The deference due a CISG opinion is based on how well it satisfies Article 7(1)'s mandates to interpret the Convention with regard for its international character and the need to

³³ See Peter Schlechtriem, Commentary, *Conformity of the goods and standards established by public law: Treatment of foreign court decision as precedent*, <http://cisgw3.law.pace.edu/cases/990517u1.html> (“the decision of the U.S. federal court is remarkable because it treats a foreign court decision as precedent, or at the least as ‘authority’. . . . In other words, it treated the CISG as a kind of international common law, the application and development of which is in the hands of the courts of all nations party to the Convention, which must therefore also give consideration to decisions made in other countries - in this case, ‘the law as articulated by the German Supreme Court.’”).

³⁴ U.S. courts have not always adopted this approach. See Joseph Lookofsky & Harry Flechtner, *Nominating Manfred Forberich: The Worst CISG Decision in 25 Years?* 9 VINDOBONA J. INT'L COMM. L. & ARB. 199 (2005); see generally Harry M. Flechtner, *The CISG in U.S. Courts: The Evolution (and Devolution) of the Methodology of Interpretation*, in QUO VADIS CISG?: Celebrating the 25th Anniversary of the United Nations Convention on Contracts for the International Sale of Goods (Franco Ferrari ed., 2005).

³⁵ The *Mussels Case*, decided in 1995, was at least the third CISG decision issued by the BGH, in addition to four decisions it had issued earlier that applied one of the CISG's predecessor sales conventions, the “Uniform Law for International Sales” (ULIS). See Pace Law School CISG Database, Country Case Schedule, <http://www.cisg.law.pace.edu/cisg/text/caselit.html#Bundesgerichtshof> (last visited Mar. 23, 2008). The BGH issued at least twenty additional CISG decisions prior to its March 2, 2005 decision reconfirming the approach adopted in the *Mussels Case* (see *supra* note 29 and accompanying text).

³⁶ Peter Schlechtriem, *Uniform Sales Law in the Decisions of the Bundesgerichtshof*, <http://cisgw3.law.pace.edu/cisg/biblio/schlechtriem3.html>. In addition to a large number of German authorities, the BGH cited French and English-language commentaries in support of the proposition that a seller normally need not supply goods that meet the special public law standards of the buyer's jurisdiction. See the *Mussels Case*, *supra* note 25, § II.1.b.bb.

promote uniformity in its application.³⁷ Consulting foreign authority when interpreting the CISG is a crucial technique for pursuing the Article 7(1) mandates – and the fact that the BGH opinion did so is an excellent gauge of its success in this endeavor.

Despite the admirable achievements of the BGH in the *Mussels Case*, the opinion nevertheless contains elements that suggest, at a deep and very subtle level, a failure to realize completely an international perspective on the Convention – in other words, elements that suggest the “homeward trend.” The court announced a moderately elaborate system for dealing with the issue of a seller’s implied responsibility for ensuring that goods meet the standards imposed by the public laws of the buyer’s jurisdiction: a general rule (seller not responsible unless it expressly promises to meet these standards) and three exceptions to that general rule (seller is impliedly responsible under Article 35(2) if the seller’s own jurisdiction has equivalent requirements, if the buyer draws the seller’s attention to the standards, or if “special circumstances” – i.e., the seller maintains a branch in the buyer’s jurisdiction, or regularly exports or markets its products there – puts the seller on notice of the standards). The court announced this system despite the fact that it did not have the benefit of extensive, or even scattered, case law on the issue from outside of Germany (although it could, and did, consult German and foreign commentary on the topic), and even though the situation before it did not implicate much of the announced doctrine (specifically, the case did not trigger any of the three exceptions to the court’s general rule).

This approach of announcing an elaborate doctrine that goes well beyond what is necessary to decide the current dispute, despite the fact that experience with the issue is limited, seems typical of, and appropriate for, a legal system’s highest court: such a tribunal has the responsibility and the power to provide authoritative guidance to lower tribunals. But the BGH is not the final arbiter in the legal system of the Convention. There is no such final arbiter, no “Supreme Court of the CISG” with authority over all other tribunals that deal with disputes governed by the Convention. Rather, the CISG is applied in a decentralized and “federal” global judicial system³⁸ in which a tribunal – whatever its authority within its own domestic system – enjoys, at best, a power to persuade other fora outside its jurisdiction. Furthermore, for the Convention’s purposes, it is extremely important that interpretation be informed by diverse perspectives, in order that uniform international sales law indeed be acceptable (and uniformly interpreted) in the great variety of legal and

³⁷ Harry M. Flechtner, *Recovering Attorneys’ Fees as Damages under the U.N. Sales Convention (CISG): The Role of Case Law in the New International Commercial Practice, with Comments on Zapata Hermanos Sucesores, S.A. v. Hearthside Baking Co.*, 22 Nw. J. INT’L L. & BUS. 121, 144-45 (2002).

³⁸ See Flechtner, *The Several Texts of the CISG in a Decentralized System*, *supra* note 22 nn. 85-91 and accompanying text.

economic systems around the globe. For example, from the perspective of developing countries it may well be important that considerations of the parties' relative sophistication and bargaining power play a role in determining when a seller should be held responsible for complying with standards imposed in the buyer's jurisdiction. Those considerations do not appear in the rule announced by the BGH. The court can hardly be blamed that its opinion does not reflect developing countries' perspective, as that perspective was not well represented in the available CISG resources when the opinion was rendered. But the lack of such input counsels caution before announcing an elaborate rule that appears to have been intended to be exhaustive.³⁹ For example, the BGH might have treated the elements it identified – the unlikelihood that sellers will normally be familiar with the special public law regulations of the buyer's jurisdiction, and the exceptional circumstances where such familiarity can be expected – as considerations for a rule to be developed after the issue had been explored by other tribunals, and confined itself to announcing merely that the seller had not breached the contract on the facts of the particular case. Such an approach might have been more in keeping with the mandates of Article 7(1) and the purposes of the Convention.

The foregoing, however, is hardly a criticism of the BGH opinion in the *Mussels Case*. In fact, that opinion is one of the most sophisticated, successful and “international” applications of the CISG to date – a remarkable achievement, particularly given that the decision was rendered early in the development of CISG jurisprudence. Indeed, the foregoing analysis merely illustrates how intractable – indeed (in its subtler forms) inescapable – the problem of the “homeward trend” is. A commentator from the United States, where the courts have often been notably unsuccessful in achieving an international perspective on the CISG, and have at times even embraced an interpretational approach that incorporates a *conscious* “homeward trend”,⁴⁰ is hardly in a position to throw stones.

B. *Articles 41 & 42: Seller's Obligations Concerning Third Party Claims of Ownership and Infringement of Intellectual Property Rights*

Article 41 of the CISG obliges the seller to “deliver goods which are free from any right or claim of a third party, unless the buyer agreed to

³⁹ As Professor Schlechtriem has stated, “one must nonetheless hope that this decision is not yet the final word on this question.” Schlechtriem, *supra* note 36, at 12. The BGH, of course, might well deem consideration of the parties' relative sophistication and power relevant in determining whether a party has acted in good faith, but the question of whether the Convention imposes on parties an obligation to act in good faith is itself controversial, and invoking the good faith doctrine would smack of a civil law (and particularly German) approach.

⁴⁰ See Lookofsky & Flechtner, *Nominating Manfred Forberich*, *supra* note 40; Flechtner, *The CISG in American Courts*, *supra* note 40.

take the goods subject to that right or claim.”⁴¹ In other words, the seller must transfer the property in (good title to) the goods to the buyer, so that the buyer can enjoy the use of what it purchased without interference from another claiming to be the true owner of the goods. Article 41, however, deals only with the seller’s *obligations* with regard to transferring ownership rights – the question of what property the seller has in fact transferred to the buyer is, as Article 4(b) explicitly declares, beyond the scope of the Convention, and is left to applicable (presumably domestic) law. Thus, non-Convention law governing the question of who owns goods that have been delivered pursuant to a contract of sale must be consulted to determine whether the seller has met or breached its obligations under Article 41 of the Convention. The obligations imposed by Article 41 are “implied” in the sense that they arise even if the parties have not affirmatively expressed the intent to impose them on the seller. The parties can, however, relieve the seller of those obligations by derogating from Article 41 (just as they can derogate from any other provision of the CISG except Article 12).⁴² One can imagine a variety of issues that could arise under Article 41,⁴³ but in fact only a modest number of decisions have addressed the provision.⁴⁴

The second sentence of Article 41 makes a vital distinction: it declares that, if a third party’s right or claim “is based on industrial property or other intellectual property, the seller’s obligation is governed by article 42.”⁴⁵ Article 42(1), in turn, requires a seller to deliver goods that are “free from any” such right or claim, but the obligation is subject to a number of severe restrictions: the seller is liable for a third party’s intellectual property claim only if the seller “knew or could not have been unaware” of such claim, and even then only if the claim arose under the laws of the State designated by Article 42(1)(a) or (b).⁴⁶ Under these subsections, the relevant laws are those of either the State where, at the time of the conclusion of the contract, the parties contemplated the goods would be “used or resold,” or (absent such contemplation) “the State where the buyer has his place of business.” Finally, Article 42(2) – appar-

⁴¹ CISG, *supra* note 1, art. 41.

⁴² *See id.* art. 6.

⁴³ For example, the BGH has recently noted that whether there are limits to the seller’s liability under Article 41 based on the invalidity of a third party’s claim to the goods – i.e., whether the seller is liable if a third party asserts a claim “pulled out of thin air” – is a matter of theoretical dispute, although in the case before it the court found that resolving issue was unnecessary. Bundesgerichtshof [BGH] [Federal Court of Justice] Jan. 11, 2006 (F.G.R.), *available at* <http://cisgw3.law.pace.edu/cases/060111g1.html>. *See* discussion *infra* Part III.

⁴⁴ As of this writing, the CISG website lists eleven decisions that have invoked Article 41. *See* <http://www.cisg.law.pace.edu/cisg/text/digest-cases-41.html>.

⁴⁵ CISG, *supra* note 1, art. 41.

⁴⁶ *Id.* art. 42(1).

ently building on assumption of risk principles⁴⁷ – relieves the seller of even the limited obligations imposed by Article 42(1) if the buyer “knew or could not have been unaware” of the third party’s right or claim when the contract was concluded (Article 42(2)(a)); the seller also has no liability if the buyer furnished “technical drawings, designs, formulae or other such specifications” to be used in producing the goods, and the third party’s right or claim arose from the seller’s compliance with those instructions (Article 42(2)(b)).

As of this writing, Article 42 has generated even less litigation than Article 41.⁴⁸ That may change, however, as the importance of intellectual property in global commerce grows, particularly if questions concerning the extent to which the CISG governs transactions in computer software are resolved in favor of the Convention’s applicability.⁴⁹ The protections offered by Article 42 are quite modest, and perhaps inadequate to offer a buyer reasonable safeguards if the goods it purchases turn out to violate some third party’s intellectual property rights. In particular, limiting the buyer’s protection to intellectual property claims of which the seller “knew or could not have been unaware” presents very difficult proof problems to a buyer asserting a claim under Article 42. Incidentally, most authorities believe that the burden of proving the elements of the CISG provisions is an issue that is itself governed by the Convention,⁵⁰

⁴⁷ See UNCITRAL Digest of case law on the United Nations Convention on the International Sale of Goods Art. 42 ¶ 1, http://www.uncitral.org/uncitral/en/case_law/digests/cisg.html.

⁴⁸ As of this writing, the CISG website lists only ten decisions that have invoked Article 42. See <http://www.cisg.law.pace.edu/cisg/text/digest-cases-42.html>.

⁴⁹ For commentary on this issue, see for example Franco Ferrari, *The CISG’s sphere of application: Articles 1-3 and 10*, in *THE DRAFT UNCITRAL DIGEST AND BEYOND: CASES, ANALYSIS AND UNRESOLVED ISSUES IN THE U.N. SALES CONVENTION* 21, 77-78 (Franco Ferrari, Harry Flechtner & Ronald A. Brand eds., 2004); JOSEPH LOOKOFKY, *UNDERSTANDING THE CISG IN THE USA: A COMPACT GUIDE TO THE 1980 UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS* § 2.5 (2d ed. 2004); Peter Schlechtriem, *Article 1*, in *COMMENTARY ON THE UN CONVENTION*, *supra* note 2, at 28. Frank Diedrich, *The CISG and Computer Software Revisited*, 6 *VINDOBONA J. INT’L COMM. L. & ARB.* 55 (Supp. 2002); Arthur Fakes, *The Application of the United Nations Convention on Contracts for the Sale of Goods to Computer, Software and Database Transactions*, 3 *SOFTWARE L.J.* 559 (1990); L. Scot Primak, *Computer Software: Should the U.N. Convention on Contracts for the International Sale of Goods Apply? A Contextual Approach to the Question*, 11 *COMPUTER/L.J.* 197 (1991).

⁵⁰ See Franco Ferrari, *Scope of application: Articles 4-5*, in *DRAFT UNCITRAL DIGEST AND BEYOND*, *supra* note 49, at 96; Franco Ferrari, *Burden of Proof under the United Nations Convention on Contracts for the International Sale of Goods (CISG)*, in *REVIEW OF THE CONVENTION ON CONTRACTS FOR THE INT’L SALE OF GOODS* 1 (2000-2001), available at <http://www.cisg.law.pace.edu/cisg/biblio/ferrari5.html>; Sonja Krusinga, (NON-)CONFORMITY IN THE 1980 UN CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS: A UNIFORM CONCEPT? 157-86 (2004); Peter

although with very few exceptions the matter is not expressly addressed and must be resolved by referring to the general principles upon which the Convention is based pursuant to Article 7(2). I am among those (apparently few) who argue that the matter is beyond the scope of the CISG and is governed by applicable non-Convention law.⁵¹ It is likely, however, that the burden of proving the elements of Article 42 would be allocated to the buyer under either approach. If a buyer is concerned about possible intellectual property problems with the goods, it may be well advised to derogate from Article 42 and substitute more robust contractual protections – although extracting such a concession from the seller will certainly cost the buyer something.

III. THE BUYER'S OBLIGATION TO EXAMINE THE GOODS AND GIVE NOTICE OF LACK OF CONFORMITY – ARTICLES 38-40 & 43-44

When goods are delivered, Article 38(1) imposes an obligation on the buyer to “examine the goods, or cause them to be examined, within as short a period as is practicable in the circumstances.”⁵² Article 39(1) requires a buyer to give the seller notice specifying a claimed lack of conformity in delivered goods “within a reasonable time after [the seller] has discovered it or ought to have discovered it.”⁵³ These two articles are

Schlechtriem, *Article 4*, in COMMENTARY ON THE UN CONVENTION, *supra* note 2, at 65; Ulrich Magnus, *General Principles of UN-Sales Law*, 3 INT'L TRADE & BUS. L. ANN. 33, 52 & nn. 86-91 (1997). See also Bundesgerichtshof [BGH] [Federal Court of Justice] January 9, 2002 (F.R.G.), *available at* <http://cisgw3.law.pace.edu/cases/020109g1.html>; Bundesgerichtshof [BGH] [Federal Court of Justice] June 30, 2004 (F.R.G.), *available at* <http://cisgw3.law.pace.edu/cases/040630g1.html>; UNCITRAL Digest of case law, *supra* note 47, art. 4, ¶ 4 n. 9.

⁵¹ See Harry M. Flechtner, *Moving through Tradition Towards Universalism under the U.N. Sales Convention (CISG): Notice of Lack of Conformity (Article 39) and Burden of Proof in the Bundesgerichtshof Opinion of 30 June 2004*, in LIBER MEMORIALIS PETAR ŠARČEVIĆ UNIVERSALISM, TRADITION AND THE INDIVIDUAL 459, 466-70 (J. Erauw, V. Tomljenović & P. Volken eds., 2006); W. Khoo, *Article 2*, in COMMENTARY ON THE INTERNATIONAL SALES LAW: THE 1980 VIENNA SALES CONVENTION 39 (C.M. Bianca & M.J. Bonell eds. 1987) (citing Conference on Contracts for the International Sale of Goods, Vienna, Mar. 10-Apr. 11 1980, 295-98, U.N.Doc. A/CONF.97/19 (1981); UNCITRAL Digest of case law, *supra* note 47, art. 4, ¶ 4 n. 10.

⁵² The other subsections of Article 38 (Article 38(2) and (3)) contain rules that defer the time for the buyer's examination in certain circumstances.

⁵³ The other subsection of Article 39 (Article 39(2)) imposes a two-year final deadline (measured from the time the goods were “actually handed over to the buyer”) for giving the required notice of lack of conformity, unless this two-year time limit is “inconsistent with a contractual period of guarantee.” The two-year cut-off for giving notice applies regardless of when a buyer “ought to have discovered” a claimed lack of conformity. Thus, absent an inconsistent “contractual period of guarantee,”

among most frequently-invoked CISG provisions in reported decisions. At the time this is written, the CISG website maintained by the Pace University Institute for International Commercial Law lists 245 decisions that cite Article 38 and 375 decisions that invoke Article 39. This “popularity” may have its roots in the consequences that Article 39(1) imposes if a buyer fails to satisfy the provision’s notice requirements: the buyer loses the right to “rely on” a lack of conformity for which it did not give the seller adequate notice. In other words (subject to some exceptions discussed below), the buyer loses the right to all remedies for a claimed lack of conformity if the notice requirement is not satisfied.⁵⁴ The very severe consequences attached to the failure to give the required notice, combined with Article 39’s quite vague standards for adequate notice – When “ought” a buyer have discovered a lack of conformity? How long is the “reasonable time” for giving notice? How specific must the notice be in describing the lack of conformity? – mean that sellers defending a claim that the goods are non-conforming have strong reasons for wanting to claim a lack of adequate notice, and can often make a plausible argument on that score.⁵⁵ Article 38 is frequently invoked along with Article 39 because the time that Article 38 sets for examining the goods will often be the time the buyer “ought to have discovered” a lack of conformity – and thus will set the clock ticking on the buyer’s reasonable time for giving notice under Article 39(1).

Some decisions – particularly decisions by German tribunals – have set standards for the “reasonable time” within which Article 39(1) notice must be given, as well as for the specificity with which such notice must describe the claimed lack of conformity, that appear unduly strict.⁵⁶ As I have stated elsewhere:

The ultimate goal of the Convention is not to induce buyers to give the notice required by Article 39, but rather to validate the reasonable expectations of the parties to an international sales contract. . . . The consequences of a finding that the buyer failed to give proper notice are substantial: the loss of all remedies for even the most real and serious non-conformities. Thus, a decision finding that a buyer

two years after delivery a buyer will lose all rights to claim that the goods were non-conforming even if the buyer could not reasonably have discovered the lack of conformity within those two years.

⁵⁴ It is worth noting that Article 39 imposes a notice requirement on a “defect-by-defect” basis. Thus a buyer make give adequate notice to the seller as to some but not all claimed non-conformities in the goods; in that case, the buyer retains its rights with respect to defects that have been the subject of proper notice, but loses rights as to defects for which adequate notice was not given.

⁵⁵ See Harry M. Flechtner, *Buyer’s obligation to give notice of lack of conformity (Articles 38, 39, 40 and 44)*, in DRAFT UNCITRAL DIGEST AND BEYOND, *supra* note 49, at 377-78.

⁵⁶ *Id.* at 379-85.

has failed to fulfill its Article 39 notice requirement, even where the seller has suffered no prejudice because of tardy or vague notice, elevates a secondary and instrumental duty under the Convention to one that is on a par with, and even supersedes, a primary and ultimate duty under the CISG – the seller’s obligation to deliver goods that conform to the contract. . . . That is a miscarriage of justice that presents a more than trivial threat to the achievement of a workable and widely-accepted system of international sales law.⁵⁷

A recent decision (January 11, 2006) in which the BGH applied a provision that mirrors Article 39(1) illustrates the continuing challenges surrounding the Convention’s notice requirements. The provision at issue, Article 43(1), obliges a buyer to notify the seller of third party claims that the buyer believes give rise to a violation of the seller’s obligations under Articles 41 or 42⁵⁸; the notice must “specify[] the nature of the right or claim of the third party” and must be given “within a reasonable time after [the buyer] has become aware or ought to have become aware of the right or claim.” Thus the obligation imposed by Article 43(1) closely parallels that described in Article 39(1) – except that Article 39(1) deals with notice that the seller has violated its obligations under Article 35, whereas Article 43(1) addresses notice that the seller failed to comply with Articles 41 or 42.⁵⁹ Because Articles 39(1) and 43(1) are so similar in purpose, approach and wording, the two provisions should be construed in a similar fashion, and case law interpreting one provision is relevant to the interpretation of the other.⁶⁰

In the January 11, 2006 BGH case,⁶¹ a Dutch dealer had contracted to purchase a used automobile from a German seller. The seller delivered the car in early March 1999, but on August 23 the police impounded the vehicle on suspicion it was stolen. By letter dated October 26, 1999 – slightly more than two months later – the buyer demanded that the seller refund the purchase price, but the seller refused the demand. In letters to the buyer dated May 16, and May 24, 2000, the insurance company that had covered the loss of the owner from whom the automobile had allegedly been stolen (and who thus succeeded to the owner’s rights) demanded turnover of the vehicle. On December 8, 2000 the buyer sued

⁵⁷ *Id.* at 385-86, 391.

⁵⁸ For a discussion of Articles 41 and 42, see *supra* Part II.B.

⁵⁹ Claims that the seller has violated Articles 41 or 42 are much rarer than claims that the goods are non-conforming under Article 35. See *supra* Part II.A. As a result, many more decisions have applied Article 39(1) than have addressed Article 43(1).

⁶⁰ See UNCITRAL Digest of case law, *supra* note 47, art. 43 ¶ 2 (“those called upon to interpret article 43(1) . . . may look for guidance from the numerous decisions that apply the parallel provisions of article 39 . . .”).

⁶¹ BGH Jan. 11, 2006, *supra* note 43.

the seller in Germany for a refund,⁶² arguing that the seller had breached its obligation under Article 41 to deliver goods that were “free from any right or claim of a third party. . . .” The trial court found in favor of the buyer, but the regional appeals court (Oberlandesgericht (“OLG”)) reversed. It held that the buyer had failed to notify the seller of the third party claim within a reasonable time after the buyer became aware of the claim as required by Article 43(1), and thus that the buyer had lost the right to “rely on” the claimed breach of Article 41. In reaching its conclusions, the OLG appears to have applied a theory (sometimes referred to as the “noble month” approach) that sets one month as the presumptive “reasonable time” for a buyer to give notice, although the period might be longer or shorter if a party can demonstrate unusual circumstances.⁶³ Thus (as recounted in the subsequent BGH decision) the OLG held that, because the police seized the car on August 23, the buyer should have notified the seller of that fact “within a month at the latest, i.e., by September 23, 1999.”⁶⁴ Because the buyer did not give notice until October 26, Article 43(1) was not satisfied. Similarly, the OLG stated, the buyer lost any rights under Article 41 based on the insurance company’s claim to the car (which the insurance company asserted in letters to the buyer dated May 16 and 24, 2000) because the buyer had not complied with “a notice deadline of at most one month”⁶⁵ – the first notice of the insurance company’s claim that the buyer gave the seller was the complaint in the lawsuit, filed on December 8, 2000. The OLG therefore dismissed the buyer’s claim.

On appeal, the BGH appears to have rejected the OLG’s presumption that the usual “reasonable time” for giving notice is the “noble month.” The BGH commented: “The circumstances of each individual case are decisive in measuring the time period, so that a schematic fixing of the time for the notice of defect is impossible.”⁶⁶ This is an encouraging development as it is improper to create specific presumptions regarding what is a reasonable time when those presumptions are not found in the text of the Convention itself. It would be different if examination of an internationally diverse set of decisions had revealed that tribunals generally found notice given beyond a month was too late unless there were special circumstances; however, adopting a presumption merely because it seems sensible to the decision-maker, and would make analysis easier, is an invasion of the legislative function, as well as an infringement on the sovereignty of States that ratified the Convention based on a text that did not include the presumption. By adopting the “noble month” approach,

⁶² The buyer subsequently withdrew the complaint in this suit and then refiled – although this has no bearing on the matters discussed in the text.

⁶³ See Flechtner, *Buyer’s obligation*, *supra* note 55, at 379.

⁶⁴ BGH Jan. 11, 2006, *supra* note 43.

⁶⁵ *Id.*

⁶⁶ *Id.*

the OLG imposed on the Dutch buyer a presumptive deadline recognized primarily (or even exclusively) by German courts. The unfairness of that, as well as its inconsistency with the mandate in Article 7(1) to interpret the CISG with regard for its “international character” and “the need to promote uniformity in its application,” is manifest.

Although the BGH rejected the “noble month” presumption behind the OLG’s analysis, it nevertheless affirmed the lower court’s decision, and it did so in a fashion that in effect adopts the noble month presumption in the case before it. In reviewing the OLG’s holding that the buyer had failed to give timely notice of the police seizure of the car, the BGH stated:

The buyer must be granted a certain time period within which he can get a general picture of the legal situation . . . ; the type of legal defect must also be considered. Based on these standards, the [OLG] determined legally correctly that a time period of more than two months after the seizure was not within a reasonable period of time. . . . [E]ven for a legal layperson such as [Buyer], the suspicion of theft, made obvious by the police seizure, was easily recognized as an especially significant occurrence without the need to secure legal advice. It was possible and reasonable for [Buyer] to inform [Seller] of the suspicion of theft by describing the actual occurrence, so that [Seller] would be put in a position to refute any claims by a third party as soon as possible, which is the purpose of the notice obligation. . . .⁶⁷

Rather than reviewing *de novo* the OLG’s conclusion that the buyer’s notice was too late (since that conclusion was based on improper methodology – the “noble month” presumption), the BGH in essence presumed that the lower court was correct unless the buyer could show differently. This, I submit, ratifies rather than repudiates the lower court’s approach.⁶⁸ There is nothing in the foregoing analysis that explains why the buyer’s notice should be deemed too late, beyond the fact that it would have been “possible and reasonable” for the buyer to give earlier notice, and that earlier notice would have served what the court asserts is the purpose of notice: to allow the seller “to refute any claims by a third party as soon as possible. . . .” Requiring the buyer to give notice of third party claims “as soon as possible” is a surprising (to say the least) interpretation of the phrase “reasonable time” in Article 43(1). Rather than

⁶⁷ *Id.*

⁶⁸ The BGH’s approach to the question whether the buyer was late in giving notice of the insurance company’s claim to the car is even starker in its deference to the OLG’s improperly-founded analysis, and thus even clearer in its *de facto* ratification of the invalid “noble month” approach: the court merely states, in conclusory fashion, that the buyer “did not meet the deadline of Art. 43(1) CISG triggered by the [insurance company’s] turnover demand of May 2000, as correctly stated by the Court of Appeals.” *Id.*

asking if the seller had suffered, or even was likely to have suffered, any actual prejudice as a result of not receiving earlier notice,⁶⁹ the court relies on the theoretical possibility of such prejudice to justify a strict, mechanical and formalistic application of the notice requirement.

The result is not, in my view, desirable: the buyer in the automobile case may well have ended up with nothing for the thousands it paid the seller, even though Article 41 was specifically designed to protect the buyer against this eventuality. This extreme result flows entirely from the fact that the buyer's lawyer was a little more than a month late in giving the seller notice – and this despite the fact that there is no evidence the seller suffered any ill consequences from failing to receive earlier notice. Because the notice requirement shields the seller from liability for delivering stolen goods, those from whom the seller might have sought reimbursement had it been found liable – right down to the thief that stole the car – may well be allowed to retain their profits, even if they acted improperly.⁷⁰ I would not reach such a patently unjust result absent a much more compelling case that the buyer failed its notice obligations. In my view, the BGH's approach to the notice issue produced neither fairness nor confidence in the international commercial system, and it did not (as mandated by Article 7(1)) have regard for promoting “the observance of good faith in international trade.”

A substantially more egregious example – perhaps more properly described as an “outlier” – illustrating the stiffly formalistic and pro-seller approach that some German courts have taken to the buyer's obligation to notify the seller of breach can be found in a 2005 trial court decision involving the sale of used shoes to an Ugandan buyer.⁷¹ The contract covered a large number of shoes – “360 bags of used shoes, quality class one and 360 bags of used shoes, quality class two (9,000 kg each),” for a total price (including freight) of 30,750 ₪.⁷² The contract provided for delivery “FOB Mombassa, Kenya.” According to the court, “quality class one” required “used shoes in a very good condition, i.e., without rips or holes and if at all with only slight, minor signs of use” and “quality class two” required “shoes of good quality, i.e., with slight signs of use, but also without rips or holes.”⁷³ The goods arrived at Mombassa on April 26, 2004; the buyer paid the final installment on the purchase price on May 18, and the seller transferred the bill of lading on May 24. The buyer then shipped the shoes to Uganda, where it examined them on June 16 and

⁶⁹ I have argued elsewhere that, if a buyer can show that the seller suffered no prejudice from late notice, the notice should be deemed given within a “reasonable time.” See Flechtner, *Buyer's obligation*, *supra* note 55, at 387-88.

⁷⁰ *But see infra* text accompanying notes 95-98.

⁷¹ Landgericht Frankfurt [LG] [Trial Court] April 11, 2005 (F.R.G.), *available at* <http://cisgw3.law.pace.edu/cases/050411g1.html>.

⁷² *Id.*

⁷³ *Id.*

discovered they did not conform to the contract – the shoes were “defective and unusable,” and included such useless items as “in-line skates and shoe trees.”⁷⁴ Indeed, on June 24 the Uganda National Bureau of Standards refused import of the shoes because of their “bad and unhygienic condition,” declaring them “unfit for usage” and recommending “destruction at the parties’ cost.”⁷⁵ In the meantime, the buyer had notified the seller of the goods’ lack of conformity on the day after it examined the goods (June 17), and it sent another notice elaborating on the problems on June 23. The seller, apparently, offered no relief, and so on July 2 the buyer notified the seller that it was avoiding the contract. The buyer then sued to recover the purchase price it had paid⁷⁶ plus damages for “costs incurred such as customs, handling fees and freight costs” and interest.⁷⁷

The court found that the seller had committed a fundamental breach of contract⁷⁸ which is a prerequisite for the buyer to avoid the contract.⁷⁹ The court specifically noted that the poor condition of the shoes was not due to damage in storage because “the Seller itself has stated that shoes are not perishable items and therefore cannot ‘rot’ in a container in a warehouse.”⁸⁰ The court, however, ruled that the buyer had lost all rights with respect to the seller’s breach – not just the right to avoid the contract, but the right to *any* remedy – because “the Buyer did not examine the goods soon enough and also did not give notice of the non-conformity of the goods within a reasonable time” under Articles 38 and 39(1).⁸¹ Although the buyer’s notice of lack of conformity came the very next day after the buyer examined the goods and detected the problems, the court explained that “[t]he examination of the goods, and consequently the notice was . . . too late.”⁸² It concluded that the buyer’s examination was too late under Article 38(1) and (2) because it did not occur until “more than three weeks” after the buyer received the bill of lading following the goods arrival in Mombassa,⁸³ and that this “has to be regarded as too late and unreasonable in international commerce.”⁸⁴

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ See CISG, *supra* note 1, art. 81(2).

⁷⁷ See *id.* arts. 74, 78.

⁷⁸ See *id.* art. 25.

⁷⁹ See *id.* art. 49(1)(a).

⁸⁰ Under the “FOB Mombassa” term of the contract, the seller would be responsible for damage that occurred while the goods were in transit to that port, even if the damage did not become “apparent” until later. See *id.* art. 36(1).

⁸¹ LG Apr. 11, 2005, *supra* note 71.

⁸² *Id.*

⁸³ *Id.* The court ruled that, under Article 38(2), the time for examination did not start until the goods arrived at their destination, which, under the contract’s FOB term, was Mombassa.

⁸⁴ *Id.*

The buyer, however, had argued that, under Article 38(3), its examination could be deferred until the goods arrived in Uganda because at the time the contract was concluded the seller “knew or ought to have known of the possibility” that the goods would be “redispatched” to that country⁸⁵ and it was unreasonable to expect the buyer to examine the goods in Mombassa. Examination in Mombassa was not a reasonable option, the buyer argued, because of the extra expense of sending a representative of the Ugandan buyer to Kenya, and because examination in Mombassa would have entailed breaking the customs seal on the containers that held the goods, thus triggering Kenyan customs duties. The court rejected this reasoning:

The argument presented by the Buyer that it would have been unreasonable to fly from Uganda to Kenya to examine the goods is not convincing. The Buyer . . . did not need to fly to Kenya itself to examine the goods. It could have ordered somebody else to examine the goods In addition, the inconvenience of a flight from Uganda to Kenya cannot be an argument against the Seller, as the Buyer itself has chosen Mombassa as the goods’ destination. It was free to agree upon a different destination with the Seller The argument that paying the [Kenyan] customs duties would have been unreasonable, cannot be followed [I]t would have been possible for the Buyer to agree upon Kampala, Uganda and not Mombassa, Kenya as the destination of the goods.⁸⁶

Thus in the court’s view, a buyer’s agreement to a particular destination for the goods eliminates any argument that the opportunity to examine the goods at that destination is “unreasonable” as per Article 38(3). The same logic, presumably, would also preclude any argument that examination at an agreed point of delivery might not be “practicable in the circumstances” under Article 38(1). As the court saw it, by agreeing to delivery of the shoes “FOB Mombassa,” the buyer had agreed to examine the goods in that city no matter how inconvenient or expensive such examination was. Thus the court concluded: “As the examination [of the goods] did not require much effort [*sic!*], the Seller could expect that it would be conducted within a short period of time [T]he Buyer has not presented any facts that would justify a longer period.”⁸⁷

This decision represents an almost willful misreading of the notice requirements of the Convention, and a gross miscarriage of justice. Its approach violates the normal canons of interpretation because it renders Article 38(3) a dead letter: that provision permits a buyer to defer exami-

⁸⁵ *Id.* The court questioned whether the buyer had satisfied this requirement for Article 38(3) to apply but, given its conclusion that the buyer had a reasonable opportunity to inspect the goods in Mombassa, decided it need not resolve the question.

⁸⁶ *Id.*

⁸⁷ *Id.*

nation of redispached goods until they arrive at their “new destination” if, among other requirements, examination at the point from which the goods are redispached would be unreasonable. The court, however, indicates that examination where the buyer agreed the goods would originally be shipped is by definition always reasonable. But when goods are “redispached,” a buyer has *always* agreed (either expressly or by silence) that they should be shipped to a point other than that to which they are ultimately sent. Thus the court’s approach appears to mean that the no-reasonable-opportunity-for-examination requirement of Article 38(3) will never be met, and the provision can never be invoked. The court’s approach also eviscerates the language in Article 38(1) stating that examination is not due until it is “practicable in the circumstances” since, the court suggests, a buyer’s agreement that the goods will be shipped to a particular point requires the buyer to examine them there no matter how inconvenient or expensive.

Most disturbingly, the court adopts an untenable view of the relationship between Articles 38 and 39, thus leading it to a completely incorrect – and horribly unjust – result. Note that, according to the court itself, the buyer’s time for examining the goods began to run on May 24, 2004, and the buyer gave the seller notice of lack of conformity on June 17, 2004. This is well within the “noble month” that German courts have generally allowed buyers for giving notice of lack of conformity.⁸⁸ Thus even if the buyer was tardy in examining the goods, once it discovered the problems it expedited its notice to the seller (it gave notice the very next day), and as a result it met (indeed, it gave notice earlier than) the “reasonable time” deadline normally imposed by German courts. How, then, did the court end up concluding that the buyer’s notice was too late, and thus that the buyer had lost all rights to rely on the goods’ shocking lack of conformity? The court explains this point rather clearly: “[t]he examination of the goods, and consequently the notice was . . . too late.”⁸⁹ In other words, once the buyer was late in examining the goods it did not matter how soon notice arrived: the tardy examination was fatal, and even notice that arrived within the “reasonable time” normally allotted to buyers would not suffice.

This aspect of the court’s analysis leads to several insupportable consequences. First and foremost, it visits a catastrophic penalty on the buyer even though it is demonstrable, as a matter of deductive logic, that the seller suffered no prejudice from the timing of the buyer’s examination. Had the buyer examined the good in Mombassa (incurring the extra expenses, including Kenyan customs duties, that would have entailed) and discovered the shoes’ lack of conformity at that time, it apparently

⁸⁸ The goods involved were not perishable, nor in my view were there other factors that would require quicker-than-usual notice. For a discussion of such factors, see UNCITRAL Digest of case law, *supra* note 47, art. 39 ¶ 21.

⁸⁹ LG Apr. 11, 2005, *supra* note 71.

could sit on its hands and wait to give the seller notice until June 23 – six days *after* the seller received notice in the actual case – and all would have been well: the buyer would have timely fulfilled its obligation to examine the goods and (at least if the noble month approach were adopted) to give notice.⁹⁰ If such hypothetical notice would have been sufficient even though it would have arrived later than the notice the seller actually received, then – obviously – the seller suffered no legally-cognizable prejudice from the buyer’s June 17 notice.

Second, the court’s approach – which conclusively presumes that a buyer’s notice is late if its examination was late – in effect applies the remedy that the CISG specifies for violations of Article 39(1) to violations of Article 38, despite the absence of any support for that approach in the language or (to my knowledge) the history of Article 38. Although Article 38 imposes an examination obligation on the buyer, it does not specify the consequences for violating that obligation. My own view is that there should be no consequences for late examination independent of those specified in Article 39: in other words, late examination should not matter unless it leads to notice beyond a reasonable time after the buyer “ought to have discovered” a lack of conformity. My approach (if notice is timely then late examination doesn’t matter) is the opposite of the court’s approach (timely notice doesn’t matter if examination was late). Given that only the time of notice – not the time the buyer examines the goods – has any impact on the party that Articles 38 and 39 were designed to protect (the seller), I contend that my approach is the correct one. If, on the contrary, you believe that there should be some sanction if a buyer fails to examine the goods on time even if the seller receives notice within the proper time period,⁹¹ why would you chose to impose the “draconian” sanction specified in Article 39(1) for late notice – i.e., the loss of all rights with respect to lack of conformity? If the drafters wanted that sanction for violations of Article 38, they certainly knew how

⁹⁰ I should note that the court did not, in its opinion, adopt the noble month approach (it had no occasion to do so) or state that buyer’s June 17 notice would have been timely if its examination had not been late –although the court certainly did make it clear that the reason it found the buyer’s notice was too late was because examination had been too late. The argument in the text is based on the acceptance that the noble month approach (or other approaches that would lead to finding that notice given within a month was sufficient) has gained in Germany. *See* UNCITRAL Digest of case law, *supra* note 47, art. 39 ¶ 20 n. 114.

⁹¹ I am unsure how a system designed to “punish” a buyer for violating its Article 38 obligations (and thus to deter it from doing so) would work. Suppose the buyer is late in examining goods but the lack of conformity is a latent one that the buyer would not have discovered in a timely examination. Do you strip the buyer of its right to complain about the latent defect, or does the buyer “get away with” the late examination? Or suppose the goods that the buyer examined tardily are perfectly conforming: how then do you “punish” the buyer for violating its examination obligations?

to say so – as they did in the very next section. Furthermore, the severe sanction imposed for late notice in Article 39(1) was highly controversial at the 1980 Diplomatic Conference at which the text of Convention was finalized, and it even threatened to sink the whole project.⁹² Why would one chose to extend that sanction beyond what the text of the Convention requires? Some other penalty – such as liability for extra expenses the seller suffers as a consequence of the late examination, or even fining the buyer some arbitrary amount – would make more sense than what the court does (although none of this makes sense to me), and would have at least as much (probably more) justification from the text of the CISG.

The result of the court's long series of misinterpretations and mistakes was a truly stunning injustice. As the court itself held, the seller committed a fundamental breach by delivering shoes so pitifully non-conforming – so very, very far from the contract's requirement of "class one" or "class two" used shoes – that the Ugandan Bureau of Standards blocked their import and recommended that they be destroyed. This seller escaped without liability, and was permitted to retain the full contract price the buyer paid. The buyer, located in a developing (and urgently poor) nation, lost everything – the contract price it paid, its right to shoes that conformed to the contract, and even the wretched goods that the seller actually sent, which (presumably) had to be destroyed as recommended by the Ugandan Standards Bureau (quite likely at the buyer's expense). All this occurred merely because the buyer waited until the goods arrived at the borders of its own country before examining them, and it happened even though the buyer still managed to give the seller notice of lack of conformity well within the time that would be deemed acceptable by many (if not most) German courts. I find this result almost unfathomable.

The result in the used shoes case is an extreme example of what strikes me as a strange fixation by some courts on forcing buyers to follow a rigidly-defined process for discovering and notifying the seller of a lack of conformity. This fixation manifests itself by visiting upon buyers the direst consequences – a complete loss of any rights relating to the breach – for the least failure to follow that process.⁹³ The result occurs regardless of whether the seller (who, at least allegedly, caused the problems by failing to meet one of its most basic contractual obligations) has suffered any prejudice whatsoever from the buyer's "sin," and without sufficient justification from the text of the Convention. Of course achieving the monstrous result in the used shoes case took a tour de force by the court – although a decidedly perverse one! The fact that the buyer who suffered the result in the used shoes case was located in a developing coun-

⁹² See Flechtner, *Buyer's obligation*, *supra* note 55, at 378 (recounting history of Convention text).

⁹³ See *id.* at 380 (describing the November 30, 1999 decision of the Landgericht Köln).

try sharpens the sense of injustice. A full appreciation of this aspect of the case, however, must await the discussion below of the court's handling of Article 44.⁹⁴

Several provisions in Part III, Section II, Chapter II of the Convention that have not yet been discussed also address the buyer's notice obligations. Article 43(2) provides that a seller is not entitled to "rely on" a buyer's failure to notify the seller of a third party's right or claim as required by Article 43(1) if the seller "knew of the right or claim of the third party and the nature of it." This generally parallels the rule in Article 40 which provides that a seller cannot "rely on" a buyer's failure to properly examine goods under Article 38 or to give notice of a lack of conformity as required by Article 39 if the seller "knew or could not have been unaware" of the facts relating to the lack of conformity and the seller failed to disclose those facts to the buyer.⁹⁵ The main difference between Article 43(2) and Article 40 is that the former applies to Article 43(1) notice (i.e., a buyer's notice of third party claims that allegedly give rise to a violation of the seller's obligations under Articles 41 or 42⁹⁶) whereas the latter applies to Article 39 notice (i.e., a buyer's notice that the seller violated its obligations under Article 35⁹⁷) – although there are other differences going to the substance rather than the scope of the provisions. For example, Article 40 prevents a seller from invoking a buyer's failure to satisfy Article 39 if the seller "knew or could not have been unaware" of the lack of conformity at issue; Article 43(2), in contrast, excuses non-compliance with Article 43(1) only if the seller actually knew of the right or claim as to which the buyer failed to satisfy its notice obligations. Thus when the buyer in the automobile case discussed earlier argued that Article 43(2) precluded the seller from invoking the buyer's failure to give proper notice of the insurance company's claim to the car, the OLG (as reported in the BGH opinion) dismissed the argument because the buyer had failed to prove the seller had "positive knowledge" of the claim "at the time when the claim would have had to have been presented to him."⁹⁸ The BGH let this analysis stand without comment.

⁹⁴ See *infra* text accompanying nn. 103-104.

⁹⁵ Because of the parallels between Article 40 and Article 43(2), decisions construing the former can provide guidance in applying the latter. See UNCITRAL Digest of case law, *supra* note 47, art. 43 ¶ 2 ("those called upon to interpret . . . article 43(2) may look for guidance from the numerous decisions that apply the parallel provisions of article . . . 40").

⁹⁶ For discussion of Articles 41 and 42, see *supra* Part II.B.

⁹⁷ For discussion of Article 35, see *supra* Part II.A.

⁹⁸ BGH, Jan. 11, 2006, *supra* note 43. On the question of the time as of which to determine whether the seller knew or could not have been unaware of the defect, see Ingeborg Schwenzer, *Article 40*, in COMMENTARY ON THE UN CONVENTION, *supra* note 2, at 479-80.

Article 44 of the Convention provides that a buyer who has a “reasonable excuse” for failing to provide notice as required by Article 39(1)⁹⁹ or Article 43(1) retains some (but not all) of the remedies it would have if it had met its notice obligations. Specifically, a buyer who successfully invokes Article 44 retains the right to reduce the price for goods as provided in Article 50, as well as the right to claim damages (except damages for lost profits). Even with an Article 44 “excuse” however, a party’s failure to give proper notice has serious consequences: it results in the loss of (inter alia) the right to avoid the contract (see Article 49) or to require the seller to repair or replace the goods (see Article 46(2) & (3)).¹⁰⁰ Article 44, which was added to the CISG at the 1980 Diplomatic Conference in Vienna at which the text of the Convention was approved, was designed to ease concerns, primarily among developing countries, with the “draconian” consequences the Convention visits upon buyers who do not give proper notice.¹⁰¹ In the automobile case previously discussed, the buyer invoked Article 44 in an attempt to preserve some of its remedies for the seller’s alleged violation of Article 41. The BGH commented:

[T]he buyer’s conduct [in failing to give the required notice] is excused [under Article 44] if, under the circumstances of the individual case, he equitably deserves a certain understanding and a certain consideration. This is the case when the violation of the [notice] obligation under Art. 43 CISG – especially with regard to the personal circumstances of the buyer – has such slight repercussions that a buyer is customarily forgiven for it and therefore does not justify the substantial consequences of a complete exclusion of warranties. Here, however, restraint is called for; a broad application of Art. 44 CISG is prohibited in light of its character as an exception¹⁰²

Applying these principles, the BGH let stand the lower court’s conclusion that the buyer had not proven a “reasonable excuse” for its failure to meet the notice obligations of Article 43(1). That conclusion appears justified on the facts of the automobile case: the buyer simply failed to prove any “special facts” that caused its notice to be late. Of course, as stated above the buyer’s notice should not have been judged late in the first place, so that the issue of an Article 44 excuse for late notice should not have arisen. But given the court’s premises, I have no complaints about the way it applied Article 44 to the facts of the automobile case.

⁹⁹ Note, however, that Article 44 does *not* apply to a buyer’s failure to meet the two-year notice deadline in Article 39(2).

¹⁰⁰ Ulrich Huber & Ingeborg Schwenzer, *Article 44*, in COMMENTARY ON THE UN CONVENTION, *supra* note 2, at 511.

¹⁰¹ For an account of the history of Article 44, see Flechtner, *Buyer’s obligation*, *supra* note 55, at 378.

¹⁰² BGH, Jan. 11, 2006, *supra* note 43.

The court in the used shoes case,¹⁰³ however, managed to resist what appears to have been a meritorious Article 44 claim. The buyer in that case offered a compelling “reasonable excuse” for its late examination of the goods (and hence for its “late” notice of lack of conformity under Article 39): examining the goods at their original port of arrival (Mombassa), as the court demanded, would have required the Ugandan buyer to incur the extra expense of traveling to or arranging for an inspection agent at that port and, most importantly, would have triggered Kenyan customs duties. The buyer quite understandably desired to avoid these expenses, which it did by waiting a short time to examine the goods after they arrived in Uganda. The buyer’s concerns are excellent examples of what the developing States who demanded that Article 44 be added to Convention wanted to have taken into account before their buyers would be stripped of all rights with respect to a lack of conformity. The court in the used shoes case, however, was dismissive of the buyer’s Article 44 plea: “The Buyer also cannot reduce the price. The lack of a timely notice of non-conformity has not been supported by an acceptable excuse by the Buyer (Art. 44 CISG).”¹⁰⁴ The court shows no appreciation for, or even cognizance of, the purpose behind Article 44 – to require that the difficult circumstances faced by buyers in developing states be taken into account before imposing the full panoply of the Convention’s extreme sanctions for failure to comply with notice requirements. This is a revealing measure of the court’s unwillingness, even inability, to interpret the Convention from an international perspective, and its failure to respect the need to promote good faith in international trade, as required by Article 7(1).

IV. CONCLUSION

This article has discussed several German decisions in the course of describing the provisions in Part III, Chapter II, Section II of the Convention. Until a cache of Chinese arbitration decisions applying the CISG recently surfaced,¹⁰⁵ German courts had contributed many more decisions to the jurisprudence of the CISG than any other jurisdiction. My discussion has included criticism of those decisions. In the case of the two BGH decisions analyzed at length, that criticism is in the nature of pointing out that no analysis is perfect (something always possible to an academic) and indicating the direction where progress might lie. My discussion of the BGH cases has also included praise, since those decisions (particularly the 1995 Mussels Case) make important contributions to CISG analysis and stand as guideposts pointing to an international approach to the Convention that other tribunals should emulate. I have

¹⁰³ LG Apr. 11 2005, *supra* note 71.

¹⁰⁴ *Id.*

¹⁰⁵ See Pace Law School CISG Database, Country Case Schedule, <http://www.cisg.law.pace.edu/cisg/text/casedit.html#china> (last visited Mar. 23, 2008).

been much harsher with the 2005 used shoes case. It is a decision that I believe thoroughly deserves such harsh treatment – although it is important to note that it is the product of a trial court, so that any pernicious influence it might exert will, I hope, be limited.

My discussion of decisions from the jurisdiction that has the best-developed and most sophisticated CISG jurisprudence¹⁰⁶ also illustrates why ratification of the Convention by Turkey,¹⁰⁷ to be followed by contributions to the understanding of the CISG from Turkish tribunals and commentators, would be an extremely positive development. What is needed to achieve a truly international approach to the Convention, and thus what would be instrumental to the development of a truly international general commercial law, is inclusion of viewpoints that represent the true range of global diversity. Turkey is in a unique position to act as a bridge between the current CISG jurisprudence, which has developed largely (although by no means exclusively) in tribunals of Western Europe, and hitherto un- or under-represented view points. To the extent my small voice might help, I urge Turkey to join the sixty-seven diverse States that have already ratified the Convention – a group that includes the lion's share of European Union States. It is a move that will benefit the commerce of Turkey, and for all Contracting States will be an aid to achieving a genuinely uniform global law of sales.

¹⁰⁶ Particular Italian decisions, however, eclipse anything that has yet appeared in Germany or anywhere else. See Trib. di Vigevano, 12 July 2000, available at <http://cisgw3.law.pace.edu/cases/000712i3.html>; Trib. di Rimini, 26 Nov. 2002, available at <http://cisgw3.law.pace.edu/cases/021126i3.html>; Trib. di Padova, 25 Feb. 2004, available at <http://cisgw3.law.pace.edu/cases/040225i3.html>; Trib. di Padova, 31 Mar. 2004, available at <http://cisgw3.law.pace.edu/cases/040331i3.html>.

¹⁰⁷ As was noted *supra* note *, the original of this paper was occasioned by a conference at Istanbul Bilgi University, which was held in anticipation of Turkey's ratification of the CISG.