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Restoration of the Rule of Reason in Contract Formation: Has There Been Civil and Common Law Disparity?

The drafters of the United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980)[1] [hereinafter "Convention"] sought to strike a compromise between civil law and common law.[2]

The Convention avoids using the shorthand of legal rules that might be interpreted differently in different legal systems. Instead it speaks directly to the business community by providing the results that would meet the ordinary expectations of a business person. In general, these results are largely the same in each State as would have been produced by the application of domestic laws.[3] This likeness may at first seem paradoxical, for an analysis of the two legal systems' law of contract *seems* to reveal sharp differences. The answer seems to lie in the effect of black-letter rules.

1. U.N. Convention on Contracts for the International Sale of Goods, Apr. 10, 1980, U.N. Doc. A/CONF.97/18 (1980), *reprinted in* [1980] Y.B. UNCITRAL 151 U.N. Doc. A/CN.9/SER.A/1180, and *in* 19 I.L.M. 668 (1980) [hereinafter "Convention"].

2. *Cf.* Rosett, *Critical Reflections on the United Nations Convention on Contracts for the International Sale of Goods*, 45 OHIO ST. L.J. 265 (1984).

Interestingly, writers analyzing the Convention's compatibility with their own country's law have taken a result-oriented approach, abandoning analyses that focus exclusively on legal rules or doctrines. Such writers are themselves following the encouraging path taken by the United Nations Commission on International Trade Law (UNCITRAL). *See* Sono, *UNCITRAL and the Vienna Sales Convention*, 18 INT'L L. 7, 13 (1984). Throughout UNCITRAL's drafting process preceding the diplomatic conference at Vienna for adoption of the Convention, the drafters, having profitted from the experience of The Hague Uniform Laws of 1964, stressed the need to avoid a doctrinal approach. *See* Winship, *The Scope of the Vienna Convention on International Sales Contracts*, in INTERNATIONAL SALES: THE UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS 1-9 to 1-16 (N. Galston & H. Smit eds. 1984).

3. No doubt, this similarity of result accounts for the general favor shown to the Convention by the traditionally dogma-oriented legal profession.

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Legal rules, which sometimes include contradictory elements, are primarily means of reaching fair and equitable results. The problem with legal rules is that they can come to be regarded as intrinsically binding, thus exerting an influence that reaches far beyond the substantive reasons motivating their creation. Moreover, when the rule itself becomes the focus of concentration, it often obscures the contradictory elements underlying it that were often the very reason why the rule was first embraced. Worst of all, when two legal systems' doctrines are compared, the existence of these legal rules causes an exaggeration of the two systems' differences, even though in concrete situations both systems might support the same result. Although Geldart, in his famous Elements of English Law, wrote that "[l]awyers generally speak of *law*; laymen more often of *laws*;"[4] lawyers in fact are themselves often guilty of focusing on the differences among *laws*, rather than on the common features of *the law* as a whole.

The business world is becoming global. Contract-based suits therefore should not produce different results depending on the forum in which they are initiated, especially where the different societies have similar goals. The Convention's promoters stressed the common goals of each legal system,[5] asserting that the Convention restored this underlying similarity in practical contexts. The Convention should not be examined as a compromise between civil and common law systems; such an approach would emphasize the very technicalities the Convention sought to eliminate. This paper will therefore analyze a few examples in the contract-formation area to show how the Convention, instead of striking a compromise between the two legal systems, brought to light the common bases underlying civil law and the common law.

I. The Question of Irrevocability of Offers

The revocability of offers is a common example of the perceived differences in contract formation between civil law and the common law. The traditional common law rule is that an offer is revocable, even if it states otherwise, unless the offeree gives the offeror consideration to make the offer irrevocable or to create an option contract.[6] Under civil law, an offer that states a period of time in which the offeree must accept is not revocable. If no such period is stated, the offer is irrevocable during a reasonable acceptance period.[7]

Article 16 contains the Convention's approach:

> (1) Until a contract is concluded an offer may be revoked if the revocation reaches the offeree before he has dispatched an acceptance. (2) However,

4. W. GELDART, ELEMENTS OF ENGLISH LAW 1 (1914).

5. *See* Convention *supra* note 1, at art. 7 ("In the interpretation of this Convention, regard is to be had to its international character and the need to promote uniformity in its application . . .").

6. RESTATEMENT (SECOND) OF CONTRACTS § 42 comment a.

7. ZWEIGERT-KÖTZ, EIN FHRÜNG IN DIE RECHTSVERGLEICHUNG AUF DEM GEBIETE DES PRIVATRECHTS 39 (2d ed. 1984).

> an offer cannot be revoked: (a) if it indicates, whether by stating a fixed time for acceptance or otherwise, that it is irrevocable; or (b) if it was reasonable for the offeree to rely on the offer as being irrevocable and the offeree has acted in reliance on the offer.[8]

Lawyers' prevailing attitudes to this provision are as follows. Common law lawyers consider that the general rule stated in article 16(1) corresponds to the common law. The exceptions to the general rule contained in article 16(2) do not trouble common law lawyers because they reflect the common law principle of promissory estoppel. Civil law lawyers, on the other hand, consider the exceptions in article 16(2) powerful enough to render nominal the effect of article 16(1)'s general rule. Therefore, article 16 is satisfactory to both civil and common law lawyers, each side believing that the Convention strikes a compromise between the two systems that they find workable. However, the question remains: Does the Convention in fact strike a compromise?

Lawyers should not attempt to understand and apply the Convention in terms of their own legal system's doctrines. By so doing, they will distort the Convention's rules, which in fact are tailored to meet the reasonable expectations of the business community. If, for example, a civil law lawyer understands article 16 merely to restate and apply the traditional civil law rule, the lawyer might believe that an offer is always irrevocable during the period the contract states for acceptance. Such an understanding would be wrong.[9] Under the Convention, the crucial test is the intent of the offeror.[10] The fact that the contract states a period for acceptance merely creates a rebuttable presumption of irrevocability.

Suppose an offer is made to a business client that indicates similar offers have also been made to some of the client's competitors and that asks the client to advise within a week whether he accepts.[11] Under the Convention, whether the one-week period is construed as a period of irrevocability is determined by looking to the circumstances of the transaction. If, for example, the contents of the offer suggest that the offeror's intent is to create a "first-come, first served" offer, then the stated period will not serve to make the offer irrevocable during that period.

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8. Convention *supra* note 1, at art. 16.

9. Suppose an offer dated September 1 states, "If I do not receive your reply of acceptance by September 15, this offer expires," or more briefly, "Please reply by September 15." Two questions must be distinguished. One relates to when the offer lapses. The other relates to the period during which the offer cannot be revoked. The hypothetical offer is clear on the question of lapse, but it does not answer the question of irrevocability. Moreover, an offer may lapse at the end of a stated period of irrevocability or sometime thereafter. However, civil law lawyers often fail to distinguish these two questions. Thus, an abstract legal analysis tends to obscure the reality of the business world.

10. *See* art. 8 of the Convention. *See also* Eorsi, *Revocability of Offer*, in COMMENTARY ON THE INTERNATIONAL SALES LAW: THE 1980 VIENNA SALES CONVENTION 157 (Bianca & Bonell eds. 1987).

11. For further discussion of this point, see Part III.

The need to protect an offeree's reliance is one reason for the traditional civil law rule of irrevocability. Where an offeror induces an offeree to consider an offer, the offeror should not be permitted to revoke his offer while the offeree is examining it. Would civil law lawyers enforce this rule even if revocation would do no substantial harm to the offeree? If the answer is yes, then the value of the traditional, unshakeable rule becomes questionable, at least from the perspective of the business community.

Imagine that X, a manufacturer of powerful engines, is aware of Y's interest in his engines. X writes to Y offering to sell a certain quantity of specified engines for a stated price and gives Y forty-five days to consider. However, the next day, X changes his mind and writes to Y to ignore the offer. Assume that Y merely glanced at the first letter and, by the time he received X's revocation, has done nothing in reliance upon it. Moreover, assume that because of X's revocation, Y pays no more attention to X's offer. Assume further that twenty days later Y learns from a third source that X's offer was a very attractive one. Y thereupon examines X's offer for the first time, concludes that the offer should not have been ignored and accepts. Who in the business world would say that X should be bound?[12]

II. Offers as "Gifts of Power" To Create A Contract

Contracts are powerful legal devices for maintaining order in business relationships. An offer is really an offeror's unilateral authorization for the offeree to create such a contract. Because such offers are often unsolicited and not supported by consideration, an offer has the character of a gift of power.[13]

Both the civil and the common law treat an ordinary promise of a gift (particularly if oral) as revocable, especially when the promisee has not yet relied on the promise.[14] Until the offeree relies, revocation does not harm the offeree or disturb the *status quo*. If the two legal systems

12. In this connection, an interesting historical fact may be noted. Under the old German law, an offer was revocable until the offer was accepted, as in the common law. However, the strict application of that rule created many instances where it was felt that some remedy, like the tort-like *culpa in contrahendo* must be given to the offeree who suffered substantially by acting in reasonable reliance upon the offer. Thus, the need to prevent harms from reasonable reliance upon an offer is what eventually converted that rule to that of the present civil law. This development of course resembles that of promissory estoppel in the common law. As in the latter's development, the abstract support given to the current rule emphasizes only the protection of reliance as the rule's basis, rather than emphasizing the original basis of the rule.

13. An exception is the option contract, where such power is bargained for, or "purchased."

14. An offer's gift of power may also be applied to a third person's authorization to act on the authorizer's behalf as an agent. This delegation of authority is revocable at any time, unless the revocation harms the agent or the delegation or agency has already been coupled with an interest—a situation functionally resembling the option contract situation.

agree on this general principle, why should they differ on the revocability of an offer? Or do they differ?

III. Civil Law: Irrevocability Linked to Reliance Protection, Not Intent

The tendency in civil law is to regard the black-letter rule of irrevocability as an absolute, even though it is a part of contract law where the will of the parties controls. When an offer expressly states that it may be revoked, civil law will of course honor this qualification. But if the offer does not expressly so state, the civil law often does not attempt to ascertain the intent of the offeror.

The civil law rule of irrevocability is justified when revocation of an offer causes change in the offeree's position, i.e., where the offeree reasonably relies to his detriment. However, to determine the reasonableness of the offeree's reliance calls for a close scrutiny of the offeror's intent, to be ascertained from the circumstances of the offer. Even if the offeree made expenditures to assess the offer and the offer was revoked, the offeree may nevertheless have incurred expenses at his own risk.[15] The civil law frequently ignores the need for this scrutiny of intent,[16] possibly because the need for such a search was obscured by the rule's abstract emphasis on the protection of reliance.

It is nevertheless important to distinguish the question of giving effect to the offeror's intent from the question of protecting reliance. Many situations do not justify a mechanical application of the rule of irrevocability: no protection is necessary because there has been no detrimental reliance. Mechanical application of the black-letter rule obscures the fact that two distinct questions are involved. The offeror's intent must reasonably be inferred from the circumstances of the offer. Then one must ask whether the offeree's reliance on the offer's irrevocability was reasonable *and* whether the offeree in fact relied to his detriment.

IV. The Common Law: Why Gilmore Wrote *The Death of Contract*

The preceding discussion of civil law might cause those living under the common law to feel greater confidence in their own legal system. However, the common law contains a similar confusion of the questions of intent and of reliance protection. As discussed separately below, consideration theory gradually became burdened with an impossible dual function, leading ultimately to the enshrinement of the doctrine of promissory estoppel at the portals of contract law, and a consequent weakening of the importance of intent.[17]

Theories oriented to protecting reliance necessarily emphasize

15. For an example of such an offer, see text accompanying note 11, *supra*.

16. *See supra* note 9.

17. Observation of this phenomenon led Grant Gilmore to write THE DEATH OF CONTRACT (1974).

objective standards.[18] Promissory estoppel's objective approach analyzes the *relationship* arising from a promise, not the contract itself. Many kinds of relationships arise in private life; a contractual relationship, or a relationship created through a promise between the promisor and promisee, is only one of them. Non-contractual relationships essential to the private order of any society also require reliance. Before getting on a bus, we do not verify whether the bus has stable tires and a sober driver. We buy food based on an expectation that it is edible. We enter classrooms without worrying whether the ceiling might collapse. Such reliance allows daily life to function smoothly.

Contractual relationships differ from those other examples in that parties voluntarily enter into a relationship. The same need for reliance protection exists in contractual as in noncontractual relationships, but in contractual relationships the law is also concerned with the intent of the contracting parties. Although honoring the intent of the contracting parties is itself a principle touching the basic organizational structure of the international business community, reliance protection does not necessarily stem from this organizational structure associated with the intent. This difference is crucially important.

When a promise induces reasonable reliance that causes damage to the other party, the damage must be cured. Society does not permit the promisor to escape by asserting that a different intention was behind the promise if that intention cannot reasonably be inferred from the circumstances. He will be estopped from asserting it. Estoppel is thus a one-way "sanction" against the party who otherwise disturbed the social order, resembling the tort of misrepresentation more than it does contract law. However, reliance-based, objective theory seems to ignore the origin of this sanction, generalizing about the sanction as if it resulted from the contract itself.

Societies under both the common law and civil law have tended constantly to group together as contracts most of the private relationships created through the will of a party.[19] This tendency may have given rise to the confusions between, and mingling of, the concepts of a contract and a contractual relationship. Even worse, the legal effects arising from a contract, and those from the contractual *relationship*, have often been grouped together, without distinction, in discussions of contract law and attempts to systematize it. The law of contract (or more properly, perhaps, the law relating to a promise) requires the subjective test of intent. The objective test maintains order in many kinds of non-

18. This impression may have been caused by the fact that judicial decisions were rendered only around those cases where protection was requested.

19. For example, the so-called unilateral contract is not a contractual agreement in that the promisor's promise is unilateral, and his obligation to perform is only subject to the fulfillment of a condition which he himself imposed. Nevertheless, it creates a contract-like relationship. And, as discussed in Part II, even in the ordinary offer-and-acceptance *relationship*, an offer is a unilateral promise in the sense that the offeror's obligation to perform his promise is subject to the fulfillment of a condition, *i.e.*, the offeree's promise in return.

contractual private *relationships*, both contractual and non-contractual, and is thus more akin to the law of such torts as misrepresentation. An unnecessary confusion ensues when these two tests are compared and discussed as if they belong to the same dimension.

V. Consideration Theory Burdened by an Impossible Dual Function

The above-noted confusion occurred under the common law because of developments surrounding the theory of consideration. Not all promises are necessarily legally enforceable. Society sanctions breaches of promise in ways other than by legal sanctions, as, for example, by the loss of reputation. For a promise to be legally binding, the promisor's intent in making a promise must be so firm and serious that it can reasonably be inferred that he is prepared to accept legal sanction in case of breach and, therefore, that leaving the breach thereof legally unsanctioned would disturb the social order. The exchange of consideration had originally been one test of the seriousness of the promisor's subjective intent. Another such test was whether a promise was under seal.

The use of consideration expanded, however, as a convenient tool to justify legal interventions to protect parties. This process of expansion culminated in the holding that a detriment suffered by a promisee is consideration, even when the promise had not conferred any benefit upon the promisor. By this point, the central concern had become protecting the promisee's reliance. Therefore, before "consideration was found," an objective test had to be imported to assess whether the promisee's acts or detriments in reliance on a promise were reasonable. Consideration's original role had thus been transformed from that of a guide to the promisor's intent to now also disposing of the question of the promisee's reasonableness in relying on the promise. It seemed an impossible dual function.

This tendency to reliance protection led to the enshrinement of promissory estoppel in the Restatement of Contract, Section 90.[20] Curiously, over time the commentators had forgotten that the reliance-protective approach was only a one-way street that allowed a party in need of protection to sanction the other party. Perhaps it was the accumulation of judicial decisions that created the impression that courts were protecting the legal effect of a promise itself.[21] Regardless, the need for protection in fact arose, not from the contract, but from the *relationship* in a particular situation, and protection was afforded only when acting in reliance upon this relationship would substantially disturb the *status*

20. Indeed, by the time the American Law Institute enacted the Restatement Second, the process had advanced so far that the drafters declared in comment a that the rule will "often render inquiry unnecessary as to the precise scope of the policy of enforcing bargains."

21. When used successfully, such theories can obscure those focusing on the subjective standard of ascertaining intent.

quo.[22]

Article 16(2)(a) of the Convention has restored the importance of searching for the offeror's intent. Article 16(a) also reflects an offer's unilateral empowerment of the offeree. Article 16(2)(b) recognizes the need for reliance protection in the business setting where the offeree's reliance on the offer's irrevocability was reasonable under the circumstances and the offeree has already acted in reliance on the offer. The soundness of this solution should be apparent to all business people, regardless of legal doctrine.

VI. Time When Contract Becomes Concluded

The issue of the permissibility of withdrawing an acceptance merits attention, for it, too, is a problem area where, in both the civil and common law systems, doctrine often disturbs proper thinking. *Adams v. Lindsell*,[23] and *Byrne v. Leon van Tienhoven & Co.*,[24] are commonly believed to have established the rule. Although the real issue in these cases was whether an *offer* could still be revoked after an acceptance had been dispatched, the rule established by the cases is that a contract is formed at the time an acceptance is dispatched. This rule of contract formation is so firmly established that it overrides the offeree's ability to withdraw acceptance before the acceptance has been received by the offeror, even though such a result falls outside the logic of what motivated the rule's formation.

In the civil law, the situation is similar. For example, article 526(1) of the Japanese Civil Code provides that a contract is formed when an acceptance is dispatched. However, an examination of its *traveau preparatoire* reveals that the rule's rationale was to preclude revocation of an offer when it might reach the offeree after the offeree's acceptance is dispatched. Thus a broad rule was established to catch a relatively small fish, and once created it caused more problems than it solved, inviting sophisticated legal discussions similar to those that have taken place in the common law countries.[25]

The Convention does not follow such an approach. Article 16(1) clearly states that revocation of an offer will no longer be permitted after an acceptance is dispatched. Article 18(2), however, adds that the acceptance will not become effective until it reaches the offeror. Thus, according to article 22 the acceptance may be withdrawn if the withdrawal reaches the offeror before the acceptance or at the same time as the acceptance would otherwise have become effective.

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22. These developments were exactly what Gilmore attacked with humor and irony in his THE DEATH OF CONTRACT.

23. 1 Barnewall & Anderson 681 (K.B. 1818).

24. 49 L.J.C.P. 316, L.R. 5 C.P.D. 344 (1880).

25. *See* MacNeil, *Time of Acceptance: Too Many Problems for a Single Rule*, 112 U. PA. L. REV. 947, 952-79 (1964). It may also be of interest to note that Adams v. Lindsell and Byrne v. Leon van Tienhoven & Co. were relied upon at the time of the Japanese codification in support of the rule.

As discussed earlier, upon receiving an offer, the offeree has the power to create a contract by acceptance. The offeree is under no duty to accept the offer. By dispensing with an all-embracing rule on the time of the contract's formation, the Convention takes into account this voluntary aspect of an acceptance. When an acceptance reaches the offeror, the acceptance will become effective and will simultaneously be merged into a contract. By permitting withdrawal of an acceptance before its receipt, the offeror does not lose anything he deserves, but the *status quo* of the parties' relationship is preserved.

VII. Neither Civil Nor Common Law Prevailed: A Road to Delocalization of Law

Under both civil law and the common law, many black-letter rules that have developed are, at best, the product of continuously accumulated human experiences of how to reach fair and equitable results. The law is not a mere series of such rules—the law is above them. Lawyers' technical expertise, however, often has obscured the fact that these rules are only guides for applying the law. The Convention liberates the business community from the jungle of technicalities and restored the rule of reason.

These practical rules remain part of a traditional convention, reflecting the reality of a world where any contract dispute arising from an international transaction will ultimately have to be decided by the application of the law of a particular State. Thus, the drafters desired the "unification" of each national law. However, the Convention's success in identifying solutions acceptable to the business world provides hope that the Convention will establish a foundation for the delocalization of the law. The age of independence, or even interdependence, has already gone and we are now in the age of interpenetration, where national boundaries lose their meaning.[26] For a global legal order to be established to govern business transactions "ignorant" of national boundaries, such a legal order must first free the business world from the dogmas that heretofore have shaped the traditional local orders. This is a road for the restoration of *lex marcatoria*, in the same manner as it existed in the medieval age, at a global dimension in relation to the so-called "international" transactions.[27]

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26. *See* Sono, *Sovereignty, This Strange Thing: Its Impact on Global Economics*, Ga. J. INT'L & COMP. L. 9 549 (1979).

27. In this connection, the increasing popularity of commercial arbitration at the expense of national judicial tribunals may also help to restore the *lex marcatoria*. The recent judicial favor towards expanding the scope of arbitrability of international disputes, including even issues, such as anti-monopoly laws, that touch upon a State's public policies, will further strengthen this trend. *See* Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614 (1985). Commercial arbitrations by their nature are unconnected with the exercise of sovereignty, and they will often lead to applying the underlying commercially reasonable result as understood in transactions of a global dimension. The Convention on the Limitation Period in the International Sale of Goods (New York, 1974), which deals with problems of the stat-

ute of limitation or prescription and their international effects, already treats arbitrations at the same level as ordinary judicial proceedings. Art. 1(3)(e). This Convention entered into force on August 1, 1988.