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Foreword

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SYMPOSIUM:

Teaching Sales Law in a Global Context: The Reciprocal Influence of Domestic Sales Law (Article 2) on Private International Law (CISG & UNIDROIT) and Private International Law on Revised Article 2

Foreword

Sarah Howard Jenkins*

Modern commercial parties, regardless of size, are now confronted with a myriad of contracting rules as their transactions cross national boundary lines. The burgeoning global marketplace and the growing interdependency among sovereign nations on the international trade of goods and services increase the concern for minimizing conflicts between rules of sovereign states governing commercial transactions. Of even greater significance is the impact of modern computer and telecommunications technology that facilitates transnational and global contracting.

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Some of the problems inherent in both current and future international sales transactions have been minimized by recent efforts to harmonize and to coordinate the private laws of sovereign states. The United Nations Commission on International Trade Law (UNCITRAL) sponsored the Convention on Contracts for the International Sale of Goods that was adopted by the United Nations Diplomatic Conference in 1980. The efforts of the International Institute for the Unification of Private Law (UNIDROIT) to establish general rules for international commercial contracts, covering both good and services,¹ were finalized in 1994.

On the domestic front, promulgation of Article 2 of the Uniform Commercial Code by the National Conference of Commissioners on Uniform State Laws and the American Law Institute in 1952, with its first revision in 1958, predates the Convention and the UNIDROIT Principles by more than thirty years. Revision of Article 2 is currently underway with its projected completion two years away.

These initiatives in domestic and international contract law, coupled with the recent promulgation of the UNCITRAL Model Electronic Commerce Act,² provide a golden opportunity to add to existing legal scholarship a symposium addressing the historical development of these bodies of contracting rules, the symbiotic relationship among them, the substantive nuances that distinguish them, and the need to include international contract law in domestic contracting law courses in American Law Schools.³ Each contributor is or has been involved to some degree with law reform, some in the international arena, some the domestic sphere, and several in both; all bring a wealth of practical and theoretical insight to the issues presented.

Professor E. Allan Farnsworth, actively involved in international and domestic law reform,⁴ addresses the historical development of private international law. Professor Farnsworth explains that what appears to the outside observer as a relationship of reciprocal influence

1. UNIDROIT PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS preamble (1994).

2. A copy of this Act may be obtained online at the following URL: <<http://www3.un.or.at/uncitral/texts/electcom/ml-ec.htm>>.

3. Audio tapes of the January 7, 1998, program of the AALS Section on Commercial and Related Consumer Law on this topic are available through the AALS office.

4. E. Allan Farnsworth is a member of the ALI; United States Representative to the United Nations Commission on International Trade Law, 1970-82; Reporter for the *Restatement (Second) of Contracts*, 1971-81; Member of the Governing Counsel for the Institute for Unification of Private Law (Rome) since 1979; and a member of the UNIDROIT Working Group that drafted the Principles.

between domestic and private international contract law is in fact a symbiotic one.⁵ Professor Farnsworth clarifies that, despite the similarity of language between the domestic law rules, *Restatement (Second) of Contracts* and Article 2, and private international law, the Convention and the UNIDROIT Principles, little direct influence by Article 2 can be demonstrated. He suggests reasons for the absence of direct influence by domestic sales law. This carries serious implications for those who suggest that interpretation and construction of the Convention should be made in light of precedent under current Article 2.⁶

Given the absence of direct influence of Article 2 on the Convention, will the experience under the Convention have a *significant* impact on the revision of Article 2? Professors Linda Rusch, Associate Reporter to the Revised Article 2 Drafting Committee, and Henry Gabriel, Revised Article 2 Drafting Committee Member,⁷ state a resounding, "No!"⁸ Without addressing the rationale behind the rejection of the approach taken by private international law on issues addressed by the Drafting Committee, Professor Rusch identifies the two topics upon which the Convention materially influenced the revision of Article 2. In contrast, Professor Gabriel addresses some of the theoretical and substantive distinctions that minimized the impact of the international law experience under the Convention on the revised Article 2, and Professor James J. White⁹ provides a critical assessment of the revised Article 2's warranty

5. E. Allan Farnsworth, *The American Provenance of the UNIDROIT Principles*, 72 TUL. L. REV. 1985 (1998).

6. See, e.g., Henry D. Gabriel, *A Primer on the United Nations Convention on the International Sale of Goods: From the Perspective of the Uniform Commercial Code*, 7 IND. INT'L & COMP. L. REV. 279 (1997). But cf. C.M. BIANCA & M.J. BONELL, COMMENTARY ON THE INTERNATIONAL SALES LAW: THE 1980 VIENNA SALES CONVENTION (TALLON) art. 79, ¶ 1.3 (1987) (exemption under CISG developed without reference to domestic theories and resort cannot be made to domestic law as a guide); Franco Ferrari, *The Relationship Between the UCC and the CISG and the Construction of Uniform Law*, 29 LOY. L.A. L. REV. 1012, 1024 (1996) (CISG opted for autonomous interpretation); Phanesh Koneru, *The International Interpretation of the UN Convention on Contracts for the International Sale of Goods: An Approach Based on General Principles*, 6 MINN. J. GLOBAL TRADE 105, 106 (1997).

7. Henry Gabriel is also a member of the ALI and a Commissioner from Louisiana on the National Conference of Commissioners on Uniform State Laws.

8. Linda J. Rusch, *The Relevance of Evolving Domestic and International Law on Contracts in the Classroom: Assumptions about Assent*, 72 TUL. L. REV. 2043 (1998); Henry Deeb Gabriel, *The Inapplicability of the United Nations Convention on the International Sale of Goods as a Model for the Revision of Article Two of the Uniform Commercial Code*, 72 TUL. L. REV. 1995 (1998).

9. James J. White is a member of the ALI, Reporter for UCC Revised Article 5, and a Commissioner from Michigan on the National Conference of Commissioners on Uniform State Laws. He also serves as a member of the Revised Article 1 Drafting Committee.

provisions.¹⁰ While the impact of the Convention and the UNIDROIT Principles has been minimal, Professors Boss¹¹ and Rusch examine the profound influence of electronic contracting, especially the UNCITRAL Model Electronic Commerce Act, on the revised Article 2.¹²

On a comparative level, Professor Jenkins addresses the differences in approach between domestic Article 2 and international law, under the Convention and the UNIDROIT Principles, on the substantive rules on impracticability and the relative advantages and disadvantages of the differing approaches.¹³ Similarly, Professor Rusch wrestles with the doctrine of assent in the context of standard form contracting, using a comparative approach to examine the competing policies of assent and fairness.¹⁴

Finally, Professor Peter Linzer¹⁵ makes a well-reasoned plea for the inclusion of private international commercial law in domestic contract law and sales law courses in American law schools.¹⁶ Without exposure to private international law initiatives, he argues, law graduates will be ill-prepared for the practice of commercial law in the twenty-first century.

For the law teacher, this Symposium offers historical and comparative analyses, substantive evaluation, and practical insight. The Symposium's goal is to challenge assumptions that have been made on the relationship between domestic and international law, to highlight the importance of private international law in the law school

10. James J. White, *Freeing the Tortious Soul of Express Warranty Law*, 72 TUL. L. REV. 2089 (1998).

11. Amelia Boss is a member of the Permanent Editorial Board of the UCC; a member of the ALI, the ALI member of the Drafting Committee to Revise Article 2 of the UCC, the Drafting Committee on Article 2B, and the Drafting Committee to Revised Article 1; and she serves as an advisor and United States Delegate to the United Nations Commission on International Trade Law on issues relating to electronic commerce. In May of 1992, Professor Boss delivered one of the keynote addresses to the UNCITRAL Congress at its twenty-fifth anniversary observance on electronic commerce.

12. Amelia H. Boss, *Electronic Commerce and the Symbiotic Relationship Between International and Domestic Law Reform*, 72 TUL. L. REV. 1931 (1998); Linda J. Rusch, *The Relevance of Evolving Domestic and International Law on Contracts in the Classroom: Assumptions about Assent*, 72 TUL. L. REV. 2043 (1998).

13. Sarah Howard Jenkins, *Exemption for Nonperformance: UCC, CISG, UNIDROIT Principles—A Comparative Assessment*, 72 TUL. L. REV. 2015 (1998).

14. Linda J. Rusch, *The Relevance of Evolving Domestic and International Law on Contracts in the Classroom: Assumptions about Assent*, 72 TUL. L. REV. 2043 (1998).

15. Peter Linzer is a member of the ALI and the Editor/Reviser of the *Restatement (Second) of Contracts*.

16. Peter Linzer, *Non-["Un-?"] American Law and the Core Curriculum*, 72 TUL. L. REV. 2031 (1998).

curriculum, and to encourage continued involvement in private law reform by members of the legal academy.