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### Recommended Citation

(1988) "Book Review," *Cornell International Law Journal*: Vol. 21: Iss. 3, Article 9.  
Available at: <http://scholarship.law.cornell.edu/cilj/vol21/iss3/9>

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## CISG Laid Bare: A Lucid Guide to a Muddy Code

**Commentary on the International Sales Law: The 1980 Vienna Sales Convention**, edited by C. M. Bianca and M. J. Bonell (Guiffre, Milan, 1987,) xvii, 886 pages.

Counselors, drafters, judges and arbitrators, who now must decide how to apply and interpret the United Nations Convention on Contracts for the International Sale of Goods (CISG), will find this book very useful. By joining CISG as of January 1, 1988, the United States has committed itself to a special set of rules that will displace the Uniform Commercial Code in international transactions. The incentive to adopt this Convention was the claim that CISG will unify the law of sales throughout the world by breaking off international sales from other sales transactions and then applying to them a special set of rules. I have argued extensively elsewhere that this innovation is unwise in both of its major aspects.<sup>1</sup> It is a mistake to try to divide the law between domestic and international sales, since this dichotomy is undefinable in a world economy that is increasingly integrated across borders. It is also a mistake to attempt to "unify" law by agreeing on a formulation of substantive rules unless one is prepared to coordinate the judicial and social contexts in which those rules take on meaning. Many of the world's legal systems now operate quite harmoniously, although they have radically different statements of legal norms because these rules are interpreted in ways that produce harmonious results in context.<sup>2</sup>

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1. See Rosett, *Critical Reflections on the United Nations Convention on Contracts for the International Sale of Goods*, 45 OHIO ST. L.J. 265, 274-77 (1984) [hereinafter cited as *Critical Reflections*]; Rosett, *The International Sales Convention: A Dissenting View*, 18 INT'L LAW. 445 (1984); *International Sale of Goods: Hearing Before Senate Comm. on Foreign Relations*, 98th Cong., 2d Sess. 837 (1984) (testimony Arthur Rosett).

2. A number of years ago, the late Professor Addison Mueller offered a seminar at the UCLA Law School with the late Professor Folke Schmidt, of the law faculty at Uppsala University, that demonstrated the compensatory and ultimately harmonious interrelatedness of apparently conflicting formal rules. Each professor selected five factual situations which he believed were particularly problematic under his nation's law of sales (the UCC and the Scandinavian Sale of Goods Act). Each seminar ses-  
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The emphasis the drafters of CISG place on finding a verbal formula that everyone can agree on, even when that formula fails to confront and deal with the substantive issues that still divide legal regimes, may well operate to lessen harmony. The common statements of rules will be understood differently and inevitably will be applied differently. CISG thus has bought unification as a paramount virtue at the expense of the substance of the rules adopted. To buy agreement, the parties often compromised on confused, incoherent, and sometimes regressive rules. Since CISG is just one in a series of such conventions that UNCITRAL has on its agenda, we need to ask ourselves whether this accomplishment is worth the price.

Now that CISG is United States law, American lawyers must learn how to deal with it in transactions when it applies. Lawyers with different roles in the system will be confronted with distinct choices. Judges and arbitrators will have to interpret and apply the Convention in order to decide cases. They will soon realize that the process of interpretation appropriate for this text is significantly different from the interpretive technique familiar to modern common lawyers approaching a statute or code in their domestic system. Other lawyers, who serve as counselors, will have to understand CISG from a somewhat different perspective to give advice to clients in the course of sales transactions. Perhaps the most avid group of lawyer-readers for this book is likely to be those counselors lucky enough to have a client who sometimes engages in international trade. These lawyers must decide whether to advise their clients to draft their contracts in contemplation of being governed by the Convention, or whether to opt out of CISG by including a specific clause derogating from the Convention and choosing another law to govern the agreement. This book is a praiseworthy success because it has useful things to say to both legal advisors and adjudicators. I will return to these audiences and their concerns, but first let me tell you a little about the book itself.

It should be clear by now that this reviewer is not a great fan of the Convention. Nevertheless, I also think that this book, written by many of CISG's principal drafters, is admirable. This book consists of an article-by-article analysis of CISG by eighteen authors, each of whom writes on an article or on a related group of articles. What will strike the reader immediately is the stellar quality of the contributors. They come from fourteen nations, most having been intimately involved in the drafting of CISG and having represented their country at the confer-

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sion was divided between an exposition of the situation and a description by the coparticipant of how the other system would analyze and resolve the same factual situation. Typically, the two presentations would start off in opposite directions, but somewhere in the analysis one would take a sharp left turn in direction while the other analysis would take a sharp right, producing quite parallel approaches. In most of the ten problems there would be a second similar shift to bring the two sides to the same resting point at the end of the story. Viewed in isolation, the rules were obviously inconsistent. Viewed as a whole in the special context in which they operated, however, the same rules were quite harmonious.

ences that produced the Convention. The authors come from every continent and every major legal system. Socialism, capitalism, developing countries, industrial powers, and NICs are all represented. This feature is the key to the book's single most useful aspect: it explains better than any other single source how we got here, where the words of the Convention come from, and how to trace its history through the frequently opaque and spotty travaux préparatoires that form CISG's legislative history.

The editors have imposed a rather rigid structure on the book, forcing each contributor to go through each section assigned to him and not only explain its history and meaning, but elaborate on the problems it poses. A reassuringly high percentage of the contributors rise to this challenge and make a serious effort to see their brainchild, warts and all. It is certainly a virtue that, unlike other official and unofficial documents that have been written about CISG, this book is not a heavily partisan selling job. These short essays make some otherwise incomprehensible articles of the Convention understandable as an organic development and as the end product of a tortured drafting process. After all, the project that produced this Convention goes back to 1929. The sponsoring agency and many of the participating nations, not to mention most of the individual delegates who completed the task, were unborn or were just children at the outset of the project. This history, particularly the tale of those crucial meetings of the 1970's during which many of the crucial decisions were shaped, is only partially captured in the summary reports of the sessions published at the time. Finding one's way through United Nations documents is always a hassle, even with a depository library at one's disposal. This book substantially mitigates that difficulty by providing clear histories of each article with references to the travaux préparatoire, but also goes substantially beyond them to direct the reader to other sources few would find on their own. When the published sources are inadequate, the authors frequently tell the story from their personal experience, showing the advantage of having history told by the participants. The authors were there and can trace the development better than anyone can hope to work out from the published sources.

### **I. Conventions and Kaleidoscopes**

The presence of eighteen authors inevitably has a scattering effect. Some authors deal with all or most of the Convention articles on a topic. In several places, however, a different commentator comes in to deal with one article between two articles discussed by another author. There are obvious and frequently useful shifts in perspective as the book moves from the work of one author to another. This Convention is not the product of any single author or of a single coherent perspective. Many of its provisions were cut and pasted from various codes around the world. After the lawyer-experts got as far as they could with eclecticism, compromise, and fancy word-craft, the diplomats entered the

game at the 1980 Vienna meetings. Behind closed doors they produced a politically acceptable version of the more contentious provisions. The obvious way to accomplish this goal is with a sentence that can mean anything or nothing and therefore is not too objectionable to anyone. Certainly a provision on interest that can gain acquiescence from Islamic, socialist, and capitalist constituencies is bound to have rather striking protean qualities.

The book thus provides a wonderful kaleidoscopic effect as a large number of authors produce many little gems, each displaying many, if not a thousand, points of light. Some of the most striking discussions are only a few sentences long and few extend more than a page or two. Authors treat a topic when they come to it in the setting of the article they are discussing, yet often no cross-references are provided to the other places in which the topic appears. This feature is not necessarily a vice, but it places unsustainable burdens on the book index, for it is inevitable that some of the best treatments of a point are not where the CISG text would lead you to expect them.<sup>3</sup>

## II. Occasional Blindspots

The format sometimes leads to understandable blind spots, when it appears that an author knows the story so well that he does not realize that the rest of us weren't there and may need a fuller explanation of the terms used. For example, the treatment of the essential jurisdictional element of "place of business" in articles one and ten is unlikely to help an American lawyer understand what is meant in practical terms, because our law uses this term in a distinctly different connotation than the commentary's author has in mind. Along the same lines, it is puzzling that the author of the commentary on article four, who is trained in the common law, provides so little guidance on the meaning of the term "validity of contract", a crucial aspect of the Convention. The term is not to my knowledge often used in common law countries, and its mean-

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3. A nine-page index is not adequate for an 850-page book organized this way. For example, the discussion of contract validity under article four, where the term appears in the CISG text, is very thin. Khoo, *Questions to be Covered by the Convention*, in COMMENTARY ON THE INTERNATIONAL SALES LAW 44 (C. Bianca & M. Bonell eds. 1987). As I went to work on this review, I recalled that Professor Bonell, who did not write the commentary on article four, did provide some very useful insights into the concept of validity. I was chagrined to discover that this discussion is omitted from the index, forcing me to leaf back through all of Bonell's articles until I found what I was looking for under article seven. Bonell, *Interpretation of the Convention*, in COMMENTARY ON THE INTERNATIONAL SALES LAW, *supra* at 65. Two other instances in which I was unable to find a point in the index were Professor Eorsi's treatment of advertisements as offers in article 14, Eorsi, *Formation of the Contract*, in COMMENTARY ON THE INTERNATIONAL SALES LAW, *supra* at 135-36 and Professor Maskow's illuminating discussion of the distinction in article 53 between taking delivery and making delivery. Maskow, *Obligations of the Buyer*, in COMMENTARY ON THE INTERNATIONAL SALES LAW, *supra* at 383.

ing is often quite indefinite.<sup>4</sup> Essentially, the term contract validity indicates those circumstances in which positive law displaces the parties' contractual autonomy and imposes a legally defined rule on their relationship. In other words, it defines the scope of contract and the extent to which national rules on such topics as legal capacity of the parties, mistake, misunderstanding, fraud, unconscionability, usury, consumer protection, compliance with socialist plan, and other forms of illegality apply. Yet the book offers its readers little helpful guidance on how to understand the Convention's bare terms in these specific situations. The seriousness of this failing becomes manifest when one considers that the most likely response to any substantial problem in commercial law is some mandatory regulation dealing with it by legislative, judicial, or administrative rule and that such responses usually affect contractual validity.

The book's heavy structural emphasis on section-by-section analysis results in little consideration of problems not addressed in the Convention text. For example, what is a "sale"? How does CISG work with retained security interests, consignments, or leasing in general? Several of the authors, most notably Professors Will and Maskow in their excellent parallel treatments of the articles on buyers' and sellers' remedies, struggle heroically to provide some of the missing connective tissue. They base their illustrations on specific and familiar transactions, connecting the CISG provision to comparable treatments of the same situation by major legal systems. Professor Maskow is particularly helpful when discussing the relation between the general terms of buyer's obligations and the much used definitions of INCOTERMS and the socialist CMEA General Conditions of Delivery of Goods.<sup>5</sup>

Professor Farnsworth's discussion of article 19 dealing with modified acceptance, crossed orders and the battle of the forms also gives useful illustrations that disclose the regressive nature of this article.<sup>6</sup> American law under the UCC Section 2-207, and international law as embodied in article seven of the Uniform Law on the Formation of Contracts both conform to common business practice in recognizing that parties may form a contract even if the specific terms of the communications they exchange are not consistent in all respects. While Professor Farnsworth's discussion cannot cure the defects of a poorly conceived provision, it will provide interpreters with real help around the difficulties.

Unfortunately, other discussions treat the sales transaction in a rather abstract fashion that leaves this reader uncertain regarding just

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4. Heitz, *Validity of Contracts Under the UNCISG and Swiss Contract Law*, 20 VAND. J. TRANSNAT'L. L. 639 (1987); Critical Reflections, *supra* note 1, at 280; Phillip, *Mandatory Rules, Public Law (Political Rules) and Choice of Law in the E.E.C. Convention on the Law Applicable to Contractual Obligations*, in CONTRACT CONFLICTS 81 (P. North ed. 1982).

5. Maskow, *supra* note 3, at 383-93.

6. Farnsworth, *Modified Acceptance*, in COMMENTARY ON THE INTERNATIONAL SALES LAW, *supra* note 3, at 175.

what kind of transaction the author has in mind. It would have been very helpful to have a single explanation of how this Convention will affect typical international transactions, such as a CIF sale of standard goods with payment by an irrevocable letter of credit against bill of lading and insurance certificate.

To some extent the absence of such an explanation is a direct result of the inability of the drafters of CISG to agree on the appropriate role of such trade usage, customs, and definitions. Professor Bonell describes these problems in his treatment of article nine and candidly regrets the failure to include in CISG a provision regarding trade definitions similar to that which existed under ULIS, the older sales convention.<sup>7</sup> This omission from CISG creates uncertainty whether CISG is consistent with continued use of these transactions. Perhaps parties must derogate from CISG and choose another law to avoid, for example, having CISG's novel rights of the buyer to inspect and examine the goods under articles 38 and 58(3) applied in mischievous ways to a CIF documentary sale. Professor Maskow's treatment of this specific issue is very reassuring, but I understand him to assume that CISG would honor the parties' choice of trade definitions or the Uniform Customs and Practice for Documentary Credits.<sup>8</sup> My hope that his interpretation is correct is somewhat shadowed by Professor Bonell's discussion of articles six and nine. In article six, Bonell states quite emphatically that it is insufficient for parties to choose a standard set of contract terms and conditions unless they explicitly exclude the application of the Convention.<sup>9</sup> In article nine Bonell outlines CISG's unfortunate and unreceptive treatment of trade definitions and other forms of customs and usage under CISG.<sup>10</sup> This suggests that it will not be enough to use the familiar trade definitions with a reference to their source if a drafting lawyer wants to avoid the potential superimposition of the inconsistent CISG provisions.

### III. Coolness of Tone

Obviously, those who created the Convention in general approve of it. It is a great strength of this book that its authors are able to examine critically their handiwork in a balanced way. What is somewhat surprising is that even after making allowance for the rather abstract tone that is common in scholarly writing, there remains throughout this book a notable coolness toward the substance of the Convention. This coolness permeates most of the authors' assessments. The tone is set by Professor Bonell in his introductory section, where a few opening pages of

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7. Bonell, *Art. 9- Usages and Practices*, in COMMENTARY ON THE INTERNATIONAL SALES LAW, *supra* note 3, at 114.

8. Maskow, *Art. 58- Time of Payment*, in COMMENTARY ON THE INTERNATIONAL SALES LAW, *supra* note 3, at 424-30.

9. Bonell, *Art. 6- Parties' Autonomy*, in COMMENTARY ON THE INTERNATIONAL SALES LAW, *supra* note 3, at 56-57.

10. Bonell, *supra* note 7, at 104-06.

basic history of the Convention are followed by a short essay in two sections entitled "Meaning and Purpose of the Convention" and "Problems Concerning the Convention". What is remarkable is the degree to which this essay is responsive and defensive in structure. Professor Bonell first points out that there have been criticisms of the drafters' decision to limit the ambit of the Convention to "international relationships" and criticism of how such relationships are defined. It appears that Professor Bonell is defending the Convention from some unnamed and unquoted critics. The tone is one familiar to every advocate; it is the voice of confession and avoidance. It recognizes faults, admits imperfections, concedes shortcomings, and suggests the moderate hope that the advantages outweigh the flaws.

This responsive emphasis dominates throughout the book, leading one to ask what in the nature of this project causes so many of its drafters to appear so uneasy with the content of their own product. Those who have labored for years to bring forth a major piece of work know the feeling of post-partum depression that can come after it is too late to give the galley proofs one more correcting edit, but it is surprising to find that so few of the more than one hundred articles in this book strike an enthusiastic note regarding the substance of the Convention. In some cases this Convention represents the investment of literally decades of the authors' time, yet where are the discussions that in effect say something like, "This is a very clever and well drafted provision that significantly clarifies and rectifies prior law and will improve the ease and fairness of commercial transactions"?

#### IV. Law Unification and Law Improvement

Aside from law unification, the authors suggest few substantive policies that CISG advances. In those relatively rare instances when an author mentions an instrumental goal of law reform, he is likely to drop it quickly, without providing any compelling demonstration that the Convention text serves the stated end. For example, in the first paragraph of the introduction, Professor Bonell describes the need to "provide rules governing the international sale of goods which, apart from being uniform, also take into account the fact that export or import transactions are often entered into by parties who do not possess equal bargaining power and who operate in quite different socio-economic contexts."<sup>11</sup> This is a commendable goal that may help explain the reference in the Preamble of the Convention to "the broad objectives in the resolutions adopted by the sixth special session of the General Assembly of the United Nations on the establishment of a New International Economic

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11. Bonell, *Introduction to the Convention*, in COMMENTARY ON THE INTERNATIONAL SALES LAW, *supra* note 3, at 1.

Order.” Unfortunately, this idea does not surface again.<sup>12</sup> Where are the provisions that are designed to advantage weaker parties? How can the Convention claim to be sensitive to the need for such protection and at the same time allow parties to derogate freely from its provisions?<sup>13</sup> How can the Convention be said to be intended to redress the balance between the strong and the weak in the marketplace if it removes from its ambit all matters of validity, that is, those that are the subject of mandatory rules and therefore outside of the contractual autonomy of the parties? The single greatest weakness of contract as a tool of social organization is that it almost always tends to aggravate the power inequalities between the parties, advantaging the stronger and more sophisticated when they deal with the weaker. Bargaining always tends to favor the strong, the informed, and the quick. That is the primary reason why social intervention is needed to declare that some kinds of deals are invalid. How are these problems, which are inherent in all legal systems based on personal autonomy and consent, different in international transactions than they are in domestic sales law?

The book’s introduction anticipates this criticism:

Still less convincing appears the view according to which the new uniform law is inspired by schemes or principles that are outdated or at least not corresponding to the effective needs of international trade. One must bear in mind that elaborating an international Convention is something quite different from proposing a model law. While in the latter case, one can look exclusively to the most advanced solutions, in the former one must take into account all the different positions that States take on the merits of the questions under consideration. Hence the necessity for compromise solutions that by their nature will be less valuable from a strictly technical standpoint, but at least present the advantage of rendering the uniform rules acceptable to all States. Notwithstanding this, there are a number of fairly innovative provisions in the present Convention. . .<sup>14</sup>

The problem is not that CISG is not a model law. Rather, the central fault is that it is hard to detect a systematic set of values of any kind at work here. This is going to make interpretation of CISG very difficult, since its language is loose and does not emerge from a shared defining legal culture. Yet the authors urge interpreters to treat the Convention

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12. The discussion of the preamble by Professor Evans barely mentions the NIECO reference, and the rest of the articles in the book do not tell us further how the Convention serves this lofty purpose.

13. The discussion of article six recognizes that the economically stronger party can abuse the principle of party autonomy in practice, but does not attempt to reconcile the Convention’s adoption of unlimited autonomy with its other stated values. Bonell, *supra* note 11, at 51-52.

14. *Id.* at 13. The discussion goes on to catalogue these innovations for common law systems, including: the elimination of the Statute of Frauds; the elimination of the doctrine of consideration for promises not to revoke an offer or to modify a contract; and the distinction between “conditions” and “warranties.” The innovations noted for civil law systems are the elimination of fault as an element of damages and the requirement that avoidance be preceded by notice. No items on this list will contribute materially to solving problems traceable to inequality of bargaining power.

as a code, to avoid interpreting it the way they interpret national law, and to reason analogically in arriving at a solution to specific problems.

## V. Codification and Harmonization

The book's structured organization seems to have left the authors little opportunity to step back and take an overall look at the process of international codification by consensus that led to CISG and is likely to produce a number of other conventions in the years ahead. None of the authors takes the occasion to share his insights and experiences with the process of codification used by UNCITRAL or on the uses and limits of a convention like CISG as a tool of harmonization in commercial law. I wish that more attention had been devoted to discussion of this process. In this century commercial law has become codified throughout the world in national legal systems that otherwise are very different. Two centuries ago and beyond such codes were relatively uncommon. In those earlier times the harmony of international commercial practice was embodied in a kind of common law merchant in the western world, and by trade customs that mitigated the hostility that dominated dealings with the other civilizations with which Europeans traded. Now codes are found everywhere and are the expected form for stating the law. In the discussion of interpretation under article seven of the Convention, Professor Bonell recognizes that codes are understood as very different things in different legal systems, and that Europeans and common lawyers approach the interpretive task differently because of their divergent understanding of what a code is all about.<sup>15</sup>

The term "code" may describe very different documents. Some "codes" are simply compilations of statutes enacted over time, while others start primarily as teaching materials; only a few claim to be systematically exclusive and definitive statements of the law.<sup>16</sup> From time to time, most legal systems feel the need to collect, revise, and rationalize the rules on a subject that have grown up. These kinds of compilations can be seen in the Biblical Codes, the Revised Statutes, or in most titles of the United States Code. A compilation code is likely not to display notable textual coherence; its acceptability flows from the degree to which it embodies shared experience or that it is believed to contain the command of an indisputable authority. Other varieties of code start out with an educational or explicit law reform function. They seek not only to collect the law, but to rationalize it, to make it more consistent with stated values, or to improve it. Compiling, explaining, teaching, and reforming the law are closely related goals. All are likely to contribute to a codification, and it sometimes is hard to characterize one aspect as dominant in a single code. Looking back over time it may be hard to tell what the original intention of the creators was. Scholars continue to debate the extent to which the authors of the Mishnah or Justinian set

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15. Bonell, *supra* note 3, at 72-80.

16. E. DORFF & A. ROSETT, *A LIVING TREE*, 366-76 (1988).

out to write a code and the extent that the work originally was intended as a text for students. In any event, over the centuries these texts have become the authoritative statement of the law because "that's the way I was taught it when I started to study law." To take a more modern example, the leaders of the American Law Institute have long debated whether their Restatements should simply compile and edit the common law, or whether they are to rationalize it and seek the "better rule." The Institute has been promulgating restatements for over half a century now but the issue seems to arise again with each new project.

Only rarely in history has any society agreed sufficiently on values to make possible a third kind of code, which is engendered by a generally shared faith in the capacity of systematics to capture the essence of reality. At such a time it will seem possible to state in simple, clear terms the crucial propositions upon which the whole world hangs, and then to deduct logically from those axioms the correct resolution of concrete problems. Europe was swept by such faith during the 17-19th centuries as Enlightenment and rationalism took legal form in this third kind of code. The French and German Civil Codes were grounded on the claim that their lucid general propositions provided a rational basis to arrive logically at good rules to govern specific disputes. Such a code is the sum of the law in the sense that it contains the central core of principles from which specific rules for concrete situations could, it is thought, be derived. As time has passed and these codes have been transported around the world to very different cultures, this faith appears to have been diluted, but it lives on as an assumption in hearts of many civil lawyers.

My point is that to write a code you either have to have a large fund of shared experience (the compilation), or a high degree of certainty regarding shared values (the Civil Codes), or unquestioning confidence in the authority of the law-giver (Signs and Wonders). The very different experiences with imported European Civil Codes in Japan and China during the past century exemplify how hard it can be to borrow a code unless at least one of these conditions is satisfied. China's efforts to borrow a code have yet to take root firmly, while Japan has made its borrowed codes work only by creating a whole new language to express the foreign concepts and then slowly providing the new terms with referents in the underlying national experience.<sup>17</sup>

During the past half-century, the center of gravity for international law unification has shifted from such agencies as UNIDROIT and the Hague Conferences to UNCITRAL. The shift is more than organizational. The highly Eurocentric roots of this project have been squeezed as membership in the drafting bodies has expanded many fold to admit representatives of less developed, socialist, Islamic and other legal regimes. Diversity enriches social processes, often by complicating

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17. Ramseyer, *Water Law in Imperial Japan: Public Goods, Private Claims and Legal Convergence*, 18 J. LEGAL STUD. 51 (1989).

them. In this case, the inclusion of many new voices has certainly made it more difficult to reach any agreement on the contentious issues of sales law. CISG is the inevitable product of compromise without basic agreement. Instead of compromise purchased by one side giving way on one set of issues and the other side conceding on the next, the CISG negotiators searched for a sufficiently broad formulation to encompass both views. The result, of course, is that CISG says nothing about the issues people are going to fight about,<sup>18</sup> and has nothing new and substantive to say about the issues that do cause disputes. A law built that way will not resolve many troubling cases.

Unfortunately, CISG lacks any of these preconditions for successful codification. The group that promulgates it does not share a large body of experience to compile, the drafters lack essential agreement on values and priorities regarding contentious questions and no one has much confidence in the authority of the law giving agency. When this project began over a half century ago, its aim was to bring together the divergent strands of the civil law that had developed in Continental European capitalist nations under the influence of industrial development. The differences were perceived by the sponsors as substantial, particularly when they contemplated including either the Scandinavians or the idiosyncratic English in the project, but they seem quite small when compared to the drastically different conditions that pertained to large segments of humanity that were not participants. Until the project ground to a halt as a result of the political and ideological disasters that culminated in a catastrophic war, it seemed reasonable to expect that the group could agree on sensible rules based on their shared cultural and economic experience. What basis is there for reaching such consensus today?

Do not understand my doubts about the feasibility of world codification as doubt about the reality of harmonization of commercial and legal practice. The unification of practice has already gone very far and seems to be accelerating. My point is that harmonization of practice precedes unification through formal statements of norms. People are very adept at finding ways to do business together. Only gradually do these accommodations, which in the beginning often are seen as deviance, work their way into acceptance as the correct way of doing things, and then fully become part of the formal statements of law. Typically, the last stage in this process is the discovery of an overarching value system that explains and legitimates the practice. Holmes taught us that law and experience interact, but it is not only in the common law that durable law is more likely to grow out of experience than business practice is to conform happily to the demands of lawmakers.

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18. For example, CISG lavishes great attention on the details of contract formation, which to my knowledge does not give rise to many real world disputes anywhere. One exception is the subject of modified acceptance and crossed orders where the Convention moves backwards from the prior position of both American and international law. See Farnsworth, *supra* note 6 and accompanying text.

This book represents a belated step in the direction of recognizing that the Convention is part of such an ongoing process, rather than an eternal monument. The text of CISG suffers because its drafters appear to have conceived it as having an existence outside of time. Many of its key provisions have no visible past and the text makes no provision for correction, improvement, or change. Professor Bonnell's discussion of article seven provides an excellent short survey of the devices that other international conventions have incorporated to serve this purpose.<sup>19</sup> A functional code must anticipate, deal with, and incorporate into its core structure some provision anticipating the time when the legitimating circumstances (shared community experience, value certainty, or authority) pass and a new code or new ideas must take their place.

## VI. Where Do We Go From Here?

Putting all the pieces together, what can a judge or lawyer who must interpret CISG draw from this book?

### A. Treat CISG as a Code

Do not treat CISG as a tightly drawn statute. This law is not like the Internal Revenue Code (but then again, neither is the Uniform Commercial Code). It is intended more often as a general statement of principles that can be applied and extended analogically. There usually is no point in parsing each word for a precision that is not there. American courts should have no trouble shucking the last vestiges of plain meaning and the traditional narrow English style of statutory interpretation.<sup>20</sup> The text of the Convention invites interpretation in light of "its international character," to promote "the observance of good faith in international trade," and to assist "the development of trade on the basis of equality, and mutual benefit" in order to advance "friendly relations among States."<sup>21</sup> Certainly that mandate is sufficiently broad to allow an interpreter to choose an approach to the text that produces the sensible, fair, or reasonable result. Of course those lawyers who must counsel clients are confronted with the flip side of the interpreter's broad mandate. Judges and arbitrators have a wonderful canvas upon which to project their views, but the risk-adverse counselor will find little comfort in the capacity of the Convention's text to contain diverse meanings.

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19. Bonell, *supra* note 3, at 88-93; *see also* Critical Reflections, *supra* note 1, at 293-99.

20. American lawyers would do well to study carefully the heated debates reflected in English case law over the past decade as English courts have had to confront a growing body of European law and international conventions with multiple authoritative versions in many languages. *See, e.g.*, *Re Jahre v. The Norwegian State*, Court of Appeal (Civil Div.) 18 Dec. 1987 (unpublished); *Fothergill v. Monarch Airlines Ltd.*, [1981] A.C. 251 (1980); *James Buchanan & Co. Ltd. v. Babco Forwarding and Shipping (UK) Ltd.*, [1978] A.C. 141, (1977). For a recent Supreme Court treatment of this issue see *Air France v. Saks*, 470 U.S. 392 (1985).

21. CISG, at article seven and preamble.

## B. Be Aware of Limits of the Text, Legislative History, and Other Guides

In a masterful four-page discussion Professor Bonell catalogues some of the inherent limits an interpreter will encounter in dealing with the text.<sup>22</sup> He suggests that the interpreter check ambiguities and obscurities against all six equally authentic language versions. The connotations of the text are likely to differ significantly in different languages, providing the interpreter with a potentially welcome choice if he or she is a judge or arbitrator and with a potentially insoluble problem if he or she is a counselor.<sup>23</sup> Of course, to use this option the interpreter must know, or have access to the services of someone familiar with legal vocabulary and usage in Arabic, Chinese, English, French, Russian and Spanish. Those of us who are a bit rusty in one or more of these tongues will find it difficult to take advantage of this suggestion. Professor Bonell then suggests we check the legislative history, but do not be too disappointed if that history is absent or reveals that there were differences in opinion among the drafters themselves as to what their handiwork means. Next, look to interpretations of the provision in other countries. This, too, may be difficult because in many countries judicial opinions are not widely disseminated or published. Professor Bonell expresses the hope that UNICTRAL will develop a procedure for the deposit of decisions with its Secretariat, who then would publish a summary in all the official languages of the UN. He recognizes that it is unclear what an interpreting judge is to do with a scattering of short summaries of divergent solutions from isolated courts of first instance. Finally, Professor Bonell explicitly rejects two solutions. An interpreting judge should not adopt a "national" solution, that is, the judge should not treat the provision as he or she would understand a similarly worded provision of domestic law. Second, although parties may freely exclude the application of the Convention by agreement, Professor Bonell rejects the possibility that they can agree that the rules of interpretation used with respect to ordinary domestic legislation shall apply to it. He fears that approach might undermine worldwide uniformity in the law.

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22. See Bonell, *supra* note 3, at 90-94.

23. Difference in connotation and translation are familiar tools for diplomatic negotiators trying to reach an agreement on sensitive points when the parties really do not agree. These techniques are functional when applied to agreements dealing with broad issues of international politics and public law, such as the Anti-Ballistic Missile Treaty or the Shanghai Communique between China and the United States. The technique can only be mischievous in the context of a private law agreement that must be interpreted by private parties unrelated to the negotiators. The Secretary of the UNCITRAL Working Group on the International Sale of Goods and a legal officer serving the Working Group provide eloquent testimony of the problems of translation and multilingual multinational conventions. Bersten & Miller, *The Remedy of Reduction of Price*, 27 AM. J. COMP. L. 255, 276 (1979).

### C. Think Transactionally

Interpreters should apply articles of CISG transactionally and contextually, not word-by-word. Parties to international sales rarely make up the form of transaction as they go along. There are well-worn paths through the forest, and most traders intend to stick to the road. Although the text of CISG does not always display awareness of these transaction types, particularly in some of its more obscure articles, the interpreter will be doing everyone a great service if he or she understands the Convention text as if it were designed to enable parties to continue to do what they have been doing so well for centuries. If confronting a CIF contract, treat inspection and excuse terms as they are treated in INCOTERMS or other universally recognized definitions of such a transaction. This strategy will enable the interpreter to supply the missing links not provided by the drafters of the Convention. It will enable interpreters to breathe coherence into the text that the drafters probably wished for but, unfortunately, did not provide us. It also will enable the text to be understood in a way that will best comply with that essential guide for all contracts, the intention of the parties. It is generally safe to assume that the parties made their agreement against the background of commercial practice. Interpreting the Convention in ways that are consistent with that practice will fulfill that intention. At the same time, counselors will have to be cautious because, as was discussed earlier, the drafters of CISG made a very clear decision not to include provisions on trade definitions and custom that would embody this approach.

### D. Opt Out If You Can

Article six, which recognizes the parties' autonomy to exclude the application of the Convention or derogate or vary the effect of its provisions, compensates to some extent for the foregoing interpretive difficulties. In light of the uncertainties and novelty of CISG, most counsel for sophisticated trading clients probably will advise them to avoid the risks of the unknown by electing to derogate from CISG and negotiating a choice of law clause that will provide a more congenial body of rules. The major exception would be those situations when, for political reasons, choice of law is not negotiable, or when the likely choice that would emerge from negotiation is an even more exotic or dubious body of law. This might be the case in transactions with some less developed countries or when the American party for some reason does not have enough negotiating leverage to choose familiar law. Until the matter is settled by judicial decisions, drafters would be wise to take Professor Bonell's advice and explicitly exclude CISG whenever they choose another body of law.<sup>24</sup> This interpretation of article six, which deals with party autonomy to derogate from the Convention and choose another law, seems dreadfully formalistic and operates only to lay a

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24. See Bonell, *supra* note 9, at 56-57.

snare for the unwary, but in light of the Convention text the advice is prudent.

#### E. Arbitrate

Clarifying interpretations of this Convention will accumulate only slowly because sales contract disputes will not appear in courts very often. The reason why lawsuits are infrequent in this field is that most traders long have preferred arbitration of commercial disputes. The adoption of CISG is unlikely to weaken that preference. One obvious advantage for commercial parties to arbitration is that the arbitrator usually is free of appellate review or criticism if he or she reads the law broadly, contextually, and differently than a judge would. Ironically, a significant fringe benefit of the adoption of CISG is that, to avoid judicial application of CISG's troublesome aspects drafters may now be more inclined to provide expansive arbitration clauses.

#### F. Please Don't Do It Again

It would be very helpful if all UNCITRAL delegates read this book and meditate upon its lessons for their future work. We should not fault the drafters of CISG for their inability to arrive at a Continental style code that concisely and clearly states universal principles of sales law. The sixty eight nations that participate in UNCITRAL are incapable of any such agreement. I fault the pretense that there are grand principles at work and transcendent values being vindicated. In fact, the Convention is largely a cut-and-paste job, and the primary operative drafting principle was to produce a document that all could agree to and none would reject. I do wish that the drafters had seen their task more realistically as of one of building from transaction and practice to principle. That is the essence of my criticism of CISG's treatment of custom and trade usage as well as its lack of a clear transactional perspective. More crucially, I wish that they had shown greater realization that the process upon which they had embarked is an organic, continuing one. It simply is not necessary to float a convention text with no attention to the need for revision, correction and interpretation. What we need are Conventions more sensitive to the need to incorporate the capacity for change, growth and discovery into the process of harmonization.

