The International Sales Convention: A Dissenting View

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The symposium on the United Nations Convention on Contracts for the International Sale of Goods in the Winter 1984 issue of *The International Lawyer*[1] presents an admirable collection of distinguished commentators on the Convention, but they tell only one side of the story. A casual reader might be left with the impression that the Convention is noncontroversial and should be routinely ratified by the United States. This would be a very unfortunate impression, for there are significant problematic issues regarding the Convention and it would be of doubtful wisdom for the United States to adopt it in its present form. These defects certainly will become apparent when a broader cross section of the legal community becomes familiar with the Convention's details. A thorough assessment of the Convention's impact by the legal and commercial communities interested in international sales transactions is overdue. I have set forth my concerns more fully elsewhere;[2] in this comment, I only suggest three central defects in this far-reaching Convention that indicate its ratification should be delayed pending clarification and further study.

I. Scope of the Convention and Strategy of Law Harmonization by Codification

The Convention seeks to unify the law of sales of different nations by breaking off international sales from general commercial transactions and creating a unified set of rules to cover such sales. This strategy can only work

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[1]18 INT'L LAW., 5–58 (1984).

[2]Rosett, *Critical Reflections on the United Nations Convention on Contracts for the International Sale of Goods*, 45 OHIO ST. L. J. (1984).

if it is possible to isolate international sales from other transactions and if it is feasible to give them separate commercial and legal treatment. To the extent that this goal is not practical, the law confronting businesspersons will not be unified; it will be complicated by giving them two sets of disparate rules to contend with.

The shortcomings of this strategy are demonstrated by the several decades of difficulty the drafters had in defining an "international sale" and the unworkable nature of their final solution. Professor Farnsworth's article in your symposium[3] mentions the definitional features in passing, but gives the reader no clue to their complexity. In fact, the definitional provisions of the Convention do not use the words "international sale." Instead, the Convention applies to all "sales of goods between parties whose places of business are in different states."[4] This creates a law of personal status, which depends on the place of business of the parties, not on any quality of the transaction. If a Paris-based United States citizen purchases goods in New York that will be resold in the United States without ever leaving the warehouse and will never cross a national boundary, the Convention treats the transaction as an international sale. In contrast, if a businessman who is a national and resident of Japan rents office space in this country, his purchase of identical goods to be shipped halfway around the world during the course of the contract will not be treated as an international contract.

This curious way of defining the scope of the Convention is hardly accidental. The motivation for harmonizing and unifying international sales contract law is that the world economy is increasingly integrated and national legal borders no longer make clear commercial sense. The economies of the developed world, and to a lesser extent the Socialist nations and the developing world, are tied together by a high level of trade and investment. The very circumstances that demand a higher level of legal harmonization precludes isolating international transactions and subjecting them to different rules than those that govern domestic agreements. Integration has reached the point where international sales are neither a functionally nor a conceptually distinct class of transactions in free market economies.

II. Substantive Inadequacies of the Convention and Limits of Possible Compromise

How was it possible after over a half century of negotiation for the delegates of sixty-two disparate legal cultures to reach agreement on a

[3]Farnsworth, *The Vienna Convention: History and Scope*, 18 INT'L LAW. 19 (1984).

[4]Article 1(1) provides: "This Convention applies to contracts for sale of goods between parties whose places of business are in different states: (a) when the States are Contracting States; or (b) when the rules of private international law lead to the application of the law of a Contracting State."

Convention? It is no criticism to observe that the Convention is very much a compromise. The problem is that in their anxiety to reach an agreement the delegates often buried problems without resolving them, cut off their messy ends, or adopted a verbal formula which hides persistent disagreement. Sometimes these "compromises" are contained in clauses that even leading participants in the drafting process cannot explain. Other times they are contained in exclusions which undercut the universal and exclusive claims of the Convention. Sometimes, they are found in formulations that are unlikely to give the American lawyer a clue as to the meaning the terms will be given by persons from other legal systems.

I cannot dissect the many substantive clauses of the Convention in this brief comment, but it is regrettable that the distinguished authors of the symposium in their more extensive treatments of important aspects of the Convention did not tell us more about some of the following: a) the extent to which the term "validity of the contract" in Article 4(a) imports national concepts of illegal contracts, mandatory terms, unconscionability, duress, capacity, mistake etc.; b) the extent to which the unification worked by the Convention extends to problems of products liability, particularly claims of third parties or those involving personal injury; c) the extent to which the term "observance of good faith" in Article 7(1) means something comparable to the similar term "obligation of good faith and fair dealing" under the UCC, and the extent to which that term instead imposes a limitation on the power of the parties to terminate negotiations without penalty before an agreement is reached; d) the extent to which Article 78 excuses performance because of inflation or other changes in price levels.

The list can be extended several fold and undoubtedly will provide fodder for generations of law review article readers. The point is that a set of modern sales contract rules that do not provide guidance on the legal risks of product liability, inflation and other supervening events, tender and conformity of goods, and any other topic which has been the subject of mandatory national legislation cannot claim to be a workable unification of the law. In short, those who support this Convention because it will clarify and simplify the legal questions of sales transactions are in for a big surprise. The exclusions and questions left open include almost all of the areas that are currently controversial and produce disputes. This is hardly a shocking revelation. Just how were the delegates supposed to be able to resolve these profound substantive disagreements? In fact they did not and the appearance of harmony is illusory. Having recognized that this is so, one must then ask what good will be accomplished by adopting the Convention.

III. The Convention and the Future

The most problematic aspect of the Convention structure is the way it deals with the future. In their zeal to unify sales law the drafters have created

a comprehensive and exclusive code and have cut it off from national processes of lawmaking without providing workable international substitutes. It is as if once agreement is reached on the doctrinal statements of contract law, the text will be a static and unchanging monument.

This is both unfortunate and unnecessary. It is unfortunate because it is easier to accept an unsatisfactory text if one is confident that it can be improved with experience. Conversely, when opportunities for further growth are stunted, one's expectations of the original text must be higher. It is unnecessary that opportunities for growth be so limited because there are an impressive variety of opportunities drawn from experience with other conventions and uniform laws in the United States and Europe which would have enabled flexibility and growth. Harmonization by such means is not always neat or speedy, but it is effective and possible.

In contrast, adoption of the Convention will eliminate the legislative competence of the states which have successfully governed this area of law for several centuries and will constrain the power of the federal government to adopt amendments or modifications in the Convention text. Yet the Convention establishes no international body to consider modifications. UNCITRAL provides no mechanism for ongoing review and lacks authority to propose changes in the Convention text to signatory nations. In fact, UNCITRAL has no established procedures of clear authority to take any action on its own. It operates under a process of unanimous consent, perhaps because it has never been able to agree on rules of procedure and, as Professor Honnold has described it, "the procedures bear a striking resemblance to those of a Quaker meeting."[5]

Each signatory is obliged to follow the interpretations of the others, although no process is established to decide which national decisions are authoritative and must be emulated by the other signatories. These interpretative difficulties are particularly troubling since most of the signatories of the Convention have legal systems that do not accord court decisions the dispositive authority which they are supposed to have in common law systems. Ratification will commit the United States to the regime established by the Convention with little possibility of returning to the existing flexible system of state law if the experiment proves unsatisfactory.

Finally, it should be noted that the Administration proposes to effect this epochal shift in power from the states to the national and international regimes not by an Act of Congress, but by the simple process of Senate ratification of a treaty. This unorthodox method of incorporating a private law treaty in domestic law precludes the kind of careful committee examination in both Houses and the review of the specific text in an authoritative

[5]Honnold, *The United Nations Commission on International Trade Law: Mission and Methods*, 27 AM. J. COMP. L. 201, 210 (1979).

English version that has been used in the adoption by this country of earlier private law Conventions.

Readers of *The International Lawyer* will profit from reading the symposium in the Winter 1984 issue and will benefit from the explanations it provides. Careful study of the text of the Convention itself will raise important questions in the readers' minds that should lead to more critical consideration of this far-reaching innovation.