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IS THE UCC DEAD OR MERELY LANGUISHING?

Anita F. Hill*

The question "Is the UCC Dead, or Alive and Well?" most certainly is posed only for the purpose of providing commercial law scholars the opportunity to engage in academic debate. Surely an American law that has been enacted in all fifty states and is in effect in the District of Columbia and the U.S. Virgin Islands can only be described as alive.

Moreover, each year thousands of claims involving the UCC are litigated. For example, section 2-207, which deals with valid acceptance and rejection of goods, is a fertile source of litigation. The case law of the Uniform Commercial Code is reported by the most prominent unofficial case law reporting service¹ and in official legal publications.² The Code has earned its own publication devoted solely to UCC cases.³ And finally, despite its faded novelty, courses on the Code continue to be part of the curriculum of every law school in the country and, predictably, the subject of scholarship of those who teach the Code courses. One need look no further than this Symposium to be reminded of the scholarly value of the Code. Because in many instances it has become worn, and, perhaps, overextended, the Code is renovated by revisions and additions. Several articles of the Code have been revised or are currently the subject of revision efforts. Recently, new articles have expanded the Code's scope and coverage. The Code is commonly litigated, analyzed and debated.

Unless this activity is simply aimed at chronicling the Code's history, the UCC is not dead. Perhaps the question, "Is the Code Dead or Alive?" is not academic so much as it is incomplete. It ignores at least one other potential state of being. Perhaps the UCC is alive and ailing or "dying a lingering death."⁴ In true academic fashion, rather than ask whether the Code is "Dead, or Alive and Well" in the face of the new developments in state, federal and international law, I might reformulate

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1. U.C.C. Reporting Service (Callaghan).

2. For example, official legal publications include *U.S. Reports*, the *Federal Reporter*, the *North Eastern Reporter* and the *Pacific Reporter*.

3. See *supra* note 1.

4. See GRANT GILMORE, *THE DEATH OF CONTRACT* 4 (1974).

the question to posit whether the Code, though alive, can coexist happily and perhaps even healthily amidst the profusion of related legal developments. Can the once fashionable Code suffer being out of fashion with dignity and grace, or will it become a "lame duck" destined for replacement by younger and more innovative successors?

I. ASSESSING THE CODE'S FUTURE THROUGH AN ADMITTEDLY UNSCIENTIFIC LOOK AT ITS PAST

The Code is alive, and though currently languishing, can be made happy and healthy again. Convincing the doubtful, both here and abroad, of the importance of the Code's continued vitality is, of course, the difficult task. Moreover, determining who in the legal community is best able to carry out that task is equally difficult. Convincing the doubters can be undertaken in a variety of ways, two of which are most obvious. First, one could begin to persuade the naysayers of the Code's significance by showing them what life without the Code would be like. Second, one could show the Code's viability by pointing out its strengths relative to other doctrines which are generally thought to be healthy. This first, rather Capra-esque approach would not simply point out the cacophony of commercial utterances that existed prior to the Code, but would also present a drastically different and utterly grim picture of contemporary commercial life without the Code.

Beginning with some of the pronouncements found in Article 2, there is ample evidence that the Code has not only impacted contract issues arising from sales of goods but has impacted the law of commercial and consumer exchanges in general. The Code's adoption of the equitable principle of unconscionability⁵ allows courts of law to overtly police bargains in contracts for sales of goods. Moreover, its extension to other types of contracts, either by analogy or by legislative enactment,⁶ helps reduce the amount of muddled reasoning engaged in by pre-Code courts that attempted to do covertly what they could not do overtly.⁷ Section 2-302 has invited judicial review of the bargaining processes that lead to a contract clause pre-designating a biased arbitrator,⁸ or a contract clause

5. U.C.C. § 2-302 (1990).

6. See *Zapatha v. Dairy Mart, Inc.*, 408 N.E.2d 1370, 1375 (Mass. 1980) (applying, by analogy, Code's provisions of unconscionability to franchise contracts); see also CAL. CIV. CODE § 1670.5 (West 1985) (providing remedies for substantive and procedural unconscionability).

7. For a harsh criticism of pre-Code cases, see Arthur A. Leff, *Unconscionability and the Code—The Emperor's New Clause*, 115 U. PA. L. REV. 485, 537-38 (1967).

8. See *Graham v. Scissor-Tail, Inc.*, 28 Cal. 3d 807, 623 P.2d 165, 171 Cal. Rptr. 604 (1981).

allowing a 400% markup on a standard priced item.⁹ While the provision's application has resulted in highly criticized opinions, with today's increased consumer awareness, the inevitable and unfortunate alternative would be a loss of confidence in the courts.

Equally impressive is the Code's impact on the law governing excuse of contract performance and warranties. Section 2-615 is a lucid synthesis of various confusing pre-Code common-law doctrines. As Judge J. Skelley Wright noted, section 2-615 frees the law from "the earlier fictional and unrealistic strictures" found in the pre-Code legal tests for excuse.¹⁰ While far from creating settled doctrine, section 2-615 relieves the court from the mental connections often required to determine what was an "implied term" or what was in the parties' "contemplation" at the time of the contract, which seems much like trying to establish when the parties had a meeting of the minds for purposes of contract formation. Modern transactions involving multiple parties in various countries present adequate complexities, without the necessity of a court trying to look into the minds of the parties to establish their legal rights. One wonders whether such could ever be ascertained in a contract involving the sale of radio parts by a United States company through a Swedish distributor to an overthrown government in Iran, once the goods have been detained by United States Customs officials.¹¹

The warranty provisions of Article 2 have paved the way for third parties to raise claims against manufacturers with whom they are not in privity. In particular, section 2-318 allows a purchaser's family members to assert actions for breaches of warranty on products used in the household. This extends vertical privity, while the official comments to section 2-318 leave open the possible extension of horizontal privity. Thus, the Code narrows the gap between torts and contracts and allows for further extension of third-party rights under contract law.¹² The extension of Article 2's provisions to other types of contract, and the application of

9. See *Jones v. Star Credit Corp.*, 298 N.Y.S.2d 264 (Sup. Ct. 1969); see also *Carboni v. Arrospide*, 2 Cal. App. 4th 76, 2 Cal. Rptr. 2d 845 (1991) (invalidating note with repayment interest rate of 200% per annum). In *Carboni*, a \$4000 loan was made in July of 1988. *Id.* at 79, 2 Cal. Rptr. 2d at 846. By the time of trial, March of 1990, the principal plus interest on the note amounted to \$390,000. *Id.*

10. *Transatlantic Fin. Corp. v. United States*, 363 F.2d 312, 315 (D.C. Cir. 1966).

11. See *Harriscom Svenska AB v. Harris Corp.*, No. Civ-88-679T, 1990 U.S. Dist. LEXIS 20006, at *2 (W.D.N.Y. Dec. 11, 1990).

12. See *Larsen v. Pacesetter Sys., Inc.*, 837 P.2d 1273 (Haw. 1992) (distinguishing between personal injury claims covered by tort law and purely economic loss covered by contract law, and requiring privity of contract). But see *Liberty Homes, Inc. v. Epperson*, 581 So. 2d 449 (Ala. 1991) (extending privity to remote buyer of specially made trailer home in suit against trailer home manufacturer).

Article 2 principles in what previously had been considered the tort arena, indicate the continued vitality of the UCC beyond its defined scope.

Yet the true skeptic will not be convinced of the Code's future utility by evidence of its past or current accomplishments. Many will find it difficult, if not impossible, to suspend present reality long enough to imagine a world prior to the Code, much less one where there never was a Code. Others will argue that the law's only significant contribution is that it can contribute to solving future problems. Much like the debate in legal scholarship between the practitioners and the academics over whether legal "scholarship" is best about lawyerly argument or academic inquiry, no clear dichotomy can or should be drawn. To the extent one can distinguish between the work of lawyers and that of academics, one reasonably can conclude that both contribute to the improvement of the law. Similarly, one cannot begin to contemplate the future life of the Code without pondering its past.

I argue that there is a future for the Code, notwithstanding the myriad of other commercial laws, because there remain many questions and many areas to be explored. Many of these new areas of concern are brought to our attention by the very works that threaten to replace the Code. In addition, a future for the UCC exists because a general, domestic commercial law doctrine, consistent with federal or international law, has never been articulated, much less adopted. Development of such a doctrine is crucial to the future of domestic as well as international commercial law, whatever the structural basis for that law may be.

II. THE CISG: A UCC SUCCESSOR?

In assessing the present and future need for the Uniform Commercial Code, one should examine alternatives for its replacement. One potential replacement is the international convention. The United Nations Convention on Contracts for the International Sale of Goods (CISG)¹³ has been ratified by the United States and several other countries. Yet, one must only look fleetingly at the literature discussing the CISG before becoming aware of its shortcomings. Its most obvious imperfections are noted, of course, by its critics.¹⁴

13. United Nations Convention on Contracts for the International Sale of Goods, Apr. 11, 1980, S. TREATY DOC. No. 9, 98th Cong., 1st Sess. (1983) [hereinafter CISG], reprinted in 52 Fed. Reg. 6264 (1987).

14. See Arthur Rosett, *Critical Reflections on the United Nations Convention on Contracts for the International Sale of Goods*, 45 OHIO ST. L.J. 265 (1984) [hereinafter Rosett, *Critical Reflections*]; see also Arthur Rosett, *The International Sales Convention: A Dissenting View*, 18

Generally speaking, any successful attempt at a uniform law will be marked by compromise. The CISG is no exception; for that matter, neither is the UCC. International uniformity suffers the additional burdens of divergent language, culture and legal systems. According to Arthur Rosett, the drafters of the CISG sought "to straddle two points of view" in an effort to reconcile these differences rather than seek imaginative approaches free of the existing conceptual baggage.¹⁵ Thus, Rosett disagrees with the doctrinal strategy of the drafters who "often buried problems without resolving them . . . or adopted a verbal formula which hides persistent disagreement."¹⁶

International scholars have also remarked on other substantive and procedural failings of the CISG. For example, the CISG fails to "address problems of risk of loss . . . in documentary sales transactions in which trade terms are . . . used,"¹⁷ resolve the issue of whether a party may enforce a clause banning oral modifications,¹⁸ clarify the relationship between the CISG and domestic tort law where issues of damage to property are raised,¹⁹ recognize imbalances in parties' bargaining power,²⁰ and recognize the legal and cultural values of underdeveloped countries.²¹ These weaknesses in the CISG suggest that we should not be so quick to supplant the UCC with the principles embodied in the CISG or any other international enactment.

International law scholars call for strengthening the international law system by clarifying the distinctions between "hard" and "soft" international obligations and by developing "soft" law formulations.²² In

INT'L LAW. 445 (1984) [hereinafter Rosett, *International Sales*] (discussing central defects of CISG).

15. Rosett, *Critical Reflections*, *supra* note 14, at 286.

16. Rosett, *International Sales*, *supra* note 14, at 447; *see also* Rosett, *Critical Reflections*, *supra* note 14, at 286-93 (providing examples of specific provisions that compromise CISG's effectiveness).

17. Harold J. Berman & Monica Ladd, *Risk of Loss or Damage in Documentary Transactions Under the Convention on the International Sale of Goods*, 21 CORNELL INT'L L.J. 423, 423 (1988).

18. *See* Robert A. Hillman, *Article 29(2) of the United Nations Convention on Contracts for the International Sale of Goods: A New Effort at Clarifying the Legal Effect of "No Oral Modification" Clauses*, 21 CORNELL INT'L L.J. 449, 458-63 (1988).

19. *See* Peter Schlechtriem, *The Borderland of Tort and Contract—Opening a New Frontier?*, 21 CORNELL INT'L L.J. 467, 471-72 (1988).

20. *See* Arthur Rosett, *CISG Laid Bare: A Lucid Guide to a Muddy Code*, 21 CORNELL INT'L L.J. 575, 581-82 (1988).

21. *See* Elizabeth Hayes Patterson, *United Nations Convention on Contracts for the International Sale of Goods: Unification and the Tension Between Compromise and Domination*, 22 STAN. J. INT'L L. 263, 301-02 (1986).

22. Although a solid definition of "soft law" is difficult to establish, one of the characteristics of "soft law" is that its obligations are expressed in terms of "guidelines" or "codes of

contrast, hard law obligations include treaties that are precisely worded and contain identifiable rights and duties.²³ In sum, because of a variety of current political, legal and social developments, international law is in a state of flux. Some commentators suggest that the CISG's²⁴ problems go unaddressed because of specific failures that may be better addressed by domestic uniform law.²⁵ The doctrinal concerns raise caution, as well, against application of the CISG principles to domestic contracts.

III. LEGAL SCHOLARSHIP AND THE LIFE OF THE CODE

Before one can urge the adoption of the UCC doctrine, more expository work must be done to establish what doctrine the UCC espouses. If the commercial scholar has failed to sustain the vitality of the Code in any way, it is in failing to fully develop a doctrine of domestic commercial law that the Code either does or should follow. Developing a doctrine is crucial for the continued existence of the Code in its present form, and certainly in a modified or amended form.

The law is not self-defining, either in its content or its duration. If it were, the legal system could dispense with courts, and legal scholarship would be meaningless. If the UCC is to remain alive, and to be strengthened when necessary, judicial opinions must adhere to some ideology of commercial law. Scholarly commentary must continue to struggle to determine the actual and contemplated philosophy of commercial law.

For some time, legal commentary has focused particularly on the jurisprudence of Karl Llewellyn, as expressed in Article 2 of the Code.²⁶ In one provocative piece, Professor Danzig described the Code's approach as a guide to law finding, whereby the decision maker is to search for the answer to difficult questions by observing the behavior of those in the marketplace.²⁷ The Code, he observed, only minimally reflects a moral imperative and in Llewellyn's own words is meant to be nonpoliti-

conduct." Typically, "soft law" obligations, even when contained in treaties, are weak requirements that are not binding on the parties to the treaties involved. See C.M. Chinkin, *The Challenge of Soft Law: Development and Change in International Law*, 38 INT'L & COMP. L.Q. 850, 859-62 (1989); Joseph Gold, *Strengthening the Soft International Law of Exchange Arrangements*, 77 AM. J. INT'L L. 443, 443-44 (1983); R.A. Mullerson, *Agora: New Thinking by Soviet Scholars*, 83 AM. J. INT'L L. 494, 511 (1989).

23. Chinkin, *supra* note 22, at 851.

24. See *supra* notes 17-21 and accompanying text.

25. See Rosett, *Critical Reflections*, *supra* note 14, at 286.

26. See Richard Danzig, *A Comment on the Jurisprudence of the Uniform Commercial Code*, 27 STAN. L. REV. 621 (1975).

27. *Id.* at 626-27.

cal in character.²⁸ Other inquiry into the questions of what the Code does has focused at least as much on what the Code should do. The discussion has been dominated by a group of scholars who suggest that the law is, or at least should be, efficient. These scholars urge that parties make efficient decisions absent conflict, and thus courts' opinions should reflect the efficient decisions that the parties themselves would have made had they rationally foreseen the occurrences that brought about the conflict.

Efficiency should guide decisions even at the expense of the precise language of the Code.²⁹ From this, one can conclude that these later commentators would suggest that the Code's drafters intended efficiency as their goal and that such should be the goals of subsequent drafting and revision. Although both positions have been argued, debate on the issue of the Code's ideology generally presumes the legitimacy of Llewellyn's "mercantile" approach and the efficiency approach, rather than beginning with the premise that a law claiming to be amoral, nonpolitical and efficient will simply reflect the moral, political and economic choices of its interpreters.

Both the "mercantile" approach attributed to Llewellyn and the efficiency approach ignore many of the political, economic and social changes present in today's commercial climate. Just as the lines between states became blurred, leading to the enactment of uniform domestic commercial law in the form of the Code, the lines between countries are being blurred. However, cultural and political differences between countries continue to exist and are more profound than interstate differences. Thus, anything other than a very broadly stated uniform international commercial law will suffer from being too general or suffer from imposing cultural and political standards on those who may adopt it. Nevertheless, as more U.S. corporations invest in foreign countries and engage in exchanges with corporations abroad, and as more foreign corporations become a part of our domestic commercial landscape, domestic commercial law must take into account the political, economic and cultural dynamics of entities that exist primarily outside of our borders.

Our domestic commercial ideology must begin to address what some have chosen to ignore, that law is more than efficiency and that

28. *Id.* at 628; Memorandum from Karl Llewellyn to the Executive Committee on Scope and Program, National Conference of Commissioners on Uniform State Laws, *Re: Possible Uniform Commercial Code*, reprinted in WILLIAM TWINING, KARL LLEWELLYN AND THE REALIST MOVEMENT 524 (1973).

29. See George L. Priest, *Breach and Remedy for the Tender of Nonconforming Goods under the Uniform Commercial Code: An Economic Approach*, 91 HARV. L. REV. 960 (1978).

even commercially reasonable parties make decisions that are cultural and political in nature. It has always been that way, and as we begin to abandon the ideal of homogeneity in relevant commercial practices, it will be even more so. Our legal scholarship about what the law is, as well as what it should be, must reflect this reality.

IV. CONCLUSION

The UCC is not dead. Historically, it represents one of the most important contributions ever made to American law. Currently, it influences commercial law and legal development throughout the world. At the same time, its domestic reach is being broadened. Its future may in fact be in doubt. Understanding its future may lie in harmonizing its jurisprudence with changes in commercial circumstances. To the extent that this is true, the UCC's future is in the hands of legal scholars. To borrow the words of one commentator, its future is too important to leave to lawyers.³⁰

30. See Danzig, *supra* note 26, at 622.